

Legal Issues in Fire Investigations



State of Florida
Department of Financial Services
Division of Investigative & Forensic Services
Bureau of Fire, Arson & Explosives Investigations

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**Florida Department of Financial Services
Division of Investigative & Forensic Services
Bureau of Fire, Arson & Explosives Investigations
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Because of the legal issues that face the origin and cause investigator in their quest to determine the origin and cause of a fire, the investigator must understand that there are rules and laws that govern this type of investigation. It is absolutely vital that fire have a professional and responsible explanation. However, the explanation must conform to all applicable rules and laws from both the civil and criminal jurisdiction.

The overall goal of this course is to introduce the student to the basic concepts of the legal issues that face fire investigators. It is designed to make the student aware of the issues from both a criminal and civil proceeding. This course is not intended to qualify anyone to practice law.

Our commitment to the citizens of Florida causes us to continually endeavor to increase our knowledge of fire, its behavior and new methods of investigating fires, while continually ensuring that the rights of the citizen are protected. This course is designed to be a foundation of that quest.

References

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Key Court Cases

In re Amendments to Florida Evidence Code, 278 So.3d 551 (Fla. 2019)

Daubert v. Merrill-Dow Pharmaceuticals, 509 U.S. 579 (1993)

Frye v. United States, 54 App. D.C 46, 293 F. 1013 (1923)

Kuhmo Tire Company v. Carmichael, 526 U.S. 137 (1999)

Michigan v. Clifford, 464 U.S. 287 (1984)

Michigan Millers Mutual Ins. Co. v. Janelle R. Benfield, 140 F.3d 915 (11th Cir. 1998)

Michigan v. Tyler, 436 U.S. 499 (1978)

Stansbury v. California 511 U.S. 318 (1994)

Wong Sun v. U.S., 371 U.S. 471 (1963)

LEGAL ISSUES IN FIRE INVESTIGATIONS

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Unit 1

Lesson 1: Course Administration

Enabling Objectives

At the end of this unit, the student will be able to:

1. State the minimum passing score for the overall course.
2. Understand the minimum passing score for the final exam.

Course administration. This course is designed to be delivered in block instruction, based on an eight-hour day, for a standard five-day week. Total number of classroom hours is 45. The method of delivery is lecture, supplemented with other material which may be displayed in the classroom.

Required Texts. There are two suggested texts for this course:

- National Fire Protection Association. (2014). *NFPA 1033 Standard for Professional Qualifications for Fire Investigator*. Quincy, MA: NFPA
- National Fire Protection Association. (2021). *NFPA 921 Guide For Fire and Explosion Investigations*. Quincy, MA: NFPA

Student Competency Requirements. The minimum passing grade for this overall course is 70%.

Final Exam. The final exam is a closed book exam with a 120 minute time limit. Test questions are derived **DIRECTLY** from the enabling learning objectives (ELO's). The minimum passing grade for the final exam is 70%. All test questions are available within the training material. Test questions will use distracters and changed verbiage from the Enabling Learning Objectives (ELO's). Read each question carefully. There are no "gotcha" questions. Every effort has been made to present a final exam that has been covered in the training period and addressed in the body of the material. Again, questions will be essentially listed as an Enabling Learning Objective (ELO).

Training Portion	Maximum Points	Minimum Points
Final Exam	100	70

The course is organized into 6 Units, 16 Lessons and a final exam.

Daily Schedule – Legal Issues in Fire Investigations Course

Course Name	Hours
Arson and Related Laws	2.00
Search and Seizure Issues at the Fire Scene	2.00
Documentation of Fire Scene	1.00
Presenting a Case for Prosecution	2.00
Insurance Cases – Kitchen Fires	1.00
Home Work: Review Michigan v Tyler, Michigan v. Clifford Cases	
Arson for Profit	2.00
NFPA 921 and 1033	2.00
Investigative File	2.00
Spoliation of Evidence	2.00
Home Work: CFITrainer – Depositions 1	
Expert Testimony	2.00
Interview/Interrogations	2.00
Understanding the Insurance World – Part 1	4.00
Home Work: CFITrainer – Depositions 2	
Understanding the Insurance World – Part 2	2.00
SIU Information Sharing	2.00
Deposition and Trial Testimony	2.00
Testimony Review and Practice	2.00
Home Work - TBA	
Juvenile Fire Setters	3.00
Exam Review Time	1.00
Final Exam	2.00
Final Grading	1.00
Course Review and Critique	1.00

NOTE: This schedule shall be based on the availability of the instructors and may be changed to ensure that the material is presented effectively.



Unit 1

Lesson 2: The Arson Statute and Related Laws

Citrus County Chronicle Front Page
 Courtesy Det. Curt Clendenney
 Bureau of Fire, Arson & Explosives Investigations (2008)

Enabling Learning Objectives:

At the end of this session, the student will be able to:

1. Identify the essential elements of the crime of arson.
2. Identify the differences between 1st and 2nd degree arson.
3. Explain the crime of arson as a general intent crime.
4. Describe how “unlawful” damage affects the crimes of arson.
5. Define “felony arson”.
6. Identify related statutes in arson cases to include fire bombs, burning to defraud, false and fraudulent insurance claims.
7. Define “fire bomb”.
8. Describe the term “burning to defraud”.
9. Describe “claims fraud” and “application fraud”.
10. Explain how an individual could be charged with both arson and grand theft.
11. Explain the components required to charge someone with preventing or obstructing the extinguishment of a fire.

Overview

Once a fire has been determined to be incendiary in origin, it is the fire investigator’s responsibility to identify and apprehend the responsible party. In a criminal investigation, this means the filing of formal criminal charges and the initiation of a prosecution. In order to charge an individual with the crime of arson, the investigator must have a clear understanding of the essential elements of the offense to be charged. The elements of a criminal offense are the component parts which must be established and proved in order to convict a person of the offense. Each and every one of the elements of the offense must be proved beyond a reasonable doubt before a person can be convicted. If even one element is missing or cannot be proved, there cannot be a conviction. A review of the arson and other statutes related to fire investigations is an appropriate place to begin.

I. Arson - Florida Statute 806.01

The crime of arson is contained in section 806.01 of the Florida Statutes which states:

(1) Any person who willfully and unlawfully, or while in the commission of any felony, by fire or explosion, damages or causes to be damaged:

(a) Any dwelling, whether occupied or not, or its contents;

(b) Any structure, or contents thereof, where persons are normally present, such as: jails,

prisons, or detention centers; hospitals, nursing homes, or other health care facilities; department stores, office buildings, business establishments, churches, or educational institutions during normal hours of occupancy; or other similar structures; or
(c) **Any other structure** that he or she knew or had **reasonable grounds to believe was occupied by a human being** is guilty of **arson in the first degree**, which constitutes a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) Any person who willfully and unlawfully, or while in the commission of any felony, by fire or explosion, damages or causes to be damaged **any structure, whether the property of himself or herself or another, under any circumstances not referred to in subsection (1)**, is guilty of **arson in the second degree**, which constitutes a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) As used in this chapter, “**structure**” means any building of any kind, any enclosed area with a roof over it, any real property and appurtenances thereto, any tent or other portable building, and any vehicle, vessel, watercraft, or aircraft.¹

Arson includes:

1. Arson in the First Degree, a First Degree Felony
2. Arson in the Second Degree, a Second Degree Felony

Arson is treated as a serious offense in Florida, as indicated by the severe prescribed penalties. First degree arson is punishable by imprisonment up to thirty (30) years. Second degree arson is punishable by imprisonment up to fifteen (15) years.

A. The three essential elements of the crime of arson are:

- (1) Willful and unlawful damage; or, damage occurring while in the commission of any other felony offense;
- (2) By fire or explosion;
- (3) To any “structure”.

These are the essential elements of arson and will constitute a *prima facie* case of arson in the second degree.

There are a number of points that need to be made about the statute. *First*, in terms of proving “damage” to a structure or its contents, it is not necessary to prove substantial damage. At one time, the “mere scorch rule” meant that the crime of arson could not be proved without some significant damage to a structure or its contents. If it was merely “scorched”, the crime of arson had not occurred. That is no longer the case. Virtually any type of fire-related damage will be enough.

Second, the term “structure” as it is used in the arson statute is not just limited to traditional concept of a building. It includes any building of any kind, any enclosed area with a roof over it, any appurtenant structure or outbuilding, any tent or portable building, any kind of vehicle (including cars, trucks and motorcycles, any kind of boat, vessel or watercraft and any type of aircraft (including airplanes, helicopters and gliders).

¹ Section 806.01, Florida Statutes (2017).

First degree arson also includes damage to the contents of certain structures as well. It has been specifically held by a court that the burning of jail issued clothing is considered damage to the “contents” of a jail and constitutes the crime of arson even if there is no apparent damage to the building itself. In another jail case, minimal damage to an exhaust fan in a window of the jail was sufficient to constitute damage to the “structure” within the meaning of the arson statute.

A significant distinction between 1st degree and 2nd degree arson is the fact that **any damage** by fire or explosion to the **contents** of the structures referenced in the 1st degree arson statute will constitute the commission of arson in the 1st degree with or without any damage to the structure itself. Under the 2nd degree arson statute, there must be structural damage for the crime to occur. Of course if the fire is set inside the structure, it is almost inevitable that there will be enough damage to satisfy the requirements of the arson statute.

It is important to note that when property is removed from a structure and then burned, the type of structure it was taken from will determine whether that is a case of arson or simply criminal mischief (vandalism) under Chapter 806.13, Florida Statutes.

Third, the crime of arson is considered to be a general intent crime. Voluntary intoxication is not a defense to this crime, as it would be to specific intent crimes, such as 1st degree murder. However, in arson cases resulting from bar room brawls or domestic violence situations, this may be a consideration.

Fourth, in certain situations 2nd degree arson may not be considered a lesser included offense of 1st degree arson, as held by a Florida court.² Proof that the damage by fire or explosion occurred to one of the specifically referenced structures under the 1st degree arson statute would preclude a conviction for 2nd degree arson because the statute refers to “any structure... under any circumstances not referred to in [the 1st degree arson statute]”. It should also be noted that 2nd degree arson may not be a lesser included offense to a charge of 1st degree arson where the damage was only to the contents of a building rather than the building itself. As previously stated, damage to contents alone will not constitute the crime of arson unless those contents were part of a structure referenced in the 1st degree arson statute. The prosecutor will consider this issue at the charging stage and make the appropriate decision. An investigator who may have probable cause to arrest an individual on charges of arson at the fire scene must recognize this distinction.

Fifth, the issue of “unlawful” damage has been called into question in at least one reported decision with potentially troubling implications. In *State v. Mayle*³ the trial court granted a motion to dismiss based upon undisputed facts which established the defendant had set fire to his own uninsured van where no other property was damaged by the burning of the vehicle. The court held: “[Unlawfully] must mean something more than the mere burning of one’s own property without any danger or damage to others or the property of others, nor intent to inflict such damage.”

This strained interpretation of the arson statute implies that burning of one’s own property

² See *Stevens v. State*, 226 So. 3d 787 (Fla. 2017), in which the court held second-degree arson is a permissive lesser included offense of first-degree arson, abrogating *Higgins v. State*, 553 So. 2d 177 (Fla. 1st DCA 1989), which implied second-degree arson could be a necessarily included offense of first degree arson in all cases instead of the limited circumstances of that case. In *Stevens*, as in *Higgins*, a second- degree arson instruction is improper when the structure in question is indisputably a dwelling.

³ 406 So. 2nd 108 (Fla. 5th DCA 1981).

is lawful where there is no actual or intended damage or danger of damage to other persons or their property. Such a reading of the statute would suggest the burning of one's own property is "lawful" in the absence of such circumstances. Clearly, this is contrary to the intent of the statute and public policy against the deliberate burning of property under any circumstances. The inherent damage of uncontrolled fire is self-evident and should be recognized. A later decision of the 1st DCA disagreed with the rationale of the *Mayle* decision. This case of *State v. McBride*⁴ involved an appeal of the dismissal of an information charging arson where the defendant burned his vehicle on a state highway roadside. The *McBride* court disagreed with the 5th DCA's view in *Mayle* and distinguished its holdings, first by the fact that *Mayle* involved a (c)(4) motion while *McBride* involved a dismissal of the information based upon the facial sufficiency of the charge. While the 1st DCA reversed the dismissal of the information, it did note the state would be required to prove "unlawfulness" in the burning of the vehicle by establishing three things:

1. injury to a person or damage to property; or
2. the intent to cause such injury or damage; or
3. a danger of such injury or damage present in the burning of the vehicle.

The information in the *McBride* case had charged the defendant with unlawfully burned his vehicle and damaged the surrounding vegetation which was the property of the U.S. Department of Agriculture Forestry Service (USDA). The 1st DCA noted the element of "unlawfulness" would be satisfied by proof of damage to the surrounding vegetation or by proof of the defendant's intent to defraud his insurance carrier or "otherwise". Thus, the information was held to be legally sufficient by charging the crime of arson under the statutory language but noted the state would be required to prove the element of "unlawfulness". In a case decided a few years after *McBride*, the 1st DCA held that to satisfy "unlawfulness" element of this section, the State only needs to show that willful act was done without legitimate, lawful purpose. *Berry v. State*, 566 So.2d 22 (Fla. 1st DCA 1990), rev. denied, 576 So.2d 284. (Note: The pre-1979 version of the arson statute required proof of malicious and unlawful burning.)

Finally, the statute includes the concept of "felony arson" which is similar to the crime of felony murder which the criminal justice system has long used as a deterrent to certain violent crimes. Under this section of the arson statute, a fire of accidental origin may actually give rise to a charge of arson. The law provides that a person in the process of committing any felony offense who causes a fire to occur – even accidentally – is guilty of the crime of arson, e.g., a burglar knocks over a burning candle when exiting the burglary scene, setting fire to the structure. This was a controversial provision of the arson statute when it was amended in 1997, but it has never been challenged on its constitutional validity. It is intended to deter criminal conduct by holding a felon responsible for anything that happens while perpetrating a felony. Interestingly, in *State v. Williams*, 254 So. 2nd 548 (Fla. 2nd DCA 1971), where the defendant conspired with and procured victim to unlawfully burn buildings in a hunting camp and the victim went into the camp site alone and was fatally burned in ensuing fire while attempting to commit the arson, the court held the felony-murder statute was not applicable. *State v. Williams*, 254 So.2d 548 (Fla. 2d DCA 1971).

B. Arson cases are often heavily circumstantial

⁴ 519 So. 2d 716 (Fla. 1st DCA 1988).

By its nature, arson is a “stealth” crime, carried out to evade detection, with evidence often being consumed by fire and contaminated by fire suppression efforts. Even with the advent of traffic cams and the prevalence of home and business security cameras, it is rare for an investigator to obtain a clear videotape of a defendant setting a fire. And even when it is uncontroverted that a fire was deliberately set, tying it to a specific defendant may be entirely circumstantial. In a circumstantial evidence case, the sufficiency of the evidence to exclude all reasonable hypotheses of innocence is decided at trial, after all of the evidence has been presented.

For example, in *Hart v. State*, 524 So. 2d 707 (Fla. 4th DCA 1988), it was undisputed that the fire, set with a flammable liquid and timing device while the defendant’s home, which was titled in his sister’s name, was secured, was arson. However, proof of the defendant’s involvement in the fire was based on circumstantial evidence, including the fact the defendant was experiencing financial and domestic difficulties, the home was heavily mortgaged, the defendant had overstated the home’s purchase price and failed to disclosed the alarm system was inoperable to the insurance agent when purchasing the dwelling policy, the defendant was seen in the area prior to the fire, the defendant and his sister were the only persons with keys, and the defendant coached his sister prior to her deposition in the related civil case. The appellate court upheld the trial court’s guilty finding on the arson and burning to defraud charges holding that there was substantial competent evidence to support it.

Contrast *Hart* with *Perez v. State*, 120 So. 3d 168 (Fla 2nd DCA 2013), where appellate court reversed the defendant’s arson and burning to defraud convictions, finding the evidence insufficient to support them. Although the cause of the fire was debated at trial, on appeal, only the sufficiency of the evidence that the defendant set the fire at his house, which he claimed to have discovered upon arriving home from visiting a cousin, was disputed. There was no evidence the house was locked at the time the fire occurred suggesting someone other than the defendant could have entered the house to set it. There was no evidence any items, including valuables, were removed from the house prior to the fire. Because investigators did not submit the defendant’s clothing for testing, there was no evidence he had come into contact with any ignitable liquid. Thus, the state failed to exclude all reasonable hypotheses of innocence.

II. Related Florida Statutes in Arson Cases

A. Fire Bombs – Florida Statute 806.111:

Under section 806.111, Florida Statutes, it is a 3rd degree felony to do virtually anything that puts a person in contact with a fire bomb. Conviction of this crime can result in enhanced penalties in the federal system as it is considered a crime of violence for career offender purposes as it entails conduct presenting serious potential risk of physical injury to others. *U.S. Jackson*, 199 F. 3d 1279 (11th Cir. 2000).

(1) *Any person who possesses, manufactures, transports, or disposes of a fire bomb with intent that such fire bomb be willfully and unlawfully used to damage by fire or explosion any structure or property is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.*

(2) *For the purposes of this section:*

(a) “Disposes of” means to give, give away, loan, offer, offer for sale, sell, or transfer.
(b) “Fire bomb” means a container containing flammable or combustible liquid, or any incendiary chemical mixture or compound having a wick or similar device capable of being ignited or other means capable of causing ignition; but no device commercially manufactured primarily for the purpose of illumination, heating, or cooking shall be deemed to be such a fire bomb.

(3) Subsection (1) shall not prohibit the authorized use or possession of any material, substance, or device described therein by a member of the Armed Forces of the United States or by firefighters, police officers, peace officers, or law enforcement officers so authorized by duly constituted authorities.⁵

First, virtually any act which puts a person in contact with a fire bomb that is intended to be used for an unlawful purpose will come within the scope of this law.

Second, it requires a specific intent that the fire bomb be used willfully and unlawfully to damage a structure or property by fire or explosion. This means that voluntary intoxication may be a defense to this crime.

Third, this statute covers contemplated acts of arson which go beyond the arson statute under Florida Statute 806.01. In talking about damage by fire or explosion to a structure or “property”, it is not limited to the contents of a structure referenced in the 1st degree arson statute but instead covers “any property”, i.e., virtually anything, whether or not it was considered the contents of any kind of structure.

Fourth, proof of this offense will most likely require expert testimony establishing that the device was a “fire bomb” within the meaning of the statute. The statute defines the term fire bomb as: “any kind of container holding flammable or combustible liquid, or any incendiary chemical mixture or compound having a wick capable of being ignited or with some other means of causing ignition.” The statute specifically exempts from this definition devices used primarily for illumination, heating or cooking such as lanterns, portable heaters and camp stoves. See *Moore v. State*, 787 So. 2d 71 (Fla. 2nd DCA 2001)(evidence that defendant possessed a container with a wick or similar device without proof that it contained a flammable or combustible liquid was insufficient to sustain conviction for possession of a fire bomb.)

B. Burning to Defraud – Florida Statute 817.233:

Section 817.233, Florida Statutes, makes it a 3rd Degree Felony to commit or to attempt to commit arson, for the purpose of collecting insurance proceeds:

*Any person who willfully and with intent to injure or defraud the insurer sets fire to or burns or attempts so to do or who causes to be burned or who aids, counsels or procures the burning of any building, structure or personal property, of whatsoever class or character, whether the property of himself or herself or of another, which shall at the time be insured by any person against loss or damage by fire, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.*⁶

⁵ Section 806.111, Florida Statutes(2017).

⁶ Section 817.233, Florida Statutes(2017).

First, a strict reading of the statute suggest that it will only apply to situations where the property is set on fire or burned. This is in contrast to the arson statute which includes damage by both fire or explosion. In certain situations, this could make a difference.

Second, the type of property damaged by fire under this statute is more expansive than the property referenced under Florida Statute 806.01, as it is not limited to dwellings, structures which are normally occupied or contents within a dwelling.

Third, this is a specific intent crime and voluntary intoxication may be a defense.

Fourth, in virtually every arson-for-profit case, proving the charge of arson will automatically prove a charge of burning to defraud.

This offense should generally be charged when an individual is arrested in a case of arson-for-profit. It is not a lesser included offense of arson. It is well-settled law that it is a separate offense for which an individual may be prosecuted and convicted.

C. False and Fraudulent Insurance Claims – Florida Statute 817.234:

This statute makes it a felony offense (there is no misdemeanor insurance fraud under Florida law) for anyone to be involved with presenting a false and fraudulent insurance claim. As this is a separate crime from arson and burning to defraud, a defendant can be charged and convicted with all three crimes for a single fire.

The severity of the crime depends upon the value of the property involved in the claim even if the claim is denied. If the amount of the fraudulent claim presented is less than \$20,000, it is a 3rd degree felony; more than \$20,000 but less than \$100,000, it is a 2nd degree felony; more than \$100,000, it is a 1st degree felony.

A person commits insurance if that person, with the intent to injure, defraud, or deceive any insurer:

- 1. Presents or causes to be presented any written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy or a health maintenance organization subscriber or provider contract, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim;*
- 2. Prepares or makes any written or oral statement that is intended to be presented to any insurer in connection with, or in support of, any claim for payment or other benefit pursuant to an insurance policy or a health maintenance organization subscriber or provider contract, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim.⁷*

A significant 1999 amendment to this law established a five-year statute of limitations for the prosecution of insurance fraud, regardless of the claim value presented or the felony degree. This is one of the longest statutes of limitations for any criminal offense under

⁷ Section 817.234, Florida Statutes (2017).

Florida law.

The insurance fraud statute is a very broad and far reaching law and applies to any type insurance claim, including automobile, property, life and health insurance claims. A number of important points about this statute should always be considered.

First, almost anything done in support of a claim will trigger the statute, even so much as notifying the insurer to report the claim. A statement in the initial claim report, such as “I don’t know what happened” (when the person knows exactly what happened) or “I have lost everything” (when property was removed before the loss), can be considered a false or misleading statement within the law’s meaning.

Second, it is a specific intent crime for which voluntary intoxication may be a defense. However, unless the defendant remains inebriated throughout the processing of their insurance claim, such a defense will be inapplicable. It is also important to remember that the defendant must have the specific intent to defraud the insurer even if the insurer is not actually defrauded.

Third, anyone who presents a fraudulent claim, causes somebody else to present a fraudulent claim, or who simply provides the false information later used in a fraudulent claim, can be charged with this offense. Somebody who decides to “help a friend” by preparing a forged or fictitious invoice or providing an alibi for a claimant can be prosecuted. A public adjuster or vendor under an assignment of benefits who knowingly submits a fraudulent claim can be charged with this offense.

Fourth, attorneys, doctors, chiropractors and hospital employees, both public and private, who participate in fraudulent insurance claims are specifically targeted for prosecution under this statute. Any of these professionals who knowingly and willfully assist, conspire with or urge a claimant to violate this statute can be charged with insurance fraud and face administrative disciplinary action against their licenses as well. Moreover, when an attorney participates in a fraudulent claim which benefits third parties other than the claimant, those third parties themselves can be prosecuted under this statute if they actually receive the insurance benefits obtained by fraud.

Fifth, not only is fraud perpetrated by an insured or claimant against an insurance company a crime, but fraudulent conduct by an insurer or adjusting firm or their representatives in an effort to deceive a claimant during the claim process is also a crime under Section 817.234(7)(b), Florida Statutes, which states:

The provisions of this section shall also apply as to any insurer or adjusting firm or its agents or representatives who, with intent, injure, defraud, or deceive any claimant with regard to any claim. The claimant shall have the right to recover the damages provided in this section.

Sixth, in addition to any recovery an aggrieved insurer may have as a victim under the Florida criminal restitution statutes, Section 817.234(5), provides a civil cause of action to recover damages, as follows:

(5) Any insurer damaged as a result of a violation of any provision of this section when there has been a criminal adjudication of guilt shall have a cause of action to recover compensatory damages, plus all reasonable investigation and litigation

expenses, including attorneys' fees, at the trial and appellate courts.

Finally, when investigating a claims fraud case, there is always the possibility of application fraud, obtaining the policy with the premeditated intent to later file a fraudulent insurance claim. As part of that plan, the defendant may have concealed or misrepresented material facts, such as a prior loss history, the true identity of the owner, the identity of the household members who may have access to an insured vehicle, where an insured vehicle is garaged, the quantity or value of the contents contained in the structure, the occupancy of the structure, and a myriad of other factors which, if disclosed, would have changed the insurer's decision to provide coverage.

D. False and Fraudulent Applications – Florida Statute 817.234:

Florida is one of only a small number of states where application fraud is considered a criminal offense. Under, Florida Statute 817.234, is a felony if a person:

*Knowingly presents, causes to be presented, or prepares or makes with knowledge or belief that it will be presented to any insurer, purported insurer, servicing corporation, insurance broker, or insurance agent, or any employee or agent thereof, any false, incomplete, or misleading information or written or oral statement as part of, or in support of, an application for the issuance of, or the rating of, any insurance policy, or a health maintenance organization subscriber or provider contract; or knowingly conceals information concerning any fact material to such application.*⁸

Application fraud is often not discovered until a claim is submitted. If intentional fraud in the application can be established, a defendant may be separately charged in addition to claims fraud under the same statute and may be convicted of application fraud even if they are not convicted of the other charges.

In order to prove that the misrepresentation, fraud or omission was material to the insurer's decision to issue the policy, coverage or charge a certain premium, and that the insurer would not have done so if the true facts had been known, the fraud investigator should obtain a sworn statement to that effect from an underwriting representative for the insurer that the misrepresentation was material to the victim insurance company.

An insured will sometimes claim that their agent filled out the application and inserted false information without the insured's knowledge before the insured signed it. In order to sustain an application fraud conviction in a criminal case, the State must prove the insured knowingly made the application misrepresentation, either personally or by providing the agent with the false information inserted in the application.

III. Other Statutes

A. Grand Theft – Florida Statute 812.014

Depending upon the circumstances of the case, there are almost unlimited possibilities for the filing of additional criminal charges. Sometimes an insurance company will immediately issue some money to an insured after a fire to help them settle in temporary quarters. When it

⁸ *Ibid.*

is later proved that this person is responsible for the fire and/or fraudulently reported the claim, a charge of Grand Theft⁹ could be brought. Certainly, where a claim is paid by an insurance company and it is only later discovered that the person was responsible for the fire, a charge of grand theft would be appropriate. Under the grand theft statute, even an unsuccessful attempt at theft is considered a violation of the statute. Thus, even when a claim is denied and no payment is made, a charge of grand theft can be filed.

B. Preventing or Obstructing Extinguishment of a Fire – Florida Statute 806.10

It is a common practice in arson-for-profit cases, especially where a professional “torch” is involved, to disable or disconnect a fire alarm system, hydrant or sprinkler system in a building. Even without any proof of involvement in the fire, such a person can be prosecuted under section 806.10, Florida Statutes for “Preventing or Obstructing the Extinguishment of a Fire”, a 3rd Degree Felony.¹⁰

C. Injuries/Death – Florida Statute 806.031

Unfortunately, fire fighting and investigations are dangerous. In cases where the fire was caused by arson, it is especially reprehensible that somebody should be injured as a result. Section 806.031, Florida Statutes, provides criminal penalties for an arsonist whose actions result in any bodily harm to anybody. This is without regard to any specific intent on the part of the arsonist that somebody should be injured; if an injury occurs, the crime has been committed. Where there is any injury at all, the arsonist may be charged with a 1st Degree Misdemeanor offense under section 806.031(1), Florida Statutes. If the injury caused by the arsonist result in “great bodily harm, permanent disability or disfigurement” to a person, regardless of specific criminal intent, it is a 2nd Degree Felony offense punishable by imprisonment for up to fifteen (15) years.¹¹ Keep in mind that almost every burn injury results in some kind of scar constituting “permanent disfigurement”. This statute specifically states that a conviction for the underlying arson is not necessary.

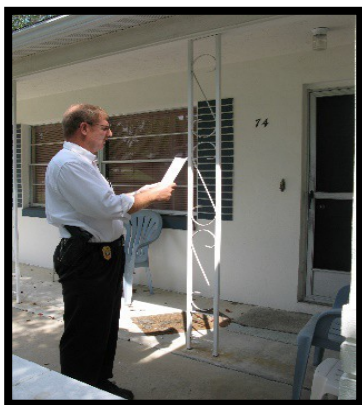
IV. Conclusion

As demonstrated by the numerous statutory violations which may be involved in an arson, especially when it is part of an insurance fraud scheme, it might be tempting to “overcharge” a defendant with every conceivable criminal offense available. However, doing so may result in confusion when presenting the case to the prosecutor as well as a jury. For that reason, a fire investigator should be familiar with the elements of all potential crimes and focus on those criminal offenses which will be the most readily proven by the available evidence, ensure a cohesive and successful prosecution, and which will carry the most severe penalties upon conviction.

⁹ Section 812.013, Florida Statutes(2020).

¹⁰ Section 806.01, Florida Statutes(2017).

¹¹ Section 806.031, Florida Statutes (2017).



Unit 1

Lesson 3: Search and Seizure Issues in Fire Cases – The Fire Scene and Beyond

Photograph of a BFAEI Detective reading a search warrant at a homicide scene in Beverly Hills, FL. Courtesy of Det. Curt Clendenney, Bureau of Fire, Arson & Explosives Investigations (2008)

Enabling Learning Objectives:

At the end of this session, the student will be able to:

1. Explain the Fourth Amendment protections for citizens' privacy and possessory interests.
2. Articulate how courts view warrantless searches and seizures.
3. Describe the three types of law enforcement searches.
4. Explain the emergency or exigent circumstances exceptions to the warrant requirement.
5. Identify the key concepts of *Michigan v. Tyler*, including when warrantless searches by fire officials or law enforcement officers are permitted.
6. Explain administrative search warrants and the absence of a "probable cause" requirement.
7. Identify key concepts of *Michigan v. Clifford*, including expectation of privacy when dealing with private residences.
8. Define how courts define "consent" in search and seizure jurisprudence.
9. Explain which parties can give permission to search in various situations.
10. Explain "common authority" in relation to giving consent to search.
11. Describe why the method of obtaining consent is critical in a consent search.
12. Identify how to avoid or resolve problems involving consent searches.
13. Explain whether an investigator is required to advise a subject of the right to refuse consent.
14. Explain "scope" of search in terms of warrant or consent searches.
15. Articulate the difference between the "plain view" and "open view" warrant exceptions during fire scene investigations and at locations outside the fire scene, to include searches and seizures involving a suspect's clothing.
16. Describe how courts are dealing with searches and seizures involving modern technology, such as cell phones, computer hard drives, and "the cloud".

The area of search and seizure has created more problems for investigators than any other area of the law. Entire cases have been lost due to a violation of a person's Fourth Amendment rights against "Unreasonable Search and Seizure by the Government". In arson investigations, the problem is particularly significant. While many criminal cases do not

involve a search or seizure, virtually every arson case involves a search of the fire scene and seizure of potential evidence. Importantly, when the search of a fire scene or other pertinent location and seizure of potential arson evidence is found to be in violation of a person's rights, the suppression of such evidence may doom an arson prosecution. Without physical evidence from the scene of an incendiary fire, the arson "*corpus delicti*" (body of the crime) cannot be established. Without evidence establishing the identity of the arsonist, a defendant's culpability for the crime cannot be proven. Therefore, it becomes particularly important for fire investigators to understand the limitations on searches and seizures at and beyond fire scenes.

Overview

The concept of searches and seizures involves several factors. *First*, the constitution only protects against "unreasonable" searches and seizures. *Second*, the Fourth Amendment only protects against unreasonable searches and seizures by an "agent of the government" and not against searches and seizures, reasonable or unreasonable, by private individuals or businesses. *Third*, any search and seizure conducted without a search warrant is presumed to be illegal. It is up to the investigator to justify why he or she conducted a search without a warrant. The Fourth Amendment to the U.S. Constitution states:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

I. Methods of Conducting a Search

A law enforcement search and seizure can be conducted in three ways:

A. Under the Authority of a Search Warrant

This is duly issued by a judge upon a sworn affidavit establishing probable cause to search a premises, property, area or item.

(1) Affidavit

The affiant is the law enforcement officer's statement used to establish probable cause. It sets out the warrant's foundation and will include:

- a. What the affiant wants to search for;
- b. Where/what the affiant wants to search;
- c. Who is in control of the items or premises;
- d. Why they are at that particular place and how the affiant knows this; and
- e. what facts in support of law violations give affiant justification for the search.¹²

¹² McDonald, T.M., & Morgan, K.A. (2010). Bureau of Fire and Arson Investigations, Search Warrant Training.

(2) Search Warrant

The search warrant (Attachment A) is the portion of the document that, upon certification of the judge, establishes that the affidavit has met the legal requirement of probable cause and authorizes law enforcement to search the specific location for the specific items outlined in the affidavit. It is a court order that authorizes the search and seizure of those items, specifies the location and time the search may be conducted and authorizes law enforcement to search for and seize those items.¹³

(3) Inventory and Return

The inventory and return portion of the document in which the affiant certifies that the premises described in the search warrant was searched and what was seized.¹⁴

Upon obtaining a search warrant, law enforcement must follow its order. If, during the search, officers discover additional evidence that is outside the scope of the warrant, an amended warrant must be obtained to seize those items and to search further for additional items within the scope of the amended warrant.¹⁵ For example, officers are not authorized to seize evidence of a separate crime or search a separate dwelling unit on the premises that is not separately identified in the warrant.¹⁶ Law enforcement must stay within the scope of the warrant.

Upon arrival, officers must ensure officer safety by securing all parties present, as well as the premises. Officers must read and provide a copy of the search warrant to the person who is in custody of the premises being searched, or post a copy of the warrant at the site if no one is present.¹⁷ The lead investigator must document the identity of the person who read or posted the warrant, as well as the person to whom it was read in the investigative report.

As mentioned above, a search pursuant to a search warrant is not immune from a challenge that the areas searched or items seized were outside the scope of the warrant. For example, in *Rodgers v. State*, 264 So. 3d 1119 (Fla. 2d DCA 2019), law enforcement obtained a warrant to search certain structures on property believed to be the source of an IP address utilized to share child pornography. Specifically, the warrant authorized the search of a single-story block residence, curtilage and vehicles on the property. During the search, over the occupant's objection, police forcibly entered an RV located at the address listed on the warrant, but not separately identified, and discovered a broken computer. Although police obtained a separate warrant before seizing and examining the computer, which contained incriminating evidence, Rodgers' conviction for possession of child pornography was subsequently overturned. The appellate court specifically found that the initial warrantless entry into the RV, which was a separate residence not mentioned or identified in the warrant, exceeded the warrant's scope and should have been suppressed.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Rodgers v. State*, 264 So. 3d 1119 (Fla. 2d DCA 2019).

¹⁶ *Ibid.*

¹⁷ McDonald, T.M., & Morgan, K.A., *supra*.

However, courts will uphold an extensive search of the premises described in a warrant as long as the areas searched could reasonably be construed to contain the object of a search. See *Davis v. State*, 217 So. 3d 1006 (Fla. 2017), upholding photographs taken of defendant’s entire home pursuant to a warrant to search for a missing person’s credit card that was believed to have been used by the defendant.

B. Conducted Without a Warrant

A search can be conducted without a warrant. But, is presumed to be illegal and can be upheld only if it is justified under one of the recognized exceptions to the warrant requirement of the Fourth Amendment.

a. Exigent Circumstances

There are a number of warrantless search exceptions which have been recognized by courts over the years. The most widely used exception is the “emergency doctrine” or the “exigent circumstance” exception. This exception permits a warrantless search where the circumstances are such that it is either impossible or impractical to obtain a search warrant before conducting the search.¹⁸ It is this exception to the warrant requirement, which has been recognized as the justification for a warrantless search of a fire scene, to determine its origin and cause. As a general rule, there is no requirement that police or fire officials obtain a search warrant to search a fire scene to determine origin and cause. However, if those same officials conduct the search for some other purpose or conduct it sometime after it reasonably could and should have been conducted, it will not be upheld by a court.

The applicability of the exigent circumstance exception was discussed by the United States Supreme Court in two landmark cases in the area of fire scene investigations: *Michigan v. Tyler* and *Michigan v. Clifford*. All fire investigators must be familiar with these cases.

Michigan v. Tyler, 436 U.S. 499 (1978)¹⁹, involved a Michigan furniture store fire reported sometime after midnight. The responding firefighters had controlled, but not extinguished the fire by 2:00 a.m., when the chief arrived. Upon his arrival, he was told that two plastic containers had been found inside the building which appeared to contain a flammable liquid. The chief looked at those containers, and suspecting arson, called a police detective to the scene. This detective seized the containers and took them into evidence. It was impossible to search the building at that time due to the heat, steam, and darkness. The fire was not fully extinguished until 4:00 a.m., when fire officials left the building unattended and unsecured.

