



# NSPII News

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**INSIDE...**

## The President's Message from Jeffrey W. Ferrand ....



I hope each of you have had a great summer, filled with success and happiness. I assure you that your board members have been working hard to maintain NSPII's status as a premiere national anti-fraud organization. It is hard to believe that my presidency is coming to an end in less than 2 months at our Advanced Fraud Seminar on November 14-15. I'd like to take this time to thank all of my fellow board members for all of their hard work and support over the last 10 months. As you will see soon, there is no doubt this organization is in good hands with Clayton Oswald and Todd Burris taking the reigns as president for the 2017 and 2018 years, respectively.

As I wrote in my recent Coalition Against Insurance Fraud column, I was excited to see how many longtime NSPII friends will join us again this year at our annual Advanced Fraud Seminar on November 14-15. This also reminded me of what a great learning event the Advanced Seminar is for younger colleagues you're mentoring. I urge you to sign them up to attend. They'll have a perfect chance to refine essential job skills — and boost their value to this organization. These talented young pros will raise their game after two days of full immersion in workshops ... panels ... and even luncheon conversations with helpful senior pros. I joined NSPII thanks to a senior attorney in my law firm who brought me to my first Advanced Seminar. Whether you'll attend or not, I encourage you to sign up young professionals in your organization. Your investment in your employees' growth also will help show why NSPII's is one of the strongest anti-fraud organizations anywhere. While our attendance is still rising, we still need all of your help in recruiting more NSPII members and national conference attendees.

I am also pleased to announce breaking news regarding our November 14-15 Advanced Fraud Seminar at the Hilton Chicago/Indian Lakes Resort. Specifically, the Illinois Chapter is hosting a Welcome Reception for all Advanced Fraud Seminar attendees on Sunday, November 13th from 5:30-9:00 p.m. Motor coaches will leave the Hilton Chicago/Indian Lakes Resort at 5:30 p.m. sharp. This will be the only pickup time with the motor coaches. Attendees will be transported to 800 East Roosevelt Road, Lombard, IL where they have the option of visiting Noon Whistle Brewing or Whirlyball (up to ten players at a time; minimum of 4 players, play a game in souped-up bumper cars called WhirlyBugs with scoops and whiffle balls), located next door. Appetizers will be provided at Whirlyball and a cash bar will be available at both locations. Motor coaches will leave at 9:00 p.m. to return to the Hilton Chicago/Indian Lakes Resort. Reservations will be required via Eventbrite, which will be sent to National Seminar attendees. If you have any questions, please contact Scott Gillman at [sgillman@condoncook.com](mailto:sgillman@condoncook.com) or (312) 266-1313. This is yet another reason to sign up for the Advanced Fraud Seminar as soon as possible.

In closing, please accept my thanks for allowing me to lead this great organization this year. I can't wait to see you all in Chicago – please stop me and introduce me to all of your friends and mentees that accompany you at this awesome event.

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## Fitting a Square Peg Into a Round Hole - Fire Classification Under *NFPA 921*, by Brian P. Henry and Andrew L. Smith

### Introduction of Fire Classification Guidelines

According to *NFPA 921*, the proper methodology for a fire or explosion investigation is to first determine and establish the origin(s), then investigate the cause(s), including the circumstances, conditions, or agencies bringing the ignition source, fuel, and oxidant together.<sup>1</sup> In sum, *NFPA 921* offers guidance on how to determine the origin and cause of a fire. Hence, origin and cause experts are retained to investigate these very issues and prepare written expert reports based on scientific methods to explain where and how fires start. Indeed, in the initial versions, *NFPA 921* made no mention of fire classification or the analysis of human motive and behavior, but that soon changed.

