



Site and Incident Management

Case Studies and Lessons Learned

Overview

- **Fire/Explosion**
 - Site Inspections
 - Experts
 - Privilege
 - Evidence Preservation
 - Case Studies

Overview of Legal Issues Related to Site and Incident Management

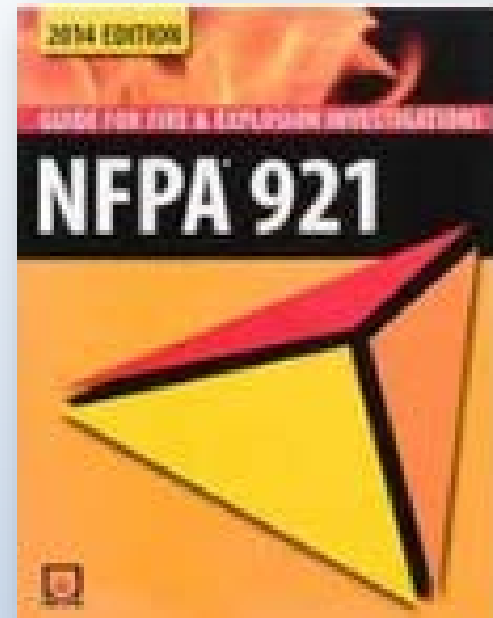
- Attorney Client Privilege
- Accurate Early Evaluation
- NFPA 921 Methodology
- Spoliation
- Accident Scenes Run Amok--TROs

Attorney Client Privilege

- Expert/client communications are not protected from discovery in subsequent litigation.
- Attorney/client communications are protected.
- Expert can tell attorney about initial impressions from site examination; attorney can tell claim handler. Benefit is that client can benefit from information relating to claim value without committing expert to his theory of the case.
- Major benefit of getting attorney involved in site examination.

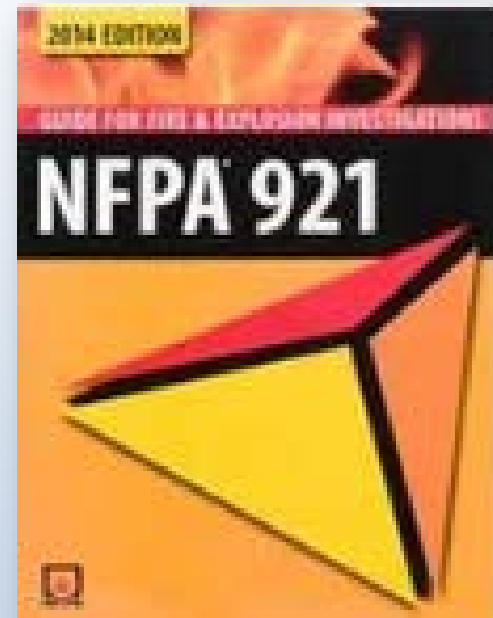
NFPA 921 Methodology

- Since the adoption of the first edition of NFPA 921 in 1992, courts have placed more scrutiny and attention on the methodology used by fire experts to form their opinions concerning the origin and cause of fires and explosions.
- NFPA 921 has been referenced in dozens of published cases excluding or admitting fire experts (and experts in other disciplines) based on their adherence to its guiding principles.



NFPA 921 Methodology

- Generally, identify clearly defined area of origin, eliminate causes, try to disprove other “likely causes.”
- Outlaws “Negative Corpus” methodology because it creates an untestable hypothesis.
- NFPA 921 requires use of testing, reliance on scientific literature, and exhaustive detail on how specifically considered guidelines.
- Can use knowledge of NFPA 921 to test your own expert’s opinion. Is there possible scenario not being considered?