About 8:00 a.m. that same morning, fire officials began returning to the scene. The first officials to arrive made a quick walk-through but did not find anything they considered significant nor did they take anything into evidence. At about 9:00 a.m., the police detective returned with an assistant chief, and the two thoroughly searched the building and seized several items, including carpet samples exhibiting flammable liquid pour patterns. Nothing else was done that day.

¹⁸ *Ker v. California*, 83 S.Ct. 1623 (1963) (upholding warrantless entry and seizure of illegal drugs by police as justified by exigency of preventing imminent destruction of evidence.)

¹⁹ *Michigan v. Tyler*, 436 U.S. 499 (1978)

Three days later, a state arson investigator and other officials arrived at the scene and searched the building, seizing a number of items as evidence. The arson investigator returned the following day, four days after the fire, and seized more evidence, then returned on the seventh day post-fire and took more evidence into custody. On the twenty-fifth day after the fire, he returned once more and seized additional evidence.

The government admitted all of this evidence at the trial at which Tyler was convicted. At no time during the fire investigation had investigators obtained a search warrant of any kind and Tyler never gave consent to any of the searches of his building, nor was he ever asked to do so.

Tyler appealed his conviction to the Michigan Supreme Court, which granted a new trial based on the admission of illegally seized evidence. While the court said that the two jugs of flammable liquid seized during fire suppression efforts could be admitted in evidence as they were in plain view,²⁰ it found every other item seized afterward to be illegally seized without a search warrant. The state appealed this decision to the United States Supreme Court.

The Supreme Court agreed with some of Michigan Supreme Court's findings but disagreed with others. More importantly, the Court provided a very comprehensive discussion of the concept of fire scene searches based on several significant observations.

First, an active fire scene is an emergency or exigent circumstance within the meaning of the Constitution's Fourth Amendment. A warrant is not required for the fire department to go into a building to put out the fire. At the same time, there is no warrant required for an investigator to go in and determine origin and cause while the fire department is still at the scene. Significantly, the court went on to state that even after the fire has been extinguished and the fire department has withdrawn from the scene, it can be searched to determine origin and cause without requiring a warrant. The court stated that such searches could be conducted for a "reasonable time" after extinguishment, although the court did not spell out what it meant by "reasonable time". The best understanding is that a "reasonable time" means the first reasonable opportunity to search the scene. In a major structure fire, for example, the reasonable time would include enough time for the fire scene to cool down, as no court will require fire and police officials to search through an actively burning fire scene debris.

After a "reasonable time" has passed, a warrant is required to conduct any further search of the property. However, if the search is strictly for the purpose of determining origin and cause, a traditional search warrant will not be required. Instead, an "administrative search warrant," discussed below, will suffice.

The U.S. Supreme Court decision of *Michigan v. Clifford*,²¹ was a "sequel" to the *Tyler* decision that clarified some of the *Tyler* rulings. In *Clifford*, an early morning fire occurred at a private residence while the owners were out of town. Firefighters extinguished the fire at 7:04 a.m., and all fire officials and police left the scene. Sometime after 12:00 p.m. that day, a team of arson investigators arrived at the residence for the first time to investigate the origin and cause of the fire. On their arrival, they found a work crew boarding up the house and

²⁰ *Coolidge v. New Hampshire*, 91 S.Ct. 2022 (1971) (holding under certain circumstances, police may seize evidence in "plain view" without a warrant).

²¹ 464 U.S. 287 (1984).

pumping water out of the basement. The crew had been sent out by the owner's insurance agent at the owners' request. The arson investigators decided to go into the house without a warrant or the owners' consent to conduct their investigation despite the activities of the work crew securing the property. They began their search in the basement of the house and found two cans of Coleman fuel in a crock pot attached to an electrical timer. The investigators recognized the use of these materials as an incendiary device and seized them. They then extended their search beyond the basement to the upper portions of the house and seized additional evidence of arson. Using this seized evidence at trial, the state convicted Clifford of arson. The Michigan Supreme Court reversed his conviction and threw out all the evidence based upon an illegal search, specifically holding that there was no emergency or exigent circumstances which justified the warrantless search of the property.

The U.S. Supreme Court again agreed and disagreed with some of the Michigan Court's findings. However, in the final analysis, the Court concluded that the entire search had been illegal and excluded all the evidence taken from inside the house. The high court found that in the situation of a fire at a private residence, there are especially strong expectations of privacy. Since the owners of the property had demonstrated their expectation of privacy by boarding up the house, it was clear that the violation of that expectation of privacy was illegal. The time delay between the fire extinguishment and the arson investigators' search was too long to be considered a "reasonable time" under *Tyler*. Also, unlike *Tyler*, this was not just the search's continuation, but its inception long after the fire was out. To be a legal warrantless search under *Tyler*, it should have been started immediately after the fire was extinguished before the owners began boarding it up.

The Court also noted that once the incendiary device was found, the fire's cause had been established. So, that any further search of the property was a search to find evidence of a crime, which requires a traditional search warrant or consent. One of the justices commented that the property owners should have been given fair advance notice of the planned search so that they could be present if they so desired. This, of course, assumes that the owners would have consented to such a search in the first place. Since law enforcement had no warrant or consent and could articulate no exigent circumstances, the search was found to be illegal.

The key takeaways from *Tyler* and *Clifford* are that fire investigators may enter and remain on a fire scene without a warrant for a reasonable time after fire extinguishment, that is, until the fire scene has cooled down and smoke has dissipated sufficiently for investigators to conduct a meaningful search to determine the fire's origin and cause. After a reasonable time has passed or the property owner/occupant has asserted their expectation of privacy, consent or a warrant is required to conduct any further search of the property to determine origin and cause. If the purpose of the search is to determine origin and cause, an administrative warrant will likely suffice. If the purpose of the search is to obtain evidence of a crime, a traditional search warrant based on probable cause must be obtained.

b. Plain View and Open View

Other exceptions to the warrant requirement that may arise in an arson investigation are the "plain view" and "open view" exceptions. Although referred to interchangeably at times, these are two separate and distinct exceptions.

The “**plain view**” doctrine was first articulated by the U.S. Supreme Court in *Coolidge v. New Hampshire*²² in 1971. In that case, police arrested Coolidge for a murder at his home and impounded and searched his vehicle pursuant to a search warrant for the car parked in Coolidge’s driveway at the time of his arrest. A jury convicted Coolidge of the murder based partially on evidence obtained from the vehicle. Coolidge appealed his conviction based on his contention that the search of his vehicle was illegal. He contended the warrant was invalid and that no exceptions to the warrant, including the “plain view” doctrine, justified the search.

The Supreme Court agreed with Coolidge that the search was illegal on a number of grounds,²³ and set forth the requirements for the application of the “plain view” doctrine, stating that under certain circumstances, police may seize evidence without a warrant. However, the police must be in a constitutionally protected area pursuant to a valid search warrant or one of the recognized exceptions to the warrant requirement when they inadvertently encounter the incriminating object. Absolute conditions precedent to the application of the plain view doctrine are a “prior valid intrusion,”²⁴ that is, that law enforcement’s intrusion into a constitutionally protected area is justified by a valid warrant or a recognized exception, such as exigent circumstances, and that discovery of the evidence is inadvertent.²⁵

In *U.S. v. Veltmann*, 869 F.Supp. 929 (M.D. Fla. 1994), a Florida federal court applied the *Tyler* and *Clifford* reasoning to an arson death case, and also discussed the “plain view” doctrine. At 9:41 p.m. on January 7, 1990, a fire was discovered at Carl and Elizabeth Veltmann’s home. After extinguishing the fire at 10:15 p.m., police and fire officials discovered Mrs. Veltmann – who subsequently died – unconscious inside. After some of the smoke had cleared, police and fire officials conducted an initial search and photographed certain items of evidence, and made observations indicating three points of origin. By 3:00 a.m., investigators had determined the fire was caused by arson and all officials left the scene by 5:00 a.m., but police posted a guard to secure the premises.

Fire investigators returned at 9:00 a.m. on January 8, 1990, when visibility was clear, and made more observations, took more photographs, videotaped the entire house, and seized evidence. They also summoned a telephone company employee to the scene to determine why the alarm had not notified the alarm company of the fire. Although the Veltmann’s son, Christopher, had arrived at the house at 2:00 a.m. on January 8, 1990, no one asked him if he objected to investigators reentering the house. The same was true when he appeared at the fire station later that morning, although investigators told him the scene investigation was

²² 91 S. Ct. 2022 (1971).

²³ The Court held the search warrant itself was invalid as it was issued based on the New Hampshire Attorney General’s determination of probable cause. However, the A.G. was not impartial as he was running the investigation and later prosecuted the case. Furthermore, there were no exigent circumstances, the seizure was not incident to Coolidge’s arrest, nor was it inadvertently discovered in plain view.

²⁴ *Ensor v. State*, 403 So. 2d 349 (Fla. 1981).

²⁵ “Four factors must be satisfied in order for the plain view doctrine to apply: (1) the object must be in plain view; (2) the officer must be legally present in the place from which the object can be plainly seen; (3) the object’s incriminating nature must be immediately apparent; and (4) the officer must have a right of access to the object.” *United States v. Garcia*, 496 F.3d 495, 508 (6th Cir. 2007). “What the ‘plain view’ cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused.” *Coolidge, supra*. That is, an officer who “is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object’ may seize it, so long as the object’s incriminating nature is “immediately apparent.” *Id.*

continuing and he voiced no objection. When Carl Veltmann spoke to the arson investigator at noon that day and was told investigators were returning to the house later that day, he likewise voiced no objection. However, no one ever asked for or obtained explicit consent or a warrant for the searches.

After Carl and Christopher Veltmann were convicted by federal prosecutors of malicious destruction by fire of the house while Elizabeth Veltmann was inside, and mail and wire fraud for submission of insurance claims related to the fire, their convictions were overturned on various grounds and remanded to the federal trial court for a new trial. *U.S. v. Veltmann*, 6 F.3d 1483 (11th Cir. 1993). On remand, they moved to suppress evidence and photographs obtained by investigators during their various post-fire searches of the residence.

The trial court granted and denied the motions in part. The court held the warrantless entries by fire and police personnel into the Veltmann residence between 9:41 p.m. and 3:00 a.m., were permissive as the fire itself justified the fire officials' entry as well as their remaining on the premises for a reasonable time to determine the cause and origin. Therefore, their observations and photographs taken during that time were admissible.

The court likewise found the reentries after 9:00 a.m. on January 8th, after posting a guard to indicate their intent to continue the investigation when the smoke had completely cleared and it was light, did not violate the Fourth Amendment, as they were continuations of the original origin and cause investigation. Unlike the *Clifford* homeowners, the Veltmanns did nothing during that time period to assert their privacy interests. However, while the reentries may not have been illegal, because investigators had already determined the origin and cause of the fire, any searches and seizures made after 9:00 a.m. still had to be examined for legality.

Ultimately the court ruled the evidence relating to the alarm system failure must be suppressed as evidence of the arson's commission, not the fire's origin and cause. Furthermore, any observations or discovery of evidence by the phone company employee brought in by the police was not in plain view, and the employee, an agent of the police, was not there legally in the absence of a warrant or consent. The court did allow evidence found in plain view by fire investigators engaged in the determination of origin and cause during the reentries when the smoke had cleared to be admitted into evidence.²⁶

In its ruling, the court specifically noted the three *Clifford* factors which govern the "constitutionality of warrantless and nonconsensual entries onto fire-damaged premises", to-wit: (1) whether there are legitimate privacy interests protected by the Fourth Amendment in the fire-damaged property; (2) whether exigent circumstances justify the government intrusion notwithstanding any reasonable expectations of privacy; and (3) whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity. Even if an emergency exists, a search to gather evidence of the origin and cause may not justify a search for criminal activity once the cause and origin have been determined.²⁷

²⁶ At their retrials, both Carl and Christopher Veltmann were acquitted of all charges.

²⁷ *Clifford*, *supra*.

The “**open view**” doctrine was explained by the Florida Supreme Court in *Ensor v. State*, *supra*, as distinct from the “plain view” exception enunciated in *Coolidge*. While the latter involves law enforcement’s intrusion into a constitutionally protected area, such as a private home or business, when contraband or incriminating evidence is discovered, the former does not.

Instead, the open view exception is implicated when the police and that object are in a non-constitutionally protected area, e.g., the police find a bag of suspected cocaine in an alley while on routine patrol. This “non-intrusion” situation is one category of “open view” where seizure and analysis of the evidence would likely not be suppressed.

Another “open view” situation involves a “pre-intrusion” where law enforcement is located outside a constitutionally protected area and discovers incriminating evidence in open view. An example would be a police officer standing on a public sidewalk looking into a private home through a curtainless window and observing a gun sitting on a table inside. While entry into the protected home would require a warrant supported by the officer’s observations, the initial observation would not violate the Fourth Amendment.

c. Independent Source Doctrine

The independent source doctrine is closely related to the inevitable discovery doctrine, which itself is an exception to the exclusionary rule. The inevitable discovery doctrine permits admission of challenged evidence obtained during an unlawful search if the preponderance of the evidence establishes that such information ultimately or inevitably would have been discovered by lawful means. *O’Hare*, 263 So. 3d at 259 (citing *Nix v. Williams*, 467 U.S. 431, 444 (1984)).

In *Bender v. State*, ---3 So2d--- (5th DCA 2023) a motion to suppress was filed in court against a warrant for the search of defendant’s residence obtained after defendant was arrested by Orange County law enforcement for violating an injunction, which was based on an affidavit written by Volusia County law enforcement, which had jurisdiction over a murder defendant was suspected of committing. The appellate court found that no error existed in denying defendant’s motion to suppress. The court found that the affidavit submitted to obtain the warrant contained information learned when Orange County law enforcement unlawfully entered and searched defendant’s home during his arrest for injunction violation.

The trial court’s determination that there was no protective sweep or search of defendant’s house during his arrest was supported by competent, substantial evidence. And, even assuming that there was a warrantless search of defendant’s residence, the evidence would have been admissible under the *independent source doctrine*, where law enforcement’s decision to obtain a search warrant for defendant’s residence was not prompted by any alleged observation during a purported sweep or search of defendant’s residence, and no evidence was obtained as a result of the alleged protective sweep or search of defendant’s house at the time of his arrest. The affidavit itself makes clear that it was based entirely on the investigation of Volusia County law enforcement and was independent of any purported sweep by Orange County law enforcement

C. Search Pursuant to an Administrative Search Warrant

Somewhere in between the search with a warrant and a search without a warrant is this third method for conducting a fire scene search. As noted above, the “administrative search warrant” concept was created by the U.S. Supreme Court in the 1978 *Tyler* decision, which requires that the investigator apply to a magistrate or judge for permission to enter the fire scene for the purpose of determining origin and cause only. The only necessary requirements are the existence of a fire, an undetermined origin and cause, and the need to return to the scene to determine that origin and cause. There is no requirement for “probable cause” as in a traditional search warrant. The type of search to be conducted under an administrative warrant is limited to the methods and areas necessary to establish the origin and cause of the fire. It does not include the authority to search areas which are clearly unrelated to the fire’s origin and cause, such as drawers with personal papers and records or areas of the structure which were not involved in the fire. To search those areas, a traditional search warrant is required.

Keep in mind that along with warrantless searches, the administrative warrant search as applied to an arson investigation presents the greatest danger of making a mistake which will be fatal to the investigation.

In Florida sections 933.20-933.30, Florida Statutes, govern the issuance of inspection or administrative warrants in general:

933.20 “Inspection warrant” means an order in writing, in the name of the people, signed by a person competent to issue search warrants pursuant to s. 933.01, and directed to a state or local official, commanding him or her to conduct an inspection required or authorized by state or local law or rule relating to municipal or county building, fire, safety, environmental, animal control, land use, plumbing, electrical, health, minimum housing, or zoning standards.

933.21 An inspection warrant shall be issued only upon cause, supported by affidavit, particularly describing the place, dwelling, structure, or premises to be inspected and the purpose for which the inspection is to be made. In addition, the affidavit shall contain a statement that consent to inspect has been sought and refused or a statement setting forth facts or circumstances reasonably justifying the failure to seek such consent. **Owner-occupied family residences are exempt from the provisions of this act.**

933.22 Cause shall be deemed to exist if reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied with respect to the particular place, dwelling, structure, or premises or if there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, or premises which condition would constitute a violation of a state or local law or rule relating to municipal or county building, fire, safety, environmental, animal control, land use, plumbing, electrical, health, minimum housing, or zoning standards.

933.23 Before issuing an inspection warrant, the judge shall examine an oath, the applicant, and any other witness and shall satisfy himself or herself of the existence of grounds for granting such application.

933.24 If the judge is satisfied that cause for the inspection exists, he or she may issue the warrant particularly describing the place, dwelling, structure, or premises to be inspected and

designating on the warrant the purpose and limitations of the inspection, including the limitations required by this act.

933.25 An inspection warrant shall be effective for the time specified therein, but not for a period of more than 14 days unless it is extended or renewed by the judge who signed and issued the original warrant upon satisfying himself or herself that such extension or renewal is in the public interest. Such inspection warrant must be executed and returned to the judge by whom it was issued within the time specified in the warrant or within the extended or renewed time. After the expiration of such time, the warrant, unless executed, is void.

933.26 An inspection pursuant to a warrant shall not be made between 6 p.m. of any day and 8 a.m. of the succeeding day; on Saturday, Sunday, or any legal holiday; or in the absence of an owner or occupant over the age of 18 years of the particular place, dwelling, structure, or premises unless specifically authorized by the judge upon a showing that such authority is reasonably necessary to effectuate the purpose of the rule being enforced. An inspection pursuant to a warrant shall not be made by means of forcible entry, except that the judge may expressly authorize a forcible entry when facts are shown which are sufficient to create a reasonable suspicion of a violation of a state or local law or rule relating to municipal or county building, fire, safety, environmental, animal control, land use, plumbing, electrical, health, minimum housing, or zoning standards which, if such violation existed, would be an immediate threat to health or safety or when facts are shown establishing that reasonable attempts to serve a previous warrant have been unsuccessful. When prior consent has been sought and refused, notice that a warrant has been issued shall be given at least 24 hours before the warrant is executed. Immediate execution of a warrant shall be prohibited except when necessary to prevent loss of life or property.

933.27 and 933.28 It is a second-degree misdemeanor for any person to willfully refuse to permit an inspection authorized by a lawfully issued inspection warrant or to maliciously, or with knowledge that cause to issue an inspection warrant does not exist, cause the issuance of an inspection warrant by executing a supporting affidavit or by directing or requesting another to execute a supporting affidavit, or who maliciously causes an inspection warrant to be executed and served for purposes other than defined by this act.

933.29 This law does not restrict the powers granted by general law to an agency of the state, or to a unit of local government acting on behalf of such agency pursuant to a contract with the agency, to conduct inspections with or without warrant as authorized by general law.

933.30 A person performing an inspection pursuant to the authority of this act shall not give information as a confidential informer, testify as a witness, or execute an affidavit as a predicate for the issuance of a criminal search warrant or for probable cause to search any dwelling or other building without a criminal search warrant.

While there is no separate statute relating specifically to origin and cause investigations, sections 933-20 – 933.30, Florida Statutes must be read in conjunction with the statutes or rules the party, e.g., a fire investigator or fire official, seeking the warrant. In other words, the party seeking the warrant has to have some legal authority to seek and execute the warrant in question and the object of the warrant, e.g., the origin and cause of a fire or an employer's books and records. If a private citizen believes their neighbor is storing hazardous waste on her property in violation of city and county codes and ordinances, he cannot get an administrative search warrant to go onto her property. But, he can contact the

local code enforcement authorities, another entity which has authority to investigate and enforce the applicable regulations, and that entity may seek an inspection warrant.

Bureau of Fire, Arson and Explosives detectives' authority actually flows from the State Fire Marshal's statutory authority under 633.104, F.S. in recognition of the Legislature's intent for the State Fire Marshal to have the responsibility to minimize the loss of life and property in this state due to fire. In order to carry out that responsibility, the State Fire Marshal, through its agents, including DIFS-BFAEI representatives, have the duty and authority to enforce all laws under Chapter 633 relating to, among other things, suppression of arson and the investigation of the cause, origin and circumstances of fire. That means that a detective assigned to investigate a fire has the duty and authority to conduct and complete his/her investigation into the origin and cause of a fire. If that investigation is disrupted by the property owner kicking the detective off the site, locking the doors and blocking re-entry, under Florida's inspection warrant statutes, the detective or local fire department official with authority, under state or local laws or ordinance, who also has the duty and authority to determine, would be in position to seek an administrative warrant solely for the purpose of determining the origin and cause of the fire, as pronounced in the two Michigan cases. However, the search cannot be conducted as part of a criminal investigation. That would require a criminal search warrant. However, if the origin and cause investigation that is completed pursuant to the administrative warrant reveals the cause of the fire to be arson, that information may be used to obtain a criminal search warrant.

II. Consent Search

The *Tyler* and *Clifford* decisions stressed the fact that the investigators never obtained consent to search the property. If they had obtained proper consent, these cases would likely have never reached the Supreme Court, the convictions would have stood and the investigators' efforts would not have been wasted. The lack of specific consent was also a factor in the *Veltmann* case. The use of consent in the fire scene searches can prevent many such problems if the investigator initially makes the effort to obtain consent.

The concept of consent in a fire scene search involves several considerations. The courts have defined a consent search as a knowing and voluntary relinquishment of a constitutional right which has been freely made by one who has both the capacity and the authority to do so. There are several key factors a court will consider in upholding a search by consent.

First, consent must be obtained from the proper person, a person who has control, authority, use or possession of the premises. If property is jointly owned or occupied, any one of the occupants or owners can give consent. However, if one of the owners or occupants expressly refuses to give consent, then the search cannot be made upon consent of the other party.

A. Who Can Give Consent

a. Landlord/Tenant

The question of whether someone has authority to give consent is not simply a question of ownership. In fact, a landlord cannot give consent to search property used or occupied by tenants. The test of "common authority" used by the courts means control over, together with the use of the property. So a tenant would be able to give consent to search his or her premises while the landlord cannot. While many leases typically provide the landlord with the

right to “inspect” the premises at any time, that is probably insufficient to authorize the landlord to give consent for a search of the property.

b. Roommate, Spouse, or Domestic Partner

Consent given by a roommate, spouse, or domestic partner is generally valid consent if it meets the “common authority” test. Certainly, a spouse can give consent. It may be a grayer area to use a roommate or live-in-significant other’s consent. Consent will be more solid if they have lived together long enough to demonstrate more than a temporary arrangement or if both signed a lease or rent agreement. In at least one case, a wife who was separated and had moved out of the house was allowed to give consent to search the marital home where her husband still lived even though he had changed all the locks. The court reasoned that she was still a co-owner of the property. However, in a similar situation in a different jurisdiction, the court rejected the same type of consent and other courts in other jurisdictions may follow suit.

c. Parents/Children

Another problem area involves parents and children. It cannot be assumed that a parent can consent to a search of a child’s room. The investigator must consider the particular circumstances to determine if a parent’s consent is appropriate in each case. For example, if the child pays rent to the parents and otherwise demonstrates some degree of independence which would entitle the child to absolute privacy in his or her room, then the investigator should proceed cautiously in seeking consent through the parents. Where the child permits a parent to freely enter the room to clean or for other such activities, the parent will probably be able to give valid consent to search the room. However, a search of clearly personal items such as locked drawers or storage boxes kept out of view will require the child’s consent. Of course, the parents may certainly consent to a search of common areas of the house, e.g. garage, attic, etc., which are not exclusively used and occupied by the child.

On the other hand, an investigator must carefully consider the validity of a child’s consent to search their parents’ house. Other than his or her own room and the “family areas”, such as the living room and kitchen, a child generally does not have the necessary control or authority over other areas of the house. This is particularly true in the parent’s bedroom and other traditionally private areas which should only be searched with consent from a parent.

d. Business

In seeking consent to search a commercial fire scene, consent must be obtained from a person with managerial authority over the business. While it is not necessary to obtain consent from the business owner, it is necessary to obtain consent from somebody with control over the daily operations of the business rather than a mere employee. Once again, the investigator must be careful not to go into areas which are obviously reserved for the exclusive use of someone other than the person who gives consent. A manager of a business cannot give consent to search the business owner’s private office. Similarly, even the business owner cannot give consent to search inside the desk or private locker of a business employee.

B. Methods for Obtaining Consent

The method of obtaining consent is perhaps the most important aspect of a consent search.

Unlike most every other type of search, a consent search does not require any standard of probable cause or exigent circumstance. The only requirement is that the consent be freely given by a person with authority to grant consent. The test the courts use to determine a consent's validity is a review of "the totality of the circumstances".

The most common problem which arises after a consent search is a denial that consent was ever given. If there is any question about whether consent was properly given or given at all, the benefit of the doubt will go against the investigator. Consent must be clearly given by the party by affirmative conduct or expression. A statement that, "I guess it's okay" or "Well, I guess I can't stop you" is not consent at all. The party giving consent must understand and recognize that the investigator is there for the express purpose of conducting a search. Thus, the investigator:

- a. must identify herself and the agency she represents;
- b. explain that she is investigating a particular fire; and
- c. she believes a search of the area is necessary to carry out that investigation.

After doing so, the investigator should obtain written consent on "Consent to Search" or "Consent to Investigate for Origin and Cause" forms (Attachment B). This should resolve most of the problems which can arise during the course of a consent search.

Coercion and intimidation cannot be used to obtain consent, even where the investigator may not realize she or he is creating a situation of intimidation. Any suggestion of threats, pressure or intimidation will invalidate a consent search. Some examples reviewed by the courts include:

- (1) A promise not to arrest a suspect's girlfriend in exchange for giving consent to search.
- (2) A warning that if the investigator had to obtain a search warrant, he would "tear the place apart".
- (3) A promise of leniency if consent was given, or the promise of a "hard time" if it was not.

It is permissible to advise a person that a warrant will be "sought" or "applied for" if consent is not given. However, it is not permissible to state that a person "might as well consent" since a warrant will undoubtedly be obtained if consent is denied.

C. Refusing Consent

Another point which sometimes comes up in investigations is whether a person must be told that they have the right to refuse consent. The U.S. Supreme Court has ruled it is not necessary to so advise a person. However, if a person asks whether consent may be refused, the investigator must tell them they have a right to refuse. While the Supreme Court has not required an investigator to inform a person of the right to refuse consent as a matter of federal law, some state courts have imposed such a requirement. In most states, Florida included, it is not required to advise the person specifically that consent can be refused.

D. Consent to Utilize an Accelerant Detection Canine

A decision by a Florida appellate court raised significant implications about the specificity of the consent necessary to utilize an Accelerant Detection Canine (ADC) in fire scene searches. Although that decision involved a narcotics case, the decision's reasoning is directly applicable to fire scene searches using an ADC. In that case, the court invalidated a canine search of a defendant's residence where a police detective used a generic form of consent to search the suspect's residence. After initiating the search, the detective called for a Narcotics Detection Canine (NDC) which alerted to a concealed area behind a wall under the kitchen sink. When the wall was opened, officers found narcotics and the suspect was charged with violation of the narcotics law. The court held the search was invalid as it exceeded the scope of authority under the consent given by the suspect since police never informed him they would use a NDC in the search and he never expressly consented to the NDC's use.

In fire scene searches where an ADC will be used, investigators are encouraged to inform the person whose premises will be searched that an ADC will be used. Consent for the use of an ADC should be expressly granted by the person/suspect before initiating the search. Written consent forms should be revised accordingly to avoid a potential problem when the consent search is later reviewed by a court.

E. Withdrawing Consent

It is particularly important to know that consent can be withdrawn at any time, in part or in whole. If a person who has given consent suddenly changes his or her mind, the search must stop. If the person limits the area of search by saying "don't look in there" or "leave that room alone", the search cannot proceed in those areas. If consent has been given by one person with authority, it can be canceled by another person with authority. In that circumstance, any evidence already obtained can be used against both the person who gave consent and the person who refused.

In addition, consent is not continuous. If the investigator wants to return to the area for a subsequent search, he must obtain consent again, unless consent was specifically given for an ongoing search ("as long as necessary").

G. Condition of the Person Giving Consent

Another factor to consider is the condition of the person giving consent. An extremely intoxicated or medicated individual cannot give valid consent. A person who is mentally challenged, incapacitated, legally incompetent or otherwise incapable of understanding the significance of giving consent cannot validly consent to a search.

H. Scope of Consent

Just as a search conducted under a warrant can be challenged for going beyond the warrant's scope, so can a consent search. The key factors courts will look to are the expressed object of the search identified and places in which it is reasonable to believe the

object may be found by law enforcement prior to obtaining consent.²⁸ So while a consent to search a vehicle for narcotics or a gun may be deemed by a court to include a search of all the vehicle's compartments and containers, consent to search a fire scene to determine the origin and cause of a fire would likely be found by a court not to include a search of a filing cabinet in a room far removed from the area of origin. A consensual search is limited by the extent of the permission granted viewed in light of the totality of circumstances.²⁹

III. Search and Seizure of a Suspect's Clothing

Because the "amateur arsonist" may spill a flammable liquid on or even burn their clothing or own body, the issue of searching and seizing a suspect's clothing has arisen on at least a few occasions. The earliest reported case on this subject was *Joyce v. Connecticut*, 639 A.2d 1007 (Conn. 1994), in which fire officials responding to a house fire encountered the badly burned owner standing in a river near the scene, his clothing still smoldering. An EMT cut off the burning clothes to treat his injuries, leaving the clothes lying on the ground as the homeowner was taken to the hospital. Police subsequently retrieved the homeowner's clothing and wallet, then dried, tagged, bagged and stored it for safekeeping. A detective told the defendant's wife she could retrieve the items from the police station. Instead, after the homeowner became an arson suspect, the detective handed over the clothing to the state fire marshal who submitted them to the state forensic laboratory for analysis, where they tested positive for gasoline. At no time was a warrant obtained for the clothing or testing.

Joyce appealed his subsequent arson conviction, contending the testing of his clothing was an illegal search and seizure under the U.S. and Connecticut state constitutions. In reversing his conviction, the Connecticut high court held that a person generally has a reasonable expectation of privacy in the clothing one wears; that the testing of the clothing at the state lab constituted a search, and that the government could not articulate any applicable exception justifying the warrantless search, such as exigent circumstances.³⁰

Since the *Joyce* case, other courts, including the Florida Supreme Court, have held that a suspect has a reasonable expectation of privacy as well as a possessory interest in clothing which may have been worn at the time of a crime in which the suspect has been injured, requiring an examination into whether law enforcement was required to obtain a search warrant before seizing that clothing and submitting it for testing absent consent or if there was an applicable exception to the warrant requirement.

²⁸ *U.S. v. Ross*, 102 S.Ct. 2157 (1982); *Florida v. Jimeno*, 111 S.Ct. 1801 (1991) (holding a suspect's rights were not violated when, after he gave officers permission to search his car for illegal narcotics, they searched a folded paper bag, containing a kilo of cocaine, on the floorboard.)

²⁹ *State v. Wells*, 539 So.2d 464 (Fla. 1989) (holding driver's consent to permit police to look into his vehicle's trunk after he was arrested for DUI did not permit them to pry open locked luggage with a knife without a warrant.)

³⁰ Undermining the State's arguments were the fact there was no testimony that an odor of gasoline was emanating from the clothing and that law enforcement did seek and obtain a warrant to search Joyce's vehicle parked away from the scene.

In *Jones v. State of Florida*, 648 So.2d 669 (Fla. 1995), the Florida Supreme Court held that warrantless seizures of a murder suspect's clothing from a private hospital room and his personal effects from hospital security were not justified by exigent circumstances, nor did the seizures fall within "open view" or "plain view" doctrines. In that case, first responders took Jones to a Tallahassee hospital, where he was admitted, after he was injured in a vehicle accident. Once investigators determined the vehicle was owned by an individual who had been reported missing, investigators visited and questioned Jones in the hospital, and seized the clothing he had been wearing at the time of the accident from his room. The next day, law enforcement seized lottery tickets and cash which hospital personnel removed from Jones' pockets and placed in hospital security for safekeeping. Police submitted the seized clothing for laboratory analysis which revealed soil and pollen on the clothing were similar to that found in a pond where the missing man's body was discovered. The lottery tickets were determined to have been purchased at the same time as those found in the victim's truck Jones was driving.

A jury convicted Jones of first-degree murder. When his appeal ultimately reached the Florida Supreme Court, it ruled that evidence relating to the clothing and lottery tickets was the result of illegal warrantless searches and seizures. The court held law enforcement violated Jones' reasonable expectation of privacy in the clothing removed by hospital staff, placed in his private room in Jones' immediate possession and control. While the hospital staff may have had joint possession and control over the clothing, it had no authority to release the defendant's belongings to police without a warrant.

The court dispensed with the State's "exigent circumstances" argument because the lead detective admitted police could have posted a guard outside the defendant's room and asked hospital security to hold the lottery tickets while police obtained a search warrant. The State's "open view" argument failed because the items were not in a public place, and even if they were, police did not have probable cause to associate the clothing with criminal activity at the time of seizure. Finally, the "plain view" doctrine was also inapplicable because police had no lawful right of access to the clothing and any incriminating nature of the clothing was not apparent when law enforcement seized it.

As for the lottery tickets, they were not in open or plain view when seized, nor did hospital security, as bailee, have authority to release the items. See also *U.S. v. Neely*, 345 F.3d 366 (5th Cir. 2003)(holding police violated defendant's rights in retrieving his bloody clothing placed by hospital personnel in a plastic bag from a hospital storeroom without a warrant; it was not in plain view); *Anderson v. State of Alaska*, 444 P.3d 239 (Alaska App. 2019)(holding law enforcement officer, who accompanied suspect into the ER from the time he arrived at the hospital, had probable cause to believe his blood-stained clothing was from a gunshot wound when she seized it from a hospital emergency room; the clothing's evidentiary value was apparent even when she entered the hospital with the suspect); *Purifoy v. State*, 225 So.3d 867 (Fla. 1st DCA 2017)(holding officers' warrantless seizure of defendant's gunshot-damaged clothing from a bag in the foot of his bed in an emergency room bay, was permissible pursuant to the open view doctrine; even though there was a meaningful interest in Purifoy's possessory interest in the clothing despite it being in a public place, and under a totality of the circumstances, there was probable cause to associate the clothing with criminal activity.)

IV. Search and Seizure Questions in the Digital, Electronic & Computer Age

With the advent of computers, cell phones and other electronic media and data storage devices, as well as social media such as Facebook, Instagram, and other platforms used to exchange information of all kinds, even incriminating information among terrorists and gangs, law enforcement's ability to access such media and data raises constitutional questions the Founding Fathers could never have contemplated.

A. Cell Phones and Computers

Cell phones, tablets, laptops and computers are often used to facilitate or even carry out many types of crimes, including child sexual offenses, harassing phone calls, stalking, human trafficking, drug trafficking, identity theft and various types of fraud. However, as these items are not in and of themselves inherently incriminating, law enforcement's ability to legally seize and retrieve data, including text messages and e-mails, from these technological instruments, must be based upon the particular circumstances of specific cases. *See, U.S. v. Darden*, 353 F.Supp.3d 697 (M.D. Tenn. 2018)(denying drug trafficking defendant's motion to suppress seizure and search of iPhones seized during arrest based on law enforcement's knowledge defendant involved in a drug conspiracy with fellow Gangster Disciples utilizing cell phones to communicate; *United States v. Conlan*, 786 F.3d 380 (5th Cir. 2015)(upholding seizure under plain view exception because seizing officer knew defendant had engaged in "harassing electronic communications"); *United States v. Key*, 889 F.3d 910, 913 (7th Cir. 2018)(upholding plain view seizure of cell phone, laptop and other items during search for a missing teenager because "[m]ultiple cell phones, prepaid credit cards, and condoms are all things typically used for prostitution"); *United States v. Babilonia*, 854 F.3d 163, 180 (2d Cir. 2017)(upholding seizure of cell phones and tablet, because a months-long investigation into the defendant revealed alleged conspiracies involved use of multiple cell phones).

The U.S. and Florida Supreme Courts have ruled that a search warrant is required to retrieve text messages, call history and digital data stored on a suspect's cell phone; considered a search, even when the phone is seized from the suspect incident to arrest or there are concerns about officer safety or destruction of evidence.³¹

The U.S. Supreme Court has held that individuals also have a reasonable expectation of privacy in their physical movements, so that historical cell site location information, sometimes referred to as cell tower information, obtained from a suspect's wireless carrier requires a warrant.³²

³¹ *Christopher L. Carpenter v. State*, 228 So. 3d 535 (Fla. 2017) (police should not have submitted suspect's cell phone, seized incident to his arrest for soliciting a minor to commit an unlawful sex act, for technical analysis without a warrant; incriminating text messages and photographs should have been suppressed); *Riley v. California*, 134 S.Ct. 2473 (2014)(evidence obtained by police who seized and opened defendant's phone, including his call log, should have been suppressed; police generally must obtain a warrant to search digital cellular information.)