Fire classification was introduced to *NFPA 921* through the inclusion of several paragraphs in Chapter 19. Then, in 2014 Chapter 20 was added and devoted entirely to “Classification of Fire Cause.” The guidelines note the rationale behind adding this new Chapter: “[c]lassification of a fire cause may be used for assignment of responsibility, reporting purposes, or compilation of statistics.”<sup>2</sup> Chapter 20 now provides four distinct fire cause classifications: accidental, natural, incendiary, or undetermined.<sup>3</sup> Of particular importance, especially in the world of insurance claim handling, the term “incendiary” is defined as “a fire that is deliberately set with the intent to cause the fire to occur in an area where the fire should not be.”<sup>4</sup>

### The Difference: Cause vs. Classification

A key distinction of this topic focuses on the difference between determining the *cause* of a fire and the establishing the *classification* of a fire. According to the recently-added Chapter 20, “[d]etermining the cause of a fire and classifying the cause of the fire are *two separate processes that should not be confused* with each other.”<sup>5</sup> (Emphasis added).

“Cause” is defined as “[t]he circumstances, conditions, or agencies that brought about or resulted in the fire or explosion incident, damage to property resulting from the fire or explosion incident, or bodily injury or loss of life resulting from the fire or explosion incident.”<sup>6</sup> On the other hand, “classification” is not actually a defined term in the general definitions section of Chapter 3 of *NFPA 921*. Rather, fire classification is mentioned first in Chapter 20, which states “[d]ifferent jurisdictions may have alternative definitions that should be applied as required. The cause of a fire may be classified as accidental, natural, incendiary, or undetermined.”<sup>7</sup> According to the Meriam-Webster Dictionary, classification is further defined as “the act or process of putting

people or things into groups based on ways that they are alike.” This begs the question, why not explicitly define fire classification anywhere in *NFPA 921*?

Up until the introduction of Chapter 20, origin and cause experts were instructed to focus on two key issues: origin and cause. However, with the introduction of Chapter 20, the NFPA provided a framework and began encouraging fire investigators to also determine the classification of fires into one of four defined and limited categories. Nevertheless, we must ask ourselves, is having fire investigators classifying fires a good thing for society or the insurance world? Are fire investigators even adequately qualified to opine as to classification based on the definitions provided? Did the Technical Committee on Fire Investigations foresee all of the issues and problems associated with classifying fires into one of four distinct categories?

### Practical Considerations of Fire Classification

**What purpose does fire classification serve?** According to the NFPA, classification of fire serves three important purposes: assignment of responsibility, reporting, or compilation of statistics. Society is infatuated with maintaining and reporting statistics. By providing four clean, distinct classification categories, we can now track fire statistics more easily than ever before. However, who is really keeping the statistics on the classification of fires?

The reporting argument is better served in the public domain when fire departments, fire marshals, arson task forces, or the Bureau of Alcohol, Tobacco, Firearms and Explosives investigate fires. Statistics can then be used to implement state or local legislation, evaluate public policy, and change regulations of certain types of fires. Indeed, this was exactly the case with a sudden increase in residential dryer fires several years ago based upon public agency reports.<sup>8</sup>

But what about the private domain? What about private origin and cause investigators retained by insurance carriers? No one in the private side of fire investigations keeps track or compiles classification statistics anywhere in the country. So how can we justify permitting private fire investigators the ability to classify fires?

Classification does assign responsibility. Was the fire accidental or was another human involved in intentionally setting the fire? An incendiary classification implicates potential reporting issues and criminal exposure for crimes such as

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arson. However, even without a classification, depending upon the origin, cause, and evidence obtained at the scene or through witness interviews, a prosecutor, insurance carrier, or other individual or entity can still potentially determine whether a fire was intentionally set. A classification of incendiary is not somehow the gold standard or rubber stamp. Irrespective of fire classification, insurance claim coverage decisions and arson prosecution decisions can still be reached based on the overall available evidence.

**Is fire classification truly necessary to further the science of fire investigation?** According to the Merriam-Webster Dictionary, “science” is defined as “knowledge about or study of the natural world based on facts learned through experiments and observation.” Some might say fire classification is not a true science, but instead should be characterized as deductive reasoning or “top-down” logic. Fire investigation focuses on the forensic analysis of a fire, not criminality. Fire investigation employs the methodology of the scientific method. The determinations of origin and cause also must be based on the scientific method pursuant to *NFPA 921*.

