

Editorial:

"A Second Opinion"

On a number of occasions, we have been retained by product manufacturers involved in large loss fire cases to render a second opinion regarding the strengths or weaknesses of a case. In many of these situations, the manufacturer felt its case was stronger than the evaluation of their defense counsel. When presented with this "second opinion" assignment, we begin our evaluation by closely scrutinizing the origin and cause evidence and opinions.

In many cases, the original analysis of the origin of the fire by the plaintiff's investigator is simply wrong or, at a minimum, inadequately presented. In others, there has never been an analysis conducted regarding whether the manufacturer's product is a competent ignition source for the available fuels. This finding is especially troubling in cases where the manufacturer was sued simply because its product was allegedly the "only ignition source in the area of origin." Competent fire scientists understand that determining the available ignition sources in a defined area is only part of the analysis.

We generally find that a claim or lawsuit is based on that faulty premise: that the area of origin is "obvious" to the plaintiff's investigators, and that the manufacturer's product is the only ignition source in that "obvious" area of origin. Unfortunately, such a determination often stems from an inadequate investigation of the fire scene, or a non-existent or faulty analysis of the ignition sources and fuels present at the scene. We find that the "obvious" area of origin or ignition source becomes less obvious when all of the available evidence is analyzed.

For example, fire origin and cause investigators often overlook key pieces of evidence such as 911 audio-tapes. Those recordings sometimes



contain information regarding the reporting witness's first observation of the fire, often placing the fire a distance away from the "obvious" area of origin proposed later by the plaintiff's investigator. Similarly, such investigators draw conclusions regarding ignition source/fuel combinations which are scientifically invalid — conclusions which are later disproved when it is determined that the blamed product is

not a competent ignition source for the available fuels due to the source's inability to generate the requisite heat energy to sustain combustion. The "obvious" ignition source becomes much less "obvious" at that point. When asked to provide a "second opinion" in these types of cases, we employ strategies not often recognized or pursued by other defense counsel inexperienced in fire science litigation. Once the "second opinion" is offered, a remarkable change generally occurs in the positions of the parties, with the manufacturer's position being strengthened considerably.

The next time you evaluate one of your cases and you think there is cause for concern with respect to the defense of the case, trust your instincts and invest in a second opinion.



Tedford & Henry
FIRE SCIENCE LITIGATIONSM

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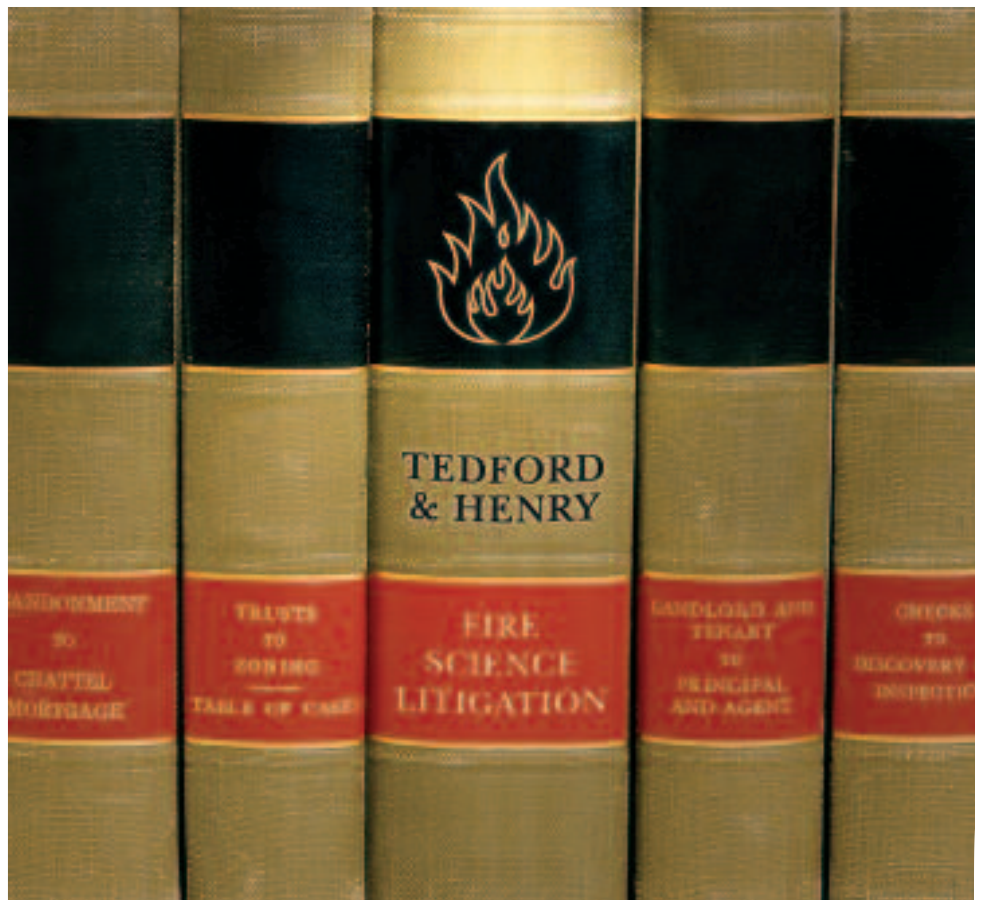


