



Jurisprudence Section - 2016

F41 New and Better Ways to Challenge Fire Investigators in Court Using National Research Council/National Academy of Sciences (NRC/NAS) Report Initiatives

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

After attending this presentation, attendees will have a model for building challenges against fire investigator experts in court. Conversely, experts can use this model to improve their expert testimony and prepare to survive challenges based on *Daubert*, *Frye*, their state equivalents, or during cross-examination at trial.^{1,2} This model has been developed by combining the recommendations from: (1) *Strengthening Forensic Science in the United States: A Path Forward* (the 2009 NRC/NAS Report); (2) the National Commission on Forensic Sciences (NCFS); (3) the Organization of Scientific Area Committees (OSAC); and, (4) the Report of the Texas Forensic Science Commission (TFSC) in the Willingham/Willis Investigation.³

This presentation will impact the forensic science community by providing information to anyone involved with civil or criminal fire litigation. Moreover, attorneys, judges, and experts from any forensic science discipline can use the model presented to gain a better understanding of how to take challenges of expert testimony to the next level based on initiatives developing from the NRC/NAS Report.

The NRC/NAS Report, published in 2009, contained 13 recommendations to overhaul forensic sciences, including minimum reporting and testimony requirements, the need for accreditation and certification, and compliance with industry standards. While the NRC/NAS Report spoke largely of forensic laboratories, fire investigations was one of the forensic disciplines this Report covered; however, since fire investigations were at the periphery of the NRC/NAS Report, in many ways it was difficult to understand the “path forward” for fire investigators from this Report. This issue of how the NRC/NAS Report applies to fire investigations was addressed two years later in Texas.

In 2011, the TFSC, investigating complaints of wrongful conviction in two arson cases, endorsed the advice of the NRC/NAS Report, but placed its recommendations in the context of overhauling one forensic discipline: fire investigations. In this context, the TFSC was the leader in the path forward for strengthening fire investigations. It emphasized the need for professional certifications and adherence to standards; however, it went further, urging that counsel aggressively pursue *Daubert/Frye* admissibility hearings in arson cases, recommending that judges should hold such hearings in all arson cases to ensure fire science testimony is reliable and relevant.²

Two years later in 2013, another initiative resulted from the NRC/NAS Report. The National Commission on Forensic Science (NCFS) was chartered as a Federal Advisory Committee, to provide policy recommendations to the federal Department of Justice. While the NCFS recommendations are not finalized, they include initiatives for universal accreditation of forensic science service providers (a term defined broadly enough to include public and private organizations employing fire investigators) and the overhaul of reporting and testimony requirements for experts, presumably applying to fire investigators as well as other forensic experts.

On the heels of the creation of the NCFS, in early 2014 the National Institute of Standards and Technology (NIST) instituted the Organization of Scientific Area Committees (OSAC) to provide practice-based guidance for each forensic science discipline, including fire investigations. One of NIST-OSAC’s goals is to create registries of standards and guidelines containing the key industry standards for each forensic discipline. Further, OSAC has stated one measure of its success will be that within five to ten years, these standards and guidelines will be regularly used in court in the direct and cross-examination of expert witnesses.

While there are common themes reverberating through the NRC/NAS Report, the TFSC Report, the NCFS policy recommendations, and the NIST-OSAC initiatives, these efforts are by no means unified. Notwithstanding the difficulty of predicting the long-term effects of these initiatives, it is clear that there will be changes raising the bar for expert testimony.

This presentation will connect the dots, so to speak, setting forth in a practical way how the NRC/NAS Report and the initiatives flowing from it can be used to build a credible model in civil and criminal cases to challenge (or conversely, to support) fire investigation experts in *Daubert/Frye* hearings, in depositions, and in trial testimony. The basic model presented in this presentation will work for other forensic disciplines by switching references to the key standards and guidelines used in fire investigations to those that are at the foundation of other disciplines. This presentation will benefit attorneys, judges, and expert witnesses.



Jurisprudence Section - 2016

Reference(s):

1. *Daubert v. Merrell Dow Pharmaceuticals Inc.* (1993), 509 U.S. 579.
 2. *Frye v. United States*, 293 F. 1013 (App.D.C. 1923).
 3. Tex. Forensic Sci. Comm'n, Final Report Willingham/Willis Investigation 8-9 (April 15, 2011), available at <http://www.fsc.state.tx.us/documents/FINAL.pdf>.
-

NRC/NAS Report, *Daubert*, NFPA & ASTM Standards