

## **Hearsay: What's It Worth?** **(Case 1013)**

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### **The Case:**

You are an engineer working for Enviro/Universal, a large consulting engineering firm. You have recently completed a phase one (preliminary review based on available information) environmental site assessment for Americorp, one of the firm's largest clients. You have been directed to send drafts of the report to the client's law firm, Dewey, Stickum & Howe, for review prior to issuing the final report.

The property in question is a large shopping mall located in an area which used to be heavily industrialized and is now being converted to residential and commercial uses. The site being investigated is not being sold; rather it is being used as collateral for a refinancing loan being sought by Americorp from a local lending institution.

In the course of conducting the research and preparing the report, you happen to have a conversation with an older gentleman at a nearby lunch counter who tells you that the property is known among long-term residents of the neighborhood to be contaminated because of the previous operations of a creosoting plant on the site many years ago. The shopping mall, built 38 years ago, was sited directly over the old creosoting plant "because that's how they used to do it back then."

This casual conversation is the only indication of contamination you have been able to uncover through your research on the site. As a result, you prepare and submit a draft of the report to the Dewey law firm, recommending that the site be the subject of a Phase 2 site assessment, which will require drilling inside of the existing shopping mall to obtain samples of the soils and groundwater beneath the structure. Within a day or two the attorney at the Dewey firm returns the draft report to you, deleting the part about the alleged creosoting contamination and the recommendation for additional testing in a Phase 2 assessment. Not understanding why this has occurred, you telephone Charlie Howe, Americorp's attorney, who tells you that:

- a. The personal information you gathered about the alleged creosote plant on the site was only hearsay, and cannot be relied upon. In addition, you were not requested to conduct such personal anecdotal research.
- b. The property is not being sold, therefore Americorp still owns it, and they now know about the alleged contamination.

- c. You have a contractual obligation to have the final report, including reasonable changes stipulated by Dewey, Stickum & Howe, completed and delivered by noon today.
- d. The refinancing is set to close later today, and if it does not close the financing will be lost and a new loan will have to be obtained at a higher rate. The loan being sought is to be used to finance a new project, which will fail to materialize (possibly irrevocably) without this financing. There will be total damages in the millions of dollars if the closing does not take place.
- e. If you fail to provide the final report as requested by the client's attorneys, you will be sued personally for these damages and neither you nor your firm will ever do work for Americorp again.

You relay this conversation to your manager, who indicates that since you are providing the client, who is not selling the property, with the final report, and since the client has all of the information you reported in the draft report, it does not matter what the final report says. He tells you to go ahead and issue the final report as revised by the Dewey legal firm, and strongly suggests that your own future with the firm will be affected by whether you comply with this directive or not.

What do you decide to do, and why?

### **Alternate Approaches and Survey Results for "Hearsay: What's It Worth?" (Case 1013)**

1. Charlie Howe and your manager are correct. Unsubstantiated gossip heard at a lunch counter does not belong in an engineering report. If no adverse effects were noticed at the site after 38 years, probably not much is going to come from it. Make the deletions demanded by Howe and get on with your career.  
Percentage of votes agreeing: 7%
2. You decide to comply with Charlie Howe's demands, and after making the requested deletions, sign the report and have it sent to Americorp. You also keep in your personal files at home all the uncovered information, whether documented or not, the original draft report, the returned draft modified by the Dewey firm, and a record of your discussions with your manager and with Charlie Howe.  
Percentage of votes agreeing: 10%
3. You like to eat, and finding another job is not all that easy, especially if the word got out that you might be a "problem employee". Therefore you decide to comply with Charlie Howe's demands, but in the report you

document your research sources for the "preliminary review based on available documented information", leaving out the hearsay opinion of the old gentlemen at the lunch counter.

Percentage of votes agreeing: 3%

4. Make the changes demanded by Howe. Include a statement in the executive summary at the beginning of the final report that says, "The information contained herein is the result of an investigation performed under direct contract with Americorp, in accordance with the limited scope of work defined in that contract. This information is for the exclusive use of Americorp and no one else may rely on it." In this way you are not certifying anything one way or the other to the lending institution.

Percentage of votes agreeing: 17%

5. Edit the draft report as Charlie Howe wishes, sign and send the final report to Americorp with a copy to Howe. Also in the transmittal letter to Howe report the hearsay comments from the lunch counter and recommend that you be retained to investigate further to see if there might be any real basis to the allegation. Pass this by your manager for his verbal approval. If he doesn't approve, then keep your own notes of what you were directed to do in your personal files at home.

