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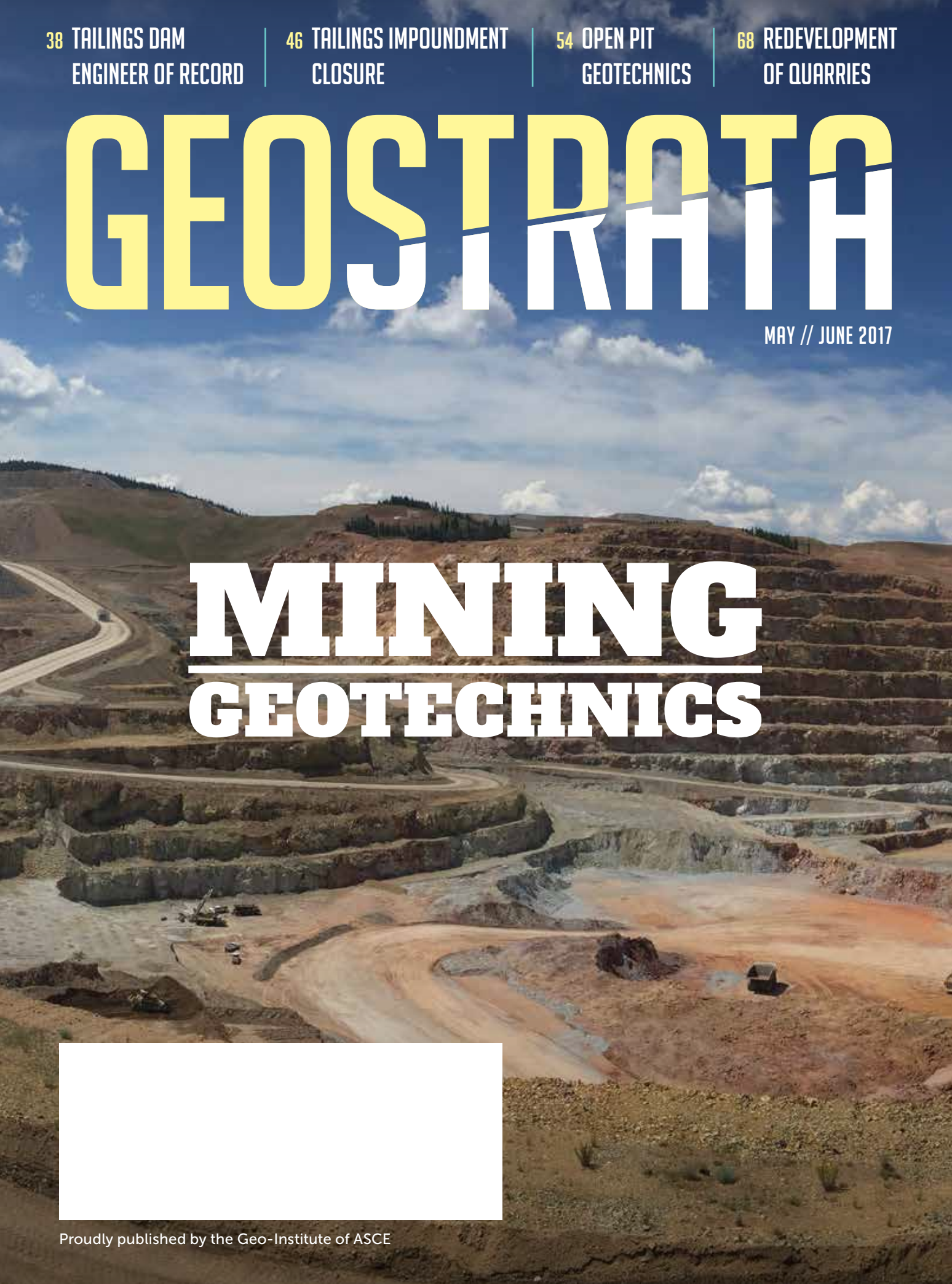

MINING GEOTECHNICS

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Do It Right, or Don't Do It at All

By John P. Bachner

The Geoprofessional Business Association's (GBA's) more than 100 case histories are a treasure trove of important experiences, almost all related to professional-liability losses. The following story is one to learn from, documented far more extensively in *GBA Case History 76*. It took place about 25 years ago, but that has no impact on its relevance to today's practice, because it's not about technology; it's about people.

In essence, Downs was practicing his profession and, accordingly, he had a responsibility to do so professionally. As a result, Downs was not only negligent; he was willfully negligent.

The location involved was Boston's historic Back Bay, created through a 30-year filling operation begun shortly after the Civil War. Once the filling was complete, development followed, with the construction of three- to five-story rowhouses supported on wooden piles. In order to last, the piles had to be submerged below groundwater to prevent exposure to air and the resulting activation of fungi that can reduce a 10-in.-diameter wooden pile to peat moss in just five years.

