

CONSIDERATIONS
FOR FIRE AND EXPLOSION SUBROGATION CASES

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TABLE OF CONTENTS

I. Introduction.....	3
II. Qualifying the Expert Witness under the Rules of Evidence.....	4
III. NFPA 921 and the Admissibility and Credibility of Expert Testimony.....	11
IV. NFPA 921 and Spoliation of Evidence.....	17
V. NFPA 921 and Major Loss Investigations.....	22
VI. Conclusion.....	27

APPENDICES

Federal Rules of Evidence Pertinent to the Admissibility of Expert Testimony.....	Appendix 1
State Court Standards for the Admissibility of Expert Testimony.....	Appendix 2
Cases Referencing NFPA 921.....	Appendix 3
NFPA 921 Excerpts.....	Appendix 4
Article: Spoliation of Evidence—A Balancing of Interests.....	Appendix 5

I. INTRODUCTION

Pursuing subrogation cases in the context of fire and explosion losses is unique and challenging. The loss site is frequently no more than a pile of rubble with charred and smoldering remains. It is important that the insurers assigning the loss, the adjuster, the origin and cause investigators, the forensic engineers, and the attorneys all be familiar with the various laws, treatises and guidelines that may apply from the loss investigation stage through trial.

Over the past few years significant developments have occurred in both the federal and state courts affecting experts who testify in fire and explosion cases. Trial court judges are scrutinizing expert testimony more than ever before. Experts who testify in fire and explosion cases also face close scrutiny under the document known as NFPA 921, *Guide for Fire and Explosion Investigations*. Failure to comply with the legal requirements imposed by the courts for expert testimony, and failure to adhere to guidelines recommended in NFPA 921, will jeopardize an expert's ability to testify and will jeopardize the entire subrogation effort.

In a similar vein, fire and explosion cases may be jeopardized if certain evidence is destroyed, raising the issue of spoliation of evidence. The sanctions and adverse effects for failing to properly preserve evidence are addressed in cases throughout the country and also in NFPA 921. The investigators and experts involved in fire and explosion subrogation cases need to be aware of the laws pertaining to spoliation and the guidelines identified in NFPA 921 pertaining to spoliation.

To assist those involved in the management of major fire and explosion investigations, the NFPA Committee has revised the chapter on handling major losses in the 2004 edition of the document. Adhering to the recommendations of new Chapter 27 will assist those pursuing subrogation in fire and explosion cases to comply with the pertinent laws, rules, regulations and guidelines.

II. QUALIFYING THE EXPERT WITNESS UNDER THE RULES OF EVIDENCE

Expert witnesses are intimately involved in fire and explosion cases. Virtually every subrogation case in this area requires the involvement of a competent origin and cause investigator and one or more forensic experts. A number of origin and cause investigators in the United States are certified. The International Association of Arson Investigators has a rigorous

Certified Fire Investigation® (CFI) program. A CFI designation for a fire investigator is recognized by the National Professional Qualifications Board through the National Fire Protection Association. To obtain CFI status, an investigator must have a designated amount of experience, training and education in order to take a test for the certificate. The test includes the investigator's knowledge of a broad range of recognized fire investigation manuals and treatises, including NFPA 921. Other investigators may obtain a Certified Fire and Explosion Investigation certification. To obtain this designation, an investigator needs to pass a test prepared by the National Association of Fire Investigators; the test is based entirely on NFPA 921.

All types of forensic engineers are involved in fire and explosion investigations, including electrical engineers, structural engineers, mechanical engineers, metallurgical engineers, fire protection engineers, fire safety engineers, etc. Various licensing requirements and standards are applicable to these engineering disciplines. However, licensure does not guarantee that Certified Fire Investigators or professional engineers will be allowed to testify in fire or explosion cases.

In presenting testimony in fire and explosion cases, all expert testimony is governed by the applicable rules of evidence of the federal or state court. Trial judges determine whether the expert may testify. The Federal Rules of Evidence apply in all federal courts, and most state courts have adopted similar rules. There are six rules of evidence that most directly pertain to the testimony of witnesses: Rule 401 entitled Definition of Relevant Evidence, Rule 402 entitled Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible, Rule 403 entitled Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time, Rule 701 entitled Opinion Testimony by Lay Witnesses, Rule 702 entitled Testimony by Experts, and Rule

703 entitled Bases of Opinion Testimony by Experts. The text of these rules is outlined in Appendix 1. Rule 702 most directly relates to this discussion and states as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Several recent United States Supreme Court decisions have addressed the admissibility of expert testimony under the Federal Rules of Evidence. As a result, the trial courts now act as a gatekeeper to scrutinize whether the experts have satisfied subsections (1), (2) and (3) of Rule 702.

In the leading case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), the Supreme Court addressed the admissibility of novel scientific evidence pertaining to expert witness testimony about epidemiological matters and alleged adverse effects from the ingestion of the anti-nausea drug Bendectin. In prior cases involving novel scientific or expert opinion evidence, the federal courts followed *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923), which stated that expert opinion based on scientific technique is inadmissible unless the technique is “generally accepted” as reliable in the relevant scientific community. The *Daubert* Court overruled *Frye*, stating that the Federal Rules of Evidence and particularly Rule 702, which post-dated *Frye* by approximately 50 years, liberalized the Rules for admissibility of expert testimony.

In *Daubert*, the Supreme Court outlined four “flexible” criteria for the trial court to consider in evaluating the admissibility of scientific testimony:

- (1) Whether the theory or technique has been tested;

- (2) Whether the theory or technique has been subjected to peer review and publication;
- (3) The known or potential rate of error and the existence and maintenance of standards controlling the techniques operation; and
- (4) The general acceptance of the theory or technique.

Daubert, 113 S. Ct. at 2796-2797. The *Daubert* Court limited its holding to “scientific” knowledge, and did not state whether the new standard applied to technical or other specialized knowledge. Though the stated reason for overruling *Frye* was that it was outdated by the liberal rules of the Federal Rules of Evidence, the net effect is that experts are subjected to greater scrutiny and fewer experts are allowed to testify.

For several years after *Daubert*, courts in various federal and state jurisdictions applied the new approach to scientific knowledge. With respect to technical or experienced based testimony, numerous jurisdictions applied the more general requirements of Rule 702 or the old standard of *Frye*. Those involved in fire and explosion subrogation cases questioned and debated whether *Daubert* would apply to origin and cause investigations and to the testimony of forensic engineers involved in such matters.

Before this question was answered, the Supreme Court decided *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997). The trial court in that case had granted summary judgment for the defense, holding that the plaintiffs lacked scientific evidence that PCBs caused the plaintiff’s lung cancer. The Eleventh Circuit overruled the trial court’s grant of summary judgment, disapproving of the stringent standard of review applied by the trial court. In a significant ruling, the United States Supreme Court reversed the Eleventh Circuit and reinstated the summary judgment. In so doing, the Court applied an “abuse of discretion standard,” holding that the appellate court cannot reverse a trial court’s decision on the admissibility of expert testimony

unless it is shown that the trial court engaged in an abuse of discretion in making its decision on the admissibility of the testimony. This decision gave great power to the trial court because its decisions would not be reviewed *de novo* by the appellate court.