³² *Timothy Ivory Carpenter v. United States*, 138 S.Ct. 2206 (2018) (holding an individual maintains a legitimate expectation of privacy in a record of his physical movements as captured through CSLI).

A defendant was also found to be in indirect civil contempt for refusing to provide his password to access his cell phone in connection with search warrant. He appealed and the court held that he had failed to make a clear showing that trial court abused its discretion or committed fundamental error in holding defendant in indirect civil contempt, and that he had not yet been charged with any crime related to his phone, therefore it rendered premature his arguments challenging the issuance of search warrant. See: Harris v. State, 344 So.3d 579 (Fla 2nd DCA 2022).

B. EDR or “Black Box” Data

The data stored on a vehicle’s event data recorder or “black box” can be a valuable tool to law enforcement investigators during DUI, traffic homicide and other criminal investigations. However, a Florida appellate court has ruled that EDR data, even if downloaded to a vendor site, is protected by the Fourth Amendment and the government cannot obtain it without a warrant absent exigent circumstances.³³

C. E-Mail and Social Media

Information found in e-mail and social media accounts which may establish an individual’s activities around the time of a fire, vehicle accident or other crime can be invaluable to law enforcement, including arson and insurance fraud investigators.³⁴ However, because e-mail and social media providers generally have privacy policies and agreements with users, and there are federal laws governing access to such information, a search warrant or court order must be procured to provide account access to law enforcement.³⁵ Investigators must be prepared to provide information to support probable cause to believe a suspect’s e-mail or social media account contains evidence of the criminal activity under investigation. This was done successfully in *U.S. v. Darden, supra*, in which the court denied defendant’s motion to suppress evidence obtained via search warrant from his Instagram account showing his affiliation with the Gangster Disciples gang, a criminal enterprise engaged in drug trafficking. The court found law enforcement’s affidavit, which included facts stating that the defendant, while in federal custody, posted pictures of himself along with Gangster Disciples’ phrases and gang signs on Instagram, was sufficient to establish probable cause.

³³ *State v. Worsham*, 227 So. 3d 602 (Fla. 4th DCA 2017) (upholding suppression of data downloaded by law enforcement investigating a DUI manslaughter case from the defendant’s impounded vehicle “event data recorder” 12 days after the deadly crash, and four days before obtaining a warrant, reasoning such data is not exposed to the public and is very difficult to obtain and interpret.)

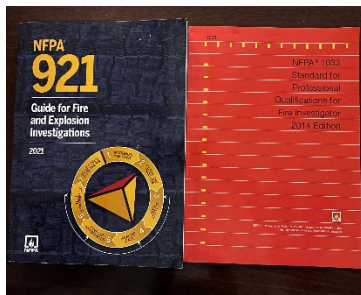
³⁴ *Lamb v. State of Florida*, 246 So.3d 400 (Fla. 4th DCA 2018) (holding video from codefendant’s social media account depicting defendant sitting in stolen vehicle and wearing the victim’s watch was sufficiently authenticated, as to be admissible at trial.)

³⁵ *U.S. v. Scully*, 108 F.Supp.3d 59 (E.D. NY 2015) (denying motion to suppress e-mails and other evidence obtained through search warrants despite the government’s failure to notify the defendant prior to warrants’ execution)

As recently pointed out by a Florida appellate court (11th Cir 2023), the court denied a warrant application seeking to require social media provider to produce “all records” pertaining to a suspect's social media account to allow law enforcement to comb through the data to decide what is germane to their investigation. The court held that warrants requiring social media sites to disclose every kind of data that could be found in a social media account are unconstitutionally overbroad and inconsistent with Fourth Amendment's particularity requirement. This case is not controlling. But it is important to point out based on the ruling. See: FLW SUPP 3101, IN RE SEARCH WARRANT APPLICATION RECEIVED MARCH 13, 2023. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Criminal Division. March 13, 2023. Milton Hirsch, Judge.

Conclusion

There are many considerations in the areas of search and seizure. However, by understanding them, an investigator can ensure that the results of their investigation will be admissible at trial, which is the objective of every investigation.



Unit 1

Lesson 4: NFPA 921 and 1033

Enabling Learning Objectives:

At the end of this session, the student will be able to:

1. Explain the importance of NFPA 921 and how courts view it.
2. Discuss changes between the last and most current version of NFPA 921.
3. Discuss how often NFPA 921 is revised and the revision points.
4. Explain the relevance of NFPA 921 for investigators.
5. Discuss federal case precedents.
6. Summarize the intent of NFPA 1033.
7. Identify to whom NFPA 1033 applies.
8. Describe the general qualifications for an investigator under NFPA 1033.
9. Discuss the general and specific duties, knowledge, and skills of a fire investigator.
10. Discuss concerns of NFPA 1033 with respect to measuring competency and the subjective components of the standard.

I. What Are NFPA 921 and NFPA 1033?

A. Background on the History of Both Publications

- (1) Why the publications were developed.
- (2) How the publications were developed.
- (3) Purpose of the publications.
 - a). NFPA 921 is a guide and not a code or a required practice. However, because the NFPA 921 Committee is made up of a cross-section of respected individuals in the fire investigation profession 921 is given great weight by most fire investigators and courts.
 - b). As a result, NFPA 921 is often used as a weapon in cross-examination of fire investigators.
 - c). NFPA 1033 is a national standard and a code under NFPA. It carries the weight of law in most jurisdictions.
 - d). NFPA 1033 sets out the minimum standards for qualification as a fire and explosion investigator. It can be used with devastating effectiveness to cross-examine and discredit a fire investigator.

B. Revision Cycle/Changes/Additions

(1) NFPA 921

- a). Revision Cycle - The current edition is the 2021 Edition. The revision is every three (3) years with the next revision in 2024.
- b). Changes:³⁶
 - 1). Chapter 4: Basic Methodology – “Test the Hypothesis (Deductive Reasoning)” has been rewritten, with corresponding changes to the annex; and the “Confirmation Bias” portion has been revised.
 - 2). Chapter 5: Basic Fire Science – has updated introduction of the chapter.
 - 3). Chapter 6: Fire Patterns – has revisions to the text dealing with soot deposition and smoke alarms.
 - 4). Chapter 7: Building Systems – has revisions to the text on “Design and Installation Parameters of the system” and “Documentation and Data Collection”.
 - 5). Chapter 8: Active Fire Protection Systems – has extensive changes within the chapter.
 - 6). Chapter 9: Electricity and Fire - has revisions to the text dealing with “Ground and Arc Fault Interrupters” and “Lightening”.
 - 7). Chapter 16: Documentation of the Investigation – has extensive changes within the chapter.
 - 8). Chapter 17: Physical Evidence – has revisions to the text dealing with “Methods of Collection”.
 - 9). Chapter 18: Origin Determination – has revisions to reflect advances in research.
 - 10). Chapter 19: Fire Cause Determination – has revisions that reflect the “Ignition Sequence”.
 - 11). Chapter 20: Classification of Fire Cause – has revisions to the chapter text.
 - 12). Chapter 23 (Explosions) – has revisions to the text involving “Dust Explosions”
 - 13). Chapter 24: Incendiary Devices – has revisions to the text “Examples of Incendiary Devices”.
 - 14). Chapter 25: Fire and Explosion Deaths and Injuries - has revisions to the chapter text.
 - 15). Chapter 27: Motor Vehicle Fires – has revisions to the chapter text.
 - 16). Chapter 30: Marine Fire Investigations – has revisions to the chapter text.

³⁶ Overview of Changes: NFPA 1033 and NFPA 921 (2021).

c). Additions:

- 1). Chapter 8: Fire Protections – has been added
- 2). Chapter 20: Classification of Fire Cause – previous section 19.1 dealing with the fire cause classifications
- 3). Chapter 21: Analyzing the Incident for Cause and Responsibility – the remaining material on causes of the fire, causes of damages to property, causes of bodily injury or loss of life, as well as determining responsibility.

(2) NFPA 1033

- (a) Revision Cycle - The current edition is the 2014 Edition. The revision is every five (5) years with the next revision in 2021 (delayed due to Covid-19 Pandemic).
- (b) The document identifies the minimum job performance requirements that are necessary to qualify as a fire investigator. Although this document primarily focuses on the public sector, it is often referenced in the private sector.
 - 1). Scene Examination
 - 2). Scene Documentation
 - 3). Evidence Collection and Preservation
 - 4). Obtaining Information through Interview and Interrogation
 - 5). Post-Incident Investigation
 - 6). Presentation of Findings-Reporting (c).
- (c) Changes³⁷

- 1). Sub-section 1.1 and 1.2 Scope and Purpose.
- 2). Definitions – updated definitions have been added for terms: Standard; Fire Analysis; Fire Dynamics; Fire Investigation Technology; and Fire Science;
- 4). Section 4.2 has been revised, “Scene Examination Duties”.
- 5). Sub-section 4.2.2; 4.2.4 text has been revised or updated.
- 6). Section 4.4 - Evidence Collection – has been revised or updated.
- 7). Sub-section 4.4.2 – text has been revised or updated.

NOTE: It should be noted that the changes mentioned in this addition do not represent every change. To see changes, please see the vertical line in the margin beside each paragraph where a change appears.

³⁷ Overview of Changes: NFPA 1033 and NFPA 921 (2021).

II. NFPA 921 – Guide for Fire and Explosion Investigations

NFPA 921's stated purpose; "...to establish guidelines and recommendations for the safe and systematic investigation or analysis of fire and explosion incidents. Fire investigation or analysis and the accurate listing of causes are fundamental to the protection of lives and property from the threat of hostile fires or explosions. It is through an efficient and accurate determination of the cause and responsibility that future fire incidents can be avoided. This document has been developed as a model for the advancement and practice of fire and explosion investigation...this document is designed to produce a systematic, working framework or outline by which effective fire and explosion investigation and origin and cause analysis can be accomplished....Deviations from these procedures, however, are not necessarily wrong or inferior but need to be justified."³⁸

A. The Role of NFPA 921 in Fire Investigations

NFPA 921 is a **"guide"** to fire investigations. At present, it is the best overall peer- reviewed and generally accepted document on the conduct of a fire investigation. As such, the courts have placed great weight on NFPA 921 as an accepted standard guide for fire and explosion investigations. Courts have also taken great care to note that even NFPA 921 states it is a **"guide"** but that deviation from the practices outlined in NFPA 921 are allowed. However, in *Thompson vs. State Farm*, the court found that investigators who deviate from NFPA 921 should have a reason that explains such deviations. In *Thompson*, the US District Court stated: "While the Court will not disqualify [the investigator], the Court notes that failure to [adhere to NFPA recommended practice without a reasonable explanation] is a weakness which may be fully exploited by Plaintiff on cross- examination."³⁹

B. NFPA 921 Relevance for Investigators

- (1) In the well-known 1993 Case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the U.S. Supreme Court held that federal trial court judges, acting as "Gatekeepers of Expert Testimony" must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. The high court's primary concern was to screen so-called scientific experts" presenting novel or "junk science" testimony from the judicial process.
- (2) The subsequent Supreme Court decision of *Kumho Tire Company, LTD., v. Patrick Carmichael*, 526 U.S. 137 (1999), expanded Daubert scrutiny to apply to all testifying experts whether or not "scientific".
- (3) Origin and cause investigators who seek to comply with NFPA 921 must also satisfy the scrutiny of *Daubert* in the federal and Florida courts, and in those other state jurisdictions that have adopted the *Daubert* Standard.

³⁸ National Fire Protection Association (2014). *NFPA 921: Guide For Fire and Explosion Investigations*

³⁹ *Thompson vs. State Farm*, 548 F. Supp. 2d 588 (W.D. Tenn. 2008).

- (4) The Federal Rules of Evidence (Rule 702) allow “technical” rather than purely “scientific” testimony by origin and cause investigator. But in all cases the investigator must establish a scientific foundation for the testimony.
 - a). NFPA 921 compliance ensures opinion testimony will be considered “reliable” so as to satisfy the reliability component of *Daubert*.
 - b). With *Kumho Tire*’s expansion of *Daubert*’s “scientific scrutiny” to all experts, origin and cause investigators must be especially careful to understand NFPA 921 in its entirety.
 - c). Investigators should be able to clearly articulate which portion of NFPA 921 (as well as other resources) they agree with and adopt as a basis of their methods for investigation and their opinion.

C. Federal Case Precedents (*Frye* and *Daubert*)

- (1) Prior to the *Daubert* decision, a 1923 case, *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 governed the admissibility of expert testimony in all courts.
- (2) The *Frye* decision applied a test of whether the expert’s methods and standards were “generally accepted” by other experts in the same field.
- (3) Federal Rule 702 governs the admission of expert testimony in Federal Courts and was the foundation of the *Daubert* decision replacing *Frye* (in federal courts). Rule 702 states that “a witness qualified as an expert by knowledge, skill experience, training or education” may give opinion testimony if shown to be properly qualified and when “Scientific, technical, or other specialized knowledge will assist the Trier of fact to understand the evidence or to determine a fact in issue”. The rule was revised after the *Daubert* decision to incorporate certain specific provisions of the decision. The purpose of the New Rule 702 was to add the requirement that the trial court be certain that expert testimony was not only relevant, but also reliable. It mandates scientific validation and verification.
- (4) In *Daubert*, the Supreme Court threw out the *Frye* “general acceptance” test applied by the trial and appellate courts. The high court held that the standard for admitting expert testimony is embodied in Federal Rule of Evidence 702, which requires both relevance and reliability. The Supreme Court directed the trial courts to consider the following four-part test when determining whether an expert’s testimony is sufficiently reliable to be admitted at trial.
 - a). Whether the technique or theory used has been tested to scientifically validate and prove it is so;

- b). Whether there is a known or potential rate of error for the technique or theory; and
 - c). Whether the technique or theory has been the subject of peer review and publication.
 - d). Whether the technique or theory has gained general acceptance within the scientific community (as was required under *Frye*).
- (5) In *Daubert*, the court provided a rather broad definition of the word “scientific”, as referred to in Rule 702 “A grounding in the methods and procedures of science”. The court additionally stated that a scientific expert’s “knowledge” means “more than subjective belief or unsupported speculations”. Therefore, the Supreme Court required that the trial court act as a “gatekeeper” to ensure the underlying reasoning and methodology are scientifically valid and can be proved to be so.
- (6) The *Daubert* court noted that the *Frye* decision focused on screening novel scientific techniques. However, when the *Daubert* court supplanted *Frye* with its interpretation of Rule 702, it specifically stated that it did not read the requirements of Rule 702 to be limited to “unconventional evidence”. The *Daubert* decision (as later clarified in the *Joiner* and *Kumho* cases) did not limit the scope of its ruling to only “scientific experts”, and included other “technical” and “specialized knowledge” experts that would also be subject to the scrutiny under Rule 702.
- (7) The problem that *Daubert* initially imposed on fire investigators using NFPA 921 was that the requirement of an underlying “scientific method” and use of “scientific data” was interpreted by some courts to mean the type of pure scientific approach applicable to laboratory testing. This problem is highlighted in the post-*Daubert* case of *Michigan Millers Mutual Insurance Co. v. Benfield*, 140 F. 3d 915 (11th Cir. 1998).

D. NFPA 921 After *Daubert*

- (1) The United States Supreme Court’s scrutiny of the engineering expert in *Kuhmo Tire* and the 11th Circuit Court of Appeals’ evaluation of the origin and cause fire expert in *Benfield* show the analysis of an expert is often a mixture of scientific principles and practical experience. Each expert in those cases based his opinion upon a mix of observation, experience and scientific principles.
- a). The mechanical engineer tire expert in *Kuhmo* clearly had to rely on certain scientific principles and prior testing data when using his experience to form his observations.
 - b). Similarly, the origin and cause investigator in *Benfield* used well-established scientific principles (not junk science) to apply to his “art” through observation and deductive reasoning. The art form and scientific principles are both a part of the process.

- (2) When an origin and cause fire investigator has to defend themselves as a fire scientist under NFPA 921 (as in *Benfield*), cross-examination at trial can be difficult. If presented as a “fire scientist”, the origin and cause investigator may be held to reliability standards higher than appropriate for the degree of science involved.
- (3) However, now that the high court has extended the authority of the federal trial court to apply the *Daubert* scrutiny to all experts, it must be recognized that origin and cause investigators will be held to a scientific standard and must anticipate this challenge. Scientific validation and verification are now imperatives.

III NFPA 1033: Are You Qualified?

NFPA 1033 Standard for Professional Qualifications for Fire Investigator is a document with which every fire investigator should be familiar. It is a national standard adopted by the National Fire Protection Association (NFPA) and prepared by the Technical Committee of Fire Investigator Professional Qualifications.

NFPA 1033 has its origins in NFPA 1031 Professional Qualifications for Fire Inspector, Fire Investigator and Fire Prevention Education Officer, adopted in 1977. The Qualifications Standards for Fire Inspectors, Fire Investigators, and Fire Prevention Education Officers were separated in 1986 and NFPA 1033 was first adopted in June of 1987.

NFPA 1033 was intended “to develop clear and concise job performance requirements that can be used to determine that an individual, when measured to the standard, possess the skills and knowledge to perform as a fire investigator.”⁴⁰ The qualifications standards of NFPA 1033 are considered applicable to both public and private fire investigators.

A. NFPA 1033 Chapter 1 Administration:

1.2 Scope: This standard identifies the minimum job performance requirements (JPR’s) for fire investigators.

1.3 Purpose: The purpose of this standard is to specify the minimum job performance requirements for serving as a fire investigator in both the private and public sectors.

1.3.1 It is not the intent of this standard to restrict any jurisdiction from exceeding these minimum requirements.

1.3.2 Job performance requirements for each duty are the tasks an individual must be able to perform in order to successfully carry out that duty; however, they are not intended to measure a level of knowledge. Together, the duties and job performance requirements define the parameters of the job of fire investigator.

NFPA 1033 is an ambitious undertaking in seeking to establish national standards for the

⁴⁰ National Fire Protection Association (2014). *NFPA 1033: Standard for professional Qualifications for Fire Investigator*.

professional qualifications of fire investigators. It is intended to establish minimum standards and specifically disclaims any intent to restrict any jurisdiction from establishing higher standards. However, no jurisdiction and only a select few governmental agencies have established any standards for the professional qualifications of fire investigators, and it remains the only true “standard” in existence. Certification programs of organizations such as the International Association of Arson Investigators (IAAI) and the National Association of Fire Investigators (NAFI) have established criteria for the designation of “certified” fire investigators. Those programs remain voluntary and the number of individuals who have become certified under the programs is only a small percentage of those who call themselves fire investigators.

The standards for NFPA 1033 are the only professional qualifications standards applicable to all fire investigators, yet they have little direct application outside the courtroom. Virtually anybody can call themselves a “fire investigator” and engage in the business of fire investigation whether or not one is deemed qualified under the standards of NFPA 1033. While licensing requirements in certain states call for a background check and proof of insurance, there is no proof of competency required for an individual who wants to set up business as a fire investigator. Only after the fact, in legal proceedings, will an investigator’s qualifications and competency be examined under the standards of NFPA 1033. However, in that context, NFPA 1033 does serve a useful purpose in exposing the unqualified and incompetent fire investigator.

B. General Qualifications

NFPA 1033 sets forth certain general qualifications for establishing and maintaining competency as a fire investigator. The general qualifications are as follows:⁴¹

1.4 General

1.4.1 The fire investigator shall be at least age 18.

1.4.2 The fire investigator shall have a high school diploma or equivalent.

1.4.3 The authority having jurisdiction shall conduct a thorough background and character investigation prior to accepting an individual as a candidate for certification as a fire investigator.

1.4.4 The job performance requirements for a fire investigator shall be completed in accordance with recognized practices and procedures or as they are defined by law or by the authority having jurisdiction.

1.4.5 The job performance requirements found in this standard are not required to be mastered in the order they appear. Training agencies or authorities shall establish instructional priority and the training program content to prepare individuals to meet the job performance requirements of this standard.

1.4.6 Evaluation of performance requirements shall be by individuals who are qualified and approved by the authority having jurisdiction.

1.4.7 The investigator shall have and maintain at a minimum an up-to-date basic knowledge of the following topics beyond the high school level:

1. Fire science
2. Fire chemistry

⁴¹ *Ibid*

3. Thermodynamics
4. Thermometry
5. Fire dynamics
6. Explosion dynamics
7. Computer fire modeling
8. Fire investigation
9. Fire analysis
10. Fire investigation methodology
11. Fire investigation technology
12. Hazardous materials
13. Failure analysis and analytical tools
14. Fire protection systems
15. Evidence documentation, collections, and preservation
16. Electricity and electrical systems

1.4.8 The fire investigator shall remain current in the topics listed in 1.3.7 by attending formal education courses, workshops, and seminars, and/or through professional publications and journals.

The only rigid requirements imposed are that the investigator be at least 18 years of age and have a high school diploma or equivalent certificate. The other criteria are broadly worded and somewhat vague. The general requirements presuppose the involvement of a governmental agency or authority evaluating and approving individuals as qualified investigators. However, as previously noted, few governmental agencies have imposed such regulatory requirements for the qualification or certification of fire investigators.

As a result, these general requirements are largely inapplicable. Until such time as governmental regulation is imposed on the field of fire investigation, the only general requirements for a fire investigator are attaining the age of 18, possessing high school diploma or equivalent and “remaining current” with continuing education in the field.

C. Specific Duties, Knowledge and Skill

Beyond the general qualifications criteria reference above, NFPA 1033 does establish a series of specific duties, knowledge and skills required of a fire investigator. There are six (6) general duties, twenty-nine (29) specific duties and twenty-nine (29) corresponding knowledge and skills prerequisites for fire investigators to be qualified under NFPA 1033. These comprise the essential text of NFPA 1033 and are enumerated below:⁴²

4.1 General

4.1.1 The Fire investigator shall meet the job performance requirements defined in Sections 4-2 through 4-7.

4.1.2 The fire investigator shall employ all elements of the scientific method as the operating analytical process throughout the investigation and for the drawing of conclusions.

4.1.3 Because fire investigators are required to perform activities in adverse conditions, site safety assessments shall be completed on all scenes and regional and national safety standards shall be followed and included in organizational policies and procedures.

4.1.4 The fire investigator shall maintain appropriate liaison with other interested

⁴² *Ibid.*

professionals and entities.

4.1.5 The fire investigator shall adhere to all applicable legal and regulatory requirements.

4.1.6 The fire investigator shall understand the organization and operation of the investigation team within an incident management system.

4.2 Scene Examination. Duties shall include inspecting and evaluating the fire scene, or evidence of the scene, and/or conducting a comprehensive review of documentation generated during the examination(s) of the scene if the scene is no longer available, so as to determine the area or point of origin, source of ignition, material(s) ignited, and act or activity that brought ignition source and materials together and to assess the subsequent progression, extinguishment, and containment of the fire.

4.2.1 Secure the fire ground, given marking devices, sufficient personnel and special tools and equipment, so that unauthorized persons can recognize the perimeters of the investigating scene, are kept from restricted areas and all evidence or potential evidence is protected from damage or destruction.

(A) *Prerequisite Knowledge:* Fire ground hazards, types of evidence, and the importance of fire scene security, evidence preservation and issues relating to spoliation.

(B) *Prerequisite skill:* Use of Marking Devices.

4.2.2 Conduct an exterior survey, given standard equipment and tools, so that evidence is identified and preserved, fire damage is interpreted, hazards are identified to avoid injuries, accessibility to the property is determined, and all potential means of ingress and egress are discovered.

(A) *Prerequisite Knowledge:* The types of building construction and the effects of fire upon construction materials, types of evidence commonly found in the perimeter, evidence preservation methods, the effects of fire suppression, fire behavior and spread, fire patterns and a basic awareness of the dangers of hazardous materials.

(B) *Prerequisite Skill:* Ability to assess fire ground and structural condition, observe the damage from and effects of the fire, and interpret burn patterns.

4.2.3 Conduct an interior survey, given standard equipment and tools, so that areas of potential evidentiary value requiring further examination are identified and preserved, the evidentiary value of contents is determined, and hazards are identified to avoid injuries.

(A) *Prerequisite Knowledge:* The types of building construction and interior finish and the effects of fire on those materials, the effects of fire suppression, fire behavior and spread, evidence preservation methods, fire patterns, effects of building contents of fire growth, and the relationship of contents to the overall investigation, weather conditions at the time of the fire and fuel moisture.

(B) *Prerequisite Skill:* Ability to assess structural conditions, observe the damage and effects of the fire, discover the impact of fire suppression efforts on fire flow and heat propagation, and evaluate protected areas to determine the presence and/or absence of contents.

4.2.4 Interpret fire patterns, given standard equipment and tools and some structural or content remains, so that each individual pattern is evaluated with respect to the burning characteristics of the materials involved and in context and relationship with all patterns observed and the mechanisms of heat transfer that led to the formation of the pattern.

(A) *Prerequisite Knowledge:* Fire dynamics, fire development and the interrelationship of heat release rate, form, and ignitability of materials.

(B) *Prerequisite Skill:* Ability to interpret the effects of burning characteristics of different types of materials.

4.2.5 Interpret and analyze fire patterns, given standard equipment and tools and some structural or content remains, so that fire development is determined, methods and effects of suppression are evaluated, false origin area patterns are recognized, and all areas of origin are correctly determined.

(A) *Prerequisite Knowledge:* Fire behavior and spread based on fire chemistry, fire dynamics, and physics, fire suppression effects, building construction.

(B) *Prerequisite Skill:* Ability to interpret variations of fire patterns of different materials with consideration given to heat release rate, form, and ignitability; distinguish impact of different types of fuel loads; evaluate fuel trails; and analyze and synthesize information.

4.2.6 Examine and remove fire debris, given standard equipment and tools, so that all debris is checked for fire cause evidence, potential ignition source(s) is identified, and evidence is preserved without investigator-inflicted damage or contamination.

(A) *Prerequisite Knowledge:* Basic understanding of ignition processes, characteristics of ignition sources, and ease of ignition of fuels, debris-layering techniques, use of tools and equipment during the debris search, types of fire cause evidence commonly found in various degrees of damage and evidence-gathering method and documentation.

(B) *Prerequisite Skill:* Ability to employ search techniques that further the discovery of fire cause evidence and ignition sources, use search techniques that incorporate documentation, and collect and preserve evidence.

4.2.7 Reconstruct the area of origin, given standard and if needed, special equipment and tools as well as sufficient personnel, so that all protected areas and fire patterns are identified and correlated to contents or structural remains, items potentially critical to cause determination and photo documentation are returned to their prefire location, and the area(s) or point(s) of origin is discovered.

(A) *Prerequisite Knowledge:* The effects of fire on different types of material and the importance and uses of reconstruction.

(B) *Prerequisite Skill:* Ability to examine all materials to determine the effects of fire, identify and distinguish among different types of fire-damaged contents, and return materials to their original position using protected areas and fire patterns.

4.2.8 Inspect the performance of building systems, including detection, suppression, HVAC, utilities, and building compartmentation, given standard and special equipment and tools, so that a determination can be made as to the need for expert resources, an operating system's impact on fire growth and spread is considered in identifying origin areas, defeated and/or failed systems are identified, and the system's potential as a fire cause is recognized.

(A) *Prerequisite Knowledge:* Different types of detection, suppression, HVAC, utility, and building compartmentation such as fire walls and fire doors; types of expert resources for building systems; the impact of fire on various systems; common methods used to defeat a

system's functional capability and types of failures.

(B) *Prerequisite Skill*: Ability to determine the system's operation and its effect on the fire; identity alterations to, and failure indicators of building systems; and evaluate the impact of suppression efforts on building systems.

4.2.9 Discriminate the effects of explosions from other types of damage, given standard equipment and tools, so that an explosion is identified and its evidence is preserved.

(A) *Prerequisite Knowledge*: Different types of explosions and their causes, characteristics of an explosion, and the difference between low- and high-order explosions.

(B) *Prerequisite Skill*: Ability to identify explosive effects on glass, walls, foundations, and other building materials; distinguish between low- and high-order explosion effects; and analyze damage to document the blast zone and origin.

4.3 Documenting the Scene. Duties shall include diagramming the scene, photographing, and taking field notes to be used to compile a final report.

4.3.1 Diagram the scene, given standard tools and equipment, so that the scene is accurately represented and evidence, pertinent contents, significant patterns, and area(s) or points of origin are identified.

(A) *Prerequisite Knowledge*: Commonly used symbols and legends that clarify the diagram, types of evidence and patterns that need to be documented, and formats for diagramming the scene.

(B) *Prerequisite Skill*: Ability to sketch the scene, basic drafting skills, and evidence recognition and observational skills.

4.3.2 Photographically document the scene, given standard tools and equipment, so that the scene is accurately depicted and the photographs appropriately support scene findings.

(A) *Prerequisite Knowledge*: Working knowledge of high-resolution camera and flash, types of film, media, and flash available, and the strengths and limitations of each.

(B) *Prerequisite Skill*: Ability to use a high-resolution camera, flash and accessories.

4.3.3 Construct investigative notes, given a fire scene, available documents (e.g., prefire plans and inspection reports), and interview information, so that the notes are accurate, provide further documentation of the scene, and represent complete documentation of the scene findings.

(A) *Prerequisite Knowledge*: Relationship between notes, diagrams, and photos, how to reduce scene information into concise notes, and the use of notes during report writing and legal proceedings.

(B) *Prerequisite Skill*: Data reduction skills, note taking skills, and observational and correlating skills.

4.4 Evidence Collection/Preservation. Duties shall include using proper physical and legal procedures to identify, document, collect, and preserve evidence required within the investigation.

4.4.1 Utilize proper procedures for managing victims and fatalities, given protocol and

appropriate personnel, so that all evidence is discovered and preserved and the protocol procedures are followed.

(A) *Prerequisite Knowledge*: Types of evidence associated with fire victims and fatalities and evidence preservation methods.

(B) *Prerequisite Skill*: Observational skills and the ability to apply protocols to given situations.

4.4.2 Locate, document, collect, label, and package, and store evidence, given standard or special tools and equipment and evidence collection materials, so that it is properly identified, preserved, collected, packaged, and stored for use in testing, legal, or other proceedings and examinations, ensuring cross-contamination and investigator-inflicted damage to evidentiary items is avoided and the chain of custody is established.

(A) *Prerequisite Knowledge*: Types of evidence, authority requirements, impact of removing evidentiary items on civil or criminal proceedings (exclusionary or fire-cause supportive evidence), types, capabilities, and limitations of standard and special tools used to locate evidence, types of laboratory tests available, packaging techniques and materials, and impact of evidence collection on the investigation.

(B) *Prerequisite Skill*: Ability to recognize different types of evidence and determine whether evidence is critical to the investigation.

4.4.3 Select evidence for analysis given all information from the investigation, so that items for analysis support specific investigation needs.

(A) *Prerequisite Knowledge*: Purposes for submitting items for analysis, types of analytical services available, and capabilities and limitations of the services performing the analysis.

(B) *Prerequisite Skill*: Ability to evaluate the fire incident to determine forensic, engineering, or laboratory needs.

4.4.4 Maintain chain of custody, given standard investigative tools, marking tools, and evidence tags or logs, so that written documentation exists for each piece of evidence and evidence is secured.

(A) *Prerequisite Knowledge*: Rules of custody and transfer procedures, types of evidence (e.g., physical evidence obtained at the scene, photos, documents) and methods of recording the chain of custody.

(B) *Prerequisite Skill*: Ability to execute the chain of custody procedures and accurately complete necessary documents.

4.4.5 Dispose of evidence, given jurisdictional or agency regulations and file information, so that the disposal is timely, safely conducted, and in compliance with jurisdictional/agency requirements.

(A) *Prerequisite Knowledge*: Disposal services available and common disposal procedures and problems.

(B) *Prerequisite Skill*: Documentation Skills.

4.5 Interview. Duties shall include obtaining information regarding the overall fire investigation from others through verbal communication.

4.5.1 Develop an interview plan, given no special tools or equipment, so that the plan reflects a strategy to further determine the fire cause and affix responsibility and includes a relevant questioning strategy for each individual to be interviewed that promotes the efficient use of the investigator's time.

(A) *Prerequisite Knowledge:* Person who can provide information that furthers the fire cause determination or the affixing of responsibility, types of questions that are pertinent and efficient to ask of different information sources (fire responders, neighbors, witnesses, suspects, and so forth), and pros and cons of interview versus document gathering.

(B) *Prerequisite Skill:* Planning skills, development of focused questions for specific individuals, and evaluation of existing file data to help develop questions and fill investigative gaps.

4.5.2 Conduct interviews given incident information, so that pertinent information is obtained, follow-up questions are asked, responses to all questions are elicited, and the response to each question is documented accurately.

(A) *Prerequisite Knowledge:* Types of interviews, personal information needed for proper documentation or follow-up, documenting methods and tools, and types of nonverbal communications and their meaning.

(B) *Prerequisite Skill:* Ability to adjust interviewing strategies based on deductive reasoning, interpret verbal and nonverbal communications, apply applicable legal requirements, and exhibit strong listening skills.

4.5.3 Evaluate interview information, given interview transcripts or notes and incident date, so that all interview data is individually analyzed and correlated with all other interviews, corroborative and conflictive information is documented, and new leads are developed.

(A) *Prerequisite Knowledge:* Types of interview, report evaluation methods, and data correlating methods.

(B) *Prerequisite Skill:* Data correlation skills and the ability to evaluate source information (e.g. fire responders and other witness).

4.6 Post-Incident Investigation. Duties shall include the investigation of all factors beyond the fire scene at the time of the origin and cause determination.

4.6.1 Gather reports and records, given no special tools, equipment, or materials, so that all gathered documents are applicable to the investigation, complete, and authentic; the chain of custody is maintained; and the material is admissible in a legal proceeding.

(A) *Prerequisite Knowledge:* Types of reports needed that facilitate determining responsibility for the fire (e.g. police reports, fire reports, insurance policies, financial records, deeds, private investigator reports, outside photos, and videos) and location of these reports.

(B) *Prerequisite Skills:* Ability to identify the reports and documents necessary for the investigation, implementing the chain of custody, and organizational skills.

4.6.2 Evaluate the investigative file, given all available file information, so that areas for further investigation are identified, the relationship between gathered documents and information is interpreted, and corroborative evidence and information discrepancies are discovered.

- (A) *Prerequisite Knowledge:* File assessment and/or evaluation methods, including accurate documentation practices and requisite investigative elements.
- (B) *Prerequisite Skills:* Information assessment, correlation skills and organizational skills.

4.6.3 Coordinate expert resources, given the investigative file, reports, and documents, so that the expert's competencies are matched to the specific investigation needs, financial expenditures are justified, and the utilization clearly furthers the investigative goals of determining or affixing responsibility.

- (A) *Prerequisite Knowledge:* How to access one's own expertise, qualification to be called for expert testimony, types of expert resources (e.g., forensic, CPA, polygraph, financial, human behavior disorders, engineering), and methods to identify expert resources.
- (B) *Prerequisite Skills:* Ability to apply expert resources to further the investigation by networking with other investigators to identify experts, question experts relative to their qualifications, and developing a utilization plan for the use of expert resources.

4.6.4 Establish evidence as to motive and/or opportunity, given an incendiary fire, so that the evidence is supported by documentation and meets the evidentiary requirements of the jurisdiction.

- (A) *Prerequisite Knowledge:* Types of motives common to incendiary fire investigation, methods used to discover opportunity, and human behavioral patterns relative to fire-setting.
- (B) *Prerequisite Skills:* Financial analysis, records gathering and analysis, interviewing, and interpreting fire scene information and evidence for relationship to motive and/or opportunity.

4.6.5 Formulate an opinion concerning origin, cause, or responsibility for the fire, given all investigative findings, so that the opinion regarding origin, cause or responsibility for a fire is supported by the data, facts, records, reports, documents, and evidence.

- (A) *Prerequisite Knowledge:* Analytical methods and procedures (e.g., hypothesis developing and testing, systems analysis, timelines, link analysis, fault tree analysis, and data reduction matrixing).
- (B) *Prerequisite Skills:* Analytical and assimilation skills.

4.7 Presentations. Duties shall include the ability to present findings to those individuals not involved in the actual investigation.

4.7.1 Prepare a written report, given investigative findings, documentation, and a specific audience, so that the report accurately reflects the investigative findings, is concise, expresses the investigator's opinion, contains facts and data that the investigator relies on in rendering an opinion, contains the reasoning of the investigator by which each opinion was reached, and meets the needs or requirements of the intended audience.

- (A) *Prerequisite Knowledge:* Elements of writing, typical components of a written report, and types of audiences and their respective needs.
- (B) *Prerequisite Skills:* Writing skills, ability to analyze information and determine the reader's needs or requirements.

4.7.2 Express investigative findings verbally, given investigative findings, notes, a time allotment, and a specific audience, so that the information is accurate, the presentation is completed within the allotted time, and the presentation includes only need-to-know information for the indented audience.

(A) *Prerequisite Knowledge*: Types of investigative findings, the informational needs of various types of audiences, and the impact of releasing information.