Percentage of votes agreeing: 20%

6. Tell your manager you are uncomfortable issuing such a potentially misleading report, but will make the required deletions and issue the report immediately. After making the report revisions, you have it delivered to your manager with a note saying, "I've made all the changes you asked me to. Please review and sign the report and I'll make sure it gets to Americorp this afternoon."

Percentage of votes agreeing: 7%

7. Tell your manager you are uncomfortable issuing such a potentially misleading report, but will make the required deletions and issue the report immediately. You make the requested changes and sign the report. But before you have it delivered to Americorp, you have one of the senior engineers in your group sit in (via speaker phone) on a call to Charlie Howe in which you tell Charlie that, although you still have reservations regarding the requested deletions as you discussed with him this morning, your manager has reviewed your concerns and OK'd the revisions. You will have the revised report delivered to Americorp with a copy to Charlie, today.

Percentage of votes agreeing: 8%

8. This type of thing happens all the time. In this case even though no construction is planned for the site, (so none of the residue from the alleged old creosoting plant will be exposed), you are not being truthful in your report. The bank putting up the refinancing loan may be liable if anything

adverse does occur in the future, and they will then surely come looking for you. Tell Howe and your manager that you are issuing the report as it was originally written, without making the deletions.

Percentage of votes agreeing: 14%

9. This type of thing happens all the time. You are hired by a company to do an investigation, then end up taking marching orders from an attorney with whom you have no contractual agreement and whose primary goal is to insulate their client from any and all potential financial losses. It doesn't seem to matter if what they tell you to do is ethical or not. Refuse to do as Charlie Howe demands, and tell your manager that your integrity is not for sale.

Percentage of votes agreeing: 9%

10. This type of thing happens all the time, and it's about time someone took a definitive stand to stop it. Tell Charlie Howe and your manager that what they want you to do is not honest, and you will not do it. Also tell your manager that you will spill the whole sordid story to the local newspaper if you experience any adverse reaction at work from your decision.

Percentage of votes agreeing: 5%

### **Forum Comments from Respondents**

1. If the site is found to be contaminated later on, you could be held partially responsible for any damages. Stand up for what is right now, and not put off the responsibility until later.
2. Make the requested deletion, but insert a statement that there was evidence of prior industrialization on the site. Since it is only for collateral on a loan, it should make no difference (unless the new project is located on the same site).
3. In such a case it is important to let "hearsay" information be known. What is ultimately done about it will be in the hands of the company and financiers. Legally and ethically, the paid for duty has been discharged in an "above-the-board" manner. While the report findings are, indeed, what was actually found, the additional "hearsay", which is undocumented, is acknowledged. It is now possible for this "hearsay" to be investigated as needed.
4. Some additional follow-up on the hearsay at the time of the investigation would have been warranted.
5. The information obtained at the lunch counter is hearsay and therefore is not reliable. The gentleman is not a professional and is in no position to help you with your job. Hearsay, even though it is unreliable, often has some truth in it. However conceivable and convincing the information is, it

is not your position to make such judgements. It should be noted that you may have reservations, but your superior is the one to make judgement decisions like that.

6. Submit the final report as revised with the hearsay information deleted. However, add a recommendation that a Phase 2 assessment be performed due to the history of the area being heavily industrialized.
7. The proper thing to do would be to go to your firm's top management for a decision. If upper management decides to comply with the lawyer's demand for revised wording in the report, without any thought for ethical integrity, then you might want to think about switching companies. You represent your company and your company represents you. If you do not believe in the practices of your company and do nothing, that speaks to your character.
8. Regardless of the client, I believe you must perform the task you are asked to do. If you lose that client your reputation will still proceed [sic] you.
9. I would be uncomfortable with the fact that my manager would be hinting to me that my future employment with the firm would be in jeopardy because I was having an ethical disagreement with some other company's attorney. I would hope my manager would want his employees to be honest in all their dealings and support them in these type of situations instead of passing it off as not very important. This relationship with the manager is the part that disturbs me the most.
10. I believe that the engineer should tell his manager that he is uncomfortable issuing the report without investigating further the rumor of contamination. He should mention that what they are doing is dishonest.....He should recommend they allow a time frame for further investigation. If his proposal is rejected, he should then make the requested changes to the report, including the following disclaimer, "The information contained herein is the result of an investigation performed under direct contract with Americorp in accordance with the limited scope of work defined in that contract. This information is for the exclusive use of Americorp and no one else may rely on it." The engineer should not sign the final report. He should submit the report to his manager. His manager should review and sign the report. The engineer should keep careful personal and company records of all his findings.
11. It is absolutely essential that the unsubstantiated date be substantiated one way or the other -- if necessary, at your own expense and on your own time. Then write the report accordingly. In a developed area, records exist for more than 38 years. The truth can be substantiated.