Perspectives from the **Hotseat**

Tedford & Henry **News & Facts**

Partner Named Certified Fire and Explosion Investigator

Tedford & Henry, LLP, is pleased to announce that Brian Henry has recently been qualified by the National Association of Fire Investigators as a Certified Fire and Explosion Investigator. Mr. Henry is one of only eighteen attorneys in the United States achieving this certification, which is awarded after demonstrating knowledge, education, and experience in the field of fire origin and cause investigations. Mr. Henry's practice is devoted to the field of fire science litigation, and his experience includes fires involving household products, appliances, and electrical equipment.





Fire Litigation Perspectives

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The Daubert Series

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. The 1993 Advisory Committee Notes to Fed. R. Civ. P. 26(a)(2) pertain-

ing to expert reports indicate the requirement that the expert "read and sign" the report does not prohibit counsel from providing assistance in preparing the report. Ideally, however, the first drafted report will be the final report. Having multiple drafts only allows your opponent to take issue with the fact that modifications were made, perhaps at counsel's urging, thereby lessening the impact of the substance of the report.

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 readership is growing, as manufacturers and business colleagues find it a resource for fire science issues as well as interesting developments in the law.

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Setting the Fire Science Community Back: One Court's Decision to Minimalize NFPA 921

In a disheartening decision, a Connecticut trial court has set back the fire science community's efforts in advancing NFPA 921: Guide for Fire Investigations and Explosions as the standard for origin and cause analyses in the United States. In Jordon, et al. v. Yankee Gas Services Co., et al., 2006 WL 280478 (2006), a wrongful death action arising out of fire occurring on August 12, 1991, in Derby, Connecticut, the plaintiff alleged that a water heater on certain premises was defective, and that the defendant knew or should have known of the conditions but failed to correct them.

In the January, 2006, decision from the Superior Court for the Judicial District of Waterbury, the court held that because the plaintiff's fire origin and cause experts did not expect to testify concerning innovative scientific techniques, their testimony was admissible without undergoing a *Porter* (Connecticut's adoption of *Daubert*) analysis or being subjected to a *Porter* hearing. The court challenged the worth of *NFPA 921* and the requirements contained therein, noting that the Guide's "contribution to fire science ought not to be overstated — it was never intended to invalidate or supplant all other scientific methods." The court went on to state that "it is a jury question whether [the experts'] investigation was based on valid and reliable methods of origin and cause investigation."