In 1999, the United States Supreme Court addressed whether its holding in *Daubert* would apply to nonscientific cases. In *Kumho Tire Company, Ltd. vs. Carmichael*, 119 S. Ct. 1167 (1999), the Supreme Court addressed expert testimony provided by a mechanical engineering expert in an alleged tire failure case. The Supreme Court noted that Rule 702 specifically referenced testimony based on science, training and experience. The Supreme Court held that a trial court's gatekeeping obligation to scrutinize expert testimony applies to all expert witnesses and not just scientific experts. The Supreme Court left to the trial court's discretion how to go about determining whether a particular expert's testimony is reliable. The court recognized that the four specific factors outlined in *Daubert* may not be adequate, and that other unidentified factors could be considered by the trial court. If there was any question before *Kumho* whether the gatekeeping role of federal trial courts would be applied to experts testifying in fire and explosion subrogation cases, that question is now resolved.

Hundreds of cases have been decided addressing these new rules on the admissibility of expert testimony. Consistency of results has not been a priority of the judiciary. Trial courts following *Daubert* will engage in the process of closely scrutinizing an expert's reliability and methods. Trial judges, armed only with their personal training and experience in matters of law, are now stepping inside the science labs and engineering departments to evaluate methods and procedures, and courts of appeal must apply an abuse of discretion standard when reviewing the trial judge's reliability determination. Simply stated, and with a few exceptions, the appellate courts will let the trial courts determine what constitutes good science and methodology.

All federal courts in the United States are obligated to follow the Supreme Court's pronouncements in *Daubert*, *Joiner* and *Kumho*. Approximately 30 states have decided to follow those rules articulated by the United States Supreme Court. The remaining jurisdictions follow a combination of the old *Frye* standard, or some specialized standard. A breakdown of the rules applied in the various state jurisdictions is contained in Appendix 2.

In pursuing fire and explosion subrogation cases, and in evaluating the potential admissibility of expert testimony, it is important to know whether the case will be in federal court or state court. If the matter is in a state court, it is important to know if the state follows the *Daubert* approach or some other standard. Two of the several states that have rejected *Daubert* and its progeny are Minnesota and Arizona.

In *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000) the Minnesota Supreme Court addressed the issue of novel expert testimony involving allegations that plaintiffs were permanently injured by exposure to the insecticide Dursban. In Minnesota, expert testimony that is not generally accepted has traditionally been analyzed under *Frye v. United States*, and a slight modification under *State v. Mack*, 929 N.W.2d 764 (Minn. 1980). Under the *Frye-Mack* test, the court will analyze whether the methodology is generally accepted and whether the expert testimony lacks reliability. The Minnesota Supreme Court in *Goeb* chose to maintain its *Frye-Mack* standard of reviewing expert testimony and specifically rejected the United States Supreme Court's approach in *Daubert*. The Court expressed concern about judicial resolution of disputes between well credentialed scientists, as well as the potential of non-uniformity in the law under *Daubert*. The Court observed that cases built on similar facts and offering similar scientific techniques could have widely disparate results under the *Daubert* approach. The Minnesota Supreme Court also adhered to a *de novo* standard of review, as opposed to the "abuse of

discretion” standard adopted in *Joiner*. According to the Minnesota Supreme Court, *de novo* review will ensure more objective and uniform rulings on a particular scientific method or technique. *Goeb*, 615 N.W.2d at 814.

The Arizona Supreme Court has also rejected *Daubert*. In the very lengthy and detailed opinion in *Logerquist v. McVey*, 1 P.3d 113 (Ariz. 2000), the Arizona Supreme Court strongly criticized the United States Supreme Court’s analysis and holdings in *Daubert*, *Joiner* and *Kumho*. It also modified the *Frye* standard for determining the admissibility of expert testimony.

In *Logerquist*, the Arizona Supreme Court addressed the admissibility of expert testimony offered by a plaintiff patient in a medical malpractice and tort action against a pediatrician based on repressed memories of childhood sexual abuse. The trial court had granted summary judgment for the defendants, but the Court of Appeals reversed and remanded the case. On remand, the trial court entered an order precluding expert testimony of the patient’s alleged repressed memory. The Arizona Supreme Court then took review of the trial court’s decision excluding the expert testimony.

In determining whether to adopt *Daubert*, the Arizona Supreme Court stated that the *Daubert* opinion appears politically naive about the “methods and procedures of both science and evidentiary admissibility.” *Logerquist*, 1 P.3d at 126. The Arizona Supreme Court rigorously criticized the U.S. Supreme Court decision in *Kumho* as well, stating that the *Kumho* opinion read more like a jury argument than an application of legal principle. *Id.* The Court also cited with approval a treatise on scientific evidence which recognized that it will take at least the next several years to determine whether *Daubert* was an enlightened step forward in the way the law uses science, or conversely, a stumble backward into the darkness of a “Kafkaesque nightmare.” *Id.* at 129. The Court concluded that the jury system and vigorous cross-

examination of experts was the best method for assessing expert testimony, rather than allowing district judges to make that determination.

Finally, the Arizona Supreme Court held that it would limit application of *Frye* to a witness's opinion that is based on novel scientific principles or techniques that the witness has taken from others and applied to the case at hand. Conversely, the Court ruled that *Frye* has no application if the expert testimony is based on a witness's own observations or experience-based testimony. In that situation, the witness will be allowed to testify and the jury will be allowed to determine the weight and credibility of the testimony.

The *Logerquist* decision is particularly significant in the fire and explosion context. Cause and origin experts often rely on their own observations and experience. Under *Logerquist*, such testimony is not subject to the intense scrutiny suggested by *Daubert* and subsequent federal court decisions.

The Rules of Evidence and the court decisions applicable to the admissibility of expert testimony must be fully understood in pursuing fire and subrogation cases. Under the *Daubert* approach, the testifying experts may face close scrutiny before they are ever allowed to testify. Under other approaches, such as those in Minnesota and Arizona, the expert may be permitted to testify but the expert is still subject to all the rigors of cross-examination.

III. NFPA 921 AND THE ADMISSIBILITY AND CREDIBILITY OF EXPERT TESTIMONY

Whether in a jurisdiction where the origin and cause investigator is subjected to a *Daubert* challenge, or in a jurisdiction where the expert is subjected to the rigors of cross-examination, it is important that the origin and cause investigator and the forensic experts supporting the subrogation effort be familiar with and follow NFPA 921. The NFPA 921 Guide for Fire and Explosion Investigations is authored by the National Fire Protection Association

Technical Committee on fire investigations. The pertinent introductory pages and table of contents of NFPA 921 are contained in Appendix 3. The purpose of NFPA 921 is to establish guidelines and recommendations for the safe and systematic investigation or analysis of fire and explosion incidents. *See* Chapter 1, Section 1.2. Many fire investigators agree and will testify that NFPA 921 sets forth the accepted methodology for investigating fires.