Scientific Method

NFPA 921 – Guide for Fire & Explosion Investigations (2008 Ed.):

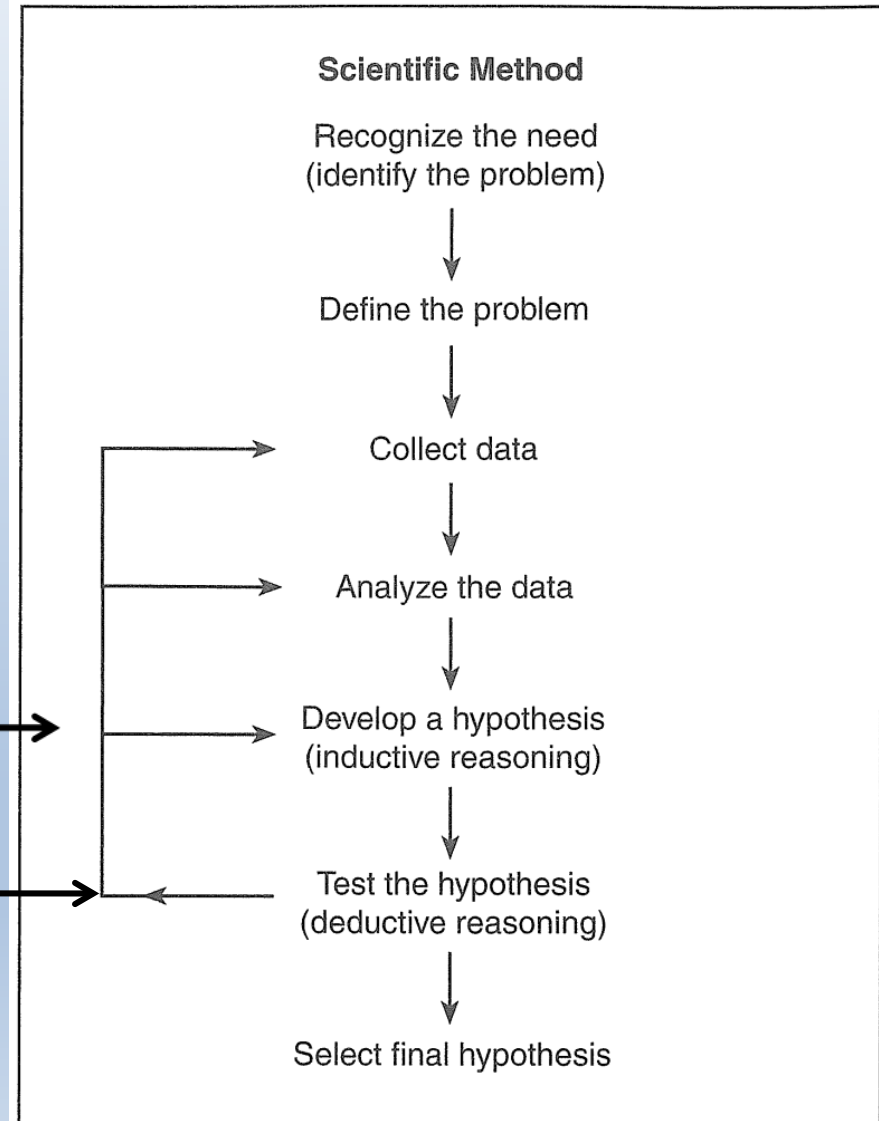
“...principle of inquiry that forms a basis for legitimate scientific and engineering investigations.”

Develop Hypothesis

- Hypothesis to explain phenomena
- Based on:
 - Empirical data (from case)
 - Investigator's training & expertise

Test Hypothesis

- Compare hypothesis with:
 - all known facts
 - body of scientific knowledge
- Tested by:
 - Physical experimentation
 - “Thought experiments”



NFPA 921 CASES FROM THE USA—2005



The above map represents about 30 state and federal cases decided in the United States by 2005.

NFPA 921 CASES FROM THE USA—2014



The above map represents about 270 state and federal cases decided in the United States by 2014.

NFPA 1033- Professional Qualifications

- NFPA 1033 a “standard” whereas NFPA 921 is a “guide.” Both were revised in 2014 with the purpose to harmonize them.
- Requires education beyond the high school level in 16 areas.
- Duty to perform comprehensive document review if access to the scene is unavailable.
- Duty to collect and preserve evidence required within the investigation.