The rowhouses began to experience severe settlement problems starting in the 1920s. Groundwater had begun to leak into interceptor sewers, lowering the groundwater table and exposing the tops of many wooden piles to air, causing them to rot. Underpinning was performed to correct the problem: the tops of the piles were cut off 4-6 ft below the original level, steel posts were inserted to hold up the granite block, and a concrete mass was placed to fill from the top of the pile to the granite block.

One block of 19 rowhouses was spared the problems until the mid-1980s. Then, within five years, all had to be underpinned. The GBA-Member Firm – we'll call it Blue Clay Associates – was retained to design repairs and observe their implementation. Because litigation was expected, the firm gave each homeowner client a brief summary report, based on daily field reports, indicating the degree of rot in each wooden pile, and describing the repairs. The summary report was to be used solely to document the need for remediation; other information was omitted.

About three years later, Doug Downs, one of Blue Clay's Downs, took a call from Ben Arnold, an acquaintance who was buying one of the 19 rowhouses whose repairs Blue Clay had designed. Its owner had furnished a copy of the summary report, prepared by a junior engineer and signed by Downs. "Can you answer some questions?" Arnold asked. It was Friday afternoon, and even though he was extremely busy, Downs agreed to meet Arnold at the rowhouse at 9:00 a.m. Monday morning. However, because of the short notice, Downs was unable to retrieve the project file because it was stored in a remote facility. Fortunately, Arnold brought his copy of the summary report. It indicated that underpinning began in 1984, with repair of one of the party walls. The front and rear walls were underpinned in 1986, and the remaining party wall was completed in 1988.

Arnold asked questions about the underpinning. Downs was unable to answer most of them and suggested that Arnold obtain the daily field reports from the rowhouse owner. Then the two walked through the house. On the first floor, several odd cracks in a transverse wall suggested sagging in the middle. Downs told Arnold to retain a structural engineer.

The visit was over in about 40 minutes, with Downs saying he would review the files. "There's no need for that," Arnold said. "Just send me a bill." Downs responded that his service was a favor, and that evening he prepared notes about the meeting.

Six weeks later, Arnold called Downs to let him know he had purchased the rowhouse, and that his renovation constructor found something odd in the crawlspace. Downs visited the home the next day, and what he saw was distressing: a relatively short central girder designed to support the floor joists had settled and left gaps. The girder was supported on granite blocks, indicating the piles had not been repaired. Becoming somewhat panicked, Downs drove to the storage facility and retrieved the project file. It revealed a note stating that the girder had been found during repairs, but the homeowner, who was in the construction business, did not want the wooden piles repaired. The homeowner said that a structural engineer had told him the girder was not needed to support the building's interior load.

Feeling guilty about not having researched the project earlier, Downs called his acquaintance to apologize for forgetting about the girder and its support. Arnold became agitated: "I retained you to give me a professional opinion. If this thing isn't fixed, the structure might not be able to handle the renovations upstairs. We're moving in in two months. What's your firm going to do about this?"

Downs agreed to prepare specifications and provide construction observation services at no charge. The specialty constructor who had underpinned the house originally agreed to do the work at its cost, about $30,000. The constructor completed its work without incident and sent Arnold the bill. A few weeks later, Arnold sent Downs a letter demanding that Blue Clay pay for the repairs, given that the additional costs and delays were Downs' fault. Blue Clay principals met with the firm's attorney. They decided they had done nothing particularly wrong, especially so because Arnold could have avoided the problem if he had followed Downs's advice and retained a structural engineer before purchasing the house. Nonetheless, they offered to pay $10,000 to make the problem go away. It didn't.

Arnold filed suit in 1989, claiming that Blue Clay Associates and Downs were liable for professional negligence, negligent misrepresentation, and breach of contract, and that the firm and Downs were guilty of deceptive trade practices (Massachusetts General Law 93A), making them liable for treble damages. The firm's principals and attorney were not overly concerned. They believed the court would see things their way; i.e., that all Downs did was provide friendly advice and, accordingly, no contract existed. And the advice was basically sound. In fact, in their opinion, the plaintiff committed contributory negligence by not following that advice.

As part of litigation's discovery process, Blue Clay produced all relevant files for the plaintiff's review. One of the documents was a hand-written note memo about a telephone conversation between Downs and the rowhouse's prior owner: "Wants completion report – OK – but should wait until [other party] wall is completed. Wants brief & concise report that says pile problem corrected." Plaintiff's counsel asked, "Did [the prior owner's] desire for a report that states the pile problem was

corrected have an impact on the completion letter?" Downs could not recall the conversation, but he answered, "No." After all, although he signed the summary report, a junior engineer had prepared it, based on daily field reports describing the repairs.