On the other hand, fire classification is instead a common sense observational assessment of a fire. By straying away from the pure scientific method, the fire investigation could subject itself to risks associated with inaccuracy and the inability to reliably and objectively test findings. Interestingly, unlike the chapters of *NFPA 921* concerning origin and cause, Chapter 20 concerning fire classification makes no reference to the scientific method. Arguably, the classification of a fire fails to satisfy the requirements of a forensic discipline.

**Does a fire classification pass the stringent requirements of expert testimony under *Daubert*?** In *Daubert v. Merrell Dow Pharmaceuticals*, the U.S. Supreme Court held a trial judge has a duty to closely scrutinize evidence to eliminate so-called “junk science.”<sup>9</sup> State courts throughout the country have also adopted similar standards for expert testimony. Courts must also examine proffered expert witness testimony under Rule 702 of the Federal Rules of Evidence.

Under this standard, is testimony about fire classification given by an origin and cause expert tantamount to the same “junk science” we now seek to exclude at trial? Many factors in Rule 702 must also be examined in determining the admissibility of expert testimony, as noted below.

**How does a fire classification assist a jury?** Typically, the jury is responsible for determining the “ultimate issues.” Certainly, an expert may testify as to facts related to the evidence uncovered at the scene or the fire or tests performed

related to samples of evidence. But ultimately it is the jury’s responsibility to reach the determination of whether or not a fire was intentionally set. For instance, most courts prohibit an expert from providing testimony about the *mens rea*, or state of mind, of a criminal defendant. How is an expert testifying a fire was intentionally set by a human any different? Such testimony takes away from the jury’s ability to reach conclusions based on factual information provided throughout trial.

Many courts have held psychological opinion testimony about intent is not helpful to determine whether the actor was capable of forming specific intent.<sup>10</sup>

**Is testimony regarding fire classification unfairly prejudicial?** Under Rule 403 of the Federal Rules of Evidence, the court may exclude relevant evidence if its probative value is substantially outweighed by a danger such as unfair prejudice, confusing the issues, or misleading the jury. This analysis goes hand-in-hand with whether fire classification is helpful to the jury. Expert testimony is truly a weapon. Jurors give significant weight to expert opinions, and experts can even be viewed as a “thirteenth juror.” Is fire classification testimony truly helpful? Are the opinions supported by the evidence? Is the fire investigator qualified to give the specific proffered testimony?

**Is an origin and cause expert qualified to opine as to classification of a fire?** An incendiary classification requires a determination the fire: (1) was deliberately set; (2) with the intent to cause the fire to occur; (3) in an area where the fire should not be.<sup>11</sup> How is an origin and cause expert qualified to opine as to human intent? Human intent requires an assessment of psychology, psychiatry, motivation, socioeconomics, and social sciences, with which a typical fire investigator has no experience. Most origin and cause experts have education in engineering, fire science, or rely on prior working experience as a firefighter, fire marshal, ATF agent, detective, or similar role. They simply do not have the education necessary to evaluate human behavior or the thoughts a person goes through in deciding to intentionally start a fire.

Moreover, *NFPA 1033: Standard for Professional Qualifications for Fire Investigators*, a national standard outlining what qualifications all fire investigators must have, does not require any training or education in the subjects a fire investigator would rely upon to assess intent. One could make a strong argument fire investigators are unqualified to assess psychological factors, cognitive comprehension, group dynamics, affluence, education, gender, or employment. Nonetheless, Chapter 11 instructs fire investigators to assess these very topics, known as “fire-related human behavior.”