Importance of Early Evaluation

- Setting accurate reserves
- Need fair and balanced expert
- Knowledgeable attorney who knows what questions to ask
- Drives future strategy



Spoliation

- Spoliation of evidence occurs when an individual or entity violates its duty to preserve relevant evidence.
- Purpose is to: (1) uphold the truth and (2) deter parties from destroying evidence.
- A finding of spoliation will often result in the imposition of sanctions and can significantly impact the litigation.



Spoliation (cont.)

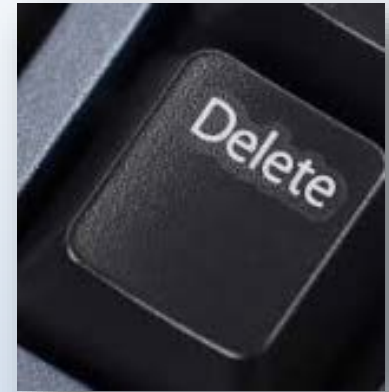
- The decision to impose sanctions is in the circuit court's discretion. Here are just some examples from Wisconsin:
 - Wisconsin courts look to what steps taken to preserve, whether comparable evidence is available, and whether the responsible party knew or should have known that a lawsuit was a possibility at the time of destruction. *Farr v. Evenflo Co., Inc.*, 287 Wis.2d 827, 705 N.W.2d 905 (Wis. 2005).
 - Wisconsin has not recognized an independent tort action for the intentional and negligent spoliation of evidence. For states that have, it may result in punitive damages.
 - Sanctions cannot “be considered unless there is clear and convincing proof that evidence was deliberately destroyed or withheld.” *Jagmin v. Simonds Abrasive Co.*, 61 Wis.2d 60, 80-81, 211 N.W.2d 810 (Wis. 1973).

Potential Sanctions

- Adverse inference jury instruction: assume that lost evidence, if available, would have been unfavorable to the spoliator.
- Refuse to introduce expert testimony regarding the evidence, which may result in summary judgment if party cannot prove its case without the evidence.
- Dismissal and default judgment if there is a finding of egregious conduct, *i.e.*, “a conscious attempt to affect the outcome of litigation or a flagrant knowing disregard of the judicial process.” *Garfoot v. Fireman’s Fund Ins. Co.*, 228 Wis.2d 707, 724, 599 N.W.2d 411 (Wis. Ct. App. 1999).
- Monetary sanctions, including attorneys’ fees, fines and punitive damages. often used in cases involving electronically stored information.



Note on Preservation of ESI



- Electronic data can be destroyed through routine application of document retention system. Metadata lost by merely by copying or sending a document.
- Parties must take special efforts, known as a “litigation hold.”
 - Must be written
 - Suspend routine document destruction
 - Communicate with key players
 - Instruct all employees to produce electronic copies of relevant active files
 - Ensure all backup media are identified and secured

Accident Scenes Run Amok

- If there is reason to believe that a plaintiff or defendant plans to remove and/or tamper with a key part of the accident scene, you may want to file a temporary restraining order, or "TRO."
- Request party not be allowed to destroy, alter, tamper with, change, or move any part of the accident scene from this point forward until provided an opportunity to inspect, video and photograph the scene of the accident with their experts.
- Must show irreparable harm if the temporary restraining order is not issued.
- If not enough time to give notice, hold a hearing and have the court issue a TRO, you can request one *ex parte*, or without notice to the opposing party, before the irreparable injury, loss or damage occurs.
- Examples (South Missouri case, large loss case in Wisconsin).

Fire and Explosion Case Studies

- Key Topic Points
 1. Scene Management/Scene Preservation
 2. Right Experts
 3. Early Defense Posture

Scene right after explosion.



Scene four days later!