NFPA 921 is the only peer reviewed document relating to the proper methodology for investigating fires. The members of the committee are appointed by the NFPA Standards Council and come from the fire service, the insurance industry, the legal community, private investigators and forensic companies, law enforcement agencies, the federal government, including representatives from the bureau of Alcohol, Tobacco and Firearms, the United States Institute of Standards in Technology and the United States Fire Administration. The NFPA 921 Committee is active and vocal. Language contained in the document is criticized, scrutinized, amended, and revised. The latest edition is 2004; the next addition will be available in 2008.

As with most authoritative works, NFPA 921 is not perfect. Not everyone agrees with all the information it contains. Despite some flaws, however, the document is highly regarded and most people in the field of fire and explosion investigation would call it an authoritative treatise.

A controversial chapter of NFPA 921 is Chapter 4, pertaining to “Basic Methodology.” Chapter 4 states that the basic methodology of the fire investigation should rely on the use of a systematic approach and attention to all relevant details. The systematic approach recommended in Chapter 4 is that of the ‘scientific method’ which is used in the physical sciences. Section 4.3 provides that the ‘scientific method’ is a principle of inquiry that forms a basis for legitimate scientific and engineering processes including fire incident investigation.

In outlining the scientific method, Chapter 4 identifies a multi-step process whereby the fire investigator must first identify the problem and recognize the need for the investigation. He must then define the problem. The next step is to collect the data and then analyze the data using inductive reasoning. The investigator is then required to develop a hypothesis, to test the hypothesis using deductive reasoning, and to finally select the final hypothesis.

The NFPA 921 Committee has debated whether the investigation of the fire scene really involves application of the scientific method or, conversely, whether it is limited to a “systematic and logical” approach. One author, for instance, has stated that the scientific method described in Chapter 4 of NFPA 921 is inappropriate. Professor Vincent M. Brannigan, Department of Fire Protection Engineering, University of Maryland, believes that Chapter 4 “. . .does not actually describe the scientific method. It describes a logical method for investigating and explaining past events, but that doesn’t make it science. Science is a logical method for creating testable hypotheses. Science generally tests its hypotheses by their ability to predict future events.” Vincent M. Brannigan, *Arson, Scientific Evidence and the Daubert Case*, FIRE CHIEF, August 1998, at 104. Because the scientific method typically requires a hypothesis be repeatable, and because overhauling or digging out a fire scene is not a repeatable event, Chapter 4 may not accurately describe the scientific method.

It may, however, be irrelevant whether Chapter 4 defines the basic methodology of fire scene investigation as one that follows the scientific method or one that follows a systematic approach. What Chapter 4 requires of the fire investigator is logical and sensible. Nevertheless, this chapter has caused great confusion and concern among people in the fire investigation community. No changes are anticipated for Chapter 4 of NFPA 921; fire investigators should be

prepared to follow the procedures outlined in the document and understand what it requires of them.

The impact of NFPA 921 and *Daubert* on the admissibility of origin and cause investigator testimony was made clear in the federal court decision in *Michigan Millers Mut. Ins. Corp. v. Benfield*, 140 F.3d 915 (11th Cir. 1998). That case involved an alleged arson fire in a single-family dwelling. The fire started on top of a dining room table where various debris had been piled. The fire itself was confined to the top of the dining room table, but soot and smoke permeated the residence. The insurance company, Michigan Millers, alleged arson on the part of the insured. At trial, the insurance company's origin cause investigator held himself out as an expert in fire sciences and testified that he could determine the origin of the fire through his knowledge of the science of fires. The investigator also testified that he complied with the scientific method within his field of science, which was the determination of the origin and cause of fires. The testifying expert was attempting to conform his testimony to his perceived notion of the requirements of Chapter 4 of NFPA 921.

Benfield was decided before the United States Supreme Court ruled in *Kumho Tire* that the *Daubert* analysis would apply to experienced based or technical knowledge type witnesses. The trial court struck the investigator's testimony and directed a verdict for the insured on the basis that the origin and cause investigation was not science-based and did not follow any scientific method. At the appellate level, counsel for Millers Mutual argued that testimony from its origin and cause investigator was simply technical and experience based. The appellate court, however, noted that the testifying investigator actually claimed to be an expert in 'fire science' and that he claimed to comply with the 'scientific method.' The appellate court observed that the investigator stated his opinion that the fire was accelerated by the use of lamp oil, but the

investigator did not take any samples from the fire debris. Indeed, the investigator did not take samples from the lamp oil bottle found near the dining room table to determine whether in fact the bottle contained lamp oil. In addition, the investigator had not eliminated another potential ignition source. A light directly above the dining room table, which was known to flicker prior to the event of the fire, had not been examined or tested.

The trial court applied the *Daubert* analysis, and the Eleventh Circuit affirmed on the basis that the methods employed by the fire investigator were not appropriate and did not rise to the scientific level represented by the investigator in his testimony. The appellate court also specifically stated that the use of science to explain how something occurs has the potential of carrying ‘great weight’ with a jury, which explains why counsel may seek to couch an expert witness’s testimony in terms of science and why the trial judge plays an important role as the gatekeeper in monitoring the evidentiary reliability of such testimony. *Benfield*, 140 F.3d at 920. The Eleventh Circuit held that the fire investigator was unable to rationally explain how he came to the conclusion that the fire was intentionally set, stating:

Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.

Id. at 921.

In *Benfield*, the origin and cause investigator’s testimony was stricken after he testified during trial. At that point a directed verdict was entered for the insured. In other cases, origin and cause investigators have been challenged and their potential testimony excluded before trial and stricken from the record after trial. For instance, in *Taepke v. Lake States Ins. Co.*,¹ an arson case pending in a circuit court in the state of Michigan, the trial court excluded the testimony of

¹ *Taepke* is not a reported decision, but the court’s order is published in *Fire & Arson Investigator* (July 2000, pp. 44-46).

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the origin and cause investigator because the investigator did not comply with various procedures outlined in NFPA 921. First, the court noted that with respect to Chapter 12, section 12.1, 1.2 of NFPA 921 1999 Edition (now section 18.1.2, 2004 Edition), the investigator admitted that the accepted methodology for reaching a conclusion as to the cause of the fire requires the identification of the ignition source and the material first ignited. The investigator, however, conceded he did not know either, even though he concluded the fire was arson.

The court also observed that Chapter 17, section 17.4, of NFPA 921 1999 Edition (now section 22.4) states that the investigation of motive evidence is part of the process of identifying an arsonist and that the accepted methodology for investigation of motive be done *after determining* the fire to be an arson. In this case, however, the investigator investigated motive before determining the fire to be an arson. Moreover, as stated in Chapter 4, section 4.3.4, of NFPA 921 (Chapter 2, section 2.3.4 for the 1999 issue and 2001 issue), the court observed that the proper method of analyzing data in a fire investigation forbids the use of subjective or speculative information. The investigator admitted that he speculated in forming his opinion that high temperature accelerants were used.