Not only did the court misinterpret what is required of the judiciary in its "gatekeeper" function, but it also failed to recognize that no other authoritative source contains a methodology for fire investigations. While the sources cited by the court, *Kirk's Fire Investigations* and the *Fire Protection Handbook*, certainly contain authoritative information, neither source identifies a reliable and approved methodology for undertak-

ing a scientific fire origin and cause analysis. Specifically, the court placed the issue of the reliability of an expert's methodology into the hands of the jury — a concept which even the United States Supreme Court has disavowed. Additionally, the court's belief that a *Porter/Daubert* analysis need be conducted only when "innovative scientific techniques" are at issue is patently wrong; such an analysis must always be conducted to assess the reliability of an expert's methodology. In fact, the court claimed its analysis was consistent with Rule 702 of the Federal Rules of Evidence, but never addressed the three-part test specified therein.

The Jordon court's dismissive treatment of *NFPA 921* as only a comprehensive guide also ignores the fact that 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 (2003 ed.). Finally, the Jordan

decision unfortunately sets a dangerous precedent for all fire and origin expert challenges by allowing courts to bypass their gatekeeper function by concluding that the science of fire investigation is not "innovative" enough to warrant judicial scrutiny before being heard by a jury. When confronting this mindset, it is important to stress the notion that there must be a foundation of reliability for an expert's opinions before the opinions should ever reach the ears of the jurors.

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

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

MANAGEMENT OF THE INVESTIGATION PROCESS AT MAJOR INCIDENTS

Abstract

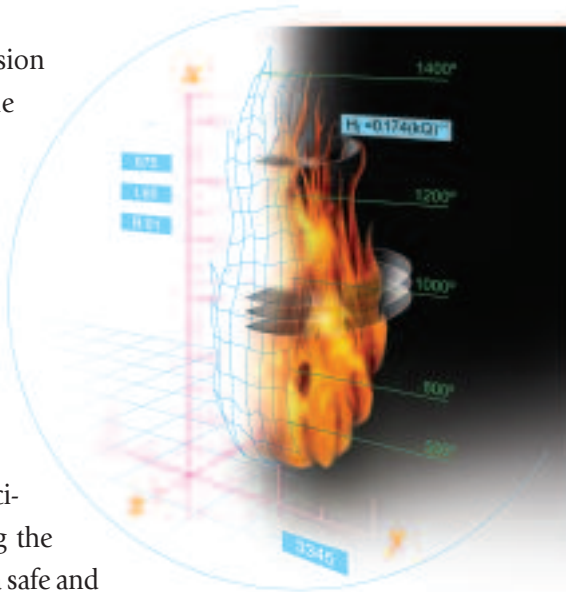
The goal of any fire or explosion investigation is to determine the origin, cause and responsibility for the event. However, investigations at major incidents present many challenges to the entity (public or private sector) that is charged with managing the entire investigative process.

The efficient management of the investigation of a major incident is a critical aspect of meeting the overall goal of the investigation in a safe and timely manner. This article endeavors to provide sample management models that can be utilized by either the public or private sector to organize and manage resources, enhance scene safety, improve communication between interested parties and cooperating agencies, and improve the overall quality of the ongoing investigative procedures of all involved.

To accomplish the development of investigation management models, it was determined that the model should not be based on “people” but on “function” so that the model could be expanded or contracted as need arises. The model also needed to be functional, user friendly and not require excessive resources. Utilizing the key concerns identified as a part of the planning process the management models were developed and tested.

By implementing a sound management model, the overall goals of the investigative process will be met in a timely and efficient manner.

— BY RONALD HOPKINS



Ronald Hopkins is an Associate Professor of Fire and Safety Engineering Technology at the Eastern Kentucky University. He is a Certified Fire Protection Specialist, Certified Fire and Explosion Investigator and Certified Fire Investigator Instructor, and maintains numerous other professional certifications and licenses. He is a principal consultant to TRACE Fire Protection and Safety Consultants, Ltd. as well as an associate with other consulting firms. Mr. Hopkins can be contacted at (859) 622-1053 or email: Ron.Hopkins@acs.eku.edu

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

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 Daubert Series

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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 experts "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 Investigators* (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.

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.

