

RECOMMENDED PRACTICES

*For Design Professionals
Engaged as Experts in the
Resolution of Construction
Industry Disputes*

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Preamble

Experts are vitally important to contemporary American jurisprudence. They review and evaluate complex technical issues and explain their findings and opinions to lay triers of fact for the latter's consideration in reaching a verdict.

Experts retained by opposing parties may disagree. In all instances, such disagreements should emanate only from differences in professional judgment.

These recommendations have been developed from the belief that adherence to them will help experts provide to triers of fact substantiated professional opinions unbiased by the adversarial nature of most dispute resolution proceedings. The organizations which endorse these recommendations do not require any individual to follow them.

The Recommendations

It is the obligation of an expert to perform in a professional manner and serve without bias. Toward these ends:

1. The expert should avoid conflicts of interest and the appearance of conflicts of interest.

COMMENTARY Regardless of the expert's objectivity, the expert's opinion may be discounted if it is found that the expert has or had a relationship with another party which consciously or even subconsciously could have biased the expert's services or opinions. To avoid this situation, experts should identify the organizations and individuals involved in the matter at issue, and determine if they or any of their associates have or ever had a relationship with any of the organizations or individuals involved. Experts should reveal any such relationships to their clients and/or clients' attorneys to permit them to determine whether or not the relationships could be construed as creating or giving the appearance of creating conflicts of interest.

* For the purposes of this document, the construction industry includes organizations and individuals involved in the design, construction, ownership or use of buildings, public works and land. The design professionals include architects, engineers, landscape architects, geologists, surveyors, planners and others.

2. The expert should undertake an engagement only when qualified to do so, and should rely upon other qualified parties for assistance in matters which are beyond the expert's area of expertise.

COMMENTARY Experts should know their limitations and should report their need for qualified assistance when the matters at issue call for expertise or experience they do not possess. In such instances, it is appropriate for experts to identify others who possess the required expertise, and to work with them. Should an expert be asked to exceed his or her limitations and thereafter be denied access to other professionals, and should the expert be requested to continue association with the case, the expert should establish which matters he or she will and will not pursue; failing that, the expert should terminate the engagement.

3. The expert should consider other practitioners' opinions relative to the principles associated with the matter at issue.

COMMENTARY In forming their opinions, experts should consider relevant literature in the field and the opinions of other professionals when such are available. Experts who disagree with the opinion of other professionals should be prepared to explain to the trier of fact the differences which exist and why a particular opinion should prevail.

4. The expert should obtain available information relative to the events in question in order to minimize reliance on assumptions, and should be prepared to explain any assumptions to the trier of fact.

COMMENTARY The expert should review those documents, such as tenders and agreements, which identify the services in question and any restrictions or limitations which may have applied. Other significant information may include codes, standards and regulations affecting the matters in dispute, and information obtained through discovery procedures. If pertinent to the assignment, the expert should also visit the site of the event involved and consider information obtained from witnesses. Whenever an expert relies on assumptions, each assumption should be identified and evaluated. When an assumption is selected to the exclusion of others, the expert should be able to explain the basis for the selection.

5. The expert should evaluate reasonable explanations of causes and effects.

COMMENTARY As necessary, experts should study and evaluate different explanations of causes and effects. Experts should not limit their inquiry for the purpose of proving the contentions advanced by those who have retained them.

6. The expert should strive to assure the integrity of tests and investigations conducted as part of the expert's services.

COMMENTARY Experts should conduct tests and investigations personally, or should direct their performance through qualified individuals who should be capable of serving as expert or factual witnesses with regard to the work they performed.

7. The expert witness should testify about professional standards of care* only with knowledge of those standards which prevailed at the time in question, based upon reasonable inquiry.

COMMENTARY When a design professional is accused of negligence, the trier of fact must determine whether or not the professional breached the applicable standard of care. A determination of the standard of care prevailing at the time in question may be made through investigation, such as the review of reports, records, or opinions of other professionals performing the same or similar services at the time in question. Expert witnesses should identify standards of care independent of their own preferences, and should not apply present standards to past events.

8. The expert witness should use only those illustrative devices or presentations which simplify or clarify an issue.

COMMENTARY The attorney who will call the expert as a witness will want to review and approve illustrative devices or presentations before they are offered during testimony. All illustrative devices or presentations developed by or for an expert should demonstrate relevant principles without bias.

9. The expert should maintain custody and control over whatever materials are entrusted to the expert's care.

COMMENTARY The preservation of evidence and the documentation of its custody and care may be necessary for its admissibility in dispute resolution proceedings. Appropriate precautions may in some cases include provision of environmentally controlled storage.

10. The expert should respect confidentiality about an assignment.

COMMENTARY All matters discussed by and between experts, their clients and/or clients' attorneys should be regarded as privileged and confidential. The contents of such discussions should not be disclosed voluntarily by an expert to any other party, except with the consent of the party who retained the expert.

11. The expert should refuse or terminate involvement in an engagement when fee is used in an attempt to compromise the expert's judgment.