Kansas Case Facts

- Natural gas fueled stoichiometric explosion and fire.
- Three deaths.
- Family smelled something "funny" but allegedly did not recognize it as gas.
- Family left to shop, three went into home and husband went to park car.
- Large explosion and fire.

Facts Cont.

- Based on flow tests and last meter reading, about a month's worth of gas leaked out into the home in 11 hours.
- Only one gas fueled appliance, one yard line and one internal hard gas pipe.
- Property owned by farmer where family worked.
- One son died at the scene, other son and wife died several days later at the hospital.

Expert Retention

- Retention of experts is critical in fire/explosion cases.
- Oftentimes, local departments lack resources or motivation to conduct complete investigation into cause and origin.
- The investigation of fire and explosion cases is both a science and an art, which can lead to varying conclusions.
- The sooner experts are retained, the more beneficial they will be to developing a theory on the given case.

Other Concerns

- Hiring the right attorney.
 - Knows what they are doing.
 - Important to be present.
- Client at site.
 - When needed (testing, item removal, storage etc.)
 - Keep focused and controlled.

Restaurant Fire Case Study

- Key Topic Points
 1. Scene Management
 2. Spoliation
 3. Importance of Diligent Investigation
 4. Failure to Adhere to NFPA Methodology
 5. Modified Defense Strategy

Bystander Photos



Bystander Photos



Key Case Facts



1. Building uninsured and plaintiff in major financial distress—turning over the property from golf course to location of several schools.
2. Propane company changed location of tank a week prior to the fire. Placed new CSST, new first and second stage regulators. Failed to pull building permit as required.
3. Technician performed documented leak check, and no other indications of ongoing leak prior to the fire.
4. First responding firefighter witnessed fire coming out of hole in kitchen wall, where second stage regulator entered building. Testified no fire was coming from the regulator itself, and he closed shutoff valve.
5. Alleged damages of ~\$1.2 million.

Facts (cont.)

5. Ice machine with history of repairs in area of second stage regulator.
6. Hood/vent system in kitchen noted to have heavy grease buildup.
7. Accident scene badly corrupted by firefighting efforts—pulled down kitchen walls to extinguish last remaining hot spots underneath kitchen floor, kitchen floor ultimately collapsed.



Investigation by Plaintiff's Expert

Plaintiff's expert inspects scene first, fails to put anyone on notice.

Finds “corner post” in pile of debris.



Investigation by Plaintiff's Expert

Lines up corner post
placing burned corner
in vicinity of second
stage regulator.

Photographed corner
post but up close but
not entire piece of
evidence.

Did not preserve it or
document it as
originally found.



Investigation by Plaintiff's Expert

Based on v-burn pattern on corner post and up along the right side of the ice machine, expert concludes that second stage regulator is area of origin, and fugitive gas was the first thing ignited.

Criticizes placement of regulator for not being more than 3 feet away from all potential ignition sources.



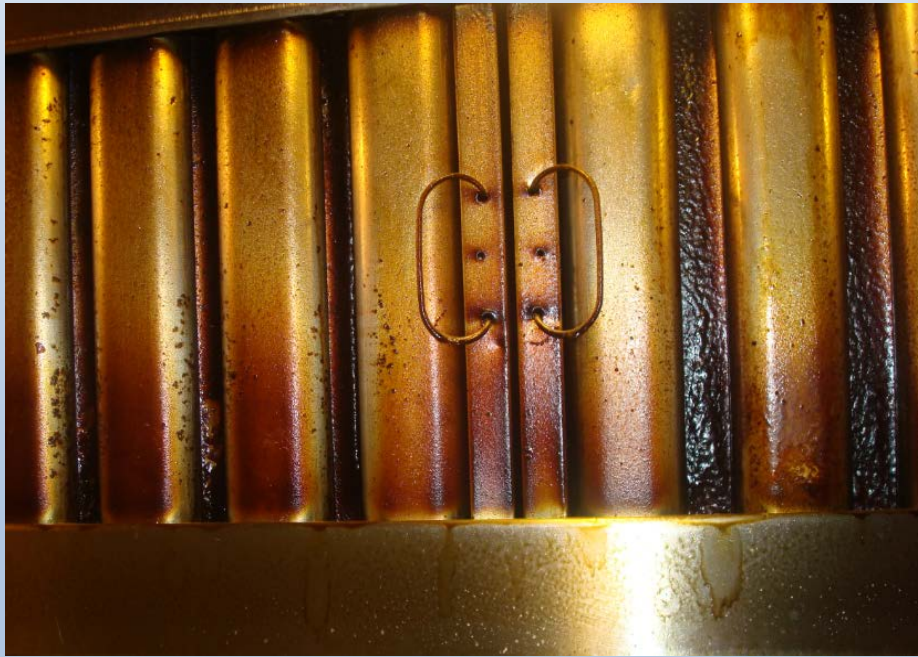
Photograph 17 – View of west kitchen exterior wall corner post located at the fire area of origin.