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More complex fire investigations may also require evaluation of other factors outside the expertise or knowledge of a fire investigator. The motive element in the “arson tetrahedron” can be quite a quagmire. Insurers and Special Investigative Units must frequently examine financial motive through researching bank accounts, credit cards, retirement accounts, utility bills, mortgage statements, tax records, proof of income, liens, and all kinds of other personal and business records. It may seem axiomatic, but origin and cause experts are not accountants or forensic economists. Likewise, an assessment of motive may be based on domestic issues, thrill-seeking, revenge, vandalism, sexual gratification or perversion, or any array of other factors one might think of, which are far outside the scope of a forensic examination of a fire scene. Interestingly, however, *NFPA 921* also specifically addresses these motive elements, although not in the origin, cause, or classification chapters.<sup>12</sup>

Whether a fire is accidental or incendiary requires some form of evaluation of human intent and reasoning. By way of example, consider a fire involving a mother who leaves French fries cooking in vegetable oil on an electric stovetop unattended. How would the fire investigator assess the mother’s intent to leave the stove unattended without evidence of an accelerant or other indicia of a quintessential incendiary fire? Based on the definitions of the four classifications provided in *NFPA 921*, it is impossible to separate forensic analysis of the fire scene and the more subjective and amorphous analysis of human behavior and intent. A fire investigator is certainly qualified to opine as to the former, but how can we justify giving fire investigators free rein to give expert testimony as to the later?

**Does *NFPA 921* implicate the assessment of human intervention in areas besides fire classification?** The 2014 version of *NFPA 921* is riddled with provisions implicating the assessment of human behavior and human intervention during the course of a fire investigation. For example, Chapter 21 specifically references a fire investigator’s analysis of “the degree to which *human fault* contributed to any one or more of the causal issues.”<sup>13</sup> (Emphasis added). “This feature deals with the *human factor* in the cause or spread of fire or in bodily injury and loss of life. It encompasses acts and omissions that contribute to a loss (responsibility), such as incendiarism and negligence.”<sup>14</sup> (Emphasis added).

The frequent references to human behavior, accountability, and responsibility imply further support to fire investigators to classify fires. Some experts may state they do not classify fires – they merely “assign responsibility.” However, this is

nothing more than semantics or academic distinctions. By evaluating fault or responsibility for a fire, an expert must by definition classify a fire and determine whether the fire was intentionally set. Further, if an origin and cause report states a fire is incendiary, the expert is by definition classifying the fire based on the four term of art classifications listed in *NFPA 921*.

**Is there a problem with the fire classification categories?** *NFPA 921* provides four distinct categories of classification. But not all fires can be classified under these categories. For example, how do you classify a campfire? We cannot say it is unclassifiable. If so, what would be the point of creating the defined categories in the first place? Not every fire fits neatly into one of the four classifications. Thus, we are left with incomplete guidelines for helping origin and cause investigators undertake the tasks which *NFPA 921* requires of them.

**What about the void between arson in the criminal context and the civil context?** Arson is a crime frequently defined by statute, and varying from jurisdiction to jurisdiction. Depending upon the statute, arson may require different a different mental state or other elements.

For instance, the Ohio arson statute provides as follows: “[n]o person, by means of fire or explosion, shall *knowingly* \*\*\* [c]ause, or create a substantial risk of, physical harm to any property of another without the other person’s consent.”<sup>15</sup> (Emphasis added). Further, “[a] person acts knowingly, regardless of purpose, when the person is aware that the person’s conduct will probably cause a certain result or will probably be of a certain nature.”<sup>16</sup> However, again, is a fire investigator qualified to opine as to the specific elements of arson, including the criminal defendant’s intent to “knowingly” or “willfully and unlawfully” start a fire?

Conversely, in the civil context we mostly focus on the “intentional acts” exclusion to an insurance policy, which typically requires the insured to take part in intentional or criminal activity to justify denial of an insurance claim. A common intentional acts exclusion reads as follows: “[w]e do not cover any loss caused intentionally by a person named in the Coverage Summary.” The elements and requirements for the arson defense in a bad faith case are completely different from prosecuting an arson case in the criminal context. What happens if an insured is found not guilty of arson in a specific jurisdiction, but the insured’s conduct could satisfy the elements of arson in another state? Should the fire still be classified as incendiary? Should the claim be denied based on the intentional act exclusion?

