

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

by

John Philip Bachner*

Serving as an expert allows you to serve the cause of justice, providing you perform properly. *Recommended Practices for Design Professionals Engaged as Experts in the Resolution of Construction Industry Disputes* sets forth consensus guidelines for proper performance, in the form of 13 practices. Conceived by ASFE and developed by the Interprofessional Council on Environmental Design (ICED), *Recommended Practices...* is the most extensively endorsed document of its kind. ASCE, NSPE, AIA, ACEC, and CGEA are among the 30-plus organizations that have affixed their seals of approval.

Justice is a particularly important issue when a geoprofessional is accused of negligence. Experts almost always are required to render an opinion about the standard of care and whether or not the geoprofessional met it. Geoprofessionals will have met the standard of care when a trier of fact (judge or, more commonly, a jury) believes they applied the skill and care ordinarily applied at the time by the professionals' peers. They are negligent when a trier of fact believes they failed to meet the standard of care and, as a consequence, caused injury or damage. Because triers of fact almost never have background in the technical issues involved, they are forced to rely heavily on experts' testimony.

Recommended Practices... Recommendation Seven says that experts should render opinions about the standard of care only after they have conducted some credible

research to determine what the standard of care actually was; i.e., what was ordinarily being done by the type of professionals involved at the time of the incident in question. Experts should not base their opinions on what they would have done, or what a book or article says should have been done, because that information does not indicate what was ordinarily done. Experts should *never* advocate for “their side” in any way. Experts serve the court, not the plaintiff or defendant. Where experts disagree, disagreement should stem *only* from honest differences of opinions.

What about those experts who lie? Isn't that perjury? No, because experts are providing an opinion, and that opinion is so important, courts have made experts virtually invulnerable to claims brought by opposition parties. But that doesn't mean the professions are powerless. ASFE case histories show that *Recommended Practices...* can be an effective weapon for shooting down hired guns who fail to make an honest effort to determine what the standard of care actually was.

Other proper procedures are covered, too, of course. Experts need to have the time and budget to conduct all necessary research, *Recommended Practices...* states. And that research should be comprehensive enough to establish what really happened, not to simply prove or disprove one narrow theory or another. Experts should be free of conflicts of interest, and they should not be rewarded based on the results of what they say; i.e., they should not accept expert assignments on a contingency fee basis. For that reason, experts should also be paid in full before they testify, so the other side cannot insinuate that experts are trying to help their clients win in order to ensure being paid.

All geoprofessionals and their lawyers need to be familiar with *Recommended Practices...* It can be a powerful weapon in the defense of claims, especially those with little or no true merit. And it's also something geoprofessionals and their attorneys need to know about in case the other side does, too. Dotting i's and crossing t's are essential to making credible testimony appear to be just that.

CGEA Geogram No. 3

**John Philip Bachner is the executive vice president of ASFE/The Best People on Earth. Because CGEA is an ASFE Regional Organization, all CGEA members are Regional Organization Affiliates of ASFE, and are entitled to a variety of benefits. These benefits include a special ASFE newsletter issued six times each year, special pricing on a variety of ASFE materials, and ASFE member pricing on programs, such as ASFE's continuing education courses and seminars. For details, click to www.asfe.org.*

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