

The Testifying Investigator:

Part II: The Expert Report

For at least the last two decades, a central part of the fire investigation process has been the production of a “report” by the investigator in which his or her findings as to the origin and/or cause are included. These reports are often solicited by the client (whether the client be a product or service company, an individual, or an insurance entity), but sometimes are offered absent request by the investigator as simply another service provided.

The benefits of the investigative report are obvious: a concise, organized rendition of the investigator’s views stemming from the fire scene investigation is generally useful in allowing someone else to evaluate the case. Unfortunately, there are also drawbacks to the publication of an investigative report, many of which fail to come to light until the matter works its way into litigation. A basic understanding of what reports are, why one is written, and what the parameters of such a document are is essential to avoiding report pitfalls and ensuring that the client receives the full benefit of the investigation.

I. What is a Report, and Who Writes One?

From a very basic point of view, the investigative “report” is merely a recitation of the facts and evidence obtained by the investigator, along with the opinions derived from the data collected. Reports can be oral or written, but typically most of us consider the investigator’s “report” to be a written document. If photographs are taken by the investigator, generally those photographs are appended to the document. Any other documentation relied upon by the investigator, such as a fire marshal report, can also be included.

There are two basic categories of individuals who may write such investigative reports: public officials and private investigators (although some well-meaning claim file managers occasionally feel compelled to draft fire investigative reports). Generally, it is part of the specific duties of fire department personnel or fire marshals to draft a report regarding a fire incident. In the case of fire departments, the report format is standardized throughout the United States through the National Fire Incident Reporting System form. While some fire marshal offices adhere to a standardized system, it is more common to see individualized reports from those offices.

Private investigators either automatically compile an investigative report as part of the service provided to their clients, or draft reports at the specific direction of the client. The contents of such reports often form the foundation for claim settlement negotiations or litigation. Regardless of who drafts a fire investigative report, careful attention should be paid to the information and data included therein, as well as to the manner in which opinions are conveyed.

III. Why Should a Report Be Drafted?

Of all the potential reasons for drafting a report, perhaps the most compelling is the notion that structure can be given to the investigative thought process, thereby creating a written record for later review and potential testimony. As noted in “The Testifying Investigator – Part I,” included in the last edition of *Fire Findings*, the parameters of litigation are established at the fire scene examination. Coincidentally, much of the information obtained by the investigator that goes into a report is obtained at

that same fire scene examination. The eventual report can provide structure to the investigative process undertaken at the fire scene examination.

Another key reason that a report should be drafted? To satisfy litigation requirements. Pursuant to Federal Rule of Civil Procedure 26(a)(2), a federal practice upon which many state court expert disclosure rules are based, a litigant must include a “written report prepared and signed by the [expert] witness” when disclosing experts. The rule also defines what is to be included a federal report, which is discussed below.

Some jurisdictions do not require the production of an expert report, instead requiring that counsel identify the opinions held by the expert and the facts and evidence relied upon in reaching those opinions. Even if only this type of “disclosure” is warranted in a particular jurisdiction, rather than an expert “report,” the testifying investigator should consult with counsel to ensure that the expert disclosure accurately reflects the work the investigator has done and accurately describes those subjects which the testifying investigator can appropriately address at the time of deposition or trial.

Probably the most common reason that a report is drafted is to satisfy the request of the client. However, investigators should exercise caution when being directed by the client to draft a report. Often, the client is unaware that all facts and data have not been collected, and that all testing has not been completed. The client is similarly often unaware that the expert’s opinion will be affected by the completion of those two tasks. Thus, proposing a delay to the client in the drafting of the report may serve the expert well. At the very least, the investigator should ask the client whether a written report should be prepared, and give the client the option of delaying that task until all facts and data have been uncovered.

IV. What Goes Into a Report?

The contents of an expert report is determined by individual jurisdictions, but some guidance can be found in the directive of Federal Rule 26(a)(2). The Federal Rule requires that the report contain the following: (1) a “complete statement” of *all* opinions and the basis and reasons for that opinion; (2) the data or other information considered by the expert in forming the opinions; (3) any exhibits to be used in support for the opinions; (4) the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; (5) the compensation to be paid to the witness; and (6) a list of other cases in which the expert has testified in the preceding four years.

But what does that mean? Does that mean that an investigator must cite to various sections of *NFPA 921* when utilizing principles espoused in that Guide? Does that mean the investigator must explain just what he knows, or *how* he knows what he knows? Depending on the jurisdiction, an investigator’s testimony may be limited to what is contained in the report and, therefore, care should be taken to include *every* relevant detail. Even in those jurisdiction where an investigator can go beyond the “four corners” of the report, investigators should strive to ensure that any report drafted can

“stand alone” if necessary as a complete embodiment of his or her work. With that goal in mind, a safe rule of thumb is that more is better than less.

Consider the following example. In one federal court case, an expert opining as to product design defect drafted one three-page report to address how the defect caused several dozen separate fires. The limited report could hardly be deemed a “complete statement” of all the opinions or bases for the opinions, and it certainly did not include all the data relied upon. Since the opponent had to spend multiple days deposing the expert due to the limited nature of the report, the court obligated the disclosing party to pay for the costs of those additional deposition sessions. The lesson to be learned is clear – make sure that *any* expert report contains all the information required by the governing jurisdiction.

At the very least, the investigator should thoroughly address the subject matter of the investigation. Specifically, if the investigator is an *origin* investigator, then details regarding fire patterns, fire dynamics, arc mapping, and eyewitness statements should be covered. If the investigator is a fire *cause* expert, then details regarding various potential ignition sources, fuels, and the probable ignition sequence should be discussed. If one expert is used for both areas, then the report should be even more detailed. It is wholly insufficient to simply offer conclusions without “showing one’s work.”

Unfortunately, there are some “gray areas” when it comes to report contents. One of the most troubling such areas involves the issue of rebuttal: must an expert offer their rebuttal to the opposing side in written format, or may that rebuttal be saved for live testimony? The short answer is “better safe than sorry.” Again, since a court can limit an expert’s testimony at trial to that which is contained in the report, the expert should offer rebuttal opinions in the report if he or she is prepared to do so at that time. Of course, that presumes that the expert has some idea of his opponent’s theories. If no information as to the opponent’s theory at the time the report is produced, be sure to cover it at the deposition.

Tip:

Origin experts should refer to specific photographs to demonstrate various fire patterns and the direction of fire spread. Using precise compass directions makes the report easier to understand – presuming the expert took down the compass directions at the scene!!!

V. Report Usage

Once the report is drafted, the report can be utilized in a variety of ways. First, the report can be used to refresh the recollection of the expert months, or perhaps years, after the fire investigation. Second, the report can serve as the outline for eventual oral testimony; if a complete report has been drafted, a deposition or trial testimony should merely be a recitation of that information contained in the report.

Tip:

Cross-examining attorneys like to refuse to allow the expert to refer to the investigative report during a deposition. Don't fall victim to the bluff – a testifying expert always has the right to consult the report, and the expert can refuse to answer the question unless the report is produced for review.

VI. Final Thoughts

The preparation of an investigative report by the testifying expert should never be short-handed or done as an afterthought. Instead, the report should be considered the testifying investigator's sword or shield – a crucial weapon in the litigation battle.