



Fire Litigation Perspectives

WINTER 2007

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The Daubert Series: Part II "The Expert Deposition"

Any attorney worth his/her salt knows the importance of expert deposition preparation. In the age of *Daubert*, however, that preparation, whether from a plaintiff or defense perspective, must entail a thoughtful contemplation of the expert's qualifications and methodology. What should you look out for? Bear in mind these items when preparing for your next deposition...

- As questioner, is the fire expert "certified"? Spend some time having the expert testify as to the qualifications that he/she is lacking. As defense counsel, does certification matter? What experience or other qualifications does the expert bring to the table?
- Determine the field of expertise appropriate to the task and then ascertain whether the expert fits the bill. For example, does the well-credentialed fire investigator also have the expertise to render an opinion about how a particular appliance caused the fire? Perhaps an electrical engineer or some other expert is in order.



- Does the expert view NFPA 921 as a "guide" or a "standard"? If the expert has not followed NFPA 921, can the expert justify the deviations?
- What methodology did the expert follow? With respect to one's own expert witnesses, demonstrating that the scientific method has been thoroughly understood and adhered to with every step the expert has taken only serves to enhance the client's position. With respect to an opposing expert, challenging the reliability of that expert's opinion for failing to adhere to the scientific method is made easier due to the fact that

NFPA 921 endorses the concept.

article continues inside...

Welcome to FIRE LITIGATION PERSPECTIVES

This quarterly publication is brought to you by Tedford and Henry, LLP, a law firm with a national practice devoted to fire science litigation. Our business colleagues find *Perspectives* a resource for fire science issues, as well as for interesting developments in the law.

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IN THIS ISSUE

- The *Daubert* Series: Part II
- Federal Court Accepts Negative Corpus Methodology
- Editorial: "Total Burns"
- Guest Article: Passive Infrared Technology
By: John R. Kominsky
- News & Facts

Editorial:

Total Burns

Lately we have been called to several fire scenes involving what could be described as a “total burn.” The discussion of total burns in Chapter 15 of NFPA 921 at Section 15.9 indicates that total burn fire scenes can present unique problems to the investigator. However, it has recently been our experience that some investigators often have no apparent difficulty identifying the origin and cause of a fire, despite those clearly-established unique problems.

The typical situation involves one party’s expert and counsel arriving at the fire scene, and the opposing expert quickly attempting to have everyone agree on an area of origin. The investigator first on the scene routinely points to the area of “greatest damage,” or to various burn patterns, in support of his or her conclusion on the area of origin.

If faced with this situation, stop. Decline to agree with the opposing expert, and point out that virtually all combustible material within the structure has been completely burned. Explain that each fuel package produced its own maximum heat release during the fire, and that the “area of greatest damage” simply reflects the relative fuel packages present and has no temporal relationship to the initiation of the fire. In a total burn scenario, burn patterns are rarely relevant as it is impossible to determine when during the fire the patterns were generated.

This typical scenario continues with one expert pressing the opposing side to agree that a suspect product lies within the prescribed area of origin of the fire. Rather than simply agreeing with such a proposal, counsel (who should always be present at the scene and involved in the investigation)

side of the litigation usually lead to one-sided versions of events, either intentionally or not.

— BY: FREDERICK B. TEDFORD

The full article can be found on the Tedford & Henry website at: www.tedfordhenry.com/articles.



should question the investigator as to how other areas of the fire scene can be ruled out as the area of origin.

Additionally, when eyewitnesses to a fire are being relied upon to help define the area of origin, all investigators and/or attorneys should immediately speak with those witnesses and obtain written statements for themselves. Statements taken by only one

Tell Us What You Think

Just as we welcome all readers to submit articles for publication in our newsletter, we welcome all readers to submit their thoughts and opinions in response to articles we print. We will be glad to publish any comments or contrary opinions in either a future newsletter or on our website.

You may submit any comments directly to: info@tedfordhenry.com

Federal Court Accepts Negative Corpus Methodology

In a recent case, a federal court dismissed a plaintiff's "bad faith" claim against a defendant insurance company arising out of the adjustment of a fire loss. In *Smith v. Allstate Insurance Company*, 2006 WL 3833533 (S.D. Ohio)(Dec. 29, 2006), the facts reveal that the defendant had retained an expert to conduct an investigation into two separate fires, an initial blaze and a rekindle, occurring at a private residence. According to the expert, the area of origin was the dining room of the home, the point of origin was the breaker box on the east wall, the first materials ignited were "ordinary combustibles," and the ignition source was an open flame from an intentional human act. Based on those findings, the expert classified the fire as incendiary in nature.