Also in contravention of Chapter 4, and particularly section 4.3.6, the court observed that the investigator did nothing to test his hypothesis that the fuel load in the basement could not have accelerated the fire and could not have generated sufficient heat to ignite wood components in the basement. The investigator admitted in his deposition that he did not know the heat release rate of the combustibles located in the basement and did no testing of them.

Not only may an origin and cause investigator's testimony be excluded prior to trial, it may be stricken after trial for failing to comply with the procedures of NFPA 921. The recent decision in *Ficic v. State Farm Fire & Casualty Co.* is a good example of such an occurrence.

See 804 N.Y.S.2d 541 (N.Y. App. Div. 2005). This case involved a car fire. During the trial, defendant's investigator erroneously testified that the fire was "suspicious". The investigator came to this conclusion even though he was unable to detect the point of origin or defect that caused the fire or find any combustible material at the site of the fire. Moreover, on cross examination he was unable to rule out that the fire was caused accidentally or was intentionally set.

Based on the investigator's erroneous opinion that the fire was "suspicious", the court found that the jury was misled into making an irrational decision that a suspicious fire is proof of an intentionally set fire. The court relied on the sections 16.2 and 16.7 of NFPA 921 (now section 19.2.1 and 18.6). Section 16.2 states that a fire "may be classified as accidental, natural, incendiary (arson), or undetermined. Use of the term suspicious is not an accurate description of a fire cause." *Ficic*, 840 N.Y.S.2d at 546. Section 16.7 adds that "if confidence level of the opinion is only "possible" or "suspected" the cause should be listed as undetermined." *Id.* "Suspicious" is not an accepted conclusion. *Id.* at 547. As a result, the court held the investigator's testimony "be stricken and disregarded as being invalid and not reliable because [his] opinion [was] not based upon generally accepted classifications for the causation of fire." *Id.* at 548.

The orders issued in *Taepke* and *Ficic* are textbook examples of an origin and cause investigators being challenged under the procedures outlined in NFPA 921. The investigators failed the challenge, and either were not allowed to testify or had their testimony stricken after the fact.

Origin and cause investigators and forensic experts working on fire or explosion subrogation cases must be prepared to meet the challenges and requirements of NFPA 921.

Whether the particular court applies the gatekeeping analysis outlined in *Daubert*, or whether the court follows the more liberal approach of the Arizona Supreme Court in *Logerquist*, any expert testifying in fire cases will be challenged under NFPA 921. If *Daubert* and its progeny are applied, the expert may not be able to testify at all or the expert's testimony may be stricken at trial. Under *Logerquist*, though the expert may be permitted to testify at trial, the expert's credibility will be seriously challenged and criticized for failing to follow the outlined procedures. In either event, the ability to successfully pursue subrogation in fire and explosion cases will be jeopardized if NFPA 921 is not followed.

IV. NFPA 921 AND SPOILIATION OF EVIDENCE

Various complimentary definitions have been given to the term "spoliation of evidence." Spoliation of evidence has been described as the failure to preserve property for another's use as evidence in pending or future litigation. *Federal Mut. Ins. Co. v. Litchfield Precision Components Inc.*, 456 N.W.2d 434, 436 (Minnesota 1990). In section 11.3.5 of the NFPA 921 2004 Edition, spoliation is described as the loss, destruction or material alteration of an object or document that is evidence or potential evidence in a legal proceeding by one who has the responsibility for its preservation.

Chapter 11 of NFPA 921 includes several sections addressing spoliation issues that are unique to origin and cause investigations in fire and explosion subrogation cases. For instance, in attempting to determine the origin and cause of a fire or explosion, it is almost always necessary to overhaul or dig out the scene in an effort to get to the point where the fire started and determine what may have started the fire. Because this necessarily involves altering the fire or explosion scene, a question arises whether this in itself is spoliation of evidence. We have found no cases that are particularly helpful in answering this question. However, it is

specifically addressed in NFPA 921. As outlined in section 11.3.5.5.1 of NFPA 921 2004

Edition:

Fire investigation usually requires the movement of evidence or alteration of the scene. In and of itself, such movement of evidence or alteration of the scene should not be considered spoliation of evidence. Physical evidence may need to be moved prior to the discovery of the cause of the fire. Additionally, it is recognized that it is sometimes necessary to remove the potential causative agent from the scene and even to carry out some disassembly in order to determine whether the object did, in fact, cause the fire and which parties may have contributed to that cause.

Recognizing that safeguards need to be followed to protect the rights of those who may have an interest in the fire scene but are not available or even known at the time of the dig-out, NFPA 921 also provides as follows in section 11.3.5.3:

Efforts to photograph, document, or preserve evidence should apply not only to evidence relevant to an investigator's opinions, but also to evidence of reasonable alternate hypotheses that were considered and ruled out.

Section 11.3.5.3 of NFPA 921 goes so far as to identify for the investigator the potential ramifications if there has been spoliation of evidence. The ramifications include potential discovery sanctions, monetary sanctions, application of adverse evidentiary inferences, limitations on use of evidence under the rules, exclusion of expert testimony, dismissal of claims or defenses, and possibly independent tort actions for the intentional or negligent destruction of evidence and even potential prosecution under criminal statutes relating to obstruction of justice.

Numerous articles have been written describing the reaction of courts when presented with situations involving spoliation of evidence. One article specifically addresses spoliation of evidence with respect to fire and explosion cases. *See, e.g.,* Appendix 4, Richard B. Allyn & Michael P. McNamee, *Spoliation of Evidence: A Balancing of Interests*, MINNESOTA INSTITUTE

OF LEGAL EDUCATION, February 1998; *see also* Russ M. Herman & Steve Herman, *Understanding Spoliation of Evidence*, TRIAL EXPERTS & EVIDENCE, March 2001.

A case that illustrates the sanctions that may be imposed when spoliation occurs is *Barker v. Bledsoe*, 85 F.R.D. 545 (W.D. Okla. 1979). During the course of a pending lawsuit destructive testing of evidence was conducted by one of the parties without notice to the other party. The court noted that modern jurisprudence no longer fosters “trial by ambush.” The court held as follows:

When an expert employed by a party or his attorney conducts an examination reasonably foreseeably destructive without notice to opposing counsel and such examination results in either negligent or intentional destruction of evidence, thereby rendering it impossible for an opposing party to obtain a fair trial, it appears that the Court would be not only empowered, but required to take appropriate action, either to dismiss the suit altogether, or to ameliorate the ill-gotten advantage. A presumption as to certain evidence is simply not sufficient to protect against such conduct.

Id. at 548. The court chose not to dismiss the case on the merits, pointing out that the remedy would be too harsh for the party whose participation in the complained of actions went no further than his choice of counsel. However, the court prohibited the party from introducing any evidence of whatever nature arising out of the testing, and prohibited any testimony from the person conducting the test. Costs and attorneys fees were also awarded against the spoliator. *Id.* at 549.