(B) *Prerequisite Skills*: Communication skills, ability to determine audience needs, and correlate findings.

4.7.3 Testify during legal proceedings, given investigative findings, contents of reports, and consultation with legal counsel, so that all pertinent investigative information and evidence are presented clearly and accurately and the investigator's demeanor and attire are appropriate to the proceedings.

(A) *Prerequisite Knowledge*: Types of investigative findings, the understanding of the types of legal proceedings, professional demeanor requirements, and an understanding of due process and legal proceedings.

(B) *Prerequisite Skills*: Communication and listening skills and ability to differentiate facts from opinion and determine accepted procedures, practices, and etiquette during legal proceedings.

NFPA 1033 incorporates NFPA 472 *Standard for Professional Competence of Responders to Hazardous Materials Incidents* as the only other document considered part of the professional qualifications criteria for fire investigators. NFPA 921 *Guide for Fire and Explosion Investigations* and NFPA 907M *Manual for the Determination of Electrical Fire Cause* are identified as recommended reference sources only are not considered requisite materials under NFPA 1033. It should be noted the NFPA 907M has been incorporated into NFPA 921 and no longer exists as a separate document.

IV The Measure of Competency

In identifying the six (6) general duties and twenty-nine (29) specific duties of a fire investigator, NFPA 1033 establishes the scope of a proper fire scene investigation. These duties provide the framework for a complete and competent investigation by a fire investigator. However, within those objective standards there is a decidedly subjective component in many of them. What must be done is clearly stated; how it must be done is not. NFPA 921 provides the mechanics of a proper fire scene investigation in detailing how the job should be done. Ironically, NFPA 1033 is a national standard carrying the full weight of NFPA's authority, yet the specific techniques and methodologies of a proper fire scene investigation are set forth in NFPA 921, a recommended "guide" which is only a reference source for the fire investigators.

Similarly, the twenty-nine (29) prerequisites knowledge and skills areas of NFPA 1033 are even more subjective in their content. NFPA 921 provides objective guidance for the measure of a fire investigator's knowledge and skills in those twenty-nine areas without objective measures to apply in determining the true depth of knowledge and skills possessed by the investigator. Interestingly, prior to the revision of NFPA 1033 in February of 1993 there were specific, objective standards of competency within the document. The prior editions of NFPA 1033 contained a detailed list of particular fire science issues which were required knowledge

for the investigator in order to be professionally qualified. It served as a virtual checklist of basic fire science knowledge which could be used to test the investigator's expertise. The knowledge of those issues remains an implicit requirement under NFPA 1033, yet their deletion from the 1993 edition removes the ability to confirm that knowledge objectively. In that regard, the current edition of NFPA 1033 represents a weakening of its effectiveness as a national standard of competency for fire investigators.

Despite this shortcoming in the current edition of NFPA 1033, it remains an important tool in promoting standards of professional competency for fire investigators. It is a comprehensive document which meticulously details the full scope of a proper fire scene investigation and catalogs the necessary knowledge and skills to conduct the investigation. While the unqualified or incompetent fire investigator may not be exposed for their lack of technical expertise under NFPA 1033, an inadequate or incomplete investigation will be exposed. Moreover, although NFPA 921 is labeled a "guide" for the investigation of fires and is only a referenced resource under NFPA 1033, it has been used with devastating effectiveness in the courtroom to point out the lack of technical expertise on the part of the unqualified fire investigators. A competent and professionally qualified fire investigator represents the best deterrent to those who would seek to advance inadequate or improper fire scene investigations as case-makers. In the bright lights of a courtroom, the truth will always be recognized. The final measure of competency is exposed in that arena by the citizens who serve as jurors.



Unit 1

Lesson 5: Expert Witness Testimony

Enabling Learning Objectives:

At the end of this session, the student will be able to:

1. Identify the case which abolished the “*Frye Test*” and established a new standard for admission of expert witness testimony.
2. Explain the scientific process in relation to *Daubert*.
3. Explain the *Daubert* reliability factors used today regarding the admission of an expert witness’s testimony involving scientific, technical, or other specialized knowledge.
4. Identify the issues impacting some of the early cases which attempted to apply the *Daubert* analysis to fire origin and cause investigations.
5. Explain the circumstances under which an expert witness’s deposition testimony may be used in a civil trial when compared to a criminal trial, including the impact of the Sixth Amendment’s confrontation clause.
6. Explain the major points to be considered in serving as a surrogate expert witness in a criminal trial, including the impact of the Sixth Amendment’s confrontation clause.

I. The *Daubert* Case

In 1923, the United States Court of Appeals for the D.C. Circuit, in the case of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), established a legal standard for the admission of expert testimony in federal court cases. That standard imposed a requirement that the data and methodology used by an expert in developing an opinion be “generally accepted” by other practitioners within the same discipline. The *Frye* standard of “general acceptance” was universally adopted and applied in both federal and state courts for over 70 years. A new standard of admissibility in federal court jurisdictions was established in 1993, which has since been adopted by the majority of state courts, including Florida. The specific impact of this new expert witness standard has varied among jurisdictions and fields of expertise, including origin and cause determinations involving investigations of fires and explosions.

In 1975, Congress enacted Federal Rule of Evidence 702, which was intended to simplify and liberalize the admission of expert testimony. The original Rule 702 stated:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise”.¹

¹ Federal Rules of Evidence (Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1937.)

While Rule 702 in its original form was intended to broaden the general admissibility of expert testimony and certainly did so, it did not directly address the legal standard for evaluating the foundation of an expert's opinions. The *Frye* standard of "general acceptance" continued to be used throughout the United States until the U.S. Supreme Court issued its opinion in *William Daubert, et ux., etc., et al., v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993). In *Daubert*, the court ruled that the *Frye* test had been superseded by Rule 702 and that federal courts must apply a new standard for the admission of expert testimony.

Jason Daubert and Eric Schuller were born with severe birth defects. They and their parents sued Merrell Dow Pharmaceuticals Inc., a subsidiary of Dow Chemical Company, alleging the company's prenatal "morning sickness" drug, Bendectin, had caused the birth defects. The U.S. District Court for the Southern District of California granted summary judgment in favor of respondent, Merrell Dow, citing *United States v. Kilgus*, 571 F.2d 508, 510 (9th Cir. 1978), wherein the 9th Circuit held "A necessary predicate to the admission of scientific evidence is that the principle upon which it is based must be sufficiently established to have general acceptance in the field to which it belongs [internal quotations omitted]."² In reaching its decision, the trial court relied on the affidavit of Steven H. Lamm, M.D., a renowned physician and epidemiologist recognized as an authority in the area of health risks from exposure to chemical substances. In his affidavit, Dr. Lamm stated that he had personally reviewed 30 published reports involving more than 130,000 case studies of Bendectin patients and that none of those studies had found any direct evidence of Bendectin having caused birth defects. On that basis, he concluded that the use of Bendectin during the first trimester of pregnancy was not a risk factor for human birth defects.³

Plaintiffs Daubert and Schuller responded with the affidavits of eight other well-credentialed experts claiming to have found a scientifically provable link between Bendectin and birth defects based on animal studies, chemical structure analyses, and the unpublished "reanalysis" of previously published human epidemiological studies. Relying on federal court precedent holding epidemiological studies are the most reliable evidence of causation in cases involving birth defects allegedly caused by chemical ingestion, the trial court rejected the proffered testimony of the plaintiffs' experts as they failed to come forward with any peer reviewed or published studies providing statistically significant epidemiological evidence.⁴

Finding the methodology used by the plaintiffs' experts particularly problematic in light of the massive weight of the original published studies supporting the defendant's position, all of which had undergone full scrutiny from the scientific community, the Court of Appeals for the Ninth Circuit upheld the trial court's position.⁵ "Reanalysis of epidemiological studies is generally accepted by the scientific community only when it is subjected to verification and scrutiny by others in the field. Plaintiffs' reanalyses do not comply with this standard; they were unpublished, not subjected to the normal peer review process and generated solely for use in litigation."⁶

The case was appealed to the U.S. Supreme Court which overturned the rulings of the lower courts

² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 727 F.Supp. 570, 572 (S.D.Cal. 1989).

³ *Ibid* at 575.

⁴ *Ibid*, stating "The plaintiffs' experts agree that none of the published studies show a statistically significant association between the use of Bendectin and birth defects [internal citations omitted].... Dr. Gross' study was apparently never published or subjected to peer review and nowhere does it state that Bendectin sales increased the relative risk of limb reduction defects to a level significantly above 1.0"

⁵ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128, 1129-1130 (9th Cir. 1991); citing *Frye v. United States*, 293 F. 1013, 1014, "[e]xpert opinion based on a scientific technique is admissible if it is generally accepted as a reliable technique among the scientific community."

⁶ *Ibid* at 1131.

and established a new standard for the admissibility of expert testimony which began with a two-step analysis by federal trial judges acting as the “gatekeepers” of expert testimony:

- (1) Evidence must be relevant; and
- (2) Evidence must be reliable.

In determining whether expert witness testimony is reliable, the court established a separate, non-exclusive four-part test:

- (1) Can the theory or technique be tested, with appropriate standards and controls for testing?
“Scientific methodology today is based on **generating hypotheses and testing them to see if they can be falsified**” [Emphasis added.] *Daubert*, 509 U.S. at 596, 113 S.Ct at 593.
- (2) Has the theory or technique been subjected to peer review and publication?
“Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability.... Some propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of ‘good science’. ... The fact of **publication** (or lack thereof) in a **peer reviewed journal thus will be a relevant, though not dispositive**, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.” [Emphasis added.] *Daubert*, 509 U.S. at 593-594, 113 S.Ct. at 2797.
- (3) Is there a known or potential rate of error regarding the application of the technique?
Daubert, 509 U.S. at 594, 113 S.Ct. at 2797 citing *United States v. Smith*, 869 F.2d 348, 353-354 (7th Cir. 1989) (surveying studies of the error rate of the spectrographic voice identification technique); and
Are standards controlling the technique's operation maintained?
Daubert, 509 U.S. at 594, 113 S.Ct. at 2797; citing, *United States v. Williams*, 583 F.2d 1194, 1198 (2nd Cir. 1978) (noting professional organization's standard governing spectrographic analysis), cert denied 439 U.S. 1117, 99 S.Ct. 1025 (1979).
- (4) Is there a level of general acceptance in that particular discipline's community?
“Finally, ‘general acceptance’ can yet have a bearing on the inquiry.... Widespread acceptance can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support within the community, may properly be viewed with skepticism.” [Internal quotations omitted.]
Daubert, 509 U.S. at 594, 113 S.Ct. at 2797; citing *United States v. Downing*, 753 F.2d, 1224, 1238 (3rd Cir. 1985).

“The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.” *Daubert*, 509 U.S. at 594-95, 113 S.Ct. at 2797.⁷

Thus, the *Frye* single-issue test was expanded to include these new factors in more broadly evaluating

⁷ As discussed in Part II, below, in a subsequent opinion intended to further clarify its *Daubert* decision, the U.S. Supreme Court acknowledged “conclusions and methodology are not entirely distinct from one another.”

the quality—and resulting admissibility—of expert witness testimony involving scientific evidence.

II. Post-*Daubert*: The Long Debate

A. Chief Justice Rehnquist’s Warning Re Potential *Daubert* Issues

The debate regarding the potential confusion resulting from the *Daubert* decision began immediately, with Chief Justice Rehnquist’s opinion, joined by Justice Stevens, which concurred in part with the majority’s *Daubert* opinion and dissented in part. Among other things, Chief Justice Rehnquist warned of the pitfalls inevitably created when the Supreme Court offers “general observations” in its opinions. Observing there had been 22 *Amicus* (“friend of the court”) briefs filed in *Daubert* by interested groups and individuals, many of which dealt with definitional issues such as the meaning of “scientific knowledge”, “the scientific method”, “scientific validity”, and “peer review”, Chief Justice Rehnquist raised the following concerns:

“Questions arise simply from reading this part of the court’s opinion, and countless more questions will surely arise when hundreds of District Judges try to apply its teaching to particular offers of expert testimony. Does all of this dicta apply to an expert seeking to testify on the basis of ‘technical or other specialized knowledge’—the other types of expert knowledge to which Rule 702 applies—or are the ‘general observations’ limited only to ‘scientific knowledge’? What is the difference between scientific knowledge and technical knowledge; Does Rule 702 actually contemplate that the phrase ‘scientific, technical, or other specialized knowledge’ be broken down into numerous sub-species of expertise, or did its authors simply pick general descriptive language covering the sort of expert testimony which courts have customarily received?”⁸

B. Clarification of the Trial Judge’s “Gatekeeper” Role – *General Electric Company v. Joiner*

As courts from various jurisdictions were still trying to shed light on the full meaning of *Daubert*, the U.S. Supreme Court took up the issue again in 1997 to provide further clarification. In *General Electric Company v. Joiner*,⁹ the Supreme Court reviewed a case in which the trial judge entered summary judgment in favor of the defendants in a lawsuit alleging the plaintiff had contracted cancer as the result of exposure to polychlorinated biphenyls (PCBs). The scientific evidence in support of the plaintiff’s claim was derived from laboratory studies of very young mice which had been injected with massive doses of PCBs and reanalysis of previous epidemiological studies, suggesting a causal connection between PCBs and cancer in humans. The trial judge ruled the evidence plaintiff’s experts offered failed to satisfy the requirements of *Daubert*, describing their opinions as “subjective belief or unsupported speculation” which failed to provide any credible scientific evidence of a direct causal connection between exposure to PCBs and cancer.¹⁰

On appeal, the 11th Circuit stated that because the Federal Rules of Evidence favor the admissibility of expert testimony generally, it applied a “particularly stringent standard of review to the trial judge’s exclusion of expert testimony.”¹¹ Reversing the trial court’s ruling, the 11th Circuit held the opinions of the plaintiff’s experts should have been admitted as they met *Daubert*’s

⁸ *Daubert v. Merrill-Dow Pharmaceuticals*, 509 U.S. 579, 600, 113 S.Ct. 2786, 2800.

⁹ *General Electric Company v. Joiner*, 522 U.S. 136, 118 S.Ct. 512 (1997).

¹⁰ *Ibid* at 140, 516.

¹¹ *Joiner v. General Electric*, 78 F.3d 524, 529 (11th Cir. 1996).

reliability and relevance standards. The 11th Circuit opinion went on to state that rather than limiting its *Daubert* reliability analysis to the scientific principles, processes and methodologies employed by the plaintiff's experts, the trial court drew different conclusions from the research which it used as a basis for excluding their testimony.¹²

The U.S. Supreme Court overturned the 11th Circuit's decision and reinstated the ruling of the trial court. In doing so, the Supreme Court reiterated and clarified certain positions expressed in the *Daubert* decision.

First, the Supreme Court affirmed the role of the trial judge as a "gatekeeper", screening such expert scientific evidence to ensure that it is not only relevant, but reliable. Rejecting the 11th Circuit's "particularly stringent standard of review" regarding expert scientific testimony, the Supreme Court stated:

On a summary judgment motion, disputed issues of fact are resolved against the moving party—here, petitioners. But the question of admissibility of expert testimony is not such an issue of fact, and is reviewable under the abuse-of-discretion standard. In applying an overly "stringent" standard, the Eleventh Circuit failed to give the trial court the deference that is the hallmark of abuse-of-discretion review.¹³

Second, the Supreme Court explained conclusions and methodology are not entirely distinct from one another, stating:

"Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* [sole authority] of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. That is what the District Court did here, and we hold that it did not abuse its discretion in so doing" [internal citations omitted].¹⁴

C. *Daubert's* Application to "Non-Scientific Technical and Other Specialized Knowledge" – *Kuhmo Tire Company v. Carmichael*

A number of early post-*Daubert* cases addressed the threshold question of whether it was even appropriate to apply *Daubert* to the testimony of "non-scientific" experts. In the case of *Iacobelli Construction, Inc. v. County of Monroe*,¹⁵ the 2nd Circuit ruled that *Daubert* did not apply to what it considered non-scientific evidence (expert testimony on site conditions, contracts, project results); only to cases presenting so called "junk science". The Court stated:

"The affidavits of Heur and Eller do not present the kind of "junk science" problem that *Daubert* meant to address. See *Tamarin v. Adam Caterers, Inc.* 13 F.3d 51, 53 (2d Cir. 1993). (*Daubert* 'specifically dealt with the admissibility of scientific evidence.') Rather, they rely upon the type of methodology and data typically used and accepted in construction-litigation cases. Given the inherently voluminous and highly technical nature of the data in such cases, the parties in a construction-contract dispute usually must retain experts to

¹² *Ibid* at 533.

¹³ *General Electric Company v. Joiner*, 522 U.S. at 143, 118 S.Ct. at 517.

¹⁴ *Ibid* at 146, 519.

¹⁵ *Iacobelli Construction, Inc. v. County of Monroe*, 32 F.3d 19 (2nd Cir. 1994).

summarize and interpret that data.”¹⁶

In *Freeman v. Case Corp.*,¹⁷ a decision which considered the testimony of a mechanical engineer in a product liability case involving the design of a tractor, the 4th Circuit found that the engineer’s testimony was sufficient to support a jury finding where it was based upon “his expertise and training in tractor design, in reviewing numerous published materials, including papers by the society of agricultural engineers, extensive industry literature, various tractor specifications, and trade journals before reaching his conclusions.” The Court further stated, at footnote 6, that “in cases like this one, where an expert relies on his experience and training and not a particular methodology to reach his conclusions, application of the *Daubert* [analysis] is unwarranted.”¹⁸ Several cases from the 2nd, 5th, 6th, and 10th Circuits were cited for this proposition.¹⁹

In allowing a police officer to testify as an expert regarding drug trafficking, the 6th Circuit’s opinion in *U.S. v. Thomas*²⁰ reflects a major step in the transition away from limiting the *Daubert* reliability test solely to scientific expert testimony to ensure such opinions are not based on so-called “junk science. The *Thomas* Court observed that although *Daubert* dealt with scientific experts, the “gatekeeper” function of Federal Judges applies to all types of expert testimony offered under Rule 702. The court interpreted the “gatekeeper” function to mean that the trial judge must first find that the evidence is both reliable and relevant. As reflected in footnote 3 to the opinion, without referencing the four-prong *Daubert* reliability analysis, the Court nevertheless tested the reliability of the detective’s expert opinion as it related to drug trafficking:

“[Detective] Todd had been a police officer for almost twenty-five years and had worked for four and a half years in a special division focusing on drug cases, particularly crack cocaine cases. He had attended several schools related to drug investigations and had been involved in executing over one thousand search warrants, most of which related to crack cocaine. Todd had also been involved in more than one thousand controlled buys of drugs and had previously testified as an expert witness in this area numerous times.”²¹

Despite none of the parties challenging *Daubert*’s applicability on appeal, the U.S. Supreme Court granted certiorari review in the landmark case *Kuhmo Tire Company v. Carmichael*²² in order to resolve the uncertainty among lower courts as to whether *Daubert*’s admissibility standards apply to expert testimony that might be characterized as based not on “scientific” knowledge, but rather on “technical” or “other specialized” knowledge. In doing so, the Court’s opinion in *Kuhmo Tire Company v. Carmichael* made it clear that with regard to the admissibility of expert testimony, Federal Rule of Evidence 702 makes no relevant distinction between “scientific” knowledge and “technical” or “other specialized” knowledge and therefore, its reliability standard applies equally to all such expert testimony.

On July 6, 1993, the right rear tire of a minivan driven by Patrick Carmichael blew out. In the accident that followed, one of the passengers died, and others were severely injured. The Carmichaels brought a products liability lawsuit in the U.S. District Court for the Southern District of Alabama against the tire manufacturer and distributor claiming the tire was defective. The

¹⁶ *Ibid* at 25.

¹⁷ *Freeman v. Case Corp.*, 118 F.3D 1011 (4th Cir. 1997).

¹⁸ *Ibid* at 1016.

¹⁹ *Ibid*.

²⁰ *U.S. v. Thomas*, 74 F.3d 676 (6th Cir. 1996).

²¹ *Ibid* at 681.

²² *Kuhmo Tire Company v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999).

plaintiffs based their case in significant part on deposition testimony provided by Dennis Carlson, Jr., an expert in tire failure analysis, who intended to testify at trial that based upon his visual and tactile inspection of the tire and upon the theory that in the absence of at least two of four specific, physical symptoms indicating tire abuse, the tire failure of the sort that occurred in the plaintiffs' case was caused by a manufacturing defect.

Granting the defendants' motion for summary judgment, the trial court judge found the following regarding the proffered testimony of the plaintiffs' expert:

- Expert's visual / tactile inspection and process of elimination analysis of tire failure was grounded in some scientific foundation, and thus *Daubert* was applicable for assessing whether the proffered scientific testimony was admissible.
- Expert's method of visual / tactile inspection and process of elimination analysis of tire failure was not susceptible to testing or falsification, there were no papers or publications which specifically addressed the propriety of the expert's method, there was no evidence of known or potential error rate of expert's technique, and the only evidence of general acceptance of the expert's method in the relevant scientific community was the expert's unsupported statement that other tire experts had testified in depositions that methods similar to those used by him were acceptable means of distinguishing between abused tires and defective tires in tire failure cases.
- Expert's testimony that based on his visual / tactile inspection and his conclusion that insufficient signs of abuse were present (did not display least two of the four specific physical symptoms), the tire had a manufacturing or design defect, was not supported by appropriate validation, and thus was not admissible.²³

Reversing the trial court's order granting defendant's Motion for Summary Judgment, the 11th Circuit Court of Appeals held:

- The *Daubert* reliability standard governs admission of scientific expert testimony. A "scientific" expert is an expert who relies on application of scientific principles, rather than on skill or experience-based observation as the basis for his or her opinion testimony.
- Because the testimony of the plaintiff's purported tire failure expert was not based on any scientific theory of physics or chemistry, but on the expert's experience in analyzing failed tires, his testimony was not "scientific" and thus was not subject to the *Daubert* reliability inquiry for determining admissibility of scientific expert testimony.
- It is the trial court's duty to determine whether non-scientific expert's testimony is sufficiently reliable and relevant to assist the jury.²⁴

In holding unequivocally that the *Daubert* "gatekeeping" obligation, requiring an inquiry into both relevance and reliability, applies not only to "scientific" testimony, but to all expert testimony, the Supreme Court referenced the following in reversing the 11th Circuit's decision:

- Rule 702 makes no relevant distinction between "scientific" knowledge and "technical" or "other specialized" knowledge and applies its reliability standard to all "scientific," "technical," or "other specialized" matters within its scope. The *Daubert* decision referred to "scientific" testimony simply because that was the nature of the expert testimony at issue.²⁵

²³ *Carmichael v. Samyang Tire, Inc.*, 923 F.Supp. 1514, 1520-1522 (S.D. Ala. 1996)

²⁴ *Carmichael v. Samyang Tire Inc.*, 131 F.3d 1433, 1435-1436 (11th Cir. 1997).

²⁵ *Kuhmo Tire Company v. Carmichael*, 526 U.S. at 147, 119 S.Ct. at 1174.

- The four factors set forth in *Daubert* will often be appropriate in determining the reliability of experienced-based expert testimony, however, as stated in the *Daubert* decision, these factors do not constitute a definitive checklist or test and may or may not be pertinent depending on the nature of the issue, the expert's particular expertise, and the subject of his or her testimony.²⁶
- Subject to an abuse-of-discretion standard, a trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. Moreover, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of an expert's testimony.²⁷
- After finding the expert's methodology met none of the *Daubert* reliability factors, the trial court's analysis revealed no countervailing factors operating in favor of admissibility which could outweigh those identified in *Daubert*. Moreover, the parties identified no such countervailing factors in their briefs.²⁸
- Finally, there was no indication in the record that other experts in the industry used the two-factor test employed by the plaintiffs' expert and the plaintiffs' cited no articles or papers that validated the expert's approach.²⁹
- Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case. The District Court did not abuse its discretionary authority in this case.³⁰

Kumho Tire is significant in at least two respects. First, it confirms the *Daubert* reliability test applies to all expert testimony—"scientific," "technical," or "other specialized" matters. While the trial judge may need to create appropriate criteria for a particular case, some measure of reliability must be used. Second, *Kumho Tire* underscored the broad discretion granted to a trial judge acting as "gatekeeper" of expert testimony, by confirming the decision of a trial judge regarding the reliability of an expert's opinion will be upheld on appeal absent an abuse of discretion.

III. The "New" Rule 702

Even as the definitive ruling on the scope of the *Daubert* reliability standard was culminating in *Kumho Tire Company v. Carmichael*, work was already underway in Congress on a revision to Rule 702 to incorporate specific reliability criteria into the Federal Evidence Code consistent with the Supreme Court's rulings on the issue. In December of 2000, a "new" Rule 702 took effect which added language related to the reliability component of expert testimony. Rule 702 now states:

"If scientific, technical, or other specialized knowledge will assist the Trier of Fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."³¹

Just as the Supreme Court made clear in *Kumho Tire Company v. Carmichael*, this new reliability

²⁶ *Ibid* at 151, 1176.

²⁷ *Ibid* at 152, 1176.

²⁸ *Ibid* at 156, 1178.

²⁹ *Ibid* at 157, 1178.

³⁰ *Ibid* at 159, 1179.

³¹ Federal Rules of Evidence (Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1937; Apr. 17, 2000, eff. Dec. 1, 2000.)

language is now part of the “gatekeeper” function for federal judges in all cases where expert testimony is offered by a party. The new Rule 702, which governs the admissibility of expert testimony, reflects the true impact of the *Daubert* decision and its progeny.

In addition to all federal courts, 41 states (including Florida) and the District of Columbia have adopted the *Daubert* standard or a substantially similar version of *Daubert*, for the admission of expert scientific testimony.³² Only five states (Illinois, Minnesota, New York, Pennsylvania and Washington) continue to rely on a *Frye* or *Frye*-plus standard. The New Jersey Supreme Court has declared the *Daubert* standard generally applies in civil cases (see *In re Accutane Litigation*, 191 A.3d 560 (N.J. 2018)), while continuing to apply the *Frye* standard in criminal cases (see *State v. J.L.G.*, 234 N.J. 265 (2018)). Four states (Nevada, North Dakota, South Carolina and Virginia) have adopted somewhat unique standards for the admission of expert scientific evidence, however, the standards adopted in two of these states (Nevada and South Carolina) appear similar to the *Daubert* standard. Unlike Florida, as of March 2019, some 31 states have failed to embrace the U.S. Supreme Court’s decision in *Kumho Tire v. Carmichael* and continue to limit the *Daubert* standard for the admission of expert testimony to matters involving purely “scientific evidence.”³³

IV. Florida’s 6-Year *Daubert* v. *Frye* Debate

The Florida Legislature amended §§ 90.702 and 90.704 of the Florida Evidence Code (§§ 90.101 – 90.958, Fla. Stat.) in 2013 to adopt the *Daubert* standard for the admission of expert testimony involving scientific, technical, or other specialized matters.³⁴ Interestingly, because the Florida Constitution vests the state’s highest court, not the legislature, with the exclusive authority to “adopt rules for the practice and procedure in all courts”, the Florida Supreme Court failed to recognize the 2013 amendments and continued to apply the *Frye* standard.³⁵ As a result, following the 2013 legislative amendments, most attorneys argued both the *Daubert* and *Frye* standards in their motions in limine to exclude expert testimony, and generally trial courts analyzed both standards when determining whether to allow the testimony.

In 2017 the Florida Bar’s Code and Rules of Evidence Committee (“Committee”) recommended that the Florida Supreme Court reject the Legislature’s 2013 *Daubert* amendment to Rule 702 to the extent it was procedural when it considered the Committee’s 2017 regular-cycle report, citing “grave constitutional concerns.” Specifically, the closely split Committee (16-14) expressed concern that the *Daubert* amendment would undermine the right to a jury trial and deny access to the courts, cause the court system to become overburdened and impede the ability to prove cases on their merits. Citing numerous federal cases, the Committee explained that because *Daubert* covers more subject areas and involves a multi-factorial analysis to determine admissibility, versus *Frye*’s simple “general acceptance” inquiry, federal courts commonly must conduct multi-day *Daubert* hearings at substantial cost in time and money.

³² In 2013 the Florida Legislature amended section 90.702, Florida Statutes (2012), to mirror the new Federal Rule of Evidence 702 as follows: If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if: (1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case. See Chapter 2013-107, section 1, Laws of Florida.

³³ Valena E. Beety, Jennifer D. Oliva, *Evidence On Fire*, 97 N.C. L. Rev. 483 (2019).

³⁴ Chapter 2013-107, section 1, Laws of Florida.

³⁵ Art. V, § 2(a), Fla. Const.

On February 16, 2017 the Florida Supreme Court released its *In Re Amendments To Evidence Code*, 210 So.3d 1231 (Fla. 2017) opinion. Following the Bar Committee's recommendation, the Supreme Court declined to adopt, to the extent they are procedural, the amendments to §§ 90.702 and 90.704 of the Florida Evidence Code due to the constitutional concerns raised, which it stated must be left for a proper case or controversy to decide.

The following year, the Florida Supreme Court was presented with a proper case or controversy in *DeLisle v. Crane Co.*³⁶ Relying in part on the reasoning in the 2017 report of the Code and Rules of Evidence Committee, the Florida Supreme Court definitively held in *DeLisle v. Crane Co.*, that *Frye* was the governing standard, and not the *Daubert* amendment to § 90.702 of the Florida Evidence Code which infringed on the Court's rulemaking authority and was in direct conflict with the Supreme Court's rule pronounced in *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007).

As the judicial make-up of the Florida Supreme Court underwent considerable change between February 2017 and May 2019, what seemed to be an end to Florida's *Frye v. Daubert* debate was short lived. By May of 2019, three of the Florida Supreme Court Justices who had strongly supported rejection of the *Daubert* amendment and continuation of the *Frye* standard were forced to retire due to age limitations; two of whom had already been replaced with individuals appointed by a conservative executive branch. Noting the 2017 majority and minority reports of the Florida Bar's Code and Rules of Evidence Committee, along with extensive comments received in response to the Committee's published recommendation, and subsequent briefing and oral argument prior to issuing its opinion in *In re Amends. to Fla. Evidence Code*, 210 So.3d 1231 (Fla. 2017), the Supreme Court elected to revisit the outcome of the 2017 recommendation without requiring a repeat of rules adoption procedures or an opportunity for public comment. As a result of its "revisit", the Florida Supreme Court released its *In re Amends. to Fla. Evidence Code*, 278 So.3d 551 (Fla. 2019) opinion on May 23, 2019.

Despite maintaining its position that the *Daubert* amendment to § 90.702 involves a procedural rule subject to the Court's exclusive jurisdiction, the Florida Supreme Court reversed its previous position favoring the *Frye* standard and adopted the Legislature's *Daubert* amendments to § 90.702 as a procedural rule of evidence. (The opinion also adopted the Legislature's amendment to § 90.704, to the extent it is a procedural rule.) And while noting the "grave constitutional concerns" expressed by those who oppose the *Daubert* amendment appear to be unfounded, the Court made clear its opinion involves a rules case and therefore, in no way decides those constitutional or other substantive concerns.³⁷

V. *Daubert* and the Fire Investigator

A. The Scientific/Technical Debate

Within the fire investigation community, there has been long-standing debate regarding the "science" behind fire scene investigations which has been heightened by the adoption of *NFPA 921*. One faction argues that determining the origin and cause of a fire should be considered a strictly scientific discipline and *NFPA 921* should be applied as the standard for using the scientific method in the conduct of fire scene investigations. This premise has been used in court challenges seeking to require that witnesses providing opinions as to the origin and cause of a fire be able to testify that all of the theories and techniques used in the investigative process were tested and subjected to the classic scientific process, as contemplated by the *Daubert* reliability test.

³⁶ *DeLisle v. Crane Co.*, 258 So.3d 1219 (Fla. 2018).

³⁷ *In Re Amend. To Fla. Evid. Code*, 278 So.3d 551, 569 (Fla. 2019)

An opposing faction advocates the “technician” theory of an origin and cause investigation. This position asserts that while much of an investigator’s training is clearly based on fire science principles contained in various texts, such as *NFPA 921*, *NFPA Fire Protection Handbook* and *Kirk’s Fire Investigation*, fire investigators use these principles to establish a proper foundation for the investigation. The ultimate expertise involved in the determination of origin and cause is derived from experience and investigative techniques. Although the texts and reference materials must necessarily adhere to the scientific method (gathering data, developing a hypothesis, testing the hypothesis, challenging or defending the hypothesis, and rejecting or confirming the hypothesis), an investigator cannot be limited to a rigid “formula” of investigation at every fire scene. In fact, well-respected origin and cause commentators have observed:

“Fire scene investigation has always been the subject of one’s opinion. We are constantly learning more about it every day and as long as the composition and type of materials that constitute a fire load change, we will continue to learn about the different effects they have on fire and explosion behavior. There are no two fires exactly alike and each has different characteristics that require man’s physical senses to evaluate the totality of the circumstances in and surrounding the fire. The investigator uses the “basics” of fire behavior, dynamics and investigative experience to begin, then beyond, must develop his thoughts and opinions on what is visually seen, smelled, heard and touched.”³⁸

The debate over the application of *Daubert* to fire scene investigations initially centered on whether origin and cause determination should be considered “scientific” evidence or non-scientific “technical” evidence. The advocates of the strict scientific approach rejected the position that fire scene investigations should be considered “non-scientific”, pointing to the many misconceptions previously used to investigate fires (spalling, flashover, inverted v-patterns, etc.), which were ultimately exposed through the work of fire scientists. Accordingly, advocates of this position assert that the use of *Daubert* in fire scene analysis is the only means of avoiding a return to improper fire scene methodologies employed by investigators lacking adequate scientific training.

In contrast, the “technicians” argue that despite employing elements of multiple scientific disciplines, including chemistry and physics, fire scene investigation has never been a pure science. Proponents of this position do not assert fire investigation is “unscientific” or void of the application of scientific principles, but rather recognize both the objective and subjective components which form a part of every fire scene investigation. That is, the human component in examining, analyzing and, ultimately, interpreting fire scene evidence to reach a conclusion about the fire’s origin and cause.

Since Florida’s adoption of the *Daubert* standard, as interpreted by *Kuhmo Tire Company v. Carmichael* (holding *Daubert* extends to all expert testimony—“scientific,” “technical,” or “other specialized” matters), regarding the application of Rule 702 of the Florida Evidence Code, the debate whether fire scene investigations involve “purely scientific evidence” or “non-scientific technical evidence” is largely moot. That being said, leading institutions and commentators appear to be in general agreement that fire scene investigations conducted in a manner consistent with the industry’s authoritative guidelines combine the application of scientific principles and methodologies with the professional judgment of well-trained and experienced fire investigators.

³⁸ *Basic C & O 101*, Ron McCardle, Bureau of Fire and Arson Investigations, Florida Division of State Fire Marshal.

B. The *Benfield* Case

The case of *Michigan Millers Mutual Insurance Company v. Janelle R. Benfield*³⁹ marks the first reported decision in which the 11th Circuit Court of Appeals addressed the *Daubert* standard with regard to a Florida case involving a fire origin and cause investigation. While the *Benfield* litigation attracted a great deal of attention within the fire investigation community due to the ongoing *Daubert* controversy regarding scientific / technical evidence, retrospective review of the case may be confusing as it was decided after the 11th Circuit's ruling that *Daubert* did not apply to non-scientific expert evidence⁴⁰ and before the U.S. Supreme Court overturned that decision in *Kuhmo Tire*, ruling that *Daubert* applies to all expert testimony regardless of whether it is based on scientific, technical, or other specialized knowledge.⁴¹ Nevertheless, the *Michigan Millers Mutual Insurance v. Benfield* case provides a clear example of how not to testify as a fire origin and cause expert.

In January 1996, the case of *Michigan Millers Mutual Insurance Company, Inc. v. Benfield* was tried in a Tampa, Florida U.S. District Court. The case involved a house fire in which the insurer, Michigan Millers Mutual Insurance Company, refused to pay Ms. Benfield's insurance claim based on assertions she had submitted fraudulent information in support of her claim, concealed damaging information, and had in fact intentionally set the fire. It was undisputed the fire started on top of a dining room table on which three or four bags of clothes were located. Ms. Benfield informed investigators that a half-full plastic bottle containing lamp oil, sealed with a screw-cap lid was also located on the table and above the table was a chandelier which often flickered.⁴² Firefighters found an empty plastic lamp oil bottle undamaged on the floor of the dining area with the undamaged screw-cap located nearby.⁴³

As a part of the insurer's case, William Buckley, a fire investigator retained by the insurer who examined the fire scene three days after the event, was initially qualified to testify as an expert regarding the origin and cause of the fire. After describing what was essentially a visual observation of the fire scene, Mr. Buckley concluded the fire was incendiary, testifying he had "eliminated all accidental causes, and determining that, given that the fire began on the dining room table, there were no other possible sources of ignition of the fire."⁴⁴ The trial judge struck Mr. Buckley's testimony following cross-examination by Ms. Benfield's attorney. In striking Mr. Buckley's testimony, the trial court noted the following:

- Mr. Buckley held himself out as an expert in fire sciences, testifying he could determine the origin of the fire through his knowledge of the science of fires and that he complied with the scientific method within his field of science, causing him to believe someone poured lamp oil from the lamp oil bottle over the clothes and set the clothes ablaze.⁴⁵
- Essentially, the testimony of Buckley reveals that he came to his opinion that the fire was incendiary largely because he was unable to identify the source of the ignition of the fire.⁴⁶
- In determining that the fire was incendiary, Buckley performed no tests and took no samples.⁴⁷

³⁹ *Michigan Millers Mutual Insurance Company v. Benfield*, 140 F. 3d 915 (11th Cir. 1998).

