

## Using Your Cause-And-Origin Expert's Expertise

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Consumer appliance manufacturers are often faced with cases pending in multiple jurisdictions involving significant property damage due to fires and other occurrences, all of which require the use of a cause-and-origin expert. Engineering experts can play a vital role in proving the origin of these damages. By leveraging your qualified expert's knowledge and expertise, you can position your case to settle before substantial discovery costs accumulate, succeed on summary judgment or give you a significant advantage at trial. Getting the most out of this expert from the initial call to your expert, through the evidence examination and during dispositive motions and trial means knowing how, when and to what extent your expert can and should be involved in the case.



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## Protecting Communications With Your Expert

First and foremost, it is critical to protect the communications with your expert from disclosure. Expert disclosure rules vary by state so it is imperative for you to know those rules and be able to convey them to your expert from the beginning of her engagement. For example, does the jurisdiction require expert reports, or merely a disclosure containing a summary of the expert's opinions? Does this jurisdiction permit discovery of draft reports from your retained expert witnesses? What about communications with, notes prepared by or opinions provided by consulting experts, nonretained experts or "independent experts?" It is crucial that your expert understands and follows these rules when communicating with you, discussing evidence examinations and preparing her report.



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Many states — like Ohio and Pennsylvania — have modeled their expert disclosure rules after the Federal Rules of Civil Procedure. Under these rules, experts are divided into two categories: consulting experts and testifying or retained experts. See Fed. R. Civ. P. 26(b)(4); Ohio Civ.R. 26(B)(5); Pa. R.C.P. No. 4003.5. Consulting experts are generally afforded full protection from discovery unless the party seeking discovery can show that exceptional circumstances prevent that party from obtaining the same facts and opinions by other means. See Fed. R. Civ. P. 26(b)(4)(D); Ohio Civ.R. 26(B)(5)(a); Pa. R.C.P. No. 4003.5(a)(3). Communications in any form between a party's attorney and his or her retained expert witnesses and that expert's draft reports are also protected from discovery. See Fed. R. Civ. P. 26(b)(4)(B-C); Ohio Civ.R. 26(B)(5)(c); Pa. R.C.P. No. 4003.5(a)(5). Discoverable communications with a retained expert are limited to those regarding (i) his or her compensation for work on a particular case,

(ii) facts or data that the party's attorney provided and the expert considered in forming his or her opinion and (iii) assumptions that the party's attorney provided that the expert relied on in forming his or her opinions. See Fed. R. Civ. P. 26(b)(4)(C).

While many states model their expert disclosure rules after the Federal Rules of Civil Procedure, you should be aware that some jurisdictions may deviate from those rules. For example, in Illinois, even though no specific rule permits disclosure of draft reports and communications of a retained expert (or "controlled expert," under Illinois rules), case law suggests these are not protected. See Ill. S. Ct. Rs. 201, 213 (eff. Jan. 1, 2007); *People v. Wagener*, 196 Ill.2d 269, 275-76 (2001) (attorney-client privilege is waived as to testimony and reports of testifying experts).

Knowing your jurisdiction's expert disclosure rules and conveying them to your expert before your expert inspects or examines the subject product will prevent any inadvertent disclosures of her opinions after the examination.

### **Scene Inspections and Evidence Examinations**

Typically, both a scene inspection and evidence examination occur in product liability cases. The scene inspection takes place almost immediately after the occurrence (e.g., presuit), while the evidence examination is often conducted during the litigation, allowing for each party's cause-and-origin experts to attend. As the attorney for the appliance manufacturer, you may not receive notice of the occurrence until after your client's claims department has declined to attend the scene inspection or has denied the presuit claim. The evidence examination then becomes your expert's sole opportunity to inspect the subject appliance and form her opinions regarding the cause and origin of the occurrence.

Qualified cause-and-origin experts should be familiar with NFPA 921, *Guide for Fire and Explosion Investigations* (National Fire Protection Association, 2014 edition) — the applicable standards governing fire investigations — but the handling attorney should also understand these standards. These standards will guide any scene inspections and evidence examinations and will identify protocols that must be prepared before the evidence examination. These standards will also help you understand your expert's methodology and highlight weaknesses in your opponent's expert's opinions.