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In addition, Chapter 20 provides “[d]ifferent jurisdictions may have alternative definitions that should be applied as required.” What was intended by this language? Does this render the four classifications superfluous depending upon the state’s criminal code and insurance claim regulations and administrative code?

### *State of Minnesota v. Steven Edwards* – A sign of the Future?

The case of *State of Minnesota v. Steven Edwards*, is an interesting criminal case from 2016 involving a charge of arson, stemming from a single-family home fire.<sup>17</sup> This is one of the few cases in the country addressing the above implications and determination of an incendiary fire by an origin and cause expert. In the case, Denise Bryn, a fire investigator for the Minnesota Fire Department, concluded the fire originated in the kitchen, but she classified the fire as undetermined. To the contrary, the homeowner’s insurance carrier Country Financial Claims retained certified fire investigator Mark Bishop, who opined the fire was “the result of a deliberate incendiary act by a person or persons unknown.” He further concluded the fire started above the electric range in the kitchen using available combustibles in the form of letters and bills, which had originally been on top of the refrigerator.

Mr. Edwards filed a motion to exclude the origin and cause report and expert testimony of Mr. Bishop. Just recently, on March 29, 2016, the court released an order granting the motion to exclude Mr. Bishop’s expert testimony, reasoning his testimony about the incendiary classification of the fire and opinions regarding human intervention with the first fuel would not assist the trier of fact and lacked foundational reliability.

First, the court reasoned “the jury is equally capable of making these common sense observations of the natural world and human behavior” as to whether “the fuel met the burner by human hands and thus the fire was deliberately set.”<sup>18</sup> Next, the court concluded the fire classification was not based on Mr. Bishop’s specialized knowledge. “Instead, he used a process of elimination, of which any lay juror is capable, to imagine the various ways the fire could have started accidentally, and then rule out each of those possible scenarios.”<sup>19</sup>

Although *Edwards* is a criminal arson case, the decision on the motion to exclude the State’s origin and cause expert’s testimony could possibly provide a roadmap for how future courts will rule on this issue across the country in the civil context as well. Be on the lookout for more and more *Daubert* challenges and motions *in limine* seeking to exclude fire

classification expert opinions as this issue gains recognition in both arson and bad faith cases alike.

### Conclusion

In sum, permitting origin and cause experts the ability to classify a fire as accidental, natural, incendiary, or undetermined has significant ramifications in any fire investigation. These issues go far beyond potential criminal exposure for arson as in the *Edwards* case. Arguments can be made for and against inclusion of fire classification in *NFPA 921*, as detailed above. Because of the implications for assessment of human behavior throughout *NFPA 921*, if you are of the opinion fire classification is outside the purview of an origin and cause expert, as an industry we may need to reconsider not only eliminating Chapter 20, but also overhauling the remainder of *NFPA 921*.

Will courts follow the *Edwards* lead and exclude fire classification testimony? Only time will tell.

<sup>1</sup>*NFPA 921* at § 4.1.

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>*NFPA 921* at § 3.3.108.

<sup>5</sup>*NFPA 921* at § 20.1.

<sup>6</sup>*NFPA 921* at § 3.3.25.

<sup>7</sup>*NFPA 921* at § 20.1.

<sup>8</sup>*Home Fires Involving Clothes Dryers or Washing Machines*, National Fire Protection Association Fire Analysis and Research Division (2012).

<sup>9</sup>509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993).

<sup>10</sup>*State v. Provost*, 490 N.W.2d 93, 101-102 (Minn. 1992).

<sup>11</sup>*NFPA 921* at § 3.3.108.

<sup>12</sup>*NFPA 921* at § 24.4.9.

<sup>13</sup>*NFPA 921* at § 21.1.1.

<sup>14</sup>*Id.*

<sup>15</sup>R.C. § 2909.03(A)(1).

<sup>16</sup>R.C. § 2901.22(B).

<sup>17</sup>Hennepin County Circuit Court, State of Minnesota, Case No. 27-CR-15-6336.

<sup>18</sup>March 29, 2016 Court Order, p. 4.

<sup>19</sup>*Id.* at p. 6.