



Jurisprudence Section - 2015

F7 A Perfect Storm Brewing for Fire Investigators in Court

*Terry-Dawn Hewitt, LLM**, McKenna Hewitt, 9057 E Mississippi Avenue, #11-206, Denver, CO 80247; and *Wayne J. McKenna, LLB*, McKenna Hewitt, 9057 E Mississippi Avenue, #11-206, Denver, CO 80247

After attending this presentation, attendees will understand the significance of three forces that are converging into a perfect storm for fire investigators. Included will be an explanation of the hypothesis that the culmination of these three forces is resulting in a reinvigoration of challenges based on the Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals Inc.* (or state equivalents), including heightened inquiry into the extent of subjectivity and bias by experts in fire cases.

This presentation will impact the forensic science community by providing information relevant to anyone involved with civil or criminal fire litigation. Extensive research has been conducted into cases across the United States and Canada where industry standards such as the National Fire Protection Association (NFPA) 921 are used in court to either support or challenge expert testimony. This research has revealed trends toward a closer scrutiny of the reliability of expert testimony and sufficiency of experts' qualifications. The detailed description of these trends (as supported by this presentation) provides attorneys, judges, and fire experts with a road map for ways to deal with fire experts in court. Even though the 2009 National Academy of Sciences (NAS) Report devoted but a short paragraph to fire investigations, attendees will learn why it is responsible for a huge impetus toward closer scrutiny of the qualifications and opinions of experts in fire cases. Together, the NAS Report, growing publicity about wrongful convictions in arson cases, and changes in industry standards for fire investigators are putting fire experts under a microscope. This presentation will help members of both the legal and the fire investigations communities to prepare for the perfect storm on the horizon that is being precipitated by these factors.

This presentation will review the three forces behind the big changes in the offing for fire investigators: (1) the ongoing movement by courts across America to scrutinize more closely the reliability of expert testimony under *Daubert* and its progeny; (2) a growing apprehension about wrongful convictions stemming from faulty forensic evidence and problems in fire investigations culminating in the revolutionary 2009 NAS Report, *Strengthening Forensic Science in the United States: A Path Forward*; and, (3) the continuing development of industry standards that are raising the bar for fire investigators, particularly revisions in the 2014 editions of NFPA 1033, *Standard for Professional Qualifications for Fire Investigator* and NFPA 921, *Guide for Fire and Explosion Investigations*.

This presentation will first explain the growing demand that experts be able to demonstrate the reliability of their opinions in court under *Daubert* and its state equivalents. Next, the problems caused by faulty forensic science, including weaknesses in fire investigations and the response by various sectors of American society to address these problems will be considered. The responses have come in the form of reports examining weaknesses in forensic science and fire investigations, together with recommendations to address these issues. The most significant of these reports are highlighted from the viewpoint of their importance to the fire investigation field.

Finally, this presentation will address the heart of this study's hypothesis and describe how these three forces are converging and causing a reinvigoration of *Daubert*. First to be considered is why *Daubert* and its progeny continue to have an influence in the coming of the perfect storm, even though investigators have had two decades to learn how to deal with *Daubert* challenges. The reasons why fire investigators have weathered the first part of the *Daubert* storm, but need to prepare for the next onslaught will be proposed. Further, an explanation of how the NAS Report and other forensic science reports are increasing pressure on investigators, thereby strengthening the potential of reliability inquiries under *Daubert* and its progeny will be presented. The session will conclude with recommendations for fire investigators planning to give expert testimony in court.

NFPA 921, NAS Report, Daubert