



# Fire Litigation Perspectives

SPRING 2007

Tedford & Henry, LLP · 750 Main Street, Suite 510, Hartford, Connecticut 06103 · P (860) 293-1200 · F (860) 293-0685 · [www.tedfordhenry.com](http://www.tedfordhenry.com)

## The Daubert Series: Part III "Supplementing the Expert Report"

*The expert report and its content were discussed in the first installment of this Series. However, the initial disclosure of the report does not end the expert's or the attorney's obligations with respect to the report, particularly when a Daubert challenge is anticipated.*

**Fed. R. Civ. P. 26 (e)** requires, on penalty of sanction, parties to supplement all expert reports on their own initiative if they learn that "in some material respect the information [previously] disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." State rules of procedure generally impose upon the parties a similar continuing duty to disclose.

### To Supplement, or Not To Supplement?

New opinions or bases for those opinions may spring from a *Daubert* challenge to the admissibility of the expert's testimony. In many cases, the groundwork for a *Daubert* challenge is established through the course of an expert's deposition testimony. In other

cases, the basis for the challenge does not become clear until the *Daubert* motion is filed. In either case, a supplemental expert report can correct and clarify the expert's opinion, potentially thwarting a successful challenge.

Even in the absence of a *Daubert* challenge, however, an expert report may require modification to address later-acquired information such as that developed through the disclosure and depositions of other experts in the case, from additional research or reflection, or from other late discovery.

Supplementation may signal a "weakness" in an expert opinion and will likely raise issues as to why the expert failed to address a particular matter in his/her initial report. Thus, it should be done sparingly and with deliberation.

*"...the groundwork for a Daubert challenge is established through the course of an expert's deposition testimony"*

*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.*

To subscribe:  
[www.tedfordhenry.com/newsletter](http://www.tedfordhenry.com/newsletter)

### IN THIS ISSUE

- The *Daubert* Series: Part III
- *Bland v. HC Beck*
- Editorial: "Mediation in Fire Cases"
- Guest Article: Optical and Electron Microscopy  
By: John R. Kominsky
- News & Facts

*Editorial:*

# *Mediation in Fire Cases*

*Have you ever been involved in a large fire claim or lawsuit which was ripe for mediation, but had difficulty finding a mediator who understood fire science issues?*

Because of an increasing demand for mediators who understand fire science principles, Tedford & Henry, LLP, has begun devoting a portion of its practice to mediating fire cases. Our experience in litigating fire science cases, either as plaintiff's counsel or as defense counsel, and our extensive training in fire science places our firm in a unique position to act as a mediator to help resolve complex fire-related litigation. We understand the often difficult and distinctive issues accompanying litigation involving fires and explosions.

Litigating fire cases can be a very costly process, which usually results in a jury attempting to sort through difficult issues and arrive at a fair and just result. Ted Tedford and Brian Henry understand fire science issues and have the credibility and knowledge to act persuasively to bring disputing parties together for a fair settlement based on the strengths and weaknesses of each party's position.

Mediation at the early stages of a fire case has the potential of resolving the conflict before vast sums are spent fine-tuning difficult defenses and offensive theories which juries will ultimately have difficulty understanding. Our

difficult fire cases where the mediator has no understanding of fire science and has been ineffective in bringing about a resolution due to that lack of understanding of the relative strengths and weaknesses of each side's case.

How early in the litigation process can a case be realistically mediated depends on the case. However, as soon as experts have formulated their opinions, the case could be ripe for mediation.

If you think mediation of your case would make economic sense and would like to mediate it with people who understand fire science, then give us a call.

*- BY: FREDERICK B. TEDFORD*  
*The full article can be found on the Tedford & Henry website at: [www.tedfordhenry.com/articles](http://www.tedfordhenry.com/articles).*



experience with fire litigation, from shoveling at a fire scene to arriving at jury verdicts, has taught us that most cases can be resolved early if a knowledgeable mediator is involved with the parties to bring about a fair result given the strengths and weaknesses of each party's position. Unfortunately, we have been involved in mediations of

## ***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](mailto:info@tedfordhenry.com)

# LIAR, LIAR, PANTS...NOT ON FIRE???

## *Expert's Failure to Test Ignition Theory Results In Testimony Preclusion*

In *Bland v. HC Beck*, 2007 WL 748461 (E.D.Mo. 2007), a federal district court grappled with the tricky element of causation in a claim brought by a plaintiff who was burned when his pants caught fire after he came in proximity to a construction site heater. Not surprisingly, the parties disputed exactly how plaintiff's pants caught fire, which led to the causation debate.

The plaintiff claimed that his pants simply ignited as he walked within three-to-four feet of a 250,000 BTU heater used at a construction site. The plaintiff's expert concluded that the subject heater was defective and unreasonably dangerous for two reasons. First, the expert claimed the heater was defective as it did not have a guard or set-off in its design to prevent accidental ignition of nearby materials. Second, the expert asserted that the manufacturer had failed to sufficiently

warn consumers of the potential hazards associated with the heater.