⁴⁰ *Carmichael v. Samyang Tire Inc.*, 131 F.3d 1433 at 1436.

⁴¹ *Kuhmo Tire Company v. Carmichael*, 526 U.S. 137 at 149, 119 S.Ct. 1167 at 1175.

⁴² *Michigan Millers Mutual Insurance Company v. Benfield*, 140 F. 3d at 918.

⁴³ *Ibid.*

⁴⁴ *Ibid* at 921.

⁴⁵ *Ibid* at 920-921.

⁴⁶ *Ibid* at 921.

⁴⁷ *Ibid.*

- Mr. Buckley was unable to describe the chandelier that hung over the table and unable to explain the methodology by which he eliminated the chandelier as a possible ignition source for the fire.⁴⁸
- After telling the jury on direct that he believed someone poured lamp oil from the lamp oil bottle over the clothes and set the clothes ablaze, on cross-examination Buckley admitted that he did not know even if the lamp oil bottle had contained lamp oil before the fire and that there was no scientific basis for such an opinion.⁴⁹
- While Buckley held the opinion that the fire was intentionally set, he was unable to rationally explain how he came to that conclusion.⁵⁰

In *Benfield*, Mr. Buckley was not found to be “wrong” as there was never any evidence suggesting the fire was accidentally caused. Using the “elimination method”, which at the time had been long recognized as a valid method of determining fire origin and cause, Mr. Buckley concluded that the fire was incendiary.⁵¹ Not only could Mr. Buckley not determine the fire’s ignition source, more importantly, he did not scientifically confirm or document his findings on various material points and primarily relied upon his years of fire investigation experience, despite holding himself out as an expert in “fire science” and claiming to have adhered to the “scientific method” in conducting his investigation. The 11th Circuit held that with such testimony as a backdrop, the district court did not abuse its discretion in granting Ms. Benfield’s motion to strike the Mr. Buckley’s testimony.

Despite having Mr. Buckley’s “expert opinion” excluded as evidence, the insurance company’s appeal to the 11th Circuit was not a complete loss. Contrary to the ruling of the trial court, the 11th Circuit found that Michigan Millers Mutual Insurance had presented a *prima facie* case of arson. Under Florida law, in order for an insurer to establish a *prima facie* case of arson for purposes of denying coverage, the insurer must put forth direct or circumstantial evidence of motive, opportunity and an incendiary cause, sufficient to permit a reasonable jury to conclude the insured was guilty of the burning.⁵²

Motive. Evidence was introduced that Ms. Benfield was having trouble selling her home and that she was having difficulty getting her estranged husband to agree to transfer the marital home to her. Additionally, evidence was introduced indicating that Ms. Benfield stood to walk away with a substantial sum of money (over \$92,000) should her claim filed with Michigan Millers Mutual Insurance be paid in full. From such evidence, the 11th Circuit found that a reasonable jury could conclude Ms. Benfield had ample motive to set fire to her home.⁵³

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Mr. Buckley used the “negative corpus” approach to determining the fire was incendiary. This approach, now rejected by NFPA 921, involved eliminating the possibility of the fire resulting from accidental or natural causes. Unfortunately, Mr. Buckley’s investigation lacked the scientific thoroughness to eliminate all accidental and natural causes. In 2011, the NFPA rejected the use of the negative corpus approach finding: “This process is not consistent with the Scientific Method, is inappropriate, and should not be used because it generates un-testable hypotheses, and may result in incorrect determinations of the ignition source and first fuel ignited. Any hypothesis formulated for the causal factors (e.g., first fuel, ignition source, and ignition sequence), must be based on facts. Those facts are derived from evidence, observations, calculations, experiments, and the laws of science. Speculative information cannot be included in the analysis.” NFPA 921 § 18.6.5 (2011 ed.)

⁵² *Ibid* at 922, citing *Ins. Co. of North America v. Valente*, 933 F.2d 921, 923 (11th Cir. 1991).

⁵³ *Ibid.*

Opportunity. Evidence showed that the house was locked only at the doorknobs and not at the dead bolts when Ms. Benfield left the house on Saturday. The evidence also showed that keys to the dead bolts were possessed by only Ms. Benfield and her daughter who was away on vacation when the blaze broke out. Additionally, the evidence showed that when Mrs. Benfield "discovered" the fire on Monday, the house was different from when she had left it, with the windows closed, the shades drawn and the dead bolts locked. From such evidence a reasonable jury could conclude that Ms. Benfield had the opportunity to set the fire.⁵⁴

Fire was incendiary. There was evidence apart from Mr. Buckley's testimony from which a reasonable jury could conclude the fire was incendiary. Ms. Benfield testified the home had been entered after her visit on Saturday and that whoever had entered the home had closed the windows, drawn the shades and locked the doors at the dead bolts. Moreover, there was evidence that a capped, half-full lamp oil bottle had been on the dining table before the fire, and after the fire an undamaged lamp-oil bottle was found empty on the floor in the dining room area with the undamaged screw-cap removed. Such circumstantial evidence could lead a reasonable jury to conclude the fire had been set by a person, and was not naturally occurring.⁵⁵

Based on its finding of sufficient evidence to establish motive, opportunity and an incendiary cause, the 11th Circuit reversed the trial court's order granting a directed verdict in favor of Ms. Benfield relating to the insurance company's denial of coverage due to arson.⁵⁶

Under the terms of Ms. Benfield's insurance policy, in order to recover for her fire loss, Ms. Benfield was obligated to cooperate with the insurance company's investigation of her claim, which included providing truthful information throughout the claim and investigation process. In granting directed verdicts in favor of Ms. Benfield regarding the insurance company's coverage denials, the trial court refused to consider much of the insurance company's evidence supporting its allegations of fraud and efforts to conceal damaging information, as the insurance company had denied coverage before much of this information was uncovered, thereby indicating the information was not material.

In reversing the trial court's directed verdicts in favor of Ms. Benfield, the 11th Circuit made it clear that in deciding whether to grant a directed verdict, a trial court must view all evidence in a light most favorable to the nonmoving party.⁵⁷ Moreover, regarding the trial court's refusal to consider the insurance company's supporting evidence uncovered after its decision to deny coverage, the 11th Circuit reminded the trial court that under Florida law, an insurer is not required to demonstrate it relied on an insured's misrepresentations when asserting a coverage denial based on fraudulent conduct; holding that a material fraud was perpetrated by an insured in pursuing an insurance claim is sufficient.⁵⁸ Reviewing all of the insurance company's evidence in support of its allegations of fraud and deceitful conduct in a light most favorable to the insurance company, the 11th Circuit held there was ample evidence to warrant an inference by the jury that Mrs. Benfield knowingly and willfully made false statements and misrepresentations of material matters in connection with her claim and the related investigation.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid* at 921.

⁵⁸ *Ibid* at 923.

C. NFPA 921 – Incorporation of the *Daubert* Standard

Section 1.2 of *NFPA 921, Guide for Fire and Explosion Investigations* states the purpose of the document “is to establish guidelines and recommendations for the safe and systematic investigation or analysis of fire and explosion incidents.” In so stating, one may argue that *NFPA 921* does not set forth standards for the conduct of fire and explosion investigations, but rather provides guidance and recommendations which may be used in conducting such investigations.

As a practical matter, trial and appellate courts deciding and reviewing matters involving fire and explosion investigations increasingly treat the issue of whether *NFPA 921* constitutes guidelines or standards as a distinction without a difference. In so doing, trial and appellate courts routinely refer to *NFPA 921* as setting forth the standards generally recognized for the conduct of fire and explosion investigations; particularly when addressing *Daubert* challenges involving the admissibility expert testimony from fire and explosion investigators.⁵⁹

Adherence to *NFPA 921* has become a two-edged sword for fire and explosion investigators. While courts have repeatedly held that compliance with *NFPA 921* meets *Daubert*’s reliability requirements, a number of courts have held expert testimony inadmissible based on a failure to adhere to *NFPA 921*. In the case of *State v. Satoris*, 2016 WL 3661681 (N.J. Super. Ct. App. Div. 2016), the court reversed a conviction because the admission of an uncorroborated canine alert violated *NFPA 921*, and the state “failed to demonstrate the scientific community had sufficiently accepted uncorroborated canine alerts as evidence of an accelerant.”⁶⁰

Some courts have held that reliance on a methodology other than *NFPA 921* does not render an expert’s opinions per se unreliable, however, an expert who purports to follow *NFPA 921* must apply its contents reliably and any decision to not use certain portions of *NFPA 921* must be thoroughly explained and justified. While *NFPA 921* allows some flexibility in analytical methods, use of the scientific method dictates that any hypothesis formed from an analysis of the data

⁵⁹ *United Fire & Cas. Co. v. Whirlpool Corp.*, 704 F.3d 1338, 1341 (11th Cir. 2013) (citing *Travelers Prop. & Cas. Corp. v. Gen. Elec. Co.*, 150 F. Supp. 2d 360, 366 (D. Conn. 2001) (“*NFPA 921* ... a peer reviewed and generally accepted standard in the fire investigation community.”); *Tunnell v. Ford Motor Co.*, 330 F. Supp. 2d 707 (W.D. Va. 2004) (“*Daubert* requires that the expert’s methodology be established, scientifically sound, and subject to testing and peer review. That is clearly the case with Crim’s opinion as he testified that he employed the fire origin methodology spelled out in the definitive fire origin standard published by the National Fire Prevention Association, Inc.’s *NFPA 921*.... A comparison of Crim’s methodology and the *NFPA 921* methodology reveals that his conclusions were based on these recognized standards and not merely his subjective belief.”); *McCoy v. Whirlpool Corp.*, 214 F.R.D. 646, 55 Fed. R. Serv. 3d 740 (D. Kan. 2003) (“[T]he parties agree [that *NFPA 921*] represents the national standard with regard to appropriate methodology for investigation by fire science experts.... The ‘gold standard’ for fire investigations is codified in *NFPA 921*, and its testing methodologies are well known in the fire investigation community and familiar to the courts.”); *Royal Ins. Co. of America v. Joseph Daniel Const., Inc.*, 208 F. Supp. 2d 423, 426–27 (S.D. N.Y. 2002) (“the *NFPA 921* sets forth professional standards for fire and explosion investigations....”); *Carney v. Sears, Roebuck, And Co.*, 2011 WL 3844077 (S.D. Fla. 2011) (“In cases of fire investigations, most experts employ methods set forth in the *Guide for Fire and Explosion Investigations*, specifically, *National Fire Protection Association Standard 921* . . . This standard serves to guide the Court in determining the reliability of Coste’s methodology.”).

⁶⁰ See *Chapman v. CAN International, Inc.*, 2020 WL 8619577 (S.D. Fla. 2020) (Additionally, Mr. Cappadona is unfamiliar with the procedures set forth in *NFPA 921*, and he acknowledged that he would not have been qualified to assist in the cause and origin investigation in the Cheeca Lodge fire. Thus, Mr. Cappadona is unqualified to opine at trial on the cause and origin of the subject fire.); See also, *Atlantic Specialty Ins. Co. v. Porter, Inc.*, 2016 WL 6126062 (E.D. La. 2016) (slip op.) (the court excluded the expert because the testimony did not follow the basic precepts of investigation laid out in *NFPA 921*).

collected in an investigation must stand the challenge of reasonable examination.”⁶¹

VI. Special Status of Expert Witnesses

Under the Florida Evidence Code (§§ 90.1.1 – 90.958 Fla. Stat.) matters involving opinion testimony at trial are set forth in §§ 90.701 – 90.706. The specific procedures which must be followed in presenting expert testimony to a jury are set forth in Florida Rules of Civil Procedure and Florida Rules of Criminal Procedure. Because of certain constitutional rights, there are important differences in the manner in which expert testimony may be presented in civil proceedings when compared to criminal proceedings.

A. Relevant Statutes and Rules of Procedure

The following are some of the major Florida Statutes and Supreme Court Rules regarding the presentation of expert testimony:

Florida Evidence Code:

Sec. 90.702: Testimony by experts. – If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

Sec. 90.703: Opinion on ultimate issue. – Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.

Sec. 90.704: Basis of opinion testimony by experts. – The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.

Sec. 90.705 Disclosure of facts or data underlying expert opinion. –

- (1) Unless otherwise required by the court, an expert may testify in terms of opinion or inferences and give reasons without prior disclosure of the underlying facts or data. On cross-examination the expert shall be required to specify the facts or data.
- (2) Prior to the witness giving the opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for the witness’s opinion. If the party establishes prima facie evidence that the expert

⁶¹ *NFPA 921* § 19.6.1, at 921-235 (2021 ed.) (citing *Daubert*).

does not have a sufficient basis for the opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.

Sec. 90.706 Authoritativeness of literature for use in cross-examination. – Statements of facts or opinions on a subject of science, art, or specialized knowledge contained in a published treatise, periodical, book, dissertation, pamphlet, or other writing may be used in cross-examination of an expert witness if the expert witness recognizes the author or the treatise, periodical, book, dissertation, pamphlet, or other writing to be authoritative, or, notwithstanding nonrecognition by the expert witness, if the trial court finds the author or the treatise, periodical, book, dissertation, pamphlet, or other writing to be authoritative and relevant to the subject matter.

Florida Rules of Civil Procedure (Fla.R.Civ.P.):

Rule 1.280. General Provisions Governing Discovery

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(5) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

- (A) (i) By interrogatories a party may require any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
- (ii) Any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial may be deposed in accordance with rule 1.390 without motion or order of court.
- (B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only ... upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Rule 1.330: Use of Depositions In Court Proceedings.– Any part or all of a deposition may be used against any party who was present or represented at the taking of a deposition or who had reasonable notice of the deposition, so far as admissible under the rules of evidence, as though the deposed person was present at trial in accordance with the following provisions

...

(a) Use of Depositions.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(F) the witness is an expert or skilled witness.

Rule 1.390: Depositions of Expert Witnesses. –

- (a) **Definition.** The term “expert witness” as used herein applies exclusively to a person duly and regularly engaged in the practice of a profession who holds a professional degree from a university or college and has had special professional training and experience, or one possessed of special knowledge or skill about the subject upon which called to testify.
- (b) **Procedure.** The testimony of an expert or skilled witness may be taken at any time before the trial in accordance with the rules for taking depositions and may be used at trial, regardless of the place of residence of the witness or whether the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state.

Florida Rules of Criminal Procedure (Fla.R.Crim.P.):

Rule 3.180: Presence of Defendant. –

- (a) **Presence of Defendant.** In all prosecution for crime the defendant shall be present:
 - (5) at all proceedings before the court when the jury is present;
 - (6) when evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury...

Rule 3.220: Discovery. –

- (b) **Prosecutor’s Discovery Obligation.**

- (1) Within 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit which shall disclose to the defendant and permit the defendant to inspect, copy ... the following information and material within the state’s possession or control...

- (A) a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto ... clearly designated in the following categories

- (i) Category A. ... (7) expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify ...

- (B) the statement of any person whose name is furnished in compliance with the preceding subdivision. The term “statement as used herein includes a written statement.... The term “statement’ is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case....

- (J) reports or statements of experts made in connection with the particular case....

- (3) The court may prohibit the state from introducing into evidence any of the foregoing material not disclosed....

B. Application of Expert Witness Statutes and Rules

1. Testifying as to the ultimate issue at trial (§ 90.703 Fla. Stat.).

The fact that an expert may testify as to the ultimate issue in a case is perhaps the most unique

and important aspect of expert testimony. Typically, witnesses are not permitted to testify as to the ultimate issue to be decided by the trier of fact (jury or judge in the event the matter is being tried without a jury). Section 90.703, Fla. Stat. (“Opinion on ultimate issue”) provides a major exception to this general rule by permitting an expert to testify in the form of an opinion regarding the ultimate issue to be decided, even when such opinion may be case dispositive.

Courts interpreting the extent to which § 90.703 permits an expert to testify regarding the ultimate issue in a case have traditionally drawn a bright line prohibiting such testimony where the expert’s conclusion tells the trier of fact how to decide a case and does not assist in determining what has occurred. The case of *Town of Palm Beach v. Palm Beach County*,⁶² involved a suit brought by municipalities against the county under the constitutional proscription against subjecting municipal property to taxation for services rendered by the county exclusively for the benefit of property located in unincorporated areas. On petition for discretionary review, the Florida Supreme Court stated the following regarding the limits of expert testimony relating to an ultimate issue under § 90.703:

Petitioners argue that section 90.703, Florida Statutes (1981), permits opinion testimony on an ultimate issue to be decided by the trier of fact. We agree. However, section 90.703 does not imply the admissibility of all opinions. If the witness’ conclusion tells the trier of fact how to decide the case, and does not assist it in determining what has occurred, then it is inadmissible. [Internal citations omitted.]⁶³

To further explain the limits of § 90.703, the Florida Supreme Court’s opinion in the *Town of Palm Beach v. Palm Beach County* references the facts presented in *Gifford v. Galaxie Homes, Inc.*, 223 So.2d 108, 111 (Fla. 2d DCA 1969), stating:

In *Gifford*, an action for negligent construction, it was held proper for the duly qualified expert to respond when asked whether the premises were "constructed and maintained according to reasonably safe construction and engineering standards." However, it would have been improper for the expert to assert to the trier of fact that the premises were "negligently constructed." While this is to some degree a matter of semantics, we find the distinction necessary. Otherwise, the trier of fact is being directed to arrive at a conclusion which it should be free to determine independently from the facts presented. We do not think that section 90.703 was intended to be so broad.⁶⁴

More recently, in the case of *Schneer v. Allstate Indem. Co.*,⁶⁵ involving the denial of an insurance claim based on the insureds’ submission of a false claim, the 3rd DCA considered the testimony of a former special investigator and assistant division director/division counsel who had been employed by the Florida Department of Insurance, Division of Insurance Fraud. After confirming he had reviewed the insurance claim file, including sworn statements and property loss statements submitted by the insureds, the insurance fraud expert testified that the case “is absolutely nothing more than an adjusting dispute over some casualty losses.... And I don’t–have not seen, in my opinion any evidence of any fraud whatsoever.”⁶⁶

Confirming the trial court’s decision to exclude the insurance fraud expert’s testimony, the 3rd

⁶² *Town of Palm Beach v. Palm Beach County*, 460 So.2d 879 (Fla. 1984).

⁶³ *Ibid* at 882.

⁶⁴ *Ibid*.

⁶⁵ *Schneer v. Allstate Indem. Co.*, 767 So.2d 485 (Fla.App. 3 Dist. 2000)

⁶⁶ *Ibid* at 487, footnote 1.

DCA stated the trial court correctly excluded the expert's testimony ... where it had the effect of advising the jury how to decide the case, rather than assisting it in determining what occurred.⁶⁷

Indeed, the court-imposed limits on the application § 90.703 appear “to some degree a matter of semantics.” A closer consideration, however, reveals that court decisions prohibiting expert testimony which “tells trier of fact how to decide the case” usually involve circumstances in which the expert is providing an opinion regarding the defendant's specific intent without providing fact-based testimony which assists the trier of fact in determining such intent.

2. Matters upon which experts may rely in forming an expert opinions (§ 90.704 Fla. Stat.).

Another unique aspect of expert testimony involves the “information” upon which an expert may rely as the basis for his or her opinions. The facts or data upon which an expert relies in forming an opinion involve matters perceived by, or made known to the expert at or before the trial, hearing or deposition. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, § 90.704, Fla. Stat. states that such facts or data need not be admissible in evidence. Accordingly, an expert may rely in part on something as suspect as a hearsay account from a lay witness and something as reliable as the results of scientific testing, while using observations reported in an authoritative text to reconcile the information. The primary focus in evaluating the facts or data upon which an expert relies is whether such facts or data are reasonably relied upon by other experts to support their opinions regarding the subject.

3. Pretrial disclosure of experts, their opinions, basis for opinions and potential bias.

A party intending to present an expert's opinion testimony at trial must respond to an opposing party's interrogatories seeking the following information:⁶⁸

- The identity of each expert;
- The subject matter on which each expert will testify; and
- The facts and opinions and basis for those opinions to which each expert will testify.

Any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial may be deposed in accordance with Rule 1.390, Fla.R.Civ.P., without a motion or court order. In addition to the expert's qualifications, opinions and basis for same, Rule 1.390 permits the following inquiries to disclose potential bias on the part of the expert:⁶⁹

- The scope of the expert's employment and compensation for such services;
- The expert's litigation experience, including the percentage of cases testifying on behalf of plaintiffs and defendants;
- The names of reasonably recent cases in which the expert has testified at deposition or trial;
- The estimation of the extent of involvement of the expert as a witness which may be based on the number of hours, percentage of hours or percentage of compensation;
- And, under unusual or compelling circumstances, financial or business records.

⁶⁷ *Ibid* at 488-489, citing *Town of Palm Beach v. Palm Beach County*, 460 So.2d at 882 (trial court abused its discretion in permitting petitioner's expert on municipal taxation to repeatedly opine that the challenged services did not provide the requisite real and substantial benefit); *Gurganus v. State*, 451 So.2d 817, 823 (Fla. 1984) (proper for expert to give testimony regarding the effect of a given quantity of alcohol on defendant's ability to form specific intent; improper for expert to testify whether defendant's actions were premeditated).

⁶⁸ Rule 1.280(b)(5)(A)(i), Fla.R.Civ.P.

⁶⁹ Rule 1.280(b)(5)(A)(ii) and (iii), Fla.R.Civ.P.

Consulting (Non-Testifying) Experts v. Testifying Experts.

Not all experts are retained to testify at trial. A consulting expert is an expert retained in anticipation of litigation, but is not expected to be called as a witness at trial. Consulting experts are retained for a variety of reasons, including assisting a party's attorney in understanding technical or scientific evidence, identifying weaknesses in the opposing party's case or preparing to depose an opposing party's expert. Accordingly, a consulting expert's factual information and opinions are generally considered to be attorney work product. Unless an opposing party can demonstrate exceptional circumstances under which it is impracticable for the opposing party to obtain facts or opinions on the same subject by other means, a party is not required to disclose facts known or opinions held by an expert whom the retaining party does not anticipate testifying at trial.⁷⁰

The case of *Wackenhut Corp. v. Crant-Heisz Enterprises, Inc.*,⁷¹ involved a negligence action brought by the owner of a warehouse damaged by fire against another corporation for allegedly permitting the fire to start. The defendant corporation filed a motion for leave to depose an expert witness retained by the plaintiff to conduct an investigation of the fire who would not be testifying at trial. Following the trial court's denial of the defendant's motion, the 2nd DCA granted certiorari review and held that because the warehouse had been removed and there were no other photographs of its interior or the fire scene, there were exceptional circumstances necessitating disclosure of photographs taken by the plaintiff's non-testifying expert. The appellate court denied, however, the defendant's request that the plaintiff's non-testifying expert be deposed and produce his reports, memoranda and other documents, as the defendant did not demonstrate any exceptional circumstances necessitating such request. Thus, the non-testifying consulting expert's opinions were protected by the work product doctrine which prevented their disclosure.

4. Use of depositions to present expert witness testimony in civil cases.

While Rule 1.390 Fla.R.Civ.P. permits any party to take depositions, including depositions of experts who will be testifying at trial, Rule 1.330(a)(1) and (2), Fla.R.Civ.P. dictates how and when a deposition may be used in a civil trial. In most instances, as long as a party was present, had reasonable notice and an opportunity to be present or was represented by counsel at a deposition, part or all of the party's deposition may be used for any purpose at trial. Moreover, a party may use the deposition of a non-party witness to contradict or impeach the testimony of such witness at trial.

With regard to using the deposition testimony of a non-party witness in a civil trial in lieu of actual attendance, Rule 1.330(a)(3) generally requires a showing of non-availability (witness is dead, in very poor health, located more than 100 miles from the place of trial or resides in another state). Contrary to this requirement to demonstrate non-availability of a non-party witness, depositions of expert witnesses may be used in a civil trial regardless of the expert's availability.

5. Use of deposition testimony in criminal cases.

The Sixth Amendment to the United States Constitution states in part that "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.... Attempts by prosecutors to present previously recorded testimonial evidence⁷² in a criminal trial

⁷⁰ Rule 1.280(b)(5)(B).

⁷¹ *Wackenhut Corp. v. Crant-Heisz Enterprises, Inc.*, 451 So.2d 900 (Fla. 2d DCA 1984).

⁷² The Sixth Amendment right to confrontation applies to "testimonial statements", meaning statements declarants reasonably expect to be used prosecutorially against the accused (eg., eye witness testimony of criminal conduct, testimony of law enforcement personnel and criminal investigators, testimony of forensic analysts and medical examiners) and "testimonial hearsay", meaning recordings and other memorializations

necessarily raises Sixth Amendment confrontation concerns. In the case of *Crawford v. Washington*, Justice Antonin Scalia thoroughly explained that in order to use previously recorded testimonial evidence in a criminal trial in lieu of in-person testimony, the prosecution must first establish: (1) the witness is unavailable to testify in person at trial; and (2) the defense had an opportunity to cross examine the witness regarding his or her anticipated testimony.⁷³

6. Use of a surrogate expert witness to provide testimony in a criminal case.

Instances may arise in which the Fire, Arson and Explosives Detective who conducted an investigation is no longer available for deposition or trial by the time the defendant is criminally charged. Such instances raise major Sixth Amendment right to confrontation concerns. Moreover, given the detective was never deposed regarding the subject investigation, the U.S. Supreme Court's holding in *Crawford v. Washington* is inapplicable. Fortunately, as demonstrated in the case of *Rasario v. State*,⁷⁴ there is a procedure by which a "surrogate" (substitute) fire and explosives expert may be used to testify in place of the unavailable expert without violating the defendant's Sixth Amendment right to confrontation.

Rasario v. State, involved the following material facts:

Medical Examiner testimony involving a child homicide prosecution –

- Homicide charges were not brought until approximately nine (9) years after murder.
- Dr. Gore, the Medical Examiner who initially performed the autopsy, was officially removed from office long before the defendant was criminally charged and was never deposed regarding his findings. By the time the matter went to trial, Dr. Gore was unavailable for purposes of trial testimony.
- Dr. Garavaglia, the Medical Examiner who replaced Dr. Gore, was called to testify at trial regarding the autopsy results.
- The defendant was found guilty and appealed his murder conviction.
- On appeal the defendant contended his Sixth Amendment right to confrontation was violated as he was never provided an opportunity to cross-examine Dr. Gore regarding the autopsy results. Moreover, the defendant asserted Dr. Garavaglia merely served as an improper conduit through which the prosecution presented Dr. Gore's autopsy findings, which constituted inadmissible hearsay evidence.

On appeal, the 5th DCA focused on two primary issues:

- (1) § 90.704 Fla. Stat. – The facts or data upon which an expert bases an opinion ... may be those ... made known to the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion.... Florida courts interpreting § 90.704 have consistently recognized that an expert's testimony may not merely be used as a conduit for the introduction of the otherwise inadmissible evidence.⁷⁵

of testimonial evidence (eg., written, transcribed, recorded, or video-taped testimonial statements made during custodial interrogations, preliminary hearings, grand jury proceedings, previous trials and depositions').

⁷³ *Crawford v. Washington*, 541 U.S. 36, 59, 68-69, 124 S.Ct. 1354, 1374 (2004).

⁷⁴ *Rosario v. State*, 175 So.3d 843 (Fla.App. 5 Dist. 2015).

⁷⁵ *Ibid* at 860, citing *Linn v. Fossum*, 946 So.2d 1032, 1037-38 (Fla. 2006) ("Florida courts have routinely recognized that an expert's testimony may not merely be used as a conduit for the introduction of the otherwise inadmissible evidence." [Internal quotations omitted.]

- (2) Sixth Amendment Confrontation Clause – Whether the Confrontation Clause of the Sixth Amendment was violated as a result of the defendant not having an opportunity to cross-examine the medical examiner who performed the autopsy.

At trial Dr. Garavaglia, the new Medical Examiner, opined the child's death was a homicide caused by asphyxiation based on five facts. With regard to confirming facts one, two, four and five, Dr Garavaglia testified that she relied on post-mortem photographs of the child's body (abrasions on the face, broken blood vessels and red marks/contusions on the back of the neck, marks on the inside of both the upper and lower lips, and a stretch abrasion on the back of the ear along with two little marks on the earlobe). As to the fact three (swelling of the brain), Dr. Garavaglia personally examined a preserved portion of the child's brain under a microscope. Dr. Garavaglia did not state the autopsy report prepared by Dr. Gore was the basis for her opinion. In fact, the court found that Dr. Garavaglia based her opinion on objective data that could not be misrepresented.⁷⁶

Based on the *Rosario v. State* line of cases, two points appear clear regarding the testimony of a surrogate expert witness: (1) § 90.704 will not permit a surrogate expert witness to serve as conduit for the admission of an unavailable expert witness's opinions; and (2) to avoid violating the defendant's Sixth Amendment right to confront his or her accusers, the surrogate expert's opinions must be independent of, and in no way rely on, the unavailable expert's report.

As demonstrated in *Rosario v. State*, the admissibility of a surrogate expert's opinions depends in large part on the unavailable expert having thoroughly gathered, organized and preserved the facts and data necessary to conduct an investigation which will properly support such opinions. With regard to expert opinions relating to the origin and cause of a fire or explosion, the retained facts and data should be sufficient to support investigative methodologies consistent with NFPA 921. Just as Dr. Gore's autopsy file included photographs and a brain tissue sample which permitted Dr. Garavaglia to independently form her opinions regarding the cause of the child's death, the same should be true of an investigative file reviewed by a surrogate origin and cause expert.

As a practical matter, the non-available origin and cause expert's supervisor may be the best candidate to serve as a surrogate origin and cause expert as he or she will have some familiarity with the investigation based on a previous supervisory review. Simply stated, while the Sixth Amendment will not permit a surrogate origin and cause expert to merely repeat the opinions set forth in a non-available expert's report, it will permit a surrogate origin and cause expert to provide his or her independent opinions based on facts and data which supported the non-available expert's report. Finally, it should be noted that in reviewing the facts and data necessary to form independent opinions, a surrogate origin and cause investigator is not limited to review and consideration of the facts and data gathered by the non-available origin and cause expert. Should additional relevant facts and data be available, the surrogate expert is encouraged obtain and consider such information in forming his or her independent opinions.

VI. Conclusion

The following are some of the major "take aways" from the foregoing discussion:

- **Florida Evidence Code § 90.702 and *Daubert*:** Florida Evidence Code § 702 ("Testimony of Experts") requires all expert testimony (scientific, technical and other specialized knowledge) to meet the reliability standards set forth in *Daubert v. Merrill-*

⁷⁶ *Rosario v. State* 175 So.2d at 859.

Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786 (1993).

- Can the theory or technique be subjected to testing with appropriate standards and controls?

“Scientific Methodology” – Generating hypotheses and testing them to determine whether they can be falsified.

- Has the theory or technique been subjected to peer review and publication?

Some propositions are too new, or of too limited interest to be published. Accordingly, publication (or lack thereof) in a peer reviewed journal is a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology.

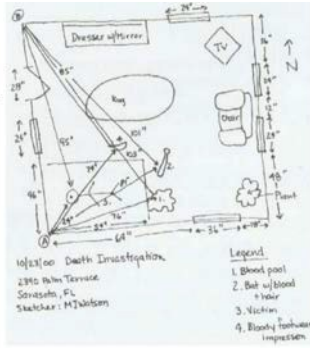
- Is there a known or potential rate of error regarding the application of the technique and are there industry standards regarding its operation?
- Is there a level of general acceptance in that particular discipline’s community?

This is the previous *Frye* standard. As with peer review publication, this standard is not necessarily dispositive, however, widespread acceptance can be an important factor in determining evidence is admissible, and a known technique which has generated little or no support within the relevant community may be properly viewed with skepticism.

- **NFPA 921:** In the conduct of fire and explosion origin and cause investigations, close adherence to *NFPA 921, Guide for Fire and Explosion Investigations* will meet the requirements of § 90.702 and *Daubert* for the admission of fire and explosion origin and cause opinions.
 - Simply stating in an origin and cause investigation report that the investigation was conducted in accordance with *NFPA 921* is insufficient. For example, in a fire origin and cause investigation the investigator must document compliance with each of the steps comprising the scientific method as outlined in 4.3.1 through 4.3.10, *NFPA 921* (2021).
 - Fire and explosion origin and cause investigators should avoid “cherry-picking” the methodologies set forth in *NFPA 921*. While *NFPA 921* allows for some flexibility in analytical methods, origin and cause experts must be able to explain why he or she departed from or ignored certain portions of *NFPA 921* based on the particular circumstances presented.
 - While there are reported decisions in which courts have accepted fire and explosion opinions based on methodologies and principles other than *NFPA 921*, there are far more reported decisions in which courts have rejected origin and cause opinions based on a failure to follow methodologies and principles of *NFPA 921*.
- **Special Status of Expert Witnesses:** Expert witnesses may provide opinions regarding the ultimate decision to be determined by the trier of fact, even when such opinions may be case dispositive. Moreover, so long as the facts and data upon which an expert relies in forming his or her opinions are of the type reasonably relied upon by other experts in the subject to support the opinion expressed, it does not matter that such facts or data are not admissible in evidence. Finally, a defendant’s Sixth Amendment right to confront witnesses supersedes contrary evidentiary statutes and rules of court procedure.
 - Despite an expert witness having the authority to provide an opinion regarding the ultimate decision to be determined by the trier of fact, this unique authority does not permit an expert to render an opinion which has the effect of telling the trier of fact how to decide the case, rather than assisting the trier of fact in understanding the evidence and determining what occurred.
 - While § 90.703 permits an expert witness to rely on otherwise inadmissible evidence in

forming his or her opinions, it does not permit an expert witness to merely serve as a conduit for the introduction of otherwise inadmissible evidence.

The potential impact of an expert witness's opinions on the outcome of a case continue to be enormous, however, before the trier of fact may receive such opinions the expert witness must now convince the court of the reliability of the principles, methodologies and techniques upon which the testimony is based.



Unit 2

Lesson 1: Documentation of the Fire Scene, a Legal Perspective

Enabling Learning Objectives:

At the end of this session, the student will be able to:

1. Explain the importance of documentation.
2. Describe how to document the discovery and report of the fire.
3. Describe what documentation and sources of documentation are needed about the conditions of the fire scene.
4. Identify four methods to document the fire scene at a trial and their purpose and concerns of use.

Overview

It goes without saying; every arson case begins at the fire scene. Unfortunately, many arson cases end at the fire scene as well. Unless the fire scene is properly documented, a case can be lost before it ever starts. A coordinated effort between fire suppression personnel and fire investigators is an essential first step in building an arson case. Proper documentation of a fire scene requires a systematic approach on the part of both firefighters and fire investigators. More importantly, it requires an understanding and recognition of the documentation needed to not only establish the incendiary cause of the fire, but to develop the connecting evidence which will identify and prove the person responsible for setting the fire.

The fire investigator must remember two very important things when documenting a fire. First, if it was not written down, most courts do not recognize that it happened. Second, the report written today could be in front of the United States Supreme Court tomorrow. The documentation of the fire scene is an important part of the fire investigation and must be treated as such.⁵⁹

I. Documenting the Discovery and Report of the Fire

Some of the most important evidence in an arson case is derived from the circumstances of the fire's discovery and initial report. These facts need to be established and properly documented at the very outset of the investigation.

⁵⁹ Morgan, K.A., (2011)

A. The Responding Agency(s) Reports

If there is any part of a fire investigation that could be considered crucial, it would be the reporting of and response to the fire. Many facts, observations and details are provided during this time frame that helps the fire investigator. All of the details of the initial reporting of the fire and subsequent response to the fire by fire, police, and emergency medical services need to be established by the fire investigator. They begin with the notification to the local agency, in most cases, the Emergency 911 Communications centers, and end when the fire, police and EMS personnel write their reports.

(1) Emergency Communications Centers

The information which can be provided includes who called the fire in, from where was the call made and what did the complainant report seeing when they first observed the fire. With the introduction of Computer Aided Dispatch (CAD), the actual recording of the caller, the times received and dispatched and who responded are all recorded and stored on computers.

(2) Fire Department

The fire department report can be a comprehensive accounting, from the fire ground perspective of what was happened with respect to the response to, and extinguishment of the fire. Most fire reports even have a free type area for the report writer to document details not captured in the mandatory fields of the report.