COMMENTARY Experts are employed to clarify technical issues with objectivity and integrity. Experts should either refuse or terminate service when they know or have reason to believe they will be rewarded for compromising their objectivity or integrity.

* Standard of care is commonly defined as that level of skill and competence ordinarily and contemporaneously demonstrated by professionals of the same discipline practicing in the same locale and faced with the same or similar facts and circumstances.

12. The expert should refuse or terminate involvement in an engagement when the expert is not permitted to perform the investigation which the expert believes is necessary to render an opinion with a reasonable degree of certainty.

COMMENTARY It is the responsibility of experts to inform their clients and/or their clients' attorneys about the scope and nature of the investigation required to reach opinions with a reasonable degree of certainty, and the effect which any time, budgetary or other limitations may have. Experts should not accept or continue an engagement if limitations will prevent them from testifying with a reasonable degree of certainty.

13. The expert witness should strive to maintain a professional demeanor and be dispassionate at all times.

COMMENTARY Particularly when rendering testimony or during cross-examination, expert witnesses should refrain from conducting themselves as though their service is a contest between themselves and some other party.

Endorsing Organizations

and Date of Endorsement*

AMERICAN ACADEMY OF
ENVIRONMENTAL ENGINEERS
March 15, 1988

AMERICAN ASSOCIATION OF
COST ENGINEERS
July 9, 1988

AMERICAN ASSOCIATION OF
ENGINEERING SOCIETIES
December 7, 1989

AMERICAN CONGRESS ON SURVEYING
AND MAPPING
January 24, 1989

AMERICAN COUNCIL OF
ENGINEERING COMPANIES
January 18, 1988

AMERICAN COUNCIL OF
INDEPENDENT LABORATORIES
April 8, 1988

THE AMERICAN INSTITUTE OF
ARCHITECTS
March 14, 1988

AMERICAN INSTITUTE OF
CERTIFIED PLANNERS
April 25, 1987

AMERICAN INSTITUTE OF
PROFESSIONAL GEOLOGISTS
January 25, 1992

AMERICAN NUCLEAR SOCIETY
November 2, 1988

AMERICAN PUBLIC WORKS ASSOCIATION
April 4, 1989

AMERICAN SOCIETY OF
AGRICULTURAL ENGINEERS
October 20, 1988

AMERICAN SOCIETY OF CERTIFIED
ENGINEERING TECHNICIANS
January 21, 1989

AMERICAN SOCIETY OF CIVIL ENGINEERS
October 23, 1988

AMERICAN SOCIETY OF
CONSULTING PLANNERS
April 30, 1988

AMERICAN SOCIETY OF
HEATING, REFRIGERATING AND
AIR-CONDITIONING ENGINEERS
January 27, 2007

AMERICAN SOCIETY OF
LANDSCAPE ARCHITECTS
August 15, 1987

AMERICAN SOCIETY OF
MECHANICAL ENGINEERS
March 15, 1990

AMERICAN SOCIETY OF
SAFETY ENGINEERS
June 1, 1988

AMERICAN TORT REFORM ASSOCIATION
September 26, 1989

ASFE/THE GEOPROFESSIONAL
BUSINESS ASSOCIATION
February 15, 1988

ASSOCIATION OF ENERGY ENGINEERS
November 4, 1988

ASSOCIATION OF ENVIRONMENTAL AND
ENGINEERING GEOLOGISTS
April 23, 1988

BOARD OF CERTIFIED SAFETY
PROFESSIONALS
March 28, 1995

CALGEO
June 23, 1988

GEO-INSTITUTE OF ASCE
May 7, 2008

HAZARDOUS WASTE ACTION
COALITION
January 22, 1994

ILLUMINATING ENGINEERING
SOCIETY OF NORTH AMERICA
June 7, 1988

INSTITUTE OF BROWNFIELD
PROFESSIONALS
September 13, 2006

INTERNATIONAL FEDERATION OF
CONSULTING ENGINEERS
February 10, 1990

INTERPROFESSIONAL COUNCIL ON
ENVIRONMENTAL DESIGN
March 17, 1988

NATIONAL ACADEMY OF
FORENSIC ENGINEERS
January 26, 1988

NATIONAL ASSOCIATION OF
MARINE SURVEYORS
September 16, 1993

NATIONAL COUNCIL OF STRUCTURAL
ENGINEERS ASSOCIATIONS
February 1, 2008

NATIONAL SOCIETY OF PROFESSIONAL
ENGINEERS
January 21, 1988

PILE DRIVING CONTRACTORS
ASSOCIATION
June 10, 2008

PROFESSIONAL LIABILITY AGENTS
NETWORK
December 7, 1993

SOCIETY OF MANUFACTURING ENGINEERS
November 12, 1994

STRUCTURAL ENGINEERS ASSOCIATION
OF ILLINOIS
December 6, 1988

WACEL/AN ASSOCIATION OF
ENGINEERING LABORATORIES, INSPECTION
AGENCIES AND BUILDING OFFICIALS
June 23, 1988