The defendant contended that the expert's opinions were unreliable and failed to meet the standards established by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Specifically, the defendant demonstrated that the expert failed to perform any testing or conduct any analysis regarding the subject heater, the plaintiff's pants, and/or the alleged ignition of cotton material at variable distances from the subject heater. The plaintiff countered with traditional *ipse dixit* arguments, namely, that his expert's failure to conduct testing of various fabrics and/or an exemplar of the subject heater was irrelevant because the expert's background in engineering and physics equipped him to offer the "common knowledge" that a 250,000 BTU heater was capable of

serving as an ignition source for combustible materials.

The *Bland* court agreed with the defendant that the expert failed to conduct any testing to demonstrate his theory was plausible. In view of that fact, the court noted that it could not even begin to review whether the expert's theory was reliable. The court pointed out that the expert did not present any data regarding similar heaters under similar circumstances, nor any evidence of others who had tested the type of heater at issue with respect to its potential as an ignition source for various fabrics. The court found that the expert simply did not provide any reliable support for the notion that the heater was defective when used as intended.

Finally, the court noted that the defendant's expert had obtained an exemplar heater and had run tests on a variety of fabrics at various distances under factors such as distance from heater, speed of walking past heater, and "stop and go" walking past heater. The court found that such testing indicated that the plaintiff's expert had the ability and means to run similar tests. In summary, the court properly concluded that the expert's general knowledge was an insufficient basis to allow the expert to testify, and it precluded the opinion testimony.

The *Bland* decision is a good reminder that a solid scientific foundation for an opinion is always necessary in a product liability action, and that an expert's "general knowledge" or experience alone cannot serve as that foundation.

## ***The Daubert Series: Part III*** ***"Supplementing the Expert Report" (continued)***

### **When Must The Expert's Report Be Supplemented?**

Rule 26 (e)(1) requires a party to supplement "at appropriate intervals...if the party learns that in some material respect the information disclosed is incomplete or incorrect... ."The Rule makes clear that the duty applies to information contained in an expert report and to information provided through an expert deposition. *Id.* The deadline for supplementation is set forth by Rule 26 (e)(1) as the time the party's disclosures under Rule 26(a)(3) are due. *Id.*

### **The Potential for Sanctions.**

Failure to supplement an expert report without "substantial justification" can lead to dire consequences. Fed. R. Civ. P. 37 (c)(1). Particularly, the proffered opinion may be precluded if the adversary has suffered prejudice as a result. *Id.*

In sum, supplement an expert's report only as necessary and in accordance with the applicable rules of procedure. Be mindful, however, that supplementation may be a useful tool to undermine an impending *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](http://www.tedfordhenry.com/articles)

### Optical and Electron Microscopy— Forensic Tools to Determine the Extent of Soot Migration

A fire loss is very complex because of the unique behavior of smoke and its resultant carbonaceous material termed "soot." "Hidden" losses, such as sooting of interstitial wall spaces or what is assumed to be soot deposition from the incident fire, are routinely becoming part of the standard fire loss claim. An inaccurate assessment of the extent of soot deposition can significantly inflate the cost of the claim. Forensic analytical testing collectively called "particle characterization" can be performed to determine the presence of soot in hidden areas such as interstitial wall spaces. This form of testing is useful because it generally allows positive identification of soot. The techniques used include inspection of particles under an optical microscope, inspection using a scanning electron microscope (SEM), and analysis using energy dispersive spectroscopy (EDS). Optical and electron microscopy provide visual information on the size and shape of particles, while EDS provides information on the chemical elements present in the sample. Although SEM analysis can provide an accurate identification of soot, the investigator must exercise sufficient care in identification of the actual source of the soot. An article of a case study where these techniques was used is contained on the Tedford & Henry website at [www.tedfordhenry.com/articles](http://www.tedfordhenry.com/articles).



John R. Kominsky's article appears on the Tedford & Henry website at: [www.tedfordhenry.com/articles](http://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](mailto: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](mailto:bhenry@tedfordhenry.com)

# The Testifying Investigator

## Part Two: 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 inves-

tioned 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.

— BY BRIAN P. HENRY

*The full article can be found on the Tedford & Henry website at: [www.tedfordhenry.com/articles](http://www.tedfordhenry.com/articles).*

tigative 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 com-





**Tedford & Henry**  
FIRE SCIENCE LITIGATION<sup>SM</sup>

**Tedford & Henry, LLP**  
750 Main Street, Suite 510, Hartford, CT 06103

RETURN SERVICE REQUESTED



*Perspectives* from the **Hotseat**

## *Tedford & Henry* **News & Facts**

Tedford & Henry will be sponsoring the DRI 2007 Fire and Casualty Seminar to be held at the Westin Chicago River North in Chicago, IL on November 1-2, 2007. For information regarding this seminar go to: [www.dri.org](http://www.dri.org).

In follow-up to our winter newsletter, for information regarding the Fire Investigation and Product Liability Litigation Seminar that Attorney Tedford is speaking at on June 7-8, 2007 in Madison, Wisconsin, please call Diane Lang, University of Wisconsin Engineering Department at (800) 462-0876.