12. You might have your lawyer call Howe and discuss a complaint to the State Bar. Alternate 8 hits the point about the bank potentially having to take the responsibility for the property. Would they make the loan if they thought there was possibility of creosote contamination? Probably not. Therefore we are now discussing FRAUD. It's not nice for engineers or lawyers to be involved in such things. I really hate all these cases you have where we are dealing with a client who appears to be as crooked as a dog's hind leg. I guess people are like that though. Let's just not drag ourselves down to their level.
  
13. First, you have a phase one report based on available information. Interviews with lay people - users, tenants (or in this case, an old gentleman) are included in such reports. The gentleman might (or might not) know what he is talking about, but the engineer must acknowledge the interview in the report, but put it in an appendix and state what you think about it. Second, the report is being used as collateral on a loan. Ever dealt with the FDIC after a bank has failed? They go after everybody who they think "tended to mislead the government," including the client, the lawyers and your boss, and if you are stupid, probably you. Thirdly, you honestly submit the report recommending the site be subject to a Phase 2 assessment, but do you state the reason? Yes, you must. Fourth the Dewey lawyer physically deletes the part about the contamination and your recommendations. No lawyer would be this stupid, because he is practicing engineering without a license if he is the one who makes the physical changes. But let's assume the lawyer demands, orally, that you remove the offending provisions because they are based on "hearsay". Lawyers sometimes have a hard time understanding that information gleaned during an engineering interview is not hearsay to an engineer, it is "information gathered", even though the court, filled with lawyers, might disagree. Fifth, the fact that you were not asked to conduct such personal anecdotal research is incorrect, in that you should conduct interviews and they are not anecdotal. Sixth, the deadline of finishing the report by noon today, including inserting the changes demanded by the lawyers, should be postponed until the issue is resolved. As noted above, the lawyers cannot demand changes to an engineering report that you seal (they can suggest changes). Seventh, unless your boss is stupid and has agreed in writing to accept damages of millions of dollars for your failure to deliver before noon, your failure to deliver the tampered report by that time will not result in any monetary loss to your boss' firm, other than the cost of your boss' lawyer. Eighth, unless you personally signed an agreement stipulating that you are personally responsible for failure to perform, you won't be paying any damages either, and if you get sued and your firm refuses to cover your expenses, sue your firm as well. Ninth, if your client (Americorp) wants a tampered report so that they can trick the bank, you want nothing to do with the client. Tenth, you replay the lawyer's threats to your manager, who also threatens you with your future in the firm. This means that your PE seal on

the report is the only thing any of the people want, including your boss and your manager, and if anybody hangs, it will be you. Don't worry. This happens to young engineers (it happened to me more than once). Your boss and the manager normally refuse to seal the report because they figure you have minimal assets, and they need a young patsy, probably the least financially capable new engineer in the office, to take the responsibility. Ever wonder why so many new engineers seal big projects? Client threats and lawyer threats are nothing new to the young engineer. Hold on to your integrity, and issue the report your way, with your interview with the old gentleman, with your recommendations, and with your seal, before noon. If it costs you your job, then you didn't want to be working for such people anyway. Steer clear of the dark side of the force. When the others go down, you won't be pulled down with them.

14. If Americorp defaults on the bank loan, the bank becomes the owner of the property, and everything on/in it. As a result, the bank then becomes legally responsible for any negative impact due to the contamination, especially if they decide to develop it for a different purpose. Should that occur, they will be knocking on your door for you and your firm to assume the cost of remediating the site, because of your report. Notably, this is a situation over which you would have no control, but could have been avoided.
15. The real issue here is whether to uphold honesty as an ethical value, as well as to decide if you are sufficiently knowledgeable to assume the legal responsibility for the health, safety and welfare of others if the contamination is present at the site in such quantity as to have an adverse impact on the public. The financial implications to the developer are his responsibilities, not yours. You do not own the site, nor do you have a financial (profit-motivated) interest in it. Once you start cutting corners or deleting information from reports at the whim of clients who think they might be adversely impacted by your report, you and your reputation start sliding irrevocably down the slippery slope.