In *Smith v. Superior Court*, 198 Cal. Rptr. 829 (Cal. App. 2nd Dist. 1984), the California Court of Appeals recognized a separate tort cause of action for intentional spoliation of evidence. The defendant in the case, a Ford automobile dealer, had promised plaintiff’s counsel that it would preserve certain automobile parts. The dealer, however, disposed of them, making it impossible for plaintiff’s experts to inspect and test the parts to pinpoint the cause of a failure.

The court compared intentional spoliation of evidence with the tort of intentional interference with a prospective business advantage and concluded that a prospective civil action in a products liability case was an economic expectancy entitled to legal protection.

Almost 15 years later, however, the California Supreme Court disapproved *Smith*. In *Cedars-Sinai Medical Center v. Superior Court*, 954 P.2d 511 (Cal. 1998), the Court expressly held that no tort cause of action exists for so-called first party intentional spoliation of evidence, where the victim knew or should have known about the alleged spoliation before the decision on the merits of the underlying action. The court expressly refused to address whether a tort action exists either for third party spoliation or for first party spoliation where the victim neither knew nor should have known of the spoliation until after a decision on the merits of the underlying action.

The following year, in *Temple Community Hosp. v. Superior Court*, 976 P.2d 223 (Cal. 1999), the California Supreme Court picked up where the *Cedars-Sinai* court left off and ruled, for substantially the same reasons in *Cedars-Sinai*, that no tort cause of action exists for third party spoliation. Although the court did recognize that spoliation victims have fewer existing remedies against third party spoliators than against first party spoliators, the court nevertheless ruled that existing remedies were adequate to protect potential victims of third party spoliation. The *Temple* court, however, did not address whether a tort cause of action would exist for first party intentional spoliation of evidence where the victim neither knew nor should have known of the spoliation until after a decision on the merits of the underlying action. Additionally, the *Temple* court expressly declined to determine whether a tort action will lie for negligent spoliation of evidence. These questions remain open in California after *Temple*.

Despite the California Supreme Court's pronouncements on intentional spoliation of evidence, however, courts in several other states have indicated that intentional spoliation of evidence may in fact constitute a viable tort claim. *See, e.g., Hirsch v. General Motors Corp.*, 628 A.2d 1108 (N.J. Super 1993); *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993) (recognizing tort action for intentional first-party and third-party spoliation). Moreover, several other courts have indicated that a cause of action may lie for mere negligent spoliation of evidence. *See, e.g., Smith v. Atkinson*, 771 So.2d 429 (Ala. 2000); *St. Mary's Hosp., Inc. v. Brinson*, 685 So. 2d 33 (Fla. App. 1996); *Anthony v. Sec. Pac. Fin. Servs., Inc.*, 75 F.3d 311 (7th Cir. 1996); *Barker v. Bledsoe*, 85 F.R.D. 545 (W.D. Okla 1979); *Holmes v. Amerex Rent-A- Car*, 180 F.3d 294 (D.C. Cir. 1999).

The most common sanction for negligent spoliation of evidence is an adverse inference with respect to the evidence presented. *See, e.g., Cedars-Sinai, supra*. However, the sanctions vary from state to state and circumstance to circumstance. The California cases, and cases from other jurisdictions, indicate that the courts are also looking closely at whether independent causes of action can arise out of spoliation of evidence. This has been and will continue to be an area of development in the law.

Those involved in fire and explosion subrogation cases must be aware of the pertinent case law pertaining to spoliation of evidence, and also aware of the guidelines set out in NFPA 921 concerning spoliation. Again, failure to follow such guidelines can result in cases being dismissed, testimony being excluded, or adverse inferences with respect to the evidence presented.

V. NFPA 921 AND MAJOR LOSS INVESTIGATIONS

Chapter 27 of NFPA 921 is entitled Management of Major Investigations. This chapter addresses the investigation of major fire and explosion incidents as a management function from an organizational and managerial perspective. Although Chapter 27 recognizes that major incidents are not always large in size or magnitude, it notes that such incidents typically are large and tend to be complex. Multiple parties are frequently involved, often including multiple public and private agencies and entities, as well as investigation teams for each interested party.

Chapter 27 was written as a guideline for all parties interested in major fire and explosion incidents to protect the parties' rights and to facilitate the proper processing, evaluation and testing of the scene and the evidence. Section 27.2 expressly states that all interested parties should be allowed to participate in the investigation and allowed to examine the evidence in its undisturbed condition. In addition, it specifically outlines that no party should remove evidence or materials without adequate notice to other interested parties, and that the same applies to any subsequent testing of evidence. The chapter also contemplates that a memorandum of understanding be prepared and signed off on by the various parties, as follows:

Figure 27.3.2(a) Memorandum of Understanding

MP3 2022273C

This Memorandum of Understanding relates to the investigation of the fire that occurred on July 1, 1998, at the Tall Building and Storage Facility, 1007 Main Ave., Any City, State, USA. It recognizes that a number of independent investigations are being conducted simultaneously and coincidentally and all with a common goal — to determine the origin and cause of the fire. All interested parties recognize that cooperation with one another will be beneficial to each party and will produce an efficient, quality outcome.

The parties agree to the following:

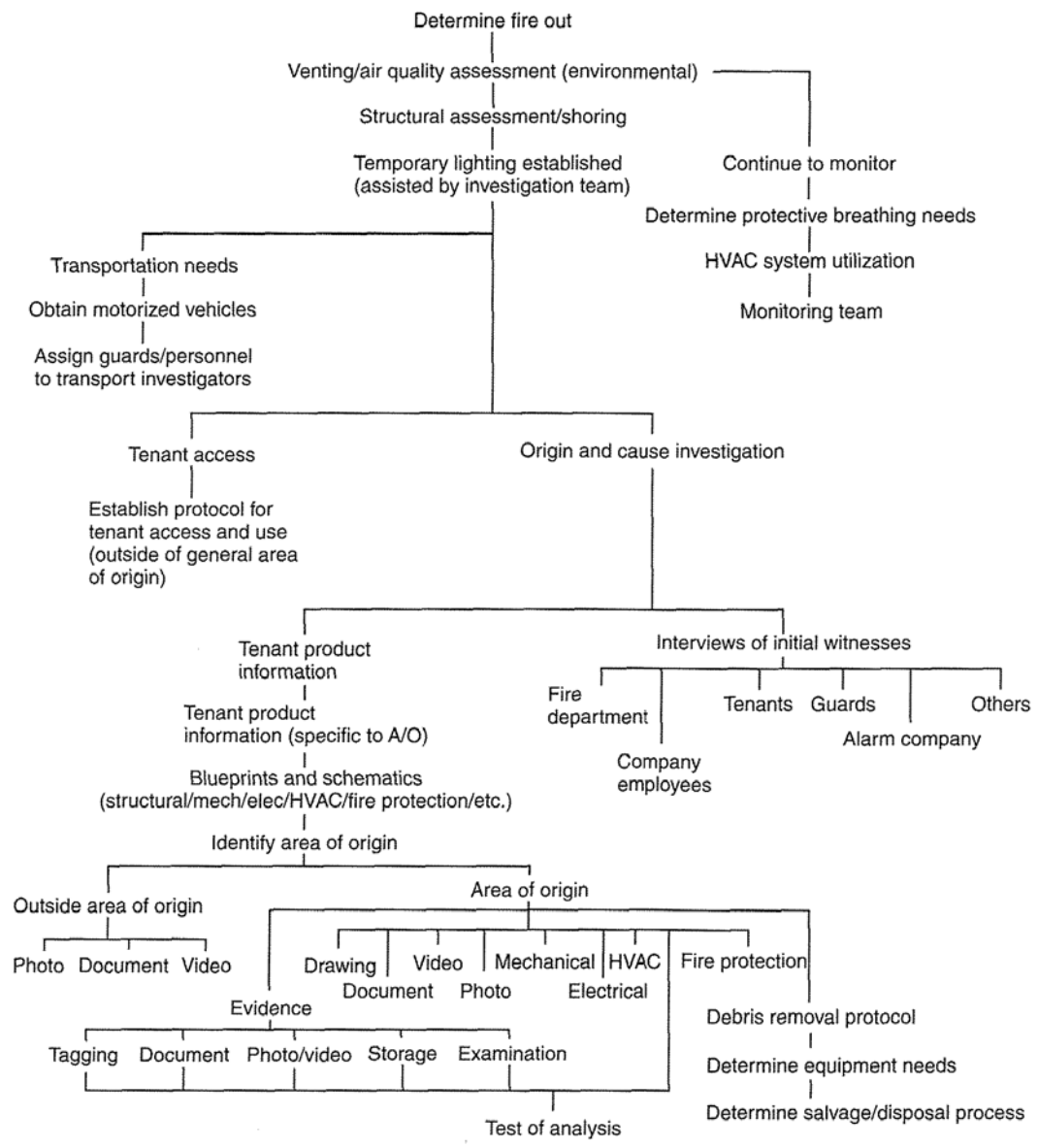
An origin and cause investigation is being conducted.

The investigation is being conducted by the Yourtown Fire Department, The Federal Fire Investigations, Payall Insurance Company, Any Storage Company, and the Tall Building Company.

Because of the nature and complexity of a major fire or explosion investigation, it is recommended that an investigation flow chart be prepared to identify all the items that need to be accomplished in processing the fire scene, securing evidence and testing evidence. A sample investigative flow chart is contained in the document as Figure 27.3.2(b) as follows:

Figure 27.3.2(b) Investigation Flow Chart

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Section 27.18.2 even contemplates joint interviews of witnesses such as the fire chief, fire prevention personnel, suppression personnel, police officers, passers by, neighbors, property owners, employees, tenants and others who may have information about the fire or explosion. As stated in the document, if more than one party is participating in the investigation, a joint interview with a representative from each of the interested parties present will usually result in a

more thorough interview and will not subject the persons being interviewed to multiple interviews.

The goal of cooperation outlined in this section of the chapter may be somewhat idealistic. Though some witnesses may be willing to give interviews, it may be unrealistic to expect that potential adverse parties will be willing to do so and counsel may advise against it depending on the circumstances. Nevertheless, the purpose of this section and of Chapter 27 is to encourage cooperation of various interested parties at the fire scene so that a full and complete investigation can be conducted by all interested parties.

Engaging all interested parties in major fire and investigation explosions will also facilitate compliance with the general procedures and guidelines outlined throughout NFPA 921. Following the spirit if not the letter of Chapter 27 will help insure that the various origin and cause investigators and forensic engineers will more likely comply with the rules and regulations governing their endeavors, facilitating the admissibility of their testimony and the presentation of evidence at trial. Another advantage to following the procedure outlined in Chapter 27 involves the sharing of expenses. Those who take part share in the costs. This can result in substantial savings for all concerned.

Chapter 27 of NFPA 921 should be considered when dealing with a major fire or explosion loss. All interested parties will benefit from a properly conducted scene investigation.

VI. CONCLUSION

In pursuing subrogation recoveries in the context of fire or explosion losses, the insurer must be certain that the origin and cause investigators, the forensic engineers and the attorneys are all highly qualified and experienced in handling such matters. Everyone involved needs to be familiar with the pertinent rules of evidence and the case law that has developed over the past

several years. It is also essential that all concerned be familiar with guidelines outlined in NFPA 921. Pursuing subrogation in the context of fire and explosion losses may be difficult, but the potential for a favorable recovery will be enhanced if these points are followed.

APPENDIX 1

Federal Rules of Evidence Pertinent to the Admissibility of Expert Testimony

Rule 401: Definition of Relevant Evidence

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402: Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the constitution of the United States, by act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403: Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time.

Although relevant, evidence may be excluded if its prohibitive value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 701: Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witnesses testimony or the determination of a fact-in-issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

Rule 702: Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier the of fact to understand the evidence or to determine a fact-in-issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703: Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

APPENDIX 2

State Court Standards for the Admissibility of Expert Testimony

States Applying *Daubert*

The following states apply the *Daubert* standard in determining the admissibility of expert testimony:

- Alaska (*Samaniego v. City of Kodiak*, 974 P.2d 836 (Alaska 2003));
- Arkansas (*Farm Bureau Mut. Ins. Co. v. Foote*, 14 S.W.3d 512 (Ark. 2000));
- Connecticut (*State v. Porter*, 698 A.2d 739 (Conn. 1997));
- Delaware (*M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. Super. Ct. 1999));
- Kentucky (*Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995));
- Louisiana (*State v. Foret*, 628 So.2d 1116 (La. 1993));
- Massachusetts (*Commonwealth v. Lanigan*, 641 N.E.2d 1342 (Mass. 1994));
- New Mexico (*State v. Torres*, 976 P.2d 20 (N.M. 1999));
- Ohio (*Terry v. Ottawa Cty. Bd. of Mental Retardation & Dev. Delay*, 847 N.E.2d 1246 (Ohio Ct. App. 2006)).
- Oregon (*State v. Lyons*, 924 P.2d 802 (Or. 1996));
- South Dakota (*State v. Moeller*, 616 N.W.2d 424 (S.D. 2000));
- Texas (*E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995));
- Vermont (*State v. Brooks*, 643 A.2d 226 (Vt. 1993)); and
- Wyoming (*Bunting v. Jamieson*, 984 P.2d 467 (Wyo. 1999)).

