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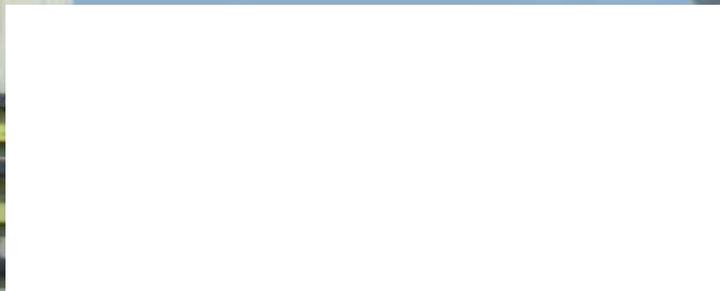
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# GEOSTRATA

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## Transportation Geotechnics





# Recommended Practices for Design Professionals Engaged as Experts in the Resolution of Construction Industry Disputes

By John P. Bachner

Are you familiar with the publication *Recommended Practices for Design Professionals Engaged as Experts in the Resolution of Construction Industry Disputes*?



What's that?

“Those who do not remember the past are condemned to repeat it,” George Santayana so famously wrote. And GBA case histories comprise a past all geoprofessionals should be familiar with.

*GBA Case History 72* relates the story of a client organization that owned an improved parcel it was leasing to an automobile dealership. Real estate values were ascending to all-time highs, and the client was planning to sell the property. Before putting the property on the market, however, the client wanted to know about possible contamination, and, for that reason, it retained a GBA-Member Firm to perform a Phase I environmental-site assessment (ESA). The firm conducted the study and, in its report, noted that its assessor had located two underground storage tanks, but more might be present: The firm was unable to perform a thorough review because the parking lot was filled with cars. It recommended that the owner have a geophysical survey conducted.

You and every other professional in your firm need to be familiar with the document; so do your attorneys. It has prevented innumerable hired-gun experts from achieving their evil purpose.

The owner showed the GBA-Member Firm's report to a prospective purchaser, which, in turn, retained its own expert. That expert identified a cluster of underground storage tanks, a situation that caused the prospective purchaser to back out of the deal. Then the existing tenant learned about the report and decided to let its lease lapse and relocate.

Alarmed by these developments, along with a recent leveling of real estate values, the owner followed the GBA-Member Firm's advice and retained a geophysical consultant to develop a remediation plan. The owner implemented the plan, but — by the time remediation was complete — real estate prices had tumbled. In response, the owner retained a third geoprofessional consultant, this time to evaluate the GBA-Member Firm's negligence liability. Eager to please, the consultant informed the owner that the original firm had been negligent because it failed to follow ASTM E1527, *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment*. Armed with that information, and anxious to achieve some level of financial recovery, the owner sued the GBA-Member Firm for negligence; i.e., a failure to abide by the standard of care that resulted in damage or injury. In depositions, however, the Member Firm's expert pointed out that: a) the standard of care is defined as that level of care and skill ordinarily demonstrated by area

practitioners at the time a service was provided, and b) an ASTM standard does not define the standard of care. The Member Firm's expert then went on to cite *Recommended Practices for Design Professionals Engaged as Experts in the Resolution of Construction Industry Disputes*, a document developed by the Interprofessional Council on Environmental Design (ICED) and published, at ICED's request, by GBA, one of whose representatives conceived the document and chaired the committee that developed it. Now endorsed by more than 40 prominent national, regional, and international associations, the document comprises 13 recommendations. Its seventh recommendation calls for experts to form their opinions about the standard of care based on research into what actually was being done at the time the alleged negligence occurred; *not* on an article or other publication of some kind, and *not* on what the expert would have done. The owner's expert admitted that it failed to follow the *Recommended Practices* document. Accordingly, the court dismissed the owner's suit.

*GBA Case History 73* relates a similar chain of events. It involves a Department of Defense (DOD) project and a constructor that faced liability because it used faulty concrete. Knowing that DOD would retain an expert who would lay blame at the constructor's feet, the defense planned to shift blame to the structural engineer

and bash the credentials of whatever expert DOD retained to declare that structural design was not the problem. The defense selected an eminent expert to do its bidding: a well-known professor with a PhD. DOD's expert was not as eminent, but — unlike the professor — he was familiar with *Recommended Practices for Design Professionals Engaged as Experts in the Resolution of Construction Industry Disputes*. For that reason, the expert's scope of service called for research into the standard of care prevailing at the time the structural engineer supposedly violated it. As could be expected, DOD's expert had to withstand a withering cross examination whose purpose was to show he was comparatively "wet behind the ears," and, for that reason, the jury should not rely on his testimony, but, instead, should accept the eminent expert's contention that the problem was caused by improper design, not constructor error. "Prior to commencing his cross examination," the case history relates, "the owner's attorney introduced into evidence a copy of *Recommended Practices for Design Professionals Engaged as Experts in the Resolution of Construction Industry Disputes*... It sets out 13 recommendations for forensic professionals/experts to follow, including one which states that experts should testify about the standard of care only if they have performed credible research to identify that level of care and skill 'ordinary' practitioners applied at the

time of the incident that gave rise to the claim. Referring to *Recommended Practices...*, the owner's attorney inquired about the methods that the contractor's expert used to establish the standard of care. The expert said he based his opinions solely on his own experience, not on research into methods used by others. Cross-examination also revealed that the professor failed to visit the site, failed to interview those who were present during construction, and failed to review daily field reports. In his closing argument, the owner's attorney emphasized that the contractor's case hinged on the testimony of an expert who failed to base his opinions on facts, as required by ICED's *Recommended Practices...* document. The judge concurred and dismissed the contractor's claim."

I have a special fondness for the aforementioned *Recommended Practices* document. As it so happens, I'm the guy who headed the committee that developed it — another valuable GBA innovation that benefits all geotechnical practitioners, and, indeed, all design and environmental professionals. You and every other professional in your firm need to be familiar with the document; so do your attorneys. It has prevented innumerable hired-gun experts

from achieving their evil purpose. And it has helped prepare innumerable true professionals to do what's really required to testify about the standard of care. Obtain a copy from the Geo-Institute, the American Society of Civil Engineers, or other endorsers — including, of course, the organization that made it possible: GBA. 

▶ **JOHN P. BACHNER** is an independent consultant who served as the Geoprofessional Business Association's (GBA's) executive vice president from 1973 through 2015. 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](http://en.wikipedia.org/wiki/Geoprofessions)). GBA invites geotechnical practitioners, educators, and government officials to become involved. Contact GBA at [info@geoprofessional.org](mailto:info@geoprofessional.org).



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