Photograph 12 – View of west kitchen wall at the area of fire origin.

Investigation by Plaintiff's Expert

Based on perceived area of origin, plaintiff's expert said he had no reason to inspect hood/vent system.



Defense Expert Inspection



Defense Expert Inspection

1. All building debris (including corner post) removed from scene.
2. Ice machine removed from scene for scrap.
3. Hood/vent system removed for scrap.
4. Unusual damage noted to flooring joists under the kitchen, which was filled with debris.



Defense Expert Inspection

Find regulator completely damaged from fire.

Orientation of regulator at time of fire uncertain due to scene alteration.

No leaks in line downstream.



Defense Analysis

1. How to perform the investigation?

- Resolve to spend the money required to distinguish your expert's investigation based on conformity to NFPA 921 and 1033.
- Utilize investigations performed by other agencies while scene was fresh to establish facts.
- Expert's opinions on causation will be limited, but can still take defensive posture and pick apart plaintiff's theory.



Defense Analysis (cont.)

2. Need to dig and get ready for the long haul.

- Need to prove up alternative causes: (1) arson; (2) fire in hood/vent; (3) ice machine malfunction.
- Develop information on credibility issues.
 - Early unfounded opinion on causation transferred to expert
 - Reason for lack of insurance
 - Seek financial information to show arson motive
 - Check entities involved in transition from golf course to school to determine legitimacy of turnaround story
 - Background checks on employees
- Contact all potential witnesses to piece together story.
- Keep expert's review of discovery minimal to lower cost of defense.



Defense Analysis (cont.)

3. How to attack?

- Lock plaintiff's expert into acceptance of NFPA 921, then show failure to follow it. Set up dispositive motions based on scientifically unreliable testimony and spoliation.
- Find fatal hole in expert's theory.
- Point expert to equally plausible alternatives and press expert to disprove.
- Find stretches or gaps in expert's CV. Lock into importance of NFPA 1033 "standard" and then use it to attack expertise and failure to follow. Emphasize aspects to case outside of expertise.
- Utilize fee shifting provisions based on likelihood of trial.



Defense Analysis (cont.)

Locating the fatal hole in the expert's theory

- Firefighter's testimony
- Characteristics of propane gas and system
- Inaccurate recitation of facts



What happened?

- Filed offer of judgment for \$100,000 early in the case.
- Filed motion for summary judgment pending at the time of mediation based on unreliability of expert opinion, lack of evidence of negligence, and existence of plausible alternatives.
- Case failed to settle at mediation. Plaintiff left asking to put the \$100,000 back on the table.
- Settled for half of the prior offer of judgment.





1. Hire the right attorney if case is unfamiliar (lead domino).
2. Hire the right expert (e.g., a fire investigator is not always enough).
3. Place all potentially responsible parties on notice and recognize who is responsible for what.
4. Do not alter scene or lose evidence.
5. Develop a protocol and document the scene and your actions.
6. Do not fail to carefully consider all potential areas of origin and alternative causes.
7. Keep your expert's opinion consistent with known facts

Questions?