

THE DAUBERT SERIES – Part I

In the next several issues, Fire Litigation Perspectives will present a new segment entitled “The Daubert Series.” Each issue will discuss a variety of substantive requirements, pitfalls, or tactical suggestions on how to approach and deal with fire experts in the age of Daubert.

The disclosure of experts and production of expert reports are routine matters for any fire litigation attorney. However, such disclosure should always be handled with great care. Reliance on a generic or boiler-plate report can have dire consequences, such as limiting the scope of a proffered expert’s testimony, or precluding it altogether. Consideration of several concepts will ensure that your expert report can go the distance.

Time and Attention to Detail. All persons involved, whether experts, attorneys, or clients, should recognize the importance of the expert’s report. Just like depositions, the preparation of the report requires time and forethought. While keeping costs at a minimum is always a consideration, shortchanging the amount of time committed to the thorough preparation of the report will only diminish its effectiveness and, possibly, the odds of prevailing in the long run.

Talk, talk, talk. Attorneys and experts should freely discuss the contents of the expert report before it is drafted. There should be no surprises and no missing elements. While the 1993 Advisory Committee Notes to Fed. R. Civ. P. 26(a)(2) pertaining to expert reports indicate that the requirement that the expert “read and sign” the report does not prohibit counsel from providing assistance in preparing the report, ideally, the first drafted report will be the final report. Having multiple drafts only allows your opponent to take issue with the fact that the modifications were made, perhaps at counsel’s urging, thereby lessening the impact of the substance of the report.

Follow the rules. Depending on what court you are in, you will be faced with a variety of local rules pertaining to the substance of your expert’s report. In any event, in federal court, the report must comply with Fed. R. Civ. P. 26(a)(2).

Unless otherwise stipulated or directed by the court, 26(a)(2) requires that the disclosure of expert “be accompanied by a written report prepared and signed by the witness.”

The report “shall contain” the following:

- ✓ a complete statement of all opinions to be expressed and the basis and reasons therefore;
- ✓ the data or other information considered by the witness in forming the opinions;
- ✓ any exhibits to be used as a summary of or in support of the opinions;
- ✓ the qualifications of the witness;
- ✓ a list of all publications authored by the witness within the preceding ten years;
- ✓ the compensation to be paid for the study and testimony; and
- ✓ a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Follow NFPA 921. Courts have increasingly recognized *NFPA 921: Guide for Fire and Explosion Investigations*, as the “national standard with regard to the appropriate methodology for investigation by fire science experts.” See *McCoy v. Whirlpool Corp.*, 214 F.R.D. 646, 650 (D. Kan. 2003). Additionally, while *NFPA 921* is entitled a “Guide” rather than a “Standard” by the National Fire Protection Association, the use of the scientific method in fire investigations as outlined in *921* is now *required* of fire investigators through *NFPA 1033: Standard for Professional Qualifications for Fire Investigator* (2003 ed.). That standard, applicable to all individuals conducting a fire investigation, states: “[t]he fire investigator *shall* employ all elements of the scientific method as the operating analytical process throughout the investigation and for the drawing of conclusions.” *NFPA 1033* at § 4.1.3 (emphasis added).

While a *Daubert* challenge may not always be avoidable, giving due consideration to the expert’s report will go a long way in diminishing the likelihood of such a challenge, if not overcoming it altogether.