The trial took place five years after Downs agreed to look at the rowhouse, a time lapse that is not at all unusual for litigation. Also not unusual, it took 14 more months for the judge to render his decision. He ruled that, because there was no "meeting of the minds" about the contract, no contract was ever formed. But that did not matter, because, the judge said, professionals owe a duty of care to any party that could foreseeably be damaged or injured by their negligent professional acts. The judge noted that Downs had failed to "exercise the reasonable skill and knowledge normally possessed by members of his profession in good standing in the community.... Regardless of whether he remembered the problems with the center girder [at the time of the site meeting, Downs] had a duty to check notes and advise [Arnold] correctly as to the condition of the foundation." Furthermore, the judge said, Downs should have made it clear that he was at the meeting only to speak in generalities; that he was giving casual advice and not an opinion; and that Arnold should not rely on the advice. In essence, Downs was practicing his profession and, accordingly, he had a responsibility to do so professionally. As a result, Downs was not only negligent; he was willfully negligent.

The judge also ruled that the summary report comprised negligent misrepresentation. Because it contained no information about its purpose and limitations, and because it failed to mention the center girder and its unrepaired wood piles, it communicated "a false representation of a material fact and [Downs] should have known it would be relied on" to show that

the foundation problems had been corrected. Further, Downs "should have known that the previous owner might use the letter as an accurate representation of the conditions of the foundation." In addition, the judge said, Downs made the misrepresentation knowingly, because he had written earlier about the lack of repairs. Whether or not Downs remembered doing so at the time he made the letter his own, by signing it, did not matter. Accordingly, Massachusetts General Law 93A was invoked, and the firm wound up spending more than $150,000 for the award it had to pay, plus defense costs and internal costs.

Here are the take-aways, in brief:

- Society expects professionals to act professionally whenever they provide a professional service, no matter how small.
- Haste makes waste.
- Be wary of doing favors, even for friends and relatives, because lack of payment or lack of formality can lull you into thinking that an inadequate professional service is adequate.
- Understand your duty of care.
- As documented in GBA case histories, project risk is inversely proportional to the project's size and complexity; i.e., the smaller and simpler the project, the bigger the risk.
- Do not apologize for what you think may be errors, because they may not be errors after all, or they might not be solely *your* error. Think how different the outcome might have been if Downs, instead of apologizing, had said, "What did the structural engineer say before you bought the house?... What? You didn't call the structural engineer like I told you to? Why not?"
- The purpose and limitations of any instrument of professional service should be made clear. Professionals do not know how something they prepare will be used in the future, or by whom.
- Documentation is always important, if only because the human memory is so notoriously unreliable. After giving Arnold his recommendations orally, Downs should have issued a memo that put those recommendations into writing, and which indicated that, per Arnold's instructions, he did not check the project file.
- Homeowners are almost a protected class in the eyes of the court, making a legal defense difficult, a situation that can actually encourage some homeowners — with their attorneys' guidance — to file suit. That being the case, geoprofessionals who accept residential commissions need to dot every "i," cross every "t," and prepare all the documentation needed to affirm that such dotting and crossing occurred. That did not occur in this case; the result was predictable, as Blue Clay's principals and attorney should have known.
- Having an effective document-retention policy in place as part of an up-to-date file-management policy is critically important. Files that go into storage still containing every scrap germane to the project can be disasters waiting to happen. In this case, the memo documenting a telephone call contributed mightily

to an additional expense of $60,000 or more. Imagine the outcome that would have occurred had the memo been discarded before the file went into storage, and if the file contained a memo from Downs to Arnold indicating that, per Arnold's instructions, Downs had not checked the project file and that, in any event, Arnold needed to retain a structural engineer before purchasing the home.

- Litigation is a fact of business life and so needs to be looked at in a matter-of-fact, unemotional manner. For that reason, when a claim is filed against them, geoprofessionals need to examine the cost of one's "day in court" vs. the cost of settling early on, to avoid the day in court altogether. In this case, Blue Clay wasted $120,000 because of its stubborn refusal to settle the claim for $30,000 when it had the chance. Was it a cavalier attitude? Hubris? No matter. Whatever it was, it was expensive.

Bottom line: Providing a flawless professional service does not mean providing a flawless deliverable. That's only part of it. You also need to know what society expects of you, then deliver it and document that you did so. If you're not willing to learn what's involved, or if you're not willing to take the time to provide it, you've chosen the wrong profession, an outcome that will probably become painfully clear sooner rather than later.

Do it right, or don't do it at all. GS

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GBA is a not-for-profit association that develops programs, services, and materials to help its member firms and their clients confront risk and optimize performance. GBA-Member Firms provide geotechnical, geologic, environmental, construction-materials engineering and testing (CoMET), and related professional services (*en.wikipedia.org/wiki/geoprofessions*). GBA invites geoprofessional constructors, educators, and government officials to become involved. Contact GBA at *info@geoprofessional.org*.