### ***Scene Inspections***

The NFPA standards strongly suggest that all interested parties be placed on notice of a scene inspection so that all parties have an opportunity to retain experts and attend the inspection. See NFPA 921, Ch. 11, § 11.3.5.4. Proper notice also minimizes claims of spoliation. See NFPA 921, Ch. 11, § 11.3.5.4. The main objective of any scene inspection is to collect data that will aid the expert in determining the origin and cause of the fire. Every attempt should be made by those at the scene inspection to protect and preserve the fire scene as intact and undisturbed as possible. See NFPA 921, Ch. 16, § 16.3.1. Valuable physical evidence should be recognized, documented, properly collected and preserved for further testing and evaluation. See NFPA 921, Ch. 4, § 4.4.4. To properly preserve evidence, care should be made to avoid cross-contamination and the evidence should be thoroughly documented before it is moved, by the use of field notes, written reports, sketches, diagrams and photographs. See NFPA 921, Ch. 16, § 16.5.2.1. All physical evidence should be marked or labeled for identification at the time of collection; the expert(s) should maintain a list of all evidence removed and who removed it. See NFPA 921, Ch. 16, § 16.7. The chain of custody should be properly documented. See NFPA 921, Ch. 16, § 16.9.2. Once evidence has been removed from the scene, it should be properly maintained and not destroyed or altered until other parties of interest have been notified. See NFPA 921, Ch. 11, § 11.3.5.7.

Not all experts follow the NFPA standards. If your client either was not invited to the scene inspection or declined the claimant's invitation to attend, key evidence may be lost before your expert has a chance to inspect the subject appliance. In a pinch, an expert can review photographs of the scene taken by someone else, but you will likely not have the universe of information available to your expert and this can drastically affect your expert's ability to determine the origin of the fire. In these circumstances, your expert may be able to help provide some guidance as to whether you pursue a spoliation claim and/or use the lack of properly documented evidence as leverage in any settlement negotiations.

### ***Evidence Examinations***

An evidence examination will typically be conducted after a lawsuit is filed to allow the parties' controlled or retained experts to view and take apart the subject appliance. You should be familiar with the basic methodology for fire or explosion investigations before the evidence exam. The approach recommended by the NFPA is the scientific method: (1) identify the problem; (2) define the problem; (3) collect data; (4) analyze the data; (5) develop a hypothesis; (6) test the hypothesis; and (7) select the final hypothesis. See NFPA 921, Ch. 4, § 4.3.1–4.3.9. Attorneys and experts should beware of making presumptions without sufficient supporting data, expectation bias and/or confirmation bias. Again, speaking to your own expert about the methodology used by your opponent's expert with this standard in mind can help you determine the strength of your defense in your case generally, as well as provide guidance related to potential Daubert motion practice as your case progresses. Questions for you and your expert to consider include: (1) Was your client invited to the scene? (2) Were the appliance and any component parts properly documented and transferred? (3) Was all potentially relevant evidence preserved for future testing and analysis? (4) Did the opposing party's expert follow each step of the scientific method or did he or she try to reach a conclusion prematurely? (5) Did he or she attempt to prove, rather than disprove, a hypothesis? (6) Was each potential cause of the fire properly ruled out?

### **Post-Examination — Using Your Expert's Expertise**

After the evidence examination, your expert should be able to provide a brief summary of her findings and initial opinions. Regardless of the jurisdiction in which your case is pending, best practice is for your expert to convey her initial findings to you via phone to avoid the potential for disclosure. In that initial conversation, your expert should be able to provide details sufficient for you to develop and/or refine your case strategy.

First, ask your expert to provide details regarding the pre- and post-fire condition of the appliance and any component parts. Any identifying information on the appliance should be noted, such as the model and serial numbers and manufacturing date stamped on the appliance (if any and if discernible post-fire). You should also ask the expert to provide a complete description of the burn pattern on the appliance and overall damage post-fire. If there were component parts available at inspection — for example, the ventilation and exhaust components accompanying a clothes dryer — you should ask your expert to describe their pre- and post-fire condition and perhaps location. If the evidence examination was a destructive examination, then your expert was permitted to dismantle and thoroughly inspect the interior of the appliance. You should ask your expert whether any part of the appliance malfunctioned or whether any part of the appliance appeared damaged pre-fire.

Also ask your expert to provide a preliminary opinion as to what may have caused the fire based on the evidence examination and her review of the case materials. Did the appliance malfunction at the time of the occurrence? Was there evidence that the appliance was misused before the occurrence, and did

that misuse cause the occurrence? Or was there a wholly separate condition outside of the appliance (i.e., in the home or location of the appliance) that may have caused or contributed to the occurrence? While your expert may not be able to provide answers to all of these questions following the evidence examination, she should be able to provide you with a preliminary opinion as to the cause and origin of the fire.

Knowing your expert conducted a scientifically sound evidence examination, and armed with her preliminary opinions, you should be able to more effectively evaluate your case for settlement, summary judgment or success at trial. Though there will likely be additional fact and expert discovery to complete, your expert's preliminary findings should provide you the tools you need to develop your case strategy.

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