In support of the opinion, the expert cited to *NFPA 921*, specifically, the "Comments" section of Chapter 18.2.5. This section, commonly considered the "negative corpus" provi-

sion, allows an investigator to deem a fire as incendiary as long as all potential accidental ignition sources in an area of origin are eliminated as the cause of the fire. It is well-recognized that ignition sources for incendiary fires sometimes do not remain after the fire and, therefore, there may be no evidence available regarding the ignition source.

Inasmuch as Allstate denied its insured's claim based in large part on the "incendiary" classification by the investigator, Smith filed suit against Allstate for compensatory damages, and for punitive damages for the insurer's alleged "bad faith" in denying the claim.

The *Smith* decision concerned Allstate's motion for summary judgment on the "bad faith" claim. The defendant argued that, inasmuch as its investigator adhered to the principles of *NFPA 921* in making his findings (including the negative corpus concept), the "bad faith" claim should be

dismissed. In considering the arguments, the trial court found evidence to support the defendant's arson defense because the investigator had ruled out all causes other than intentional human act for both fires, and there was no evidence to support a finding of some other cause. While not endorsing the investigator's findings as proven, the court found evidence to support the conclusions and, thus, dismissed the "bad faith" claim.

There has been considerable debate in the last ten years regarding the "negative corpus" methodology. The current addition of *NFPA 921* endorses the concept and provides support for an investigator's conclusion of incendiary fire based on the elimination of all other potential ignition sources. By determining that the defendant had not acted in "bad faith" in relying on *NFPA 921* principles, the *Smith* court implicitly endorsed *NFPA 921*'s inclusion of the negative corpus methodology in its text.

The Daubert Series: Part II "The Expert Deposition" (continued)

- Is the expert comfortable with the applicable fire science terms? A laundry list of unknown scientific principles in a *Daubert* motion will quickly demonstrate the "expert's" incompetence.
- Do you need to use re-direct to bolster the expert's qualifications? To clarify the expert's reasoning? Don't be forced to save these points for your reply brief to a *Daubert* motion.
- The expert deposition, whether it's your expert or that of your opponent, can be a turning point in the litigation of a fire case. This is particularly true when either the deponent or the questioning attorney have their eyes fixed on a potential *Daubert* challenge.

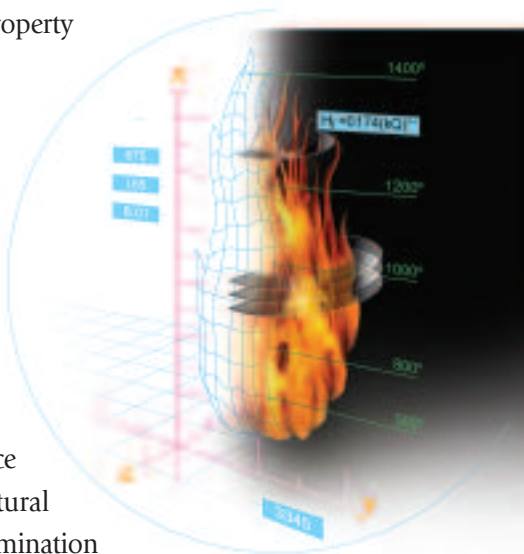
Guest Article

The practice of fire science litigation is dependent on the expertise and strong thinking of associates in this exacting field. These knowledgeable individuals have authored fire-related articles which we have posted in their entirety on the Tedford & Henry website. We appreciate the submission of these articles, and note that the opinions expressed therein are those of the authors. If any reader wishes to comment on the submissions, please send us your thoughts and we will be glad to include them in a future issue. Read excerpts of those informative articles here in *Perspectives*, and then get the full story at www.tedfordhenry.com/articles

Using Non-Invasive Techniques in Assessing Hidden Property Damage

There exists a constant battle regarding the proper valuation of property damages claims stemming from fire losses. "Hidden" losses, such as sooting behind walls or the cost for remediating mold developing due to the introduction of water during fire suppression activities, are routinely becoming part of the standard fire loss claim. With that in mind, any method or technique which can help to accurately project damages in a property loss is highly beneficial to the industry.