States Applying *Frye*

The following states continue to apply the *Frye* standard in determining the admissibility of expert testimony:

- California (*People v. Leahy*, 882 P.2d 321 (Cal. 1994));
- D.C. (*Reed v. United States*, 828 A.2d 159 (D.C. 2003));
- Florida (*Murray v. State*, 692 So.2d 157 (Fla. 1997));
- Illinois (*People v. Basler*, 740 N.E.2d 1 (Ill. 2000));
- Kansas (*State v. Shively*, 999 P.2d 952 (Kan. 2000));
- Maryland (*Carter v. Shoppers Food Warehouse MD Corp.*, 727 A.2d 958 (Md. Ct. App. 1999));
- Minnesota (*Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000));
- Missouri (*State v. Swain*, 977 S.W.2d 85 (Mo. Ct. App. 1998));

- North Dakota (*City of Fargo v. McLaughlin*, 512 N.W.2d 700 (N.D. 1994)); and
- Washington (*Medcalf v. State, Dept. of Licensing*, 944 P.2d 1014 (Wash. 1997)).

States Applying a Combination or Specialized Standard

The following states apply a combination of *Daubert* and *Frye* or follow a specialized standard:

- Alabama:
 - o The Alabama legislature adopted § 36-18-30 to address the reliability of DNA evidence. This statute is modeled after *Daubert*, and the high court said that trial courts should use the flexible *Daubert* analysis in making the “reliability” analysis for DNA testing. For scientific testimony on subjects other than DNA techniques, *Frye* remains the standard of admissibility. (*Turner v. State*, 746 So.2d 355 (Ala. 1998)).
- Arizona:
 - o *Daubert* rejected by state high court; *Frye* applies to expert testimony that is based on novel scientific principles or techniques that the testifying expert has taken from others; experience based testimony is not subject to *Frye* and the jury must determine weight and credibility. (*Logerquist v. McVey*, 1 P.3d 113 (Ariz. 2000)).
- Colorado:
 - o *Frye* applies in cases where scientific evidence is based on novel scientific devices and processes involving the evaluation of physical evidence (i.e., DNA, polygraph and blood graphing). Less restrictive Colorado Rule of Evidence 702 (based on *Daubert*) applies in other cases using experience-based experts (i.e., canine scent tracking). (*Schultz v. Wells*, 13 P.3d 846 (Colo. Ct. App. 2000); *Brooks v. People*, 975 P.2d 1105 (Colo. 1999)).
- Georgia:
 - o Georgia Stat. § 24-9-67 applies to analyze expert scientific testimony. Section 24-9-67 provides: “the opinions of experts on any question of science, skill, trade or like questions shall always be admissible and such opinions may be given on the facts as proved by other witnesses. Provided an expert witness is properly qualified in the field in which he offers testimony, and the facts relied upon are within the bounds of evidence, whether there is sufficient knowledge upon which to base an opinion or whether it is based upon hearsay goes to the weight and credibility of the testimony, not its admissibility.” (*Jordan v. Georgia Power Co.*, 466 S.E.2d 601 (Ga. Ct. App. 1995); *Norfolk S. Ry. Co. v. Baker*, 514 S.E.2d 448 (Ga. Ct. App. 1999)).

- Hawaii:
 - o High court declined to expressly adopt the *Daubert* test; because the Hawaii Rules of Evidence are patterned after the Federal Rules of Evidence, federal court treatment of evidence is instructive and using *Daubert* analysis is permissible. (*State v. Vliet*, 19 P.3d 42 (Haw. 2001)).
- Idaho:
 - o High court has yet to rule on *Daubert*; lower courts and a supreme court dissenting opinion cited *Daubert* favorably. Lower court said that the Idaho Supreme Court uses an analytical method similar to *Daubert*. (*State v. Konechny*, 3 P.3d 535 (Idaho Ct. App. 2000); *State v. Merwin*, 962 P.2d 1026 (Idaho 1998)).
- Indiana:
 - o *Daubert* adopted by highest court but only as far as *Daubert* is “helpful to the bench and bar in applying Indiana Rules of Evidence 702 (b).” (*Stewart v. State*, 652 N.E.2d 490 (Ind. 1995)).
- Iowa:
 - o Iowa courts adopted a “variation” of *Daubert* that encourages, but does not require, use of portions of *Daubert’s* analysis. Iowa courts apply *Daubert* when appropriate in both scientific and technical expert analysis. (*Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525 (Iowa 1999)).
- Maine:
 - o High court cited *Daubert* when interpreting Maine Rule of Evidence 702 and used it to analyze evidence, but has not expressly adopted *Daubert*. (*State v. Tomah*, 736 A.2d 1047 (Me. 1999); *State v. McDonald*, 718 A.2d 195 (Me. 1998)).
- Michigan:
 - o The Supreme Court of Michigan noted that Mich. R. Evid. 702 has been amended explicitly to incorporate *Daubert’s* standards of reliability. (*Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391 (Mich. 2004), petition for cert. filed (U.S. Apr. 28, 2005)). Legislature enacted MSA § 27a.2955 to codify the holding in *Daubert*. (*Greathouse v. Rhodes*, 618 N.W.2d 106 (Mich. Ct. App. 2000)). Michigan Stat. § 27a.2955 applies to actions for the death of a person or for an injury to a person or property.
- Mississippi:
 - o The general acceptance test set forth in *Frye* no longer governs the admissibility of expert witness testimony; rather, the modified *Daubert* standard applies requiring a focus on relevance and reliability. (*Mississippi Transp. Com’n v. McLemore*, 863 So. 2d 31 (Miss. 2003)).

- Montana:
 - o *Daubert* adopted by highest court, but applies only to novel scientific evidence. (*State v. Hocevar*, 7 P.3d 329 (Mont. 2000)).
- Nebraska:
 - o For trials commencing on or after October 1, 2001, in trial proceedings, the admissibility of expert testimony under the Nebraska rules of evidence should be determined based on the standards first set forth in *Daubert*. (*Schafersman v. Agland Coop.*, 631 N.W.2d 862 (Neb. 2001)).
- Nevada:
 - o High court has not yet ruled on *Daubert* and will wait to see how case law develops in other jurisdictions. (*Yamaha Motor Co. v. Arnoult*, 955 P.2d 661 (Nev. 1998)).
- New Hampshire:
 - o High court applied *Daubert* analysis in a case where both parties stipulated to it. In a subsequent case, the Court applied *Daubert* to help interpret its Rule 702 but did not expressly adopt *Daubert*. (*State v. Hungerford*, 697 A.2d 916 (N.H. 1997)).
- New Jersey:
 - o New Jersey courts apply *Frye* to determine the admissibility of all scientific evidence, but *Daubert*, a more relaxed standard, is used in toxic tort litigation. (*State v. Harvey*, 699 A.2d 596 (N.J. 1997)).
- New York:
 - o High court applies *Frye*. On several occasion, the highest court cited *Daubert* but the court has yet to expressly reject or adopt *Daubert*. (*Selig v. Pfizer, Inc.*, 713 N.Y.S.2d 898 (N.Y. Sup. Ct. 2000); *Wahl v. American Honda Motor Co.*, 693 N.Y.S.2d 875 (N.Y. Sup. Ct. 1999)).
- North Carolina:
 - o High court does not apply *Frye* but has yet to expressly reject *Frye* or adopt *Daubert*. All courts use factors similar to *Daubert* and have cited *Daubert*. (*State v. Underwood*, 518 S.E.2d 231 (N.C. Ct. App. 1999)).
- Oklahoma:
 - o Oklahoma courts apply *Daubert* only to novel scientific evidence. (*Torres v. State*, 962 P.2d 3 (Okla. Crim. App. 1998)). *Daubert* principles also apply to non-scientific but otherwise technical and specialized expert testimony. (*Harris v. State*, 84 P.3d 731 (Okla. Crim. App. 2004)).
- Pennsylvania:
 - o High court deferred ruling on *Daubert*; lower courts apply *Frye*. (*Commonwealth v. Arroyo*, 747 A.2d 341 (Pa. 2000)).