(3) Police Department

The first responding person(s) to the fire scene is usually the police. Trained to be observant as to what they see upon arrival, the police officer can provide many details that the fire department personnel may not catch. By virtue of the nature of the job, police officers ask questions and it is important that the information they obtain is reduced to writing. Since a fire is not necessarily criminal in the eyes of the police, it is important that the police agency document their involvement in a report.

(4) Emergency Medical Services

The EMS service is not always be associated with the fire department; in many cases they are a separate entity. They write reports when an injury occurs. This is completed regardless of transport. However, it is also important to understand that the medical community has its own rules that govern information. The HIPPA law is very important law to know and understand.

B. Fire Scene Witnesses

When someone is a witness, they use their senses (sight, smell, touch, hear, speak) to document what has occurred. In the case of a fire, the person(s) that discovered the fire or who were in the immediate vicinity of the fire are important to the overall documentation of the fire. Many times, they will remain at the fire scene through extinguishment and overhaul.

It is imperative to identify and speak with these individuals while they are still there. Their observations about the conditions at the time of the fire was discovered and the progression of the fire as it burned can provide critical information for the fire investigator. Their observations may provide insights into the fire's origin and cause. They may have noticed unusual or suspicious activity immediately preceding the discovery of the fire. Often these witnesses do not live in the area, but just happened to be driving through the area. Unless they are identified and interviewed while they are still at the fire scene, they may never be found later. Indeed, the arsonist himself may be there at the fire scene.

Some departments have established a standard procedure of recording the tag number and description of every vehicle in the area of the fire incident at the time of the initial response. Many fire departments and investigative agencies now videotape fire scenes to capture the scene to include witnesses. Witnesses and neighbors may decide to videotape the fire out of their own curiosity. And speaking of videotaping, most law enforcement vehicles have at least in-car cameras that come on manually or when the blue lights are activated. These videotapes can be invaluable evidence for the investigator and should be secured.

II. Documenting the Conditions at the Fire Scene

The final presentation of any fire scene, either criminal or civil, is the courtroom. Documenting the conditions at the fire scene is needed to be able to bring the fire scene into the courtroom.

A. Fire Officer in Charge

The officer in charge of the fire scene must be identified and interviewed; the weather conditions at the time of arrival and throughout the period of suppression should be noted. Fire conditions and the location of areas of active fire involvement from arrival time of the first units through extinguishment of the fire should be carefully recorded in detail. The manner by which fire was extinguished and the ensuing overhaul conducted could explain the reason a fire scene appears the way it does. It could work against an origin and subsequent cause determination if the documentation of the scene, without this information, is presented in court.

B. Security at the Fire Scene

The security of a building, structure or vehicle at the time of first arrival at the fire scene must be precisely documented. This can be a critical piece of evidence in any arson case. The location and condition of all points of entry should be noted. This must be verified with the particular firefighters who actually observed and checked the points of entry, including all doors, windows or other openings, and will be able to provide first- hand testimony at trial. It is not enough to simply speak with the officer in charge about what was reported back to him by the firefighters. Each and every point of entry must be reviewed and documented with the firefighters having actual knowledge of the conditions of those particular points of entry.

This may or may not be contained in the reports of the responding fire department. However, typically it is not. Contact must be made with the firefighters who had first- hand knowledge of the security of the building while their recollection of events is still fresh. As a practical matter, this must be done within the first forty-eight hours after the fire.

In addition to the testimony of these witnesses, corroborating physical evidence must be

documented. Establishing and close-up photographs must be taken of all doors and windows as well as their locking mechanisms. They must be closely inspected for any signs of forcible entry or tampering. Glass fragments should be examined for indications of heat crazing, carbon deposits or fracture striations. The location of glass fragments inside or outside the doors and windows must be determined and photographed.

C. Fire Suppression and Extinguishment

Critical information about a fire can be derived from the circumstances of its extinguishment and suppression. The equipment used during suppression and overhaul should be identified and recorded. The number and size of hose lines used, and the nozzles and patterns utilized will be important information. The observations of the line firefighters who entered the building can serve to corroborate the conclusions of the fire investigator. Information about floor level burning, multiple areas of fire origin, the description and locations of the flames and smoke, incidents of “flashover”, fire load conditions and location of furnishings, equipment, inventory, and other items will be invaluable testimony at trial. Once again, this can only be properly documented through the actual firefighters who made these observations and it must be established immediately after the fire.

D. Post-Extinguishment Conditions at the Fire Scene

Ideally, the fire investigator will be called out to the scene immediately after extinguishment and prior to overhaul. If not, the fire investigator will have to confirm there have been no significant changes in the fire scene since extinguishment or during overhaul. If there have been any changes to the fire scene, such as the removal of property from the inside the building during overhaul, this must be ascertained and noted. Only then can a proper fire scene investigation begin.

Even prior to analysis of the fire’s origin and cause, preliminary observations must be made about the fire scene. Apart from the obvious fire damage conditions, the fire investigator should note the existence and condition of property at the fire scene. In particular, the location and extent of fire and smoke damage (or lack of damage) to major items in the building should be recorded. In a commercial property, the type and amount of equipment and inventory on hand at the time of the fire should be catalogued. It should be closely examined to determine if there are any unusual aspects to the equipment and inventory, such as unexpectedly high or low amounts of inventory on hand at a business. Any obsolete or outdated inventory and equipment, empty containers or vacant storage areas where property would be expected to be found should be noted.

In addition, disconnected or removed equipment and fixtures, recently delivered merchandise which has not been unpacked or put on display, display items and merchandise (especially food items) left on display which should have been put away at the close of business, and any other such observations should be documented. Unusual or unexplained conditions at the time of the fire can be compelling evidence of arson. They should be noted, recorded and documented with photographs whenever they are found at a fire scene.

III. Documenting the Scene and Evidence

A discussion of fire scene analysis is better left for one trained and qualified in the subject. However, from the legal perspective as a front-row observer of cases won and lost, certain

lessons have been learned which bear repeating here in the hope these lessons – good and bad – will be learned in the classroom and not in the courtroom.

A. Systematic and Technically Sound Investigation

It goes without saying; the fire scene investigation should be properly conducted. However, this is more than simply doing a thorough job. It requires an awareness and understanding of the recognized procedures for a fire scene investigation in conformity with scientifically established procedures. More to the point, it requires an adherence to NFPA 921: A Guide for Fire and Explosion Investigations.

Since the adoption of NFPA 921 in February of 1992, it has become a controversial document. While it was intended to serve as a “guide” for the investigation of fire and explosion incidents, it has become much more than a mere guide. In practical effect, it has become the “National Standard” for fire and explosion investigations. It not only outlines the proper steps in an investigation, it challenges many of the long-standing principles of fire analysis. The interpretation of spalling, pour patterns, V-patterns, rate of char analysis, flashover and a host of other fire scene phenomena have been subjected to intense scrutiny under objective standards of scientific verification. The fire investigator who fails to follow the “guidelines” of NFPA 921 or is unfamiliar with this document will find himself challenged not only on the results of his investigation, but on his basic methodology and practice. The only way to avoid a confrontation under NFPA 921 is to follow its recommended practices and procedures whenever possible (and appropriate) and be ready to justify any deviation from its methodology, regardless of whether you agree with some, all or none of this document. You must be prepared to acknowledge it as the most widely recognized reference source in the field of fire investigation.

B. Examining the Entire Fire Scene

One of the most common mistakes made in the investigation of fire scenes is the failure to examine and document the entire scene. At trial, the fire investigator will always be accused of having jumped to conclusions without considering all of the evidence. Where the entire fire scene has not been thoroughly examined and, more importantly, thoroughly documented with photographs, the investigation is vulnerable to those accusations.

Unlike the defendant who is afforded the right to remain silent at trial, the investigator must answer for what he did or did not do. A reasonable doubt about the defendant’s guilt can easily be raised from something which was not done by the investigator or a question which cannot be appropriately answered. Certainly, any total loss fire scene should always be investigated from top to bottom, front to back. Even a partial loss fire scene should be thoroughly examined. Despite the fact that undamaged areas may have no direct bearing on the cause of the fire, it can be significant to document, if only to be able to show the jury that the investigation was objective and comprehensive. At trial, the investigator will realize all of these thorough actions were well worth the effort.

C. Photographic Documentation

There has never been a case which has gone to trial with too many photographs. However, there have been many cases which have gone to trial with too few. Cases have been lost because something originally considered insignificant or meaningless was undocumented;

almost by definition, it becomes significant when it is undocumented. Moreover, refuting a challenge to an investigator's theory of the fire goes beyond mere verbal disagreement. Refuting a challenge must be demonstrated and shown to the jury. The most convincing way to do that is with evidence such as documentary proof in the form of a photograph. For particularly dramatic and thorough effect, composite panorama photographs and overhead or aerial photographs should be considered for use.

D. Fire Scene Diagrams

A detailed and accurate fire scene diagram is an indispensable component of a proper fire scene investigation. While most fire investigators are not trained draftsman, a fire scene diagram does not have to resemble an architectural blueprint to be effective. However, it does need to accurately depict the layout and configuration of the structure. It must contain all or the rooms in the structure and the factors which would affect the fire's travel and progression, such as walls, hallways, stairways, attics, crawl spaces and the like. Many computer software programs now offer drafting capabilities and can make the job much easier for an investigator. Even without the benefit of a computer program however, an investigator can draw a fire scene diagram suitable for use at trial with just a little time and effort. It is time well spent, as the fire scene diagram will be one of the most important demonstrative exhibits at trial. The use of overlays and enlarged areas within the diagrams can make them even more effective exhibits for the jury.

IV. Documenting the Fire Scene at Trial

Without proper documentation of the fire scene at the initial stages of the investigation, the case may already be lost. Even a properly documented fire scene must still be properly presented at trial; however, this requires the effective use of demonstrative evidence to prove the point. The demonstrative evidence used in an arson trial can take several forms.

A. Photographs, Slides and Video

Photographic documentation of the fire scene is essential to a proper investigation and an effective trial presentation. The method of photographic documentation may include print photographs, digital images, slides, film, videos or a combination of these formats.

(1) Photographs

Print photograph remain the most widely used form of documentation. They offer the advantage of capturing a critical aspect of the fire scene such as a significant burn pattern or area of origin which can be used as a reference point for extensive testimony at trial. Key photographs can also be used by the attorney in the closing argument with dramatic effect. Photos in evidence can be sent into the jury room during deliberations as well, for review by the jury as they decide their verdict in the case. This can be one of the most important uses of photographic evidence at trial.

To be effectively presented at trial, photographs must be enlarged and mounted (or shown on screens), then labeled and numbered in the proper order. Photographs should be enlarged to at least an 8 X 10 or 10 X 12 size. Critical photographs can be enlarged to poster size. Making enlargements of

photographs is unquestionably expensive. However, regular size 3 X 5 prints are simply useless at trial. Much of the testimony explaining the photographs will take place in front of the jury box where the entire jury panel will have to see the photographs as the testimony explains them. It is impossible for juror on the back row or seated at the end of the jury box to see the 3 X 5 photographs with any meaningful understanding of them.

More importantly, while a burn pattern may be readily discernable to a trained investigator, the typical juror will have a hard time recognizing a burn pattern in a photograph even as it is pointed out unless the photograph is enlarged so that it clearly shows the burn pattern or whatever else may be important in that picture.

In preparing the photographs for use at trial, they must be properly labeled and numbered in the sequence corresponding to the testimony of the investigator as he explains the fire scene. In order to put the photographs in the proper order, the investigator must have prepared his testimony about the fire scene to track the order of the photographs. This will be done in conjunction with the attorney presenting the case.

(2) Digital Images

As described above, photographs have been widely used by the courts system for many years. The medium for taking those photographs has been primarily the 35mm camera. But with the introduction of the digital camera, many of the issues listed above have been corrected and enhanced.

The digital camera offers much more than its 35mm counterpart. Once an image is captured, the image can be viewed instantaneously. The photographer can then check the image to make sure the item photographed was captured to the satisfaction of the photographer. The image can be uploaded to a computer and sent within minutes to anyone.

In addition, instead of blowing up a photograph, the image is placed on a computer and broadcast to the courtroom through a projector onto a screen.

And finally, the picture in the hand is not lost. The image can be placed on photographic paper in the sizes used in court under the older photography.⁶⁰

(3) Slides

It is appropriate to mention slides in this section because prior to the digital image, slides were enlarged in the same way as the digital image is used in a projector. The cost was much more effective using the slides to show photographs; however, like the digital image on the computer, it should not take the place of the printed 8 X 10 or 10 X 12 reproduced image.

(4) Videos

⁶⁰ Morgan, K. (2011)

The use of videos, film footage or digital records of a fire scene can be particularly effective during trial. It is a much more life-like means of showing the fire scene to the jury and gives a much better perspective of the overall fire scene as the video moves throughout the scene. However, just as with slides, fire scene videos should never take the place of photographs. It is difficult to “freeze” a video to demonstrate an important part of the fire scene and it is impractical to use videos during closing arguments. Similarly, most trial judges will not permit the jury to take the films to the jury room for viewing during deliberations and even when they are allowed to do so, as practical matter the jury may not pay as close attention to the video as an enlarged photographic print.

Video of the fire in progress is an invaluable piece of evidence. Likewise video taken immediately after the fire is extinguished as the investigation begins can have a dramatic impact at trial. Where such video is available it should always be used at trial.

B. Scale Models

The construction of scale models represents one of the most persuasive ways of documenting the fire scene for use at trial. A scale model is a dramatic means of taking the jury to the fire scene there in the courtroom. It demonstrates the construction and layout of the structure before the fire in a way no photograph or diagram can possibly do. It enables the investigator to supplement his testimony with a graphic representation of the conditions and fire load which contributed to the fire’s path and progression. Constructing a scale model is a costly and time-consuming project; it can cost thousands of dollars to have one built by a consulting expert. However, where the resources are available to have a scale model constructed for use at a trial, it can provide invaluable benefit to the investigator testifying about the fire’s origin and cause.

C. Computer Graphic Simulations

As computer technology has continued to evolve, new applications have been developed for use in a number of areas, including the courtroom. The computer graphic simulation represents the most advanced form of demonstrative evidence ever conceived and its value as a trial exhibit has been increasingly recognized. In the courtroom, this is truly state-of-the-art.

A computer graphic simulation is essentially a computer-generated animation which can recreate any event in animated form. It can also be used to illustrate hypothetical events by modifying the actual facts and circumstances in any situation to predict and demonstrate what would have happened under those circumstances. In the context of arson cases, a computer graphic simulation can recreate the complete progression of a fire from ignition through overhaul in a highly realistic animated format similar to a Hollywood special effects production. A jury can watch as testimony about a fire’s origin and cause literally comes to life through a computer graphic simulation, just as if the entire fire incident had been captured on film. At the same time, opposing theories of the fire’s origin and cause can be tested through a computer graphic simulation to disprove those theories convincingly. As you might imagine, the impact of such evidence on a jury is powerful and persuasive.

A computer graphic simulation is an expensive proposition. The cost of creating one can easily exceed ten-thousand dollars (\$10,000) or more. It is cost prohibitive for all but the well-funded party willing to make the financial investment in the case. For those who can afford it, a computer graphic simulation represents the ultimate form of demonstrative evidence.

D. Computer Modeling

Another use of computer technology to create demonstrative evidence is the “modeling” of fires. This has become an increasingly common tool used in the investigation of fires and can have significant impact as demonstrative evidence at trial.

Computer modeling is essentially a series of mathematical calculations using formulas developed from research in the field of fire science. All of the known data about a particular fire will be used in making the calculations. The available fuel load, the heat release rate (HRR) of all combustible and flammable materials, the volume of the room or compartment where the fire originated, the construction of materials and composition of the structure, the volume and exchange rate of air, relevant time frames and all other known data about the fire will be included in the calculations. When all of this data is applied to the formulas and the calculations are made, it will provide information about how the fire should have initiated, developed and spread under those circumstances. This information will then be compared to the evidence and information about the fire to see if it is consistent. Variables can be introduced to the calculations to test the effects of other factors which may be suspected to have been present, such as accelerants used to set the fire. When those variables are included in the calculations, the results will again be compared to the actual evidence of the fire to see if those variables make the actual damage more consistent with the calculated damage using the variables.

Stated another way, it will show if the fire can be explained by the presence of other factors such as accelerants which are suspected to have been used in the fire. In the end, it can show if there is a “mathematical impossibility” the fire occurred as reported or claimed by the other side of this case. This information can provide compelling support for the conclusions of the investigator who determined the origin and cause of the fire from the examination of the fire scene. It should be noted there are inherent limitations on the use of computer modeling. To be considered reliable and admissible at trial, it must be shown all of the data used to make the calculations were accurate and based upon the actual conditions of the fire scene. If the reliability can be established so that the computer modeling evidence is admissible, it can have a dramatic effect at trial.

A good example of this type of evidence is the work done by the National Institute of Standards and Technology (NIST) in the Station Night Club Fire.⁶¹ They recreated the fire using all the information that was gathered at the fire scene.

⁶¹ Grosshandler, W.L., Bryner, N., and Madrzykowski, D., *Report of the Technical Investigation of the Station Nightclub Fire*, NIST NCSTAR 2, National Institute of Standards and Technology, Gaithersburg, MD (2005)

V. Conclusion

Proper documentation of the fire scene is essential to a proper investigation. It demonstrates the investigator's methodology in analyzing the fire scene and establishes his expertise as a fire investigator. It brings credibility to the expert conclusions of the fire investigator when they are presented at trial.

More importantly, the use of demonstrative evidence at trial is a critical tool in effectively presenting a case to the jury. It captures their attention, focuses them on the evidence referenced in the investigator's testimony and highlights the testimony and evidence presented at trial. It brings a scientific and objective perspective to the testimony and evidence which the jury must consider in reaching its verdict. It can be timely and costly to prepare the demonstrative evidence needed to effectively present an arson case. However, measured against the time and energy spent in developing a case for trial it is a small price to pay.



Unit 2

Lesson 2: The Investigative File – Public Agency

Photo Courtesy of Capt. Karl Morgan, BFAEI

Enabling Learning Objectives

At the end of this session, the student will be able to:

1. Identify what should be included in the Public Agency Investigative File.
2. Describe the following items and their importance:

Curriculum Vitae/Resume; Origin and Cause Report; Lab Report; fire scene photos; fire scene video; diagrams; blueprints/building plans; timeline/flowchart; consent to search warrant; waiver of rights form; evidence log; defendant's statement; tape/videotape of defendant's statement; witness statements; witness tapes/video tapes; witness summaries; examination under oath; examination under oath summary; fire department reports; police reports; insurance claim documents; insurance fire report; insurance company laboratory reports; insurance company photos/diagrams; miscellaneous insurance records; property records; utilities records; telephone records; and delivery/newspaper/mail records.

I. Introduction

While there may be several witnesses for the prosecution who need an investigative file, the lead investigator must have a complete investigative file to bring to court. A properly prepared and organized file should contain those items which will aid the investigator and prosecution in presenting the case.

II. The Investigative File

A. CV/Resume

Assuming the lead investigator will testify as an expert witness, a copy of the investigator's curriculum vitae (CV) or resume should be in the investigative file. This will be required during the qualification process to establish the investigator as an expert witness. It may be needed during cross-examination when the investigator's background, experience and training are challenged – even if the investigator is not testifying as an expert.

B. Origin and Cause Report

The fire investigation reports should be in the investigative file for reference during testimony. While they will probably not be offered in evidence, the investigator may

need to occasionally refer to the report during direct and cross-examination about the fire's origin and cause. Ideally, the investigator will be fully prepared and completely familiar with the facts of the investigation so that it will not be necessary to refer to the investigative report.

C. Laboratory Report

The original laboratory report and related evidence will be in the witness file of the chemist or laboratory analyst who testifies at trial. A copy should be in the investigative file for reference by the lead investigator, as the laboratory analysis may be used to validate the origin and cause determination when an accelerant is found or to discredit the origin and cause determination when it is not.

D. Fire Scene Photograph/Digital Images

All photographs/digital images of the fire scene and any other significant photographs/digital images should be in the investigative file. They should be put in proper order and accurately labeled. If the case is to go to the State Attorney's Office for prosecution, all of the key photographs/images should be enlarged for use as demonstrative evidence to be shown to the jury. The original photographs/images in the investigative file should be marked with the same exhibit numbers for ready reference when questioned about one of the enlarged photographs/images. The investigative file should contain all of the photographs/images taken in the case, even the ones which are not enlarged. To help the investigator maintain the knowledge of where the photographs/images were taken, the investigator should use a photograph/image log.

This log would include the location, area photographs, and any additional information that would help the investigator recall the fire scene.

E. Fire Scene Video

If the fire scene was videotaped during the fire or afterward during the investigation, the video should be in the investigative file. It will likely be used as an exhibit at trial and should be pre-marked and labeled as such. If only portions of the videotape will be shown to the jury, an edited copy should be made for that purpose while maintaining the original in the investigative file.

F. Diagrams

Any important diagrams of the fire scene or other areas related to the case should be enlarged for use as demonstrative evidence. Every original diagram or reduced copy should be in the investigative file. The investigator may need to refer to it during cross-examination about the fire scene in case the investigator is not allowed to leave the witness stand to use the enlarged diagram or to confirm the authenticity and accuracy of the enlarged diagram. The original or a reduced copy may need to be admitted in evidence in place of the enlarged diagram.

G. Blueprints/Building Plans

Blueprints and building plans should be in the investigative file whenever they are available. They will likely be used as evidence at trial. It may be appropriate to enlarge the blueprints or building plans for use as demonstrative evidence. If the original blueprints or plans are going

to be used as evidence they should be pre-marked and labeled as trial exhibits. Because of the nature of blueprints and plans, it may be helpful to have them mounted on a cardboard or fiberboard backing. In that event, the investigative file should contain a copy of the blueprints or plans.

H. Timeline/Flow Chart

A good example of effective demonstrative evidence is a timeline or flow chart of the key events or witnesses in the case. A timeline is helpful in preparing for trial testimony as it lays out the chronology of events in a visual form. Just as it is helpful to the investigator, it will be helpful to the jury. A flow chart or link analysis of the witnesses or “players” in the case may be similarly useful evidence. To be effective as demonstrative evidence, the timeline or flow chart should be enlarged for use at trial. In that event, a reduced copy should be kept in the investigative file for reference during testimony and for admission as a trial exhibit in place of the enlarged copy.

I. Consent to Search/Search Warrant

Where the fire scene was investigated under the authority of consent to search, administrative search warrant, or search warrant it should be in the investigative file. It may or may be needed as an exhibit at trial but should be available to the investigator during trial testimony. Although most search and seizure issues are resolved prior to trial, the issue may be raised during trial or a new issue may arise about the legality of the fire scene search.

J. Waiver of Rights Form

Where a statement has been taken from the accused, a waiver of rights form may have been executed. It should be kept in the investigative file for any number of possible uses at trial, including proof of the legality of the statement obtained or for establishing the date and time of the statement.

K. Evidence Log

An evidence log should be maintained whenever physical evidence is collected and preserved prior to trial. In order to prove the proper chain of custody the evidence log may become a trial exhibit. While the evidence custodian may need the original log to prove chain of custody, the investigator should have a copy in the file to establish his part in the chain of custody or respond to any issues about evidence handling.

L. Defendant’s Statement

If a written, recorded or videotaped statement of the defendant was taken, it needs to be in the investigative file. Presumably, a transcript of the statement was prepared and it should also be in the file. A written statement may be admissible evidence and should be pre-marked and labeled as a trial exhibit.

M. Tape/Videotape of Defendant's Statement

When the statement of the defendant was on tape or was videotaped, the original tape or videotape should be in the investigative file or in evidence (depending on policy). It will likely be admitted in evidence and should be marked as a trial exhibit. If it needs to be edited, and edited copy should be made and the original should be preserved.

N. Witness Statements

Any written or transcribed statements of witnesses in the case should be in the investigative file. The investigator will need to have the statements available to refer to during testimony and the statement itself may be admissible evidence under certain circumstances. In that event, the statement should be marked as a trial exhibit.

O. Witness Summaries

Summaries of all witness statements should be in the investigative file for any of several reasons. A witness can change his testimony during trial and the summary will allow the investigator to quickly identify any discrepancies or conflicts in the new testimony. The investigator may be challenged about the information obtained from witnesses which was used to develop the case. The summaries make this information readily available to the investigator should an issue suddenly arise during trial.

P. Fire Department Reports

All of the fire incident reports should be in the investigative file, including the "run report" or response report. The investigator may need to refer to this information in testifying about the fire itself. The response time, fire conditions and other factors may be used in establishing the origin and cause of the fire.

Q. Police Reports

The police reports should be in the investigative file to confirm the time frame and the fire conditions, as well as other relevant information which may be in the police reports.

II. Insurance Documents in the Investigative File

Not all arson cases are tied to insurance or involve insurance from the standpoint of an Arson-For-Profit case. However, when this does occur, it is important to have the following documents present in the investigative file:

A. Examination Under Oath

In an Arson-For-Profit case, the examination under oath transcript may contain critical evidence for the case. An authenticated original transcript should be in the investigative file, pre-marked and labeled as a trial exhibit.

B. Examination Under Oath Summary

A summary of the examination under oath transcript should be in the investigative file for ready reference during the testimony of the investigator. The statements of the defendant are generally admissible as an exception to the hearsay rule. The investigator will need to have a summary available to be able to quickly respond to questions about significant portions of that testimony.

C. Examination Under Oath Exhibits

Any records or exhibits to the Examination Under Oath should be part of the investigative file and will likely be used as evidence at trial. They should be original exhibits which have been properly authenticated, pre-marked and labeled as trial exhibits.

D. Insurance Claim Documents

In an Arson-For-Profit case, claim file documents will most likely be essential evidence at trial. The original documents should be obtained from the insurance company and marked as trial exhibits. A certified copy of the insurance policy should be in the file, as well as the Sworn Statement in Proof of Loss and claim documents submitted by the defendant.

E. Insurance Fire Report

When an independent investigation of the fire's origin and cause has been conducted by the insurance company, a copy of the report should be in the investigative file. It may be an issue for cross-examination to which the investigator will need to be able to readily respond.

F. Insurance Company Laboratory Reports

The laboratory reports from the insurance company investigation should be in the file. Because the laboratory reports are based upon different samples collected from different areas of the fire scene, the results may differ from the laboratory reports analyzing the prosecution's evidence. It is likely to become an issue during cross-examination.

G. Miscellaneous Insurance Records

The particular facts of the case may necessitate various insurance records as part of the investigative file. An insurance application, premium payment records, loss notice, claim payment records and other such items may be appropriate in a particular case. All such records should be compiled in separate folders in the investigative file. Those items which may be used as evidence need to be pre-marked and labeled as trial exhibits.

III. Other Documents

In addition, there are other documents to consider in helping to make an investigative file complete.

A. Property Records

Depending upon the facts of the case, certain property records may need to be in the investigative file and available as trial evidence. This may include the sales contract, deed, mortgage, property tax assessment/payment history, sales listing or any other such records. A separate folder for each item should be prepared and put in the investigative file. Anything which will be offered in evidence should be pre-marked and labeled as trial exhibits.

B. Telephone Records

Telephone records, particularly cellular telephone records, are often important evidence in the case. They should be part of the investigative file and any records which will be offered in evidence should be pre-marked and labeled as trial exhibits.

C. Delivery/Newspaper/Mail Records

When there is an issue about the occupancy of the property or the identity of the occupants, these records may become important evidence. When they will be offered in evidence, they should be pre-marked and labeled as trial exhibits. They may require proper authentication to be admissible at trial.



Unit 2

Lesson 3: Interviews and Interrogations

Enabling Learning Objectives:

At the end of this session, the student will be able to:

1. Describe the difference between an interview and an interrogation.
2. Describe what a witness statement is and its contents.
3. Identify what is covered under the U.S. Constitution 4th Amendment.
4. Explain the concept “Fruit of the Poisonous Tree” as it relates to the 4th Amendment and from what case it was created.
5. Identify what is covered under the U.S. Constitution 5th Amendment.
6. Explain when Miranda must be given and what Miranda entails.
7. Describe when a suspect is in custody.
8. Explain how Miranda warnings can be waived.
9. Explain how suspects can terminate an interrogation.
10. Describe ways in which a suspect can request an attorney.
11. Identify what is covered under the U.S. Constitution 6th Amendment.
12. Identify what is covered under the U.S. Constitution 14th Amendment.

I. Introduction

Interviews and suspect interrogations are an integral part of every arson investigation. There are numerous legal issues associated with both interviews and interrogations. Those legal issues involve the Constitutional rights of individuals involved in the planning or setting of an incendiary fire. If those rights are violated, any confessions, admissions or statements obtained may be suppressed and any subsequent evidence obtained may also be suppressed.

Let’s begin with the two terms mentioned above, interviews and interrogations.

A. Interview

The term “*interview*” refers to the questioning of a person who is believed to have information relevant to the matter under investigation. This person is willing to voluntarily provide information to the interviewer. Interviews are primarily conducted of witnesses having personal knowledge from seeing or hearing something related to an incident. An “*eyewitness*” is a visual or sensory witness, someone who actually saw, heard, smelled or touched something at or around the time of the event. *Background witnesses* are persons who have information regarding the circumstances behind the event. Some examples of this might be: the presence of flammable liquids normally kept on the property; information identifying potential suspects; knowledge of a

suspect's marital status; or the existence of financial problems around the time of the fire. The written or verbal assertion of certain facts to an investigator is referred to a "witness statement". This statement can be either sworn or unsworn, recorded (audio or video) or unrecorded, written or verbal.

B. Interrogation

The term "*interrogation*" is used to describe the focused questioning of a specific person suspected of having committed an offense or having information they are unwilling to voluntarily divulge. The interrogation of a suspect or witness who possesses knowledge of a crime is usually done at the culmination of an investigation and may result in an "*admission*" or "*confession*". An "*admission*" is an act or statement made by a suspect which acknowledges guilt or involvement in an incriminating circumstance, such as physical presence at the fire scene or a connection to evidence of the crime. A "*confession*" is a full and complete acknowledgement of guilt in the commission or planning of a crime.

II. Purpose of the Interview or Interrogation

The underlying purpose of the interview or interrogation is to get to the truth by gathering information to establish the facts of a crime or to determine if a crime has actually occurred. This includes:

- Verifying other information from witnesses or derived from physical evidence.
- Identifying witnesses, suspects and accomplices.
- Eliminating suspects.
- Obtaining information which may lead to the identification and recovery of physical evidence.
- Developing background information on the crime or suspect.
- Identifying specific details of the crime and the surrounding circumstances.
- Legally obtaining an admission or confession from a witness or suspect.

III. Preparation for the Interview or Interrogation

There are entire courses and textbooks on effective interview and interrogation techniques, which cannot be covered in this chapter or this class. Additionally, each individual investigator should always develop his or her own "style" of interviewing which may be appropriate to a particular situation. However, there are certain basic steps in preparing for an interview which every investigator should follow:

A. Familiarity with the Facts of the Case

The investigator should have a complete understanding of all pertinent facts known at the time of the interview (i.e., the who, what, when, where, why and how of the crime). If available, the investigator should have a diagram and photographs of the scene for use at the interview. The interviewer should be familiar with all important details of the crime, especially those that may not have been disclosed to the public.

B. Familiarity with the Interviewee's Background

The investigator should obtain any background information available on the interviewee, in addition to the basics (i.e., name, age, sex, and address). Developing information on the interviewee's education, employment, family residence, prior contacts with the criminal justice system, relationship to the suspect, victim or other witnesses, as well as the interviewees' personality traits (i.e., shyness, hostility toward law enforcement, reputation for honesty or dishonesty) will enable the investigator to adopt the correct approach in order to obtain the maximum amount of useful information from the witness or suspect. The background knowledge will also assist the investigator in testing the interviewee's truthfulness and actual knowledge of the pertinent facts.

C. Focus on Information to be Obtained

To avoid a time-consuming, rambling interview which elicits little useful information, the investigator should have prepared questions which focus on the elements of the crime, the means of identifying the persons responsible, and the identification and location of key witnesses and evidence. The interviewer should not simply read a list of questions but should be able to refer to the questions periodically to keep the interview on track. Questions should be designed to elicit concise "yes" or "no" responses where appropriate but should generally be open-ended in order to allow the witness to tell the full story in his or her own words.

IV. Legal Considerations for Suspect Interrogation

The admissibility of a suspect's statement and any subsequent evidence obtained as a result of that statement will inevitably be challenged by the suspect's attorney once an arrest has been made. Thus, the importance of acknowledging and protecting a suspect's constitutional rights while obtaining a statement is always the most important concern. Those rights include:

A. Fourth Amendment

The *Fourth Amendment* to the United States Constitution protects the "Right of the people to be secure in their person, houses, papers and effects against unreasonable search and seizure".⁶² In another section of this text, we discussed at length criminal searches and seizures conducted pursuant to search warrants and warrantless searches justified under one of the recognized exceptions to the *Fourth Amendment's* warrant requirement. The fire investigator must be cognizant of the fact that if a search and seizure is deemed by a court to be illegal, not only will critical evidence be suppressed, but a suspect's statement given during the course of that illegal search will almost certainly be challenged as illegally obtained and therefore inadmissible, as the "*Fruit of the Poisonous Tree*".⁶³ Likewise, a suspect's statements made after an illegal arrest, one determined to be lacking in probable cause, will also be subject to suppression.⁶⁴

This was the situation in the landmark case of *Wong Sun v. U.S.*, U.S. 371 U.S. 471 (1963), in which the high court created the "Fruit of the Poisonous Tree" doctrine. This doctrine states

⁶² 4th Amendment to the U.S. Constitution

⁶³ *Wong Sun v. U.S.*, 371 U.S. 471 (1963).

⁶⁴ *Brown v. Illinois*, 422 U.S. 590 (1975).

that: Evidence obtained from an illegal arrest or search – either physical or testimonial – is constitutionally tainted and will be suppressed. This principle extends to indirect, as well as direct, results of an illegal Search.⁶⁵ In *Wong Sun*, federal narcotics officers, acting on a tip from an informant, went to a laundry in search of an alleged heroin dealer named Toy. When Toy answered, then slammed the door and fled into his apartment after the agents identified themselves, the agents broke open his apartment door without a warrant and arrested Toy, despite the fact they found no illegal drugs in his residence. Toy, in turn, told the agents about another man named *Johnny* Yee who possessed illegal drugs. The agents went to Yee’s house and entered without a warrant. Yee turned over some heroin to the agents which he claims to have purchased from Toy and another man. Toy was later questioned by agents, identified his accomplice as Wong Sun, and took agents to Sun’s residence. Agents raided Wong Sun’s apartment, arrested Sun and conducted a warrantless search of his apartment – which yielded no illegal drugs. All three men made post-arrest confessions while unrepresented by legal counsel which were introduced by the government as evidence used to convict them at trial.⁶⁶

On appeal, the Supreme Court held Toy’s arrest was without probable cause as it was based on uncorroborated information from an unreliable informant. Therefore, Toy’s statement made at his residence after the agent’s unlawful entry and arrest were excluded. Furthermore, the heroin turned over to the agents by Yee was also inadmissible against Toy as it was the result of the “fruit” of Toy’s illegal arrest and his subsequent statements.

However, although Wong Sun’s arrest was also deemed illegal, his confession and the same heroin surrendered by Yee were admissible against Sun. If Sun had confessed while he was in custody after his illegal arrest, it may well have been suppressed. However, Sun’s confession was made several days following his arrest, after he was released on bond and came voluntarily into the police station. Thus, his statement and the evidence he provided were not the “fruit” of his illegal arrest.⁶⁷ The Court also held that the heroin turned over by Yee was not inadmissible against Sun. The Court reasoned that the narcotics were not tainted by any violation of Sun’s constitutional rights in obtaining the drugs.⁶⁸

B. Fifth Amendment

The Fifth Amendment to the United States Constitution commands that no person shall be compelled to be a witness against him or herself in a criminal case. The Supreme Court’s landmark *Miranda v. Arizona* 384 U.S. 436 (1966), case set forth the minimum procedures which must be employed by government agents subjecting an individual to custodial interrogation, to preserve that individual’s constitutional privilege against self-incrimination. The high court held that in order for a suspect’s statements made during custodial interrogation to be admissible in court, the suspect must be given what has become known as the “Miranda Warning”, advising of:

⁶⁵ *U.S. v. Private Trask*, 38 C.M.R. 615 (1967), in which a murder suspect gave incriminating statements after being confronted with evidence illegally seized from his locker.

⁶⁶ Yee ultimately testified against Toy and Sun as a government witness.

⁶⁷ Even after an illegal arrest, if there is a sufficient break in time, the connection between the arrest and the statement may be sufficiently “attenuated as to dissipate the taint”. *Wong Sun* at 491. The same is true after a suspect, while in custody, gives a statement without benefit of *Miranda* warnings. If the suspect is later *Mirandized*, waives his rights and gives additional statements, they may be admissible despite the suppression of the first confession. *Oregon v. Elstad*, 470 U.S. 298 (1985).