In this issue of *Perspectives*, we are pleased to offer the following abstract of an article by John R. Kominsky of Environment Quality Management, Inc. In the article — which appears in full at www.tedfordhenry.com — he discusses the development of the technique of utilizing passive infrared thermology for identifying the presence of moisture and mold behind structural walls without requiring destructive examination of the interior. In the spring issue of *Perspectives*, Mr. Kominsky will continue the topic by addressing how the technology can be utilized to detect the presence of heavy levels of soot behind walls.



Passive Infrared Technology: A Qualitative Method for Detecting Moisture Anomalies

The presence and detection of moisture behind structural walls may be best described as an elusive phenomenon. When normal amounts of moisture are present, traditional moisture-detection equipment can adequately identify such a condition. However these instruments may not be ideally suited to cope with a wet building environment condition which can change its shape, location, and content as the situation continues. Instead, thermal imaging, traditionally used to locate the presence of heat, is a more versatile tool for the identification of moisture because it can rapidly scan a surface to determine if irregular thermal patterns are present that suggest an excessive moisture condition. Testing conducted on the process has revealed that qualitative infrared thermography, coupled with an informed visual inspection and quantitative substantiation using moisture meters is an effective method to detect moisture anomalies in building envelopes.



John R. Kominsky's article appears on the Tedford & Henry website at: www.tedfordhenry.com/articles

John R. Kominsky is a Vice President at Environmental Quality Management, Inc. and is also an Adjunct Associate Professor in the Department of Environmental Health at the University of Cincinnati. He can be contacted at: (513) 825-7500 or jkominsky@eqm.com.

Submit Your Articles

Tedford and Henry encourages readers of *Perspectives* to submit topical guest articles for inclusion in this Quarterly Newsletter and on our website.

Contact Brian Henry at 860.293.1200 or via e-mail at bhenry@tedfordhenry.com

The Testifying Investigator

Part One: The Fire Scene Examination

Every day in every state in this country a fire occurs, and fire investigators respond to determine where the fire began and why. Public officials begin their investigation, and the private sector investigators are often not far behind. Those respective investigations are conducted in various ways, with investigators adhering to a variety of protocols, standards, and procedures. However, investigators should conduct every investigation with a particular thought in mind, namely, that the product of their work will end up as part of litigation with the investigator likely being needed to testify regarding his or her findings. Too often, both public sector and private sector investigators focus on getting to the bottom of a fire loss, and details which are crucial to litigation are overlooked, insufficiently documented, or disregarded.

The role of the testifying investigator begins at the fire scene examination. Not only must an approved methodology be followed (typically, the scientific method), but every detail which may play a role in future litigation must be documented and discussed.

Notes should be taken with two ideas in mind: first, that the notes themselves are discoverable in litigation; and second, that a final report based on insufficient or incomplete notes is a litigation disaster. The solution for that circumstance is to create notations which allow you to draw conclusions later; the conclusions need not be included in the notes.

Additionally, four key considerations should factor into any field examination: measure, obtain, photograph, and secure. First, measure everything, from the size of the building to the dimensions of the room of origin to the thickness of plywood sheets or structural beams. These measurements may seem trivial at the time,

but the litigation focus may be much different than the investigative focus. If the investigator fails to take those measurements and they prove to be an important consideration in litigation, a fact which the investigator may not know at the time of the scene examination, then the investigator is left with speculation rather than supportable facts.

— BY BRIAN P. HENRY

The full article can be found on the Tedford & Henry website at: www.tedfordhenry.com/articles.





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Perspectives from the **Hotseat**

Tedford & Henry **News & Facts**

Brian P. Henry will be speaking as a part of the faculty at Fire Findings on April 17-18 and will be presenting on the topic "Investigating Residential Dryer Fires."

Mr. Henry will also be speaking at the IAAI Conference in Victoria, British Columbia on May 3, 2007, on the topic of "Assisting the Expert".

Ted Tedford will be speaking at the University of Wisconsin Fire Investigation and Product Liability Litigation Seminar on June 7-8, and will be presenting on the topics of Exculpating Your Product at the Fire Scene and Defending Your Product in Litigation.