- Rhode Island:
 - o High court said that *Daubert* is consistent with state law but citation to *Daubert* does not mean an abandonment of *Frye*. (*In re Odell*, 672 A.2d 457 (R.I. 1996)).
- South Carolina:
 - o High court declined to adopt *Daubert* and said that courts should follow South Carolina Rule of Evidence 702. Rule 702's reliability analysis is very similar to *Daubert* (analyzes methodology, peer review, general acceptance and rate of error). (*State v. Council*, 515 S.E.2d 508 (S.C. 1999)).
- Tennessee:
 - o High court said that Tennessee Rules of Evidence supersede *Frye*. Although the highest court has yet to expressly adopt *Daubert*, it said that the list of reliability factors from *Daubert* are useful in applying Tennessee Rules of Evidence 702 and 703. (*McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997)).
- Utah:
 - o High court held that *Daubert* and Utah Rule of Evidence 702 are similar but that Utah uses the more restrictive three-part "*Rimmasch*" test: inherent reliability; adequate foundation; probative/prejudicial balance. (*State v. Brown*, 948 P.2d 337 (Utah 1997)).
- Virginia:
 - o High court declined to adopt *Frye*. Instead, it held that the trial court must make threshold finding of reliability through reliance on expert testimony. (*Spencer v. Com.*, 393 S.E.2d 609 (Va. 1990)).
- West Virginia:
 - o *Daubert* adopted by high court in *Wilt v. Buracker*, 443 S.E.2d 196 (1993). High court later limited the applicability of *Daubert* to scientific testimony. (*Jones v. Patterson Contracting, Inc.*, 206 W. Va. 399, 524 S.E.2d 915 (1999)).
- Wisconsin:
 - o High court expressly rejected *Frye* but has not adopted *Daubert*. Wisconsin continues to use its own five-step analysis. (*Green v. Smith & Nephew AHP, Inc.*, 617 N.W.2d 881 (Wis. Ct. App. 2000)).

APPENDIX 3

Cases Referencing NFPA 921

Alabama:

- *Allstate Ins. Co. v. Hugh Cole Builder, Inc.*, 137 F. Supp. 2d 1283 (D. Ala. 2001).

Colorado:

- *Truck Ins. Exch. v. MagneTek, Inc.*, 360 F.3d 1206 (10th Cir. 2004) (Colorado).

Connecticut:

- *Travelers Prop. & Cas. Corp. v. GE*, 150 F. Supp. 2d 360 (D. Conn. 2001).

Florida:

- *United States v. Santiago*, 2006 U.S. App. LEXIS 26665 (11th Cir. 2006).

Illinois:

- *McDonald v. Vill. of Winnetka*, 2003 U.S. Dist. LEXIS 956 (N.D. Ill. January 23, 2003).
- *Abu-Hashish v. Scottsdale Ins. Co.*, 88 F. Supp. 2d 906 (N.D. Ill. 2000).

Kansas:

- *Workman v. AB Electrolux Corp.*, 2005 U.S. Dist. LEXIS 16306 (D. Kan. August 8, 2005).
- *103 Investors I, L.P. v. Square D Co.*, 2005 U.S. Dist. LEXIS 8796 (D. Kan. May 10, 2005).
- *McCoy v. Whirlpool Corp.*, 214 F.R.D. 646 (D. Kan. 2003).

Louisiana:

- *Bennett Mfg. Co. v. South Carolina Ins. Co.*, 692 So.2d 1258 (La. Ct. App. 1997).

Maine:

- *TNT Rd. Co. v. Sterling Truck Corp.*, 2004 U.S. Dist. LEXIS 13463 (D. Me. July 19, 2004).

Michigan:

- *Michigan Millers Mut. Ins. Corp. v. Benfield*, 140 F.3d 915 (11th Cir. 1998).

Minnesota:

- *Fireman's Fund Ins. Co. v. Canon U.S.A., Inc.*, 394 F.3d 1054 (8th Cir. 2005).
- *Wagoner v. Black & Decker (U.S.) Inc.*, 2006 U.S. Dist. LEXIS 55314 (D. Minn. August 8, 2006).
- *Am. Family Ins. Group v. JVC Ams. Corp.*, 2001 U.S. Dist. LEXIS 8001 (D. Minn. April 30, 2001).

Mississippi:

- *Nationwide Ins. Co. v. Johnson*, 2006 U.S. Dist. LEXIS 49460 (D. Miss. June 12, 2006).

Nebraska:

- *State v. Davlin*, 719 N.W.2d 243 (Neb. 2006).
- *Perry Lumber Co. v. Durable Servs.*, 710 N.W.2d 854 (Neb. 2006).

New Jersey:

- *Snodgrass v. Ford Motor Co.*, 2002 U.S. Dist. LEXIS 13421 (D.N.J. March 28, 2002).

New York:

- *United States v. Marji*, 158 F.3d 60 (2d Cir. 1998) (New York).
- *Royal Ins. Co. of Am. v. Joseph Daniel Constr., Inc.*, 208 F. Supp. 2d 423 (S.D.N.Y. 2002).
- *Ficic v. State Farm Fire & Cas. Co.*, 804 N.Y.S.2d 541 (N.Y. Misc. 2005).

Ohio:

- *Ind. Ins. Co. v. GE*, 326 F. Supp. 2d 844 (D. Ohio 2004).
- *Abon, Ltd. v. Transcon. Ins. Co.*, 2005 Ohio 3052 (Ohio Ct. App. June 16, 2005).

Pennsylvania:

- *Chester Valley Coach Works v. Fisher-Price, Inc.*, 2001 U.S. Dist. LEXIS 15902 (D. Pa. August 29, 2001).

Rhode Island:

- *Dodson v. Ford Motor Co.*, 2006 R.I. Super. LEXIS 113 (R.I. Super. Ct. August 17, 2006).

Tennessee:

- *Travelers Indem. Co. v. Indus. Paper & Packaging Corp.*, 2006 U.S. Dist. LEXIS 43851 (D. Tenn. June 27, 2006).

Texas:

- *Davis v. State*, 147 S.W.3d 554 (Tex. App. 2004).

Utah:

- *State v. Schultz*, 2002 UT App 366 (Utah Ct. App. November 7, 2002).

Virginia:

- *Tunnell v. Ford Motor Co.*, 330 F. Supp. 2d 707 (D. Va. 2004).