⁶⁸ *Wong Sun* at 492.

- The right to remain silent;
- That any statement made can and will be used against the suspect in a court of law.
- The right to the presence of an attorney during questioning.
- If the suspect cannot afford an attorney, one will be appointed to represent the suspect free of charge.⁶⁹

Since *Miranda*, police may proceed to question a suspect in custody only if there is a knowing, intelligent waiver of these rights. If that cannot be shown, the suspect's statement will be subjected to suppression. *Miranda* arose out of the need to protect individuals from overzealous police tactics which could lead to involuntary "false confessions" from suspects subjected to interrogation in the "inherently coercive" atmosphere of a police station. Although the *Fifth Amendment* deals solely with the right against self-incrimination and does not mention the *Sixth Amendment* right to counsel, the *Miranda* Court determined that the right to have an attorney present during interrogation is indispensable to safeguarding a suspect's *Fifth Amendment* privilege.

However, *Miranda* warnings are required only when the suspect is "in custody" and is "interrogated" by law enforcement officers or prosecutors. It does not apply to non-custodial questioning or questioning by private citizens.

(1) When is a suspect "in custody"?

A suspect is "in custody" when an individual has been arrested, or has been deprived of his or her freedom of action in any significant way, or has otherwise been placed in circumstances that would lead a reasonable person to believe they are not free to leave. Thus, an individual may be in police "custody" even if they are not handcuffed or taken to the police station. Conversely, just because an individual is at the police station, they are not necessarily "in custody".⁷⁰

In the 1994 case of *Stansbury v. California* 511 U.S. 318 (1994), the U.S. Supreme Court stated that whether an individual is "in custody" is an objective test and does not turn on whether the police have focused on the person as a "suspect" or even whether the individual being questioned perceives him or herself as a "suspect". In *Stansbury*, detectives took Stansbury to the station for questioning as a possible witness. Stansbury went with the detectives voluntarily. During Stansbury's questioning, without being given his *Miranda* warnings, he made statements which implicated him in the killing of the 10-year-old victim.⁷¹ The detective terminated the questioning and immediately advised Stansbury of his *Fifth Amendment* rights. Stansbury requested an attorney and refused to answer any more questions and was thereafter placed under arrest. He was ultimately convicted of murder charge and the California Supreme Court upheld

⁶⁹ *Miranda v. Arizona* 384 U.S. 436 (1966)

⁷⁰ *State v. Gilles*, 701 So.2d 375 (Fla. 3rd DCA 1997), in which the court rejected the defendant's contention that she was in custody when she voluntarily came to the police station and submitted to an interview as a victim and witness, as she was free to leave at any time.

⁷¹ *Stansbury v. California* 511 U.S. 318 (1994). Stansbury admitted to speaking with the victim, admitted to driving a car that may have been involved in the murder, and also disclosed the fact he had prior convictions for rape, kidnapping and child molestation.

the admission of his statements, reasoning that because the police had not focused on *Stansbury* as a suspect until he mentioned driving a car that had been involved in the homicide, he was not “in custody” for *Fifth Amendment* purposes up to that point.

The U.S. Supreme Court disagreed but remanded the case back to the California high court to apply an objective test on the custody issue: whether a “reasonable person” in the suspect’s position would have considered he was in police custody. Thus, the mere fact that police have focused on a person as suspect does not trigger the need for *Miranda* warnings. Factors such as whether the police have communicated to the person that he or she is a suspect, the location of the interrogation⁷², and whether the person is told they are not free to leave, will bear on a person’s reasonable belief regarding their freedom of action. The court emphasized the fact that *Miranda* focused on the compulsive nature of a custodial situation on an individual’s free will.

The Florida Supreme Court, in *Ramirez v. State*, 739 So. 2d 568 (Fla. 1999), identified four factors to be utilized in the totality of circumstances test to determine whether a suspect is in custody for purposes of *Miranda*, that is, whether a reasonable person in the suspect’s position would consider himself in custody: (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; (4) whether the suspect is informed that he or she is free to leave the place of questioning. In *Ramirez*, police came to Ramirez’ home and took him to the police station for questioning after an accomplice had implicated him as a principal in a murder, and after Ramirez, a 17-year old, had turned over evidence related to the crime. While he was never told prior to being *Mirandized* that he was under arrest, he was never told he was free to leave and the police already had probable cause to arrest him. In holding the trial court should have suppressed his pre-*Miranda*⁷³ incriminating statements, the Florida high court stated: “Short of being handcuffed and being told that he was under arrest, we cannot perceive of circumstances that would be more indicative of a custodial interrogation than the circumstances of the interrogation in this case.”

In light of *Stansbury* and *Ramirez*, to avoid turning an interview into a custodial interrogation, an investigator conducting a mere witness interview should advise the subject he or she is not under arrest, does not have to answer any questions and is free to leave at any time. This is especially true when the interview is being conducted in an area such as an “interview room” at the police station, where the courts have consistently held a “coercive” atmosphere exists.

(2) What is “interrogation”?

“Interrogation” is the term used to describe the questioning of a specific person suspected of having committed an offense or of having information they are unwilling to divulge. Therefore, if a suspect makes spontaneous, unsolicited statements – even while in custody – those statements are not considered the product of custodial interrogation and are not subject to suppression on *Fifth Amendment* grounds.

⁷² For example, a person’s own home, workplace, on the street, in a police station or squad car.

⁷³ The court also ruled Ramirez’ post-*Miranda* statements should have been suppressed as his waiver was not knowing and voluntary under the circumstances.

(3) How may the *Miranda* warnings be waived?

Fifth Amendment rights may only be waived:

- a). Knowingly – with a full awareness of the nature of the right being abandoned and the consequences of abandoning that right, and
- b). Voluntarily – Freely and deliberately, not under any form of intimidation, coercion, promise of reward or deception.⁷⁴

Fifth Amendment rights may be waived in writing or orally. The best practice is to always have the suspect execute a written waiver. If, for some reason, that is not practical, it should be done orally and tape-recorded. In both situations, it is best to have the waiver witnessed by at least one other person to corroborate the fact the waiver was made knowingly and voluntarily.

(4) How can the suspect terminate an interrogation?

A suspect may cut off questioning at any time – even after executing a written *Miranda* waiver – by invoking his or her right to silence or by requesting an attorney. The fact he or she may have already volunteered statements or answered some questions does not mean they have waived their right to cut off questioning. Similarly, even if an individual has already submitted to interrogation by waiving their rights, they should be “re-mirandized” again each time a new interrogation session begins.

(5) What constitutes a request for an attorney?

There has been a great deal of litigation surrounding a suspect’s invocation of the right to counsel during custodial interrogation. Under *Edwards v. Arizona*, 451 U.S. 477 (1981), the U.S. Supreme Court established that once a suspect in custody affirmatively requests a lawyer, all questioning must immediately cease. When a suspect says the magic words, “I want to see a lawyer”, an investigator has no choice but to stop the interrogation. However, a suspect’s request for an attorney may not always be that clear. When a suspect says, “I think I need to talk to a lawyer, will I stay in jail until she gets here?”, an investigator must determine in those situations whether such statements constitute a request for clarification of the suspect’s rights or an affirmative invocation of the right to counsel.

In *Davis v. United States* 512 U.S. 452 (1994), an individual serving in the navy was suspected of committing a murder and was interviewed by naval investigators, who fully advised him of his rights. Davis waived his rights to remain silent and to obtain counsel. After over an hour of answering questions, Davis said, “maybe I should talk to a lawyer”. The investigators attempted to clarify what he meant, and Davis then said he was not actually asking for a lawyer. The

⁷⁴ However, in *Moran v. Burbine*, 475 U.S. 412 (1985), police officers’ failure to advise a burglary suspect in custody that an attorney had been hired to represent him during questioning on the burglary was held not to violate his 5th Amendment rights when they interrogated him on an unrelated murder charge. Events occurring outside a suspect’s presence and unknown to him can have no bearing on his capacity to understand and knowingly waive a constitutional right.

investigators reminded Davis of his rights again and the interview continued. After another hour, Davis said he thought he wanted a lawyer before he said anything else, and the questioning ceased. The Supreme Court held that an ambiguous reference to counsel such as the one made by Davis during custodial interrogation was insufficient to trigger a criminal suspect's right to require police to cease interrogation.

The *Davis* court prescribed the following objective test for determining whether a suspect's "equivocal statement" is an invocation of the right to counsel: if a suspect sufficiently articulates his or her desire to have counsel present such that a "reasonable law enforcement officer", in the light of the circumstances, would have understood that the suspect is invoking the right to counsel, questioning must stop. If the suspect merely expresses that they might want an attorney, interrogation may continue.

In light of *Davis*, an investigator faced with an ambiguous request for counsel by a suspect under custodial interrogation should clarify whether the suspect actually wants an attorney and the re-mirandize the suspect prior to continuing the interrogation. It is always better to "proceed with caution" than to have an otherwise admissible confession suppressed.

In February 2010, the U.S. Supreme Court issued three significant "Miranda warning" opinions which appear to limit or clarify the *Miranda* decision.

In *Florida v. Powell*, 130 S. Ct. 1195 (2010), Tampa police arrested Powell on suspicion of being a convicted felon in possession of a firearm. Before questioning him, the officer advised him, *inter alia*, "You have the right to talk to a lawyer before answering any of our questions" and "[y]ou have the right to use any of these rights at any time you want during this interview." Powell then admitted he owned a handgun found in a police search. Powell's motion to suppress the statement was denied by the trial court, and he was convicted and sentenced to 10 years in prison. The appellate court and Florida Supreme Court reversed the conviction, holding that the statement should have been suppressed because it did not clearly inform Powell of his right to an attorney during police interrogation. The U.S. Supreme Court disagreed and reversed and remanded the case to the trial court to reinstate the conviction, holding that the warning "reasonably conveyed to the suspect that the right to counsel applied 'during' interrogation."

In *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010), a police detective in 2003 tried to question Shatzer while incarcerated in a Maryland prison on a prior conviction, about new unrelated child sexual abuse allegations. After Shatzer invoked his Miranda right to counsel, the detective terminated the interview and Shatzer was released back into the general prison population, and police closed the investigation. In 2006, another detective reopened the investigation and attempted another interrogation of the still-incarcerated Shatzer, who waived his Miranda rights and made inculpatory statements which the trial court subsequently refused to suppress, rejecting Shatzer's contention that his 2003 invocation of the right to counsel still applied in 2006. In upholding Shatzer's conviction on the child abuse charges, the U.S. Supreme Court established a "break-in-custody" exception to *Edwards v. Arizona*, holding that when more than fourteen (14) days elapses between interrogations during which the suspect returns to his "normal life", free from the pressure of custodial interrogation, police may re-interrogate a suspect regarding allegations of criminal conduct separate from the conduct for which the suspect is in custody, without an attorney present.

In *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), the Supreme Court upheld the first degree

murder conviction of the defendant and the admissibility of his “confession”. During questioning of Berghuis, Michigan police properly Mirandized the defendant who never invoked his right to remain silent or requested counsel. After remaining mostly silent during the three-hour interrogation, the defendant answered “yes” when the detective asked him, “Do you pray to God to forgive you for shooting that boy down?” In rejecting Berghuis’ argument that his one-word confession should have been suppressed as he had invoked his 5th Amendment right to remain silent, the U.S. Supreme Court held that if the accused makes an “ambiguous or equivocal” statement or no statement, police are not required to end the interrogation or clarify the accused’s intent. In this case, the court found the defendant had not unambiguously invoked his 5th Amendment rights.

An example of what the Florida Supreme Court considered an unambiguous invocation of the 5th Amendment right to remain silent and cease questioning was cited in *Deviney v. State*, 112 So. 3d 57 (Fla. 2013), *reh. den.* After his DNA profile matched DNA found under an elderly female murder victim’s fingernails, police brought Deviney into the station for questioning. He was not placed under arrest and was seated unrestrained in an interview room with the door unlocked. Prior to beginning the videotaped interview, police told him he was free to leave at any time. Deviney acknowledged he understood his rights prior to signing the Miranda form. During the initial portion of the interview, which lasted about an hour, Deviney admitted to knowing the victim, but denied knowing who killed her or visiting her house the night of the murder. After taking Deviney’s DNA swab with his consent, the detectives confronted him with the fact they had already matched his DNA with that found on the victim. The defendant continued to deny involvement in the murder, became agitated, and said, “I’m ready to go home. Can I leave?” The detective said, “No.” When Deviney continually said he was done talking and asked to leave, the detective repeatedly told him he could not and that he was being detained. They also blocked his exit, frisked him and told them they would physically restrain him – although they never did. Ultimately, under continued questioning, Deviney admitted to the murder and was ultimately convicted at trial. In reversing Deviney’s conviction, the Florida Supreme Court held that the defendant’s multiple statements to police that he was “done” with questioning, coupled with his physical attempts to leave the interrogation room were an unequivocal invocation of his right to remain silent and end questioning. Furthermore, the detectives’ words and conduct blocking Deviney’s exit while continuing to question him, viewed in the totality of circumstances, rendered his confession involuntary, that is, the product of compulsion, in violation of the 5th Amendment.

C. Sixth Amendment

Prior to *Miranda*, courts generally interpreted an individual’s constitutional right to counsel as attaching only after the initiation of formal, adversarial court proceedings. Since *Miranda*, the Fifth Amendment has been interpreted to provide a right to counsel during questioning which exist pre-arrest, at the time a suspect is taken into custody and interrogated.

The Sixth Amendment right to counsel has a much broader scope, but only applies once an individual is “formally” charged, which means adversarial post-arrest judicial proceedings have been initiated against the suspect by way of formal charge, preliminary hearing, indictment, information or arraignment.⁷⁵ Once that right has attached, the police may not question that

⁷⁵ *Kirby v. Illinois*, 406 U.S. 682 (1972). A suspect also has a Sixth and Fourteenth Amendment right to the presence of counsel during a post-arrest line-up, which has been held to be a critical stage of the criminal prosecution. *Gilbert v. California*, 388 U.S. 263 (1967) and *U.S. v. Wade*, 388 U.S. 218 (1967).

individual or in any way interfere with the representation of the individual's attorney unless there has been an express waiver of the right to counsel.⁷⁶

In *Massiah v. United States*, 377 U.S. 201 (1964), government agents monitored a conversation between the defendant, who was free on bail after an arrest for narcotics violations, and his co-defendant, who was cooperating with the government and wearing a wire. Because the defendant was represented by an attorney after his arrest, the court suppressed the defendant's incriminating statements to the informant, holding that the government was, in essence, "questioning" the defendant through the cooperating co-defendant, violating the defendant's Sixth Amendment right to counsel.

D. Fourteenth Amendment

Reading a suspect their Miranda Rights and obtaining a waiver, however, does not make a suspect's confession *per se* admissible. When a suspect makes a confession without an attorney present to represent them – even with a valid waiver of that right after Miranda warnings – the court will still subject the confession to a due process test to determine whether the defendant made the statement voluntarily before allowing its admission into evidence at the defendant's criminal trial. The Due Process Clause of the Fourteenth Amendment requires state action to be consistent with fundamental fairness. A criminal defendant is deprived of this fairness when an involuntary, coerced confession is used to obtain a guilty verdict.

Coercive police conduct has been held to be a necessary predicate to a finding – under the totality of the circumstances – that a confession is not voluntary.⁷⁷ However, this does not merely prohibit the use of "rubber hose" tactics, but many other more subtle forms of coercive conduct such as repeated and lengthy interrogation under extremely stressful conditions.⁷⁸

Although there is no "bright line test" for voluntariness, such factors as the number of times a suspect is interrogated, the length of the interrogation(s), whether the suspect was deprived of food or water or sleep during interrogation, whether the police used physical or extreme psychological pressure on the suspect, whether promises or threats were made to the suspect, all come into play in the voluntariness analysis.

V. Juvenile Considerations

Arson is a crime committed by juvenile fire setters more than any other age group. Thus, it is important for the arson investigator to observe the correct procedures when dealing with a juvenile suspect to ensure the admissibility of evidence obtained from that suspect. The

⁷⁶ *Morine v. Burbine*, 475 U.S. 412 (1984)

⁷⁷ *Colorado v. Connelly*, 479 U.S. 157. In this case, a man approached police on the street and confessed to a murder. The man was immediately Mirandized, and proceeded to confess again at police headquarters, then later led police to the murder scene. When the defendant later claimed he had been acting under "command hallucinations" when he confessed, the U.S. Supreme Court held that his 14th Amendment Due Process rights were not violated as it was his alleged "mental state" verses coercive police conduct that "compelled" him to confess.

⁷⁸ Caveat: Police or government coercion applies to actions by government informants as well. In *Arizona v. Fulminante*, 499, U.S. 279 (1990), the high court held that Fulminante's confession to a fellow inmate was coerced. The inmate was, in fact, an FBI informant who befriended Fulminante at the behest of his FBI contact, then offered Fulminante "protection" from the other inmates if he told him all about the murder of his 11-year-old stepdaughter. Applying the "totality of the circumstances" test, the court found that Fulminante was motivated by fear of physical violence to confess.

shocking rise in juvenile crime of all kinds and the increasing use of adult sanctions – including the death penalty – to punish juvenile offenders has resulted in heightened concerns for the protection of juveniles’ constitutional rights.

In the case of *In Re Gault*, 387 U.S. 1 (1967), a 15-year-old boy was taken into custody for making obscene telephone calls. A hearing was held on the charges before the juvenile court, although the complaining witness was not even present at the hearing. Gault – who was not advised of his rights to counsel nor represented by counsel at the hearing – was required to answer questions posed by the judge. Gault was adjudicated delinquent and committed to a state juvenile facility until he reached the age of eighteen (18). The U.S. Supreme Court held that the adjudicatory proceedings against Gault violated due process and that juveniles must be afforded the same constitutional rights as adults during the adjudication process, including written notice of the specific charges and factual allegations; parental notification prior to the hearing; notification to the child and parents to the right to have retained or court appointed counsel; their right to confrontation and cross-examination of witnesses; and, their right against self-incrimination.⁷⁹

Although *Gault* involved Fourteenth Amendment Due Process rights during juvenile adjudicatory proceedings, the courts have subsequently required police and prosecutors to administer Miranda warnings to juveniles whenever taken into custody, prior to interrogation.⁸⁰ Additionally, many states statutorily require juveniles be provided counsel if they are indigent.⁸¹

Although the federal courts and most state courts have refused to impose a *per se* rule that a juvenile is incapable of voluntarily waiving these rights⁸², the government bears a heavy burden in establishing that a juvenile has adequately waived his or her rights to remain silent and to have an attorney.⁸³ Juveniles often misunderstand their rights and believe they will be punished for exercising those rights – especially refusing to admit their crime. Factors which courts routinely take into account when determining the validity of a juvenile’s waiver of his or her *Miranda* rights are:

- Age
- Education
- Knowledge of the substance of the charge
- Knowledge of the nature of the right to remain silent
- Knowledge of the nature of the right to an attorney
- Whether the juvenile has been allowed contact with parents, guardians,

⁷⁹ But see, *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) in which the Supreme Court held that the fundamental fairness due process standard in juvenile cases does not mandate the right to a jury trial.

⁸⁰ *West v. U.S.*, 399 F.2d 467 (5th Cir.1968); *Fare v. Michael C.*, 442 U.S. 707 (1979), where it was held a minor’s request to speak to his probation officer was not an invocation of his right to counsel. See also, *California v. Prysock*, 451 U.S. 1301 (1981).

⁸¹ Section 985.203, Florida Statutes, states a child may exercise their right to counsel at any time after arrest. Further, the law states a child is entitled to representation by legal counsel at all stages of any juvenile adjudicatory proceeding. If the child’s parents are not indigent but refuse to employ counsel, the court must appoint counsel to represent the indigent child at the detention hearing. Thereafter, the court must order parents or legal guardian to retain counsel or be held in contempt.

⁸² *U.S. v. Miller*, 453 F.2d 634 (1972).

⁸³ *Arnold v. State*, 265 So.2d 64 (Fla. 3rd DCA 1972), in which it was held the juvenile defendant’s right to counsel was violated despite the execution of a written Miranda waiver.

- attorney or other interested adults
- Whether interrogation occurred before or after formal charges were filed
- Methods used in interrogation
- Length of interrogation
- Whether the child refused to voluntarily give statements initially or on prior occasions
- Whether the child later recanted extra-judicial statements⁸⁴

While an adult's ambiguous statements have been held to fall short of an invocation of rights, the opposite is true with juveniles. A juvenile's invocation of his or her rights will often be ambiguous. They may not expressly say, "I want a lawyer" or "I don't want to answer questions". Thus, their waiver of rights must be construed from the totality of the circumstances. In *People v. Burton*⁸⁵, a sixteen-year-old charged with felony murder requested to speak with his parents. However, the police refused his requests and also refused to allow his parents access to him. After they continued their custodial interrogation, Burton ultimately confessed. The California Supreme Court later reversed his conviction, construing his request to "see his parents" was, in effect, an assertion of his privilege against self-incrimination.

Whenever dealing with juvenile suspects, an investigator cannot simply read them their rights from the Miranda card. It is essential to advise them of each one of their rights, separately and in an easily understandable manner, making sure they understand each right before moving on to the next. If the child requests to speak to a parent or guardian before proceeding with questioning, or the parents request access to the child while being questioned, the investigator should keep in mind that the failure to grant that request may well result in subsequent suppression of any statements made.

Investigators must also be sure to adhere to agency policy regarding juveniles⁸⁶

V. Conclusion

The fire investigator must possess a good working knowledge of proper interview and interrogation techniques, as well as the legal issues surrounding suspect interrogations. Failure to properly conduct these important investigative steps may undermine an investigation and subsequent prosecution, including the suppression of a suspect's confession and other key evidence in the case, dismissal of the case or acquittal at trial. Fire investigators must not only be familiar with the issues in this area but must remain aware of new legal developments through legislation, evidence rules, and court decisions in this ever-evolving area of law.

⁸⁴ West, supra.

⁸⁵ 491 P.2d 793(1971), in which the California high court stated, "It appears to us most likely and most normal that a minor who wants help on how to conduct himself with the police and wishes to indicated that he does not want to proceed without such help would express such desire by requesting to see his parents. For adults, removed from the protective ambit of parental guidance, the desire for help naturally manifests in a request for an attorney. For minors, it would seem that the desire for help naturally manifests in a request for parents."

⁸⁶ SOP-DIFS 1.6.4 – Juvenile Procedures (eff. 03/06/2017).



Unit 3

Lesson 1: Understanding the Insurance World – Part I: Terminology, Participants and Documents

Enabling Learning Objectives:

At the end of this session, the student will be able to:

1. Define an insurance policy.
2. Describe the different categories, types and lines of insurance.
3. Discuss the different types of property insurance.
4. Describe the various insurance world participants.
5. Discuss the significant documents and terms in the insurance process.
6. Explain “binder” and “declarations page”
7. Explain terms such as “all risk/named perils”, “insurable interests”, “co-insurance” and “subrogation”.
8. Explain what the “duties after loss”, including the “examination under oath”, mean to the insured and insurer.
9. Explain the difference between the “intentional loss” and “misrepresentation and fraud” exclusions.

I. Introduction

For the civil and criminal investigator alike, any meaningful investigation of insurance issues first requires an understanding of the concept of insurance, insurance terminology, participants and key documents in the insurance process. There are many types of insurance products available in the market today covering almost any type of insurable property or event. The investigator must become familiar with the unique terms associated with those products, so often understood only by an experienced insurance professional.

II. What is an Insurance Policy?

An insurance policy is a contract between the insurance company and the insured party. It is a complex legal instrument. As a contract, it sets out specific rights and obligations of the parties which are governed by the terms of the contract and applicable law. In an arson or insurance fraud investigation, the insurance policy’s terms take on significance.

III. Categories, Lines and Types of Insurance

The fire investigator most often encounters cases involving “**property insurance**”, which is a broad category of insurance that indemnifies an insured for damage or destruction of property from a variety of causes, such as when an insured’s business is destroyed by fire or a

homeowner's property is stolen during a burglary. The major types of property insurance will be discussed in more detail below.

The fire investigator may also become involved in “**liability insurance**” or “**casualty insurance**” cases. Liability insurance covers property damage to another's property on behalf of an insured who becomes legally obligated to pay another party because of his or her negligent conduct, such as a claim against an insured electrician for fire damage caused to someone's home by a fire caused by sparks from an electrician's faulty wiring installation. Liability or casualty insurance, to include premises liability and workers' compensation insurance, also provides indemnification and defense to an insured for personal injury to others, such as a grocery store patron who slips in an insured grocer's store or an employee injured on the job while working for an insured business.

However, in addition to the above broad categories, there are a number of other sub-categories or types of insurance, some of which may include both property and liability coverage, which indemnify various aspects of a person's life or business which an investigator may encounter, including the following:

- A. Life Insurance** – Protection for one's spouse, children or others who depend on the insured for support, issued in the form of a term or whole life policy.
- B. Health Insurance** – Coverage for healthcare costs, such as hospitalization, surgery, medical, dental and pharmacy bills.
- C. Disability Insurance** – Financial coverage and protection for an individual's income loss due to a short-term, long-term or permanent disability from injury or medical condition.
- D. Workers Compensation Insurance** – Insurance providing wage replacement, rehabilitation costs, medical and disability benefits to employees who are injured or contract an occupational illness in the “course and scope of employment”, as well as death benefits to employees' families if the employee is killed on the job.
- E. Long-Term Care Insurance** – Coverage for costs associated with nursing and assisted living care, most commonly for the elderly.
- F. Vehicle Insurance** – This insurance type can be purchased for personal or commercial vehicles (cars, trucks, motorcycles), and protects vehicle owners and drivers against losses related to accidents. These policies generally afford various types of property and casualty insurance, including:
 - 1. Liability coverage which protects the insured vehicle owner or driver who injures another person (medical expenses and lost income, also known as bodily injury (“BI”) liability) or causes damage to another person's car or other property (property damage (“PD”) liability);
 - 2. Personal injury protection (PIP) coverage provides protection against injury and lost wages for an insured driver, regardless of fault;
 - 3. Collision insurance coverage covers the cost of repairing the insured's vehicle after an accident;

4. Comprehensive coverage protects against damage to the insured's vehicle caused by non-auto accident events, such as theft, vandalism, falling branches, etc.; and
5. Uninsured/underinsured motorist protection covers losses incurred by insured drivers who are involved in accidents with those who have no or inadequate insurance coverage.

G. Property/Casualty Policy Categories (Major Categories)

1. Homeowners – Coverage for loss or damage to the insured's home and personal property, from fire, theft, vandalism, and other perils, as well as indemnification for liability claims brought by individuals injured on the property.
2. Residential Renter/Tenants – Coverage for belongings, liability and possibly living expenses in case of a loss event available to persons renting or subletting a single-family home, apartment, duplex, condo, studio, loft or townhome. It does not cover the actual structure.
3. Residential Owners/Landlords – Coverage for a landlord for loss or damage to the rental unit and any landlord-owned property, such as appliances, as well as loss of rental income and liability coverage.
4. Commercial (Owners) – Property and/or liability coverage for owners of commercial buildings, discussed in more detail below.
5. Commercial (Lessees) -- Property and/or liability coverage for individuals or businesses who lease commercial buildings.
6. Commercial (Lessors) -- Property and/or liability coverage for owners of commercial buildings who lease out those buildings to individuals or businesses.
7. Blanket/Multiple Location (Owners or Lessees) – Property and/or liability coverage for owners of multiple commercial buildings or lessees who operate businesses at more than one location.
8. Inland Marine - Business coverage for movable and off-premises business personal property, equipment, goods and products.
9. Valuable Articles – Protection for jewelry, antiques, silverware, china and crystal, fine art and other collectibles from damage, theft or mysterious disappearance; may be purchased as an endorsement to an existing homeowner's policy or as a stand-alone policy.

Within the various categories of insurance there are two **“lines”** of insurance. **“Personal lines”** insurance covers individuals and their households for damage to their homes, vehicles, and personal property or sickness or injury to the individual or family. Personal lines insurance includes homeowner's, health and disability or personal vehicle insurance.

“Commercial lines” coverage encompasses many insurance products for commercial enterprises to protect against loss and damage caused by accidents, natural disasters, theft, vandalism and other crimes, and even someone hacking into a business' computer system.

IV. Insurance World Participants

There are a number of different persons involved in the insurance procurement and claims processes who may be potential insurance witnesses in an arson or fraud investigation.

A. Claimants

Insurance policies afford coverage to two types of potential claimants, first and third party.

A **“first party claimant”** is an individual or legal entity asserting a right to payment under an insurance policy issued to that person or entity (“insured” or “policyholder”) arising out of the occurrence of the contingency or loss covered by the policy. An example would be a person filing a claim under their homeowner’s policy for damage caused by a kitchen fire at the home.

A **“third party claimant”** is a person or legal entity bringing a claim for personal or property damage against another person or entity under the other party’s insurance policy. For example, an individual who is injured during a slip and fall at a neighbor’s home may bring a claim against the neighbor, who will report the claim to her homeowner’s insurer. The homeowner’s insurer will then have a duty to indemnify and defend the homeowner, depending on the policy terms.

B. Insurance Company Representatives

1. Insurance Agent

These are the individuals who sell the insurance products and should have first-hand knowledge about the insurance procurement process. There are two types of insurance agents:

- a. **Captive or Company Agent** – This agent is employed by the insurance company and generally authorized to sell insurance products for only that specific company. If the coverage requested is not available through that company, the captive agent will refer the customer elsewhere. The captive agent is usually considered an agent of the insurance company.
- b. **Independent Agent** -- This person is not an employee of any insurance company and can sell insurance products on behalf of many different companies. This agent can offer a customer different policies from different carriers for the best available coverage at the best price. The independent agent is paid on a straight commission basis for the product sold and is usually – but not always -- considered the insured’s agent

2. Insurance Broker

The broker is not directly employed by any insurance company and acts as an intermediary or “broker” of specialized insurance products, typically the more complex or more difficult types of coverage to place, such as high-risk properties or businesses. Most of the insurance business written through Lloyds of London and other surplus and excess lines insurance is handled by a broker. The broker is strictly paid on a commission basis.

3. Underwriters

The insurance underwriters evaluate and decide to accept or reject prospective insurance business. They must approve any insurance coverage, even if an authorized agent has temporarily issued coverage under a “binder”. Underwriters closely examine the insurance application and collect other relevant information in order to make the decision on accepting or rejecting a prospective insured. They are involved in decisions to terminate, cancel or non-renew coverage after it has been in effect when information comes to their attention indicating the person, property or business (“the risk”) is not a sound insurance risk.

4. Loss Control Specialist/Risk Inspectors

These insurance company employees or independent contractors, who provide loss control or risk inspection services, go to a particular property or business under coverage consideration or already insured to identify and evaluate safety issues and risk hazards. They are usually part of the underwriting process. Sometimes they are sent out after insurance issuance to confirm risk suitability. Typically, they prepare a report for the underwriter or insurer on their findings and include recommendations to minimize risks. Many insurance companies share this report with their insured to help them recognize safety and hazard issues.

5. Claims Adjusters

These individuals are responsible for handling and resolving insurance claims. When a loss is first reported, an adjuster is assigned to the case, and may handle the claim from start to finish or may only handle certain claim aspects. The different types of claims adjusters are:

Handling or Desk Adjuster This adjuster, who may be an employee of the insurance company or its third-party administrator, handles the claim from the office rather than going out to the field to inspect the loss and meet with the insured. Most handle a specific type of claim, such as auto, homeowners, commercial claims, subrogation claims; some handle certain categories of claims, such as large, complex or catastrophic (CAT) losses. This adjuster manages the claim to include confirming coverage, taking a telephone statement from the insured or claimant, hiring or assigning field adjusters and experts, requesting documents from the insured, sending out claim acknowledgment and status letters, requesting proofs of loss, reviewing estimates and making claim decisions within his authority. Most have settlement authority up to a certain dollar limit and then must go to a claims manager if the settlement amount exceeds that limit.

Field Adjuster – This person visits the loss site, examines the damage, meets with the insured or the insured’s representatives, conducts recorded statements, collects pertinent documents, and prepares a repair estimate.

Company Adjuster – These are most often handling or desk adjusters, although some companies do employ staff field adjusters. These adjusters work directly and exclusively for the insurance company as an employee.

Independent Adjuster (IAs) – This is most often a field adjuster who handles insurance claims for a multitude of insurance companies which do not employ staff field adjusters or do not have an available adjuster in the loss location’s area. Most independent adjusters perform loss

inspections, prepare estimates and meet with the insured, but have no settlement authority.

Other Representatives - In addition to adjusters, insurers may employ claims examiners, claims supervisors, superintendents, managers or directors who may be involved in claims handling decisions and coverage determinations.

6. Special Investigative or Anti-Fraud Unit Representatives

The Special Investigative Unit (“SIU”) is the insurance company’s designated anti-fraud investigative division assigned to investigate questionable claims, including suspected arson cases. Many insurers have in-house SIUs with representatives directly employed by the insurer, but some insurers utilize “contract SIUs”. All insurers admitted to do business in Florida are required to have such units, either in-house or under contract.⁸⁷ SIU representatives, many of whom are former law enforcement, are trained to investigate insurance fraud. Some insurers assign an SIU representative to work with the claims adjuster, while others turn the claim over for exclusive handling by the SIU department. In a case of suspected arson, the assigned SIU representative will usually be directing the insurance company’s claim investigation.

During the course of an SIU investigation, the SIU investigator will take recorded statements of the insured and other witnesses, may conduct the insured’s examination under oath, obtain and examine pertinent documents, communicate with company retained experts, and exchange information with law enforcement and other insurance companies under applicable arson and fraud reporting statutes. However, it is important to remember that the SIU investigator is conducting a civil investigation into potential insurance policy defenses, such as application or claims fraud, and not a criminal investigation.

C. Insurance Company Experts/Contractors

1. Fire Investigator/Origin and Cause Expert

In most suspected arsons, insurers assign a fire or origin and cause (“O & C”) investigator to determine the fire cause. In most cases, the O&C is an independent contractor, although some insurance companies utilize in-house fire investigators to conduct a preliminary fire scene investigation before hiring an independent O&C. The O&C examines the fire scene, collects and submits physical evidence for analysis usually to an independent lab. He may interview the insured and other witnesses and may even bring in other experts, such as an electrical engineer. If the O&C deems the fire accidental, the insurer may utilize him to pursue “subrogation” of the claim against the responsible party, such as a negligent electrician. The fire investigator is the person who possesses the insurer’s first-hand knowledge of the fire’s origin and cause.

2. Contractor/Estimator

Even though a suspicious claim may be under investigation, the insurance company will still hire a contractor or estimator to determine the damages’ extent should the claim become payable. Insurance companies may have in-house estimators but usually use outside firms, some of which specialize in certain areas, such as fire damage estimation and reconstruction, mold and water damage remediation and repairs, etc. Insurers also often use local contractors to prepare

⁸⁷ Section 626.9891, Florida Statutes (2017).

damages and anticipated repair cost estimates to obtain a reliable measure of the actual damages.

3. Inventory Specialist

In complex residential or commercial losses, the insurer may hire an inventory specialist to examine the damaged or destroyed inventory. These are trained experts who first count or “inventory” the personal property and equipment, and then provide a detailed valuation of the damaged property and the current replacement costs for similar property. The inventory specialist will usually prepare a detailed report showing the inventory and equipment on hand, its condition and value at the time of the fire, and the current replacement costs.

4. Salvor

When inventory and equipment have not been completely destroyed in a fire or other casualty, the insurance company will often hire a salvor to collect and examine the inventory at the fire scene, take steps to protect it or provide emergency restoration services to minimize further damage and then locate a buyer for the salvaged goods. Many times, there can be significant salvage value which is used to minimize the insurance claim if it becomes payable.

5. Appraiser/Valuation Expert

In cases involving unique or specially valued such as artwork or collectibles, an appraiser or valuation expert may be retained to establish the value of the claimed property. They may also be used to confirm the authenticity of property such as artwork or antiques.

6. Forensic Accountant

An insurer may retain a forensic accountant or certified public accountant to calculate the claim value, particularly claims for “business interruption” coverage involving complex accounting formulas. In suspected arson cases, the forensic accountant will conduct a comprehensive evaluation of the insured’s financial records and books to discover any financial motive, including any significant financial trends in the insured’s finances, any irregular events or practices in the business books. The accountant will prepare an evaluation using established accounting methods and project the business’ future in the time leading up to the fire.

7. Other Experts

There may be several other experts involved in a case, depending upon the facts of the loss. A structural, mechanical, chemical or fire protection engineer, or metallurgist may be retained to assist with the origin and cause issues. A security expert may be used to evaluate the property’s security issues at the time of the fire and to determine issues of forcible entry into the building. An alarm system expert may be used to examine and determine a building’s alarm status at the time of the fire. A document examiner may analyze written records and documents to establish authenticity or author identity.

8. Attorney

In cases of suspected arson or fraud, the insurer will likely retain an attorney to assist in evaluating coverage issues, provide legal guidance on the claim handling and investigation,

conduct the EUO and request records from the insured. When the investigation is completed, the attorney will provide a “coverage opinion”, which is an evaluation of the case and the legal sufficiency of any coverage defenses, such as breach of the intentional loss exclusion or fraud and misrepresentation clause. While some insurance companies utilize in-house attorneys (“claims counsel”) for these purposes, most hire independent outside or coverage counsel specializing in the handling of fire and fraud cases.

D. Insured’s Representatives

1. Public Adjusters

A public adjuster (“P.A.”) is an individual a policyholder hires to assist in presenting a claim to the insurer.⁸⁸ The P.A. charges a “commission” – usually a percentage of the amount the insured recovered in the claim – so that they have a vested interest in making sure the insurance claim is paid and “maximized”. Their services vary from simply acting as an intermediary between the claimant and insurer to preparing proofs of loss, procuring contractors’ estimates, attending inspections and even appearing for examinations under oath. P.A.s are not to be confused with independent adjusters who represent the insurer, although they may use scanners, get to a fire scene and make contact with an insured even before the insured reports a claim.

While some states prohibit P.A.s, they are permitted in Florida, and are licensed and regulated by the Florida Department of Financial Services. Due to the dramatic rise in the numbers of public adjusters in Florida following the 2004 - 2005 hurricane seasons – a 330% increase from 678 in FY 2003-04 to 2,914 in FY 2008-09⁸⁹ – the likelihood of encountering a public adjuster in a fire investigation has also increased.

Florida law prohibits public adjusters from giving legal advice to their clients which means they cannot legally advise insureds not to speak with law enforcement or insurance company representatives. They are also prohibited from giving loans or advances to insureds or from disseminating false or misleading information about “the business of insurance” to prospective or existing clients, such as, “Unless you hire me, the insurance company will deny or lowball your claim.” P.A. contracts must contain a three-day cancellation provision (5 days for contracts related to disasters for one year after the disaster) and a statutory fraud warning.

Additionally, Florida law imposes limitations on P.A. commissions to 10% for hurricanes and other Governor-declared state-of-emergency disasters for one year after the event. However, there is no commission percentage cap for supplemental disaster claims the P.A. procures after that one-year period. There is a 20% cap on fees for all other types of losses, including a non-disaster related fire loss. Public adjusters are also prohibited from having a financial interest in an entity that obtains business in connection with claims the P.A. handles, such as repair companies.⁹⁰ It is a third-degree felony to practice public adjusting without a license in Florida.⁹¹

2. Insured’s Attorneys

⁸⁸ Section 626.854, Florida Statutes (2018).

⁸⁹ *Office of Program Policy Analysis & Government Accountability*, Report No. 10-06, January 2010.

⁹⁰ Section 626.8795, Florida Statutes.

⁹¹ Section 626.8738, Florida Statutes.

An insured may retain an attorney shortly after a loss occurs to deal with the insurance company, law enforcement, or both. While a claimant's attorney will likely permit their client to speak with insurance representatives either in an informal recorded statement or examination under oath, they may restrict access to law enforcement even if their client is not in custody. Notably, under Florida law, a licensed Florida attorney can act as a P.A. without obtaining a separate P.A. license, and then act as the insured's attorney as well.

3. Loss Consultants

In the years following the 2004-2005 hurricanes in Florida, a policyholder representative known as a "loss consultant" became more and more common. These individuals, who often work for law firms or public adjusting firms, are not licensed attorneys, public adjusters or licensed at all. However, they would routinely show up at fire or other types of loss scenes and prepare estimates, solicit business for attorneys or public adjusters and attempt to negotiate and settle claims, resulting in consumer confusion and inflated claims.

As a result, the Florida legislature amended the public adjuster statute to prohibit anyone except a licensed public adjuster or attorney from soliciting, investigating, or adjusting a claim on behalf of a public adjuster, an insured, or a third-party claimant.⁹² While a loss consultant may still be sent by an attorney or public adjuster to facilitate a post-loss inspection, they cannot engage in any of the prohibited activities without facing felony charges.

4. Contractor/Vendor Under AOBs

An omnipresent participant in the insurance claim process during the last decade is the "AOB contractor" or repair vendor who convinces policy holders to sign an "assignment of benefits" (AOB) prior to the commencement of work. An AOB is a legal contract permitting repair vendors to receive payments directly from insurance companies for work performed at a policyholder's home or business without the insured paying any money up front. While good in theory, unethical repair vendors, such as roofers or water and mold mitigation companies, have used AOBs to take control of insureds' claims, inflate the scope and repair costs, and file suit against the insurer for failing to pay the inflated claims – often without the policyholder's knowledge – before the insurer has an opportunity to inspect the property and evaluate the claim. Vendor attorneys could collect attorney fees far in excess of claim amounts by filing suit and settling the matter for merely one penny more than the insurer had already paid on the claim. Often policyholders only realized they signed away control of their claim after the vendor placed a lien on their property and they couldn't cancel the AOB.

⁹² Section 626.854(19) (d), Florida Statutes.

Long viewing AOBs as a leading contributor to Florida's rising insurance rates, insurance companies tried to prohibit their use through legislation and prohibitive policy provisions. Florida courts, however, consistently upheld such assignments. Beginning in 2019, the Florida Legislature undertook comprehensive AOB reform. Efforts begin with giving consumers the right to rescind the AOBs within certain timeframes and transferring certain pre-lawsuit duties like appearing for an EUO, to the assignee vendors. With additional reforms happening in successive sessions, the legislature enacted a provision in the 2022 Special Session prohibiting the assignment of any post-loss insurance benefit under residential and commercial property insurance policies issued on or after January 1, 2023. An investigation may require you to evaluate any assignment of benefits contracts under the law in effect when the policy was issued.

Although a vendor's failure to follow the new law may result in an AOB being void or the vendor facing administrative or civil consequences, there are no criminal penalties contained in the AOB reform statutes. However, a vendor's failure to follow the law may be part of a larger scheme to defraud a consumer or an insurer, so that complaints regarding such failures may still yield valuable evidence for a criminal investigation.

V. Insurance World Documents

The process of obtaining insurance coverage involves a prospective insured communicating with an agent, either in person, over the phone, or even on-line, and completing an application which the agent submits to one or more carriers for evaluation by the underwriters. If the application is accepted by an insurer, a binder will be issued. Depending on the type of risk, the insurer may order an inspection and perform further risk evaluation tasks before issuing the insurance policy. All the documents involved in the coverage procurement process may become significant in an arson investigation.

Once the policy is issued, many policy provisions may not become significant until a loss occurs, and a claim is submitted. When that occurs, an understanding of the insured's duties and the insurer's rights during the claim investigation becomes critical for the public investigator.

A. The Application

This document contains the basic information provided by the prospective policyholder to the prospective insurer to determine whether the insurer will accept the risk, what types of coverage it will issue, what terms and limitations may apply, and the premium to be charged. The application will contain information regarding the insured (individual, family, business), property to be insured (address, size, age, construction and value), insured's insurance, loss and claim history, any potential hazards (dangerous animals on the premises, distance from the coast, distance from the nearest fire station, etc.). (See Attachment C) Under the laws of most states, including Florida, representations made on the application are incorporated into the policy itself.

B. Binder

Newly issued insurance coverage may be under a “binder”, which is temporary insurance pending approval of an application and usually effective only for a limited period, such as thirty or sixty days. A binder will be issued by an agent with “binding authority” immediately upon submission of the application to protect the insured’s interest while the application is being evaluated through the underwriting process. A binder is usually a single sheet containing basic information about the named insured, property insured, and coverage amounts. It is issued before the policy itself is issued, although it is considered subject to the terms and conditions of the policy which is scheduled to be issued. A loss occurring under a binder may be entirely coincidental or may be a factor to be considered in the investigation.

C. Inspection Report

After a binder is issued, but before the time to preemptively cancel coverage expires, an insurer may order an inspection of the property. This may consist of a “drive by” inspection by an agent who takes exterior photographs, a more in-depth inspection of the exterior and interior of the property, including the roof for wind rating purposes, or a comprehensive inspection of fire suppression and other safety systems, such as in the case of a restaurant. The importance of the inspection report is that it may be the only documentation of the property at the time of policy inception, prior to a fire or other loss under investigation.

D. Policy

As stated above, an insurance policy is a contract between the insurance company and the insured. A typical property insurance policy includes the following:

1. Declarations Page

The basic information about the policy coverage can be found on the face of the policy or the “declarations page”, also called the “dec page” or “cover sheet”. (See Attachments D and E.) While the main body of the policy is usually a series of printed forms which are compiled to make the complete policy, the declarations page is specially prepared with the specific information about the coverage under that particular policy, and typically contain the following:

a. Identity of Insureds/Others With An Insurable Interest

This is the party (individual or business) whose interests are protected by policy’s coverage. There are three types of insured under a typical policy:

1) Named Insured

In a personal lines policy such as a homeowner's policy, it may be an individual, group of individuals or a married couple, listed by name. In a commercial policy, it will be the insured business and/or the principal or owner of the business. The named insured has all the policy's rights and responsibilities

2) Definitional Insured

In a homeowner's policy, "insured" is defined to include the named insured as well as any other "resident relatives" or family members living in the insured household. These individuals are considered to be "definitional insureds" even if not specifically named.

In commercial policies, "insured" is usually defined to include the business' owner(s), partner(s), director(s), manager(s) and employees. However, particular provisions may or may not apply to the entire group. Some commercial policies exclude coverage if any definitional insured's criminal acts cause the loss, while others only prohibit coverage if the business' owner or principal commit the acts. Statutes and case law will dictate whose actions can be imputed to the business.

3) Additional Insured

Many insurance policies, particularly commercial policies, show an additional insured on the dec page or "change endorsement" which creates something of a hybrid coverage relationship. The additional insured is another party who has a distinct legal interest in the insured property or business which needs to be protected. For example, many leases require the tenant to obtain insurance for the building owner's benefit. The landlord would then be listed as an additional insured to protect her ownership interest in the building because a tenant cannot insure the full value of the structure as he lacks an insurable interest in its full value and has only a legal interest in the property's use during the lease term. The landlord/owner may also be shown as an additional insured for other purposes, such as liability protection if someone is injured while visiting the premises.

Lessors or consignors of goods and property to a business may be listed on the policy as additional insureds to protect their property or for other reasons. The additional insured's significance is that they have a recognized interest under the insurance policy in the event of a loss. Their right of recovery after a loss, including a loss involving an insured's arson or fraud, will depend upon the policy language and applicable case law. Under most insurance policies issued today, an additional insured is subject to the defenses which may be asserted against the named insured, including arson or fraud.

4) Mortgagee

A mortgagee is an individual, corporation, partnership, LLC, or financial institution which has a secured interest in the insured property in the form of a mortgage or similar security instrument recorded against the land and its improvements (buildings). A mortgagee has a special relationship with the insurer under a policy. Most policies specifically state a mortgagee's rights cannot be invalidated by the acts of the named insured, such as arson or fraud. Accordingly, the insurer will generally still be obligated to pay the mortgagee's interest in the property on the date of loss even when there is no

coverage for the named insured due to arson or fraud. However, the mortgagee's special protection only applies when the mortgagee is named on the declarations page of the policy. If they are not named for any reason other than the insurer's error or oversight, they are generally treated as an equitable claimant to the insurance proceeds and will be paid only if the named insured is paid.

The coverage amount for a mortgagee is not a fixed amount but is the outstanding mortgage balance the insured owes as of the date of the fire, capped by the policy's coverage limits. Ironically, although the insured's inability to pay the mortgage may be the primary motive for setting a fire, the insurer will still have to pay off the mortgage.

In some cases, the insurer may have little to gain by contesting a suspicious fire claim when the mortgagee is going to receive most or all the insurance proceeds. However, most policies give the insurer the right to a full assignment or transfer of the mortgage note when it pays the mortgagee's claim which it can then seek to recover from the named insured or foreclose upon the property if it can prove the named insured set the fire. For this strategy to work, there must be some significant post-loss value in the property and land or a named insured with financial assets to pursue.

5) Loss Payees/Lien holders

A loss payee or lien holder named on a policy typically holds some type of secured interest in the personal property, furnishings, fixtures, and equipment at the insured property. A business' consumer finance company, lessor, vendor or supplier may have such a security interest. A loss payee or lien holder named on the policy has the right to be paid the outstanding balance owed to them up to the policy limits only if the named insured did not deliberately cause the loss. This is because a loss payee/lien holder stands in named insured's "shoes", meaning their claim is treated just as the named insured's claim. So, if the named insured's claim is denied due to arson or fraud, the loss payee's claim will also be denied unless the policy affords them the same level of protection as a mortgagee.

b. Description of Insured Property

This is the type of property and its location, such as "Commercial Building located at 123 Main Street, Aurora, Washington 42701" or "Business Personal Property listed on Schedule A located at locations listed on Schedule B." If the policy covers a vehicle or mobile home, the make, model, year manufactured, and VIN will generally be listed.

c. Policy Term

This is the effective date range of the policy listed on the declarations page, namely, when the policy commences and expires. This may be a six-month, one-year or even three-year term. A loss occurring shortly after the policy was taken out or right before it expires may be a significant fact in the investigation. Accordingly, the investigator should always confirm through the agent or underwriter whether a policy was newly issued, about to be canceled, under a cancellation notice, already renewed or set to renew before reaching any conclusion.

d. Policy Limits

These are the maximum benefits payable in the event of a loss. After adjustment, an insurer is obligated to pay for the actual damages caused by the loss only up to the policy limits even if those damages exceed that amount. The insured absorbs any amount over policy limits

The policy limits are usually listed on the policy declarations page by coverage (building, contents, and additional living expenses), although there may be special limits listed in the main policy for certain property or loss types. There are different insurance coverage types provided under every policy and, in most cases; each type of coverage has a specific policy limit. Each type of claimed coverage will be adjusted and determined, up to each specific coverage's policy limits. An insured may have a loss in excess of the policy limits for one coverage type but have below policy limits damages for others. Any "unused" or excess coverage amount from one policy section cannot be used to cover damages under another policy section.

When determining the available coverage amount for a fire loss, it is not a matter of simply adding up all the coverage limits shown as certain coverage may be inapplicable to a fire loss. For example, property and vehicle policies provide liability coverage for the insured in the event of injury on the premises. However, the liability coverage amount, meant for injury to third parties, should not be considered as part of the amount the insured stands to recover. In most fire cases, the total amount of insurance which an insured stands to recover is the aggregate of the structure and personal property coverage limits. The investigator should confirm with the insurer the actual available insurance coverage when investigating a fire.

e. Endorsement

An endorsement or "change endorsement" is a policy coverage addition or modification, usually after initial issuance. The most common type is an increase or decrease in coverage limits, but may it also be used to add or change parties, including insureds (e.g., when a spouse is added) and mortgagees (e.g., when property is refinanced) or to add or delete a coverage type. Although an endorsement should be issued as soon as the change is effective, there may be a processing delay. It is therefore important to contact the producing agent or underwriter to determine whether there are any recent or pending endorsements. Changes made to a policy, such as increasing coverage limits shortly before a loss, should always be closely investigated.

There are many coverage types available under different homeowner's and commercial policies, each with their own purpose. A policy may contain any number of these coverages as part of a policy "package", such as commercial property and vehicle coverage. It is critical to determine which coverages apply to a specific fire loss in such a scenario.

f. Coverage Types

i. Structure or Building

This is the amount of available building or residence coverage which includes the building itself as well as installed appliances, plumbing and lighting fixtures, heating and air conditioning systems, flooring and permanently installed items.

ii. Personal Property or Contents

Under a homeowner's policy, this coverage encompasses furniture, movable appliances (refrigerator, washer, or dryer) paintings and artwork, lamps, books, clothing, personal effects, jewelry, guns, collectibles, linens and almost anything else considered movable. Many policies limit coverage for certain items, unless they are specially insured, i.e., \$2,500 limit for jewelry, \$200 limit for cash.

iii. Business Personal Property

In a commercial policy, this covers the furnishings, office equipment, inventory, stock, business books and papers, uninstalled shelving, display counters, manufacturing and production equipment and other movable items. Some of these items may be separately insured under a particular coverage of the policy.

iv. Appurtenant/Other Structures

Most homeowner's policies and many commercial policies provide coverage for "appurtenant" or "other structures" located on the property apart from the principal building or residence such as storage buildings, tool sheds, barns, gatehouses, or swimming pools (usually considered to be "structures"). The coverage amount is typically a percentage (ten to twenty percent) of the coverage for the principal structure. Some insurance companies will allow this coverage to be added to the coverage on the principal structure when the property is underinsured after a loss, an exception to the general rule against transferring coverage limits.

v. Additional Living Expenses (ALE)/Loss of Use

Most homeowner's policies provide coverage for necessary expenses when the residence is uninhabitable due to a loss which covers the additional cost an insured actually incurs due to displacement, such as motel, apartment or rental house expenses, food and laundry. ALE may be paid until the insured is back in their home or permanently relocates, but only to the extent they exceed the insured's ordinary living expenses for those same items. As a good faith measure, an insurance company will often provide an "advance" payment to the insured to assist with expenses not covered by ALE and later deduct it from the final claim settlement amount, even when the claim is under investigation.

vi. Loss of Rents

This applies to the rental income loss after a rental property has been damaged or destroyed and the tenant's rent is abated. Also, some homeowner's policies allow the insured to select payment for the "fair rental value" of a residence, in lieu of claiming ALE. When this is permitted, the insured may claim the residence's rental value even though it had never actually been used as rental property. An insured who chooses to live in a second residence or vacation home during the pendency of the claim may receive the fair rental value of the fire-damaged residence whether or not the insured ever incurred any "additional" expenses from the move. This coverage can provide a financial windfall to the insured contrary to the underlying fundamental principle of indemnity, to-

wit: an insured will be paid only for the actual loss suffered.

vii. Business Interruption/Loss of Income

This commercial property coverage provides benefits for the financial loss caused by the business operation's interruption and is intended to replace the business' lost income when it is no longer able to operate at full capacity or must completely shut down. In most policies, it replaces the "net income" of the business after its ordinary, discontinued and continuing expenses are taken into account, such as rent, equipment payments, payroll, taxes, storage charges and similar expenses. In some cases, continuing expenses can result in a business receiving payment for "lost profits" when it was never actually profitable before the loss. However, it is still seldom an actual gain for the business. The methods for determining this type of claim vary significantly from policy to policy.

viii. Cash and Securities

Many commercial policies provide coverage for the loss of cash and securities kept on the premises which are destroyed in a fire. The amount of coverage will depend upon business' nature but is usually \$10,000 or less.

ix. Electronic Data

With the advent of computers, coverage for the loss of electronic data is an important protection for businesses. This type of coverage pays the cost of restoring or recreating the electronic data of the business. The coverage is usually in the range of \$10,000 or so, but can be substantially higher and a claim for electronic data loss can be significant.

x. Goods in Transit

This coverage protects a business' goods and products while in transit to customers or storage destinations and is generally limited to losses occurring during the actual shipment. Depending upon the nature of the shipped goods, there can be substantial coverage amounts involved in this type of loss.

xi. Inland Marine

This is a separate business coverage type for personal property, equipment, goods and products which are movable and usually located off premises. As most commercial policies do not cover business personal property located away from the main business location, this coverage may be acquired as a separate coverage or under a separate policy.

xii. Boiler and Machinery

This is one of the oldest insurance coverage forms which traditionally covered business steam boilers and manufacturing equipment but now typically includes other business or manufacturing operations' mechanical equipment usually of a type not covered under traditional commercial policies but essential to the operation of a business. It may also be separate coverage added by endorsement or provided under a separate policy.

xiii. Builder's Risk

This is a unique type of coverage that it is specifically designed to insure property under construction which protects the builder and/or owner of the property against loss or damage occurring during the construction process. It is limited coverage for the structure under construction only which is not found in an insurance policy. It may be provided on a "named peril" basis only, such as for loss by fire. Another unique feature of this coverage type is that the coverage amount changes as the construction process proceeds to reflect the current stage of construction. Claims under builder's risk policies may involve suspected intentional losses, such as:

1. Vandalism or theft as construction sites are prime targets for both;
2. A fire being set by the disgruntled sub-contractor;
3. A recently terminated employee damaging the property;
4. A fire set by a contractor or developer faced with significant cost overruns or other financial setbacks, such as unanticipated issues with soil, foundation, sewer, utilities, regulatory authorities.

2. Duties After Loss or Post-Lost Duties

This is one of the most important provisions of an insurance policy. (See Attachment F) It imposes specific requirements for the presentation of a claim after a loss which courts generally consider "conditions precedent" to recovery, meaning the insured must satisfy them before the insurer is legally required to pay the claim. The requirements in a property policy include:

- The duty to promptly report the loss when it occurs.
- The duty to report the loss to the appropriate public authorities in case of fire or theft.
- The duty to take steps to protect the property against further loss or damage after loss.
- The duty to permit inspection of the damaged property.
- The duty to submit a sworn statement in proof of loss.
- The duty to prepare a detailed itemization of the damaged property.
- The duty to provide records and documents substantiating the claim and material to the insurer's claim investigation.
- The duty to cooperate.
- The duty to appear for and answer questions at an examination under oath.

a. Duty to Cooperate

The duty to cooperate, found in almost every insurance policy, imposes a broad duty on the insured to cooperate with the insurer in its loss investigation and adjustment, that is, the insured is not only required to respond to the insurer's requests but to secure others' cooperation, such as relatives, employees, vendors, public adjusters and contractors. This is often accomplished by the insurer meeting with the insured, taking a statement and having the insured sign an authorization form permitting the insurer to get information and records from others.

b. Duty to Permit Inspection

This may be a three-part duty, requiring the insured to (1) permit the insurer to inspect the

damaged property site where the loss occurred, including permitting access to the fire scene to the insurer's O & C investigator; (2) permit inspection of the damaged personal property, equipment, inventory and other items from the fire scene, especially anything which the insured removed after the loss; and (3) permit inspection of the insured's "books and records".

c. Duty to Submit a Sworn Statement in Proof of Loss

Another important requirement is for the insured to submit a sworn statement in proof of loss, a critical document in the claim process. (See Attachment G.)

First, it requires the insured to provide an array of information about the claim, including the identity of the person(s) making the claim, the claimant's legal interest in the property, all persons or entities entitled to make a claim, such as the landlord, tenant and mortgagee, the date and time of the loss, cause of the loss, any changes in title or occupancy of the premises since the policy was issued, and a statement of the specific amount being claimed as a result of the loss.

Second, it requires the insured to provide this information in a sworn, notarized document under oath which requires the insured to swear to the truth of all the information on the proof, including the amount claimed.

Third, it requires the insured to swear that the loss did not originate by any act or design of the insured and that nothing has been done to deceive the insurer relating to the loss or claim.

Finally, it establishes the time frame for a decision on the claim as prescribed in the loss payable policy provisions, as well as state insurance laws and regulation, such as 30 days following the submission of a complete proof of loss.

d. Duty to Produce Records

An insured must produce documentation to support its claim and material to the insurer's claim investigation, such as titles, registrations, deeds, receipts, invoices, estimates and appraisals, financial records, tax returns, balance sheets, timecards, cell phone and toll records.

e. Duty to Submit to Examination(s) Under Oath

Almost every insurance policy requires an insured to appear for an EUO as one of the duties after the loss. Perhaps the most important component in an insurer's investigation of suspected arson or fraud is the right to conduct an Examination Under Oath ("EUO"), which is an unparalleled investigative tool.

The right is often one of the final steps in making a claim decision. Using information developed during the pendency of the earlier investigation, the insurance company can develop key issues in the case and the questions which must be asked of the insured in the EUO setting.

The EUO is a formal proceeding taken before the court reporter and recorded in a verbatim transcript containing every question and answer. Many insurers also videotape EUOs. It is usually conducted by an attorney although a SIU investigator may conduct the EUO. The insured has the right to be represented by an attorney at his or her own expense. However, unlike a deposition or court proceeding, the insured's counsel has no right to raise evidentiary

objections or ask questions of the client and is only allowed to offer legal advice to the insured. EUOs typically last several hours but may span multiple days.

The Examination Under Oath's scope is broad and spans a number of subject areas, including background information, such as:

- Legal name and other names used.
- Date of birth and social security number.
- Marital status and marital history.
- The identity of his children and other relatives.
- Current place of residence and prior residences.
- Current and prior employment.
- Criminal record, including arrests and convictions.
- Civil litigation involvement.
- Ownership history of the insured property or business.
- Insured or business' insurance history, including any prior claims.
- Circumstances of obtaining the specific policy involved in the claim.

On the issue of possible financial motive, questions will be asked about:

- Primary insurance
- Other sources of income or earnings.
- The assets and liabilities of the insured and business.
- The status of obligations with creditors and suppliers.
- The financial trend in the time leading up to the fire.
- The status of tax filings and tax obligations.
- Liens and judgments recorded against the property or business.
- Recent loans or loan requests and all related financial information.

The claim itself is discussed in detail, including:

- The particulars of the claim presented.
- The method of calculating the claim.
- The basis for the values claimed.
- The documents available to substantiate the claim.
- The physical location of claimed items inside the insured property.

The circumstances of the loss will be discussed at length, including:

- The layout of the building.
- The type and location of all doors and windows.
- The type and condition of all locks.
- The type and location of security alarm or fire suppression systems.
- Prior break-ins or related security problems with the building.
- The general condition of the building prior to the fire.
- Known fire hazards such as faulty wiring or malfunctioning equipment.
- The presence and location of any flammable or combustible materials in the building.

- Any unusual activities or conditions noted before the fire.
- The presence and activities of the last persons known to be in the building and the security of the building when the last person left before the fire.

The activities and whereabouts of the insured(s) from the time the last person left until the fire occurred will be covered in precise detail:

- Where they were.
- Where they later went.
- Who they were with.
- What they did.
- The vehicle they were in.
- Any phone calls made or received throughout that time (including cellular calls).
- Any return to the insured property or near it during that time.
- The exact time and manner by which they learned of the fire will be covered.

In addition, they will be asked about:

- Their activities after learning of the fire.
- Their first visit to the fire scene and their observations.
- Anything unusual or out of place noted when they first entered the fire scene.
- Their own belief of the probable cause of the fire and any evidence or information to support that belief.
- The identity of any suspects or persons having a reason to set the fire.
- Whether the insured(s) were involved in setting or procuring the setting of the fire.
- If they had any reason to know the fire would occur.
- Whether they had ever made a statement indicating a plan or desire for a fire to occur.

Throughout all of this, the insurance company is evaluating the insured's statement from several perspectives. First, much of the information will already be known, so an insured's deception will quickly be apparent. Second, the willingness of the insured to cooperate and provide information will be noted. Finally, the insured's overall appearance and demeanor as a witness will be measured for credibility and believability. Evasive answers, hostile responses, claimed lack of memory or knowledge about key facts and traditional kinesics interview responses will be considered. In the end, it is all about credibility and whether the insured can be believed when denying any involvement in the loss and any fraud in the claim. An insured who testifies falsely or deceptively about any issue during the EUO will have believability problems when later denying responsibility for the fire before a jury.

For the public investigator, this information is crucial and may not otherwise be available when the insured is a suspect in the case. There is no Fifth Amendment right to remain silent during the EUO. The insured must answer all questions reasonably related to the investigation of the claim or risk the insurer denying the claim. If the insured is claiming an alibi or implicating another in setting the fire, it will be disclosed in the transcript of the EUO, while a criminal investigator seldom has an opportunity to learn about a suspect's alibi or the existence of alternative suspects before the case is filed. It is a tremendous advantage for the public investigator to have this information to assist in the investigation of the case.

3. Loss Payment or Payable Clause

This policy provision establishes the time when the insurer must pay or deny the claim. (See Attachment F) In most homeowner's policies, it is sixty days after the insured submits the sworn proof of loss and meets all conditions or duties. In most commercial policies, it is sixty days after the proof of loss has been presented and those duties have been met but can be as short as thirty or even twenty days. Many state statutes and insurance code regulations establish the date when a claim must be paid or denied. In case the deadline is different from the time under the policy, the shorter time period will apply.

4. Mortgagee/Loss Payee Clause

This clause defines the legal relationship between the mortgagee or loss payee (lien holder) and the insurance company, especially as to the effect of an insured's arson or fraud. (See Attachment F.) However, it also has significance for the processing of mortgagee claims which are not affected by an insured's potential arson or fraud. It will establish any conditions which the mortgagee must fulfil, such as notifying the insurer of any change in the use and occupancy of the premises or any increase in the risk of loss known to the mortgagee. The mortgagee may also be required to file a sworn proof loss or pay a premium which was due. Otherwise, there are few duties imposed upon the mortgagee and the insurer generally must act upon a mortgagee's claim without regard for the duties of the named insured and the corresponding time periods for the handling of the insured's claim.

In most cases, the mortgagee's claim must be paid promptly after the loss or the insurer is subject to the payment of interest and additional penalties. For this reason, many insurers will pay the mortgagee even during an active investigation of suspected arson and fraud by the name insured. While some public investigators take this as a sign that the insurer has closed its investigation or is going to pay the claim, that is not necessarily the case. It is done because the insurer has no choice but to promptly act upon the mortgagee's claim. As noted above, the mortgagee clause allows an insurer to demand an assignment of the mortgage note when it pays off the balance providing it with a potential means for recovery of some or all of its money.

In the case of loss payees or lien holder, this clause establishes their rights and responsibilities. Some policies give them the same rights as a mortgagee but in most, the loss payee or lien holder's claim is subject to all available defenses to the claim of the named insured. In terms of a loss payee's or lien holder's responsibilities under the policy, they have few responsibilities other than to present and establish the amount of their claim.

5. Intentional Loss/Criminal Acts Exclusion

Most modern policy forms have a specific exclusion for a loss intentionally caused by the named insured which is the contractual basis of an arson coverage defense, barring recovery by the insured for any aspect of the claim. (See Attachment F)

The intentional loss exclusion may also limit those circumstances where an intentional loss will be excluded from coverage. In some insurance policies, it must be an intentional loss caused for the purpose of collecting insurance proceeds. So, a fire set as an act of domestic violence or by a troubled child may be considered a covered loss for the insured(s) depending on the policy

terms. The intentional loss exclusion may also determine the right of recovery of other insureds under the policy where a loss has been caused by only one of the insureds. Some exclude coverage for every insured when any insured intentionally causes a loss, while other policy forms simply state an intentional loss is excluded without further specifying whether it excludes coverage for all other insureds. This raises the “innocent co-insured” issue.

In some jurisdictions, courts have held that where an insurance policy fails to specifically exclude coverage for all insureds in the event of any insured’s intentional loss, the other insured(s)’ claim must be paid. In other jurisdictions, courts have permitted coverage for an innocent co-insured regardless of the intentional loss exclusion language as a matter of public policy or because of that state’s insurance code provisions which prohibit such policy language. This has also arisen in the context of insureds who have separated or are in the process of divorce when one of the parties sets fire to the marital residence as an act of spite or revenge. While insurance companies recognize the public interest in paying the claim of a truly innocent co-insured, there are cases where the fire is planned and carried out primarily by one of the insured with the acquiescence and approval of the other insured, providing little or no evidence directly implicating the other insured. In those cases, the co-insured may not be “innocent” at all, presenting a formidable challenge in fighting arson claims.

Some commercial insurance policies contain much broader intentional loss exclusion language. In the case of a corporate insured, the general rule is that arson may only be imputed to the corporation when it is carried out by a person having control over the affairs of the corporation, that is, the arson must be a corporate decision. However, some of the recent policy forms have contained more expansive language excluding coverage for an intentional loss caused by any business officer, director, partner or employee. For most insurers to successfully assert the intentional loss exclusion, however, there must be some evidence indicating the loss was caused to benefit the business or its principals or owners.

6. Misrepresentation/Fraud Exclusion

Since the advent of the earliest policy forms, virtually all policies have contained a clause voiding coverage for a loss when the insured has misrepresented or concealed material facts concerning the claim or has engaged in fraud, whether before or after the loss. (See Attachment F.) For many years, this was the primary tool in combating arson claims.

Arson is always a difficult case to prove. The fires may be easily proved to be incendiary, but most arsonist-insureds plan the fire so that it is difficult or impossible to tie them to the fire. Generally, juries must be truly convinced to find a person responsible for arson, even under a lesser civil burden of proof. However, the misrepresentation/fraud defense is always easier to prove and establish convincing evidence for a jury.

Fraud is a basic component of arson and the fraud is seldom limited to the fire itself. An insured who was not involved in a loss has no valid reason to misrepresent any facts but one who has planned to set a fire will often seek to maximize the insurance recovery by fraudulently overstating the amount and value of items allegedly lost. Recognizing the insurer’s close scrutiny in an incendiary fire investigation, a fire-setting insured will try to conceal suspicious circumstances such as:

- Failing business.

- Property up for sale which cannot be readily sold.
- An imminent mortgage foreclosure.
- Internal business conflicts and problems.
- A pending divorce with a need to liquidate marital assets.
- Any other circumstances which would raise suspicions about the insured.

The facts which an insured may misrepresent can usually be uncovered with a thorough investigation, and, unlike the proof of arson requiring circumstantial evidence, it can usually be proved with irrefutable direct evidence. Claiming items which were not owned or were not in the property at the time of the fire can be conclusively proved. A false alibi can be convincingly exposed. An individual or business' true financial picture can be undeniably shown with bank records, tax returns, mortgage payment records and other objective evidence. The power of the misrepresentation/fraud exclusion lies in the ability to prove it directly, objectively and conclusively. Faced with irrefutable proof, a jury is much more willing to return a fraud verdict even if it is unable or unwilling to find the insured committed arson.

For similar reasons, a criminal prosecution on charges of insurance fraud can often be readily proved using such evidence. In arson-for-profit cases, insurance fraud should always be aggressively pursued.

VI. Other Insurance Policy-Related Terms and Concepts

A. All Risk/Named Perils

Insurance policies only insure against certain kinds of events or "perils" which might cause a loss. Originally, insurance policies would list the specific insured perils, referred to as "Named Peril" coverage, meaning that unless a specifically named peril caused a loss, it would not be covered. Today, most insurance policies provided "All Risk" coverage which in many respects is the opposite of named peril coverage. While named peril policy only covers a loss caused by a peril specifically named in the policy, an all risk policy covers every kind of loss except those which are specifically excluded by the policy.

Interestingly, excluded perils have created the motive for many arson cases. Properties have been torched after they have been damaged by flood or earthquake when there was no flood or earthquake insurance coverage on the property. Homes severely damaged by termites or pests or in need of repairs (excluded causes under most policies) have often served as motivating factors in setting a fire. An awareness of those coverage issues is necessary to properly investigate a fire under those circumstances.

In addition to the basic information shown on the policy dec page or binder, there is important information in the body of the insurance policy which must be understood and evaluated.

B. Insurable Interest

Insurable interest, a significant insurance law concept, is the recognized legal interest of an individual or business which may be insured under a policy of insurance. It is generally defined as any substantial economic interest in the preservation of the property, that is, the person or entity would suffer an actual economic loss from damage or destruction of the insured property.

One cannot insure something which is not subject to an ownership interest or some other legal “interest” of the insured property because the underwriting process evaluates the risk of loss from the perspective of both the property and the applicant. One who has no ownership or legal interest in property likely has no concern for protecting the property, and nothing to lose, but everything to gain, from a loss and insurance claim. For that reason, one seeking to recover a claim for damaged property must prove an insurable interest in the property.

Virtually all policies have an insurable interest provision and most jurisdictions have specific statutes or insurance code sections relating to insurable interest. There is a substantial body of case law addressing the issue of insurable interest.

Under the insurance policy terms and the law of most jurisdictions, there can be no recovery without an insurable interest. While a full ownership interest may not be required, there must be some legal interest which an insured party would want to protect against loss. A tenant may not own the property but wants to preserve it in order to continue to reside or operate a business there. Conversely, a landlord may not have an interest in a tenant’s personal property or business but wants to preserve the building.

C. Co-Insurance

Co-insurance is an important part of insurance relating to an insurance company’s concerns about under-insured or over-insured properties. Most insurance claims involve losses which do not totally destroy the property and involve only a portion of the coverage. Until a total loss occurs, most of the insurance coverage taken out on a property is not needed. Realizing this fact, many insureds seek to obtain a lesser amount of insurance in order to reduce the insurance premium. Insurance companies also recognize the probability of only a partial loss and that the full coverage amount is seldom at risk. By collecting a premium on the full amount of coverage, an insurance company generates revenues from all policies which can be used to pay losses, including the total losses which occur in a minority of the cases. This is factored into the insurance premium and would otherwise cause the insurance company to charge a higher premium for under-insured properties.

In order to compel the insured to take out full coverage, many insurance policies contain a co-insurance provision which states that the coverage under the policy must represent the true insurable value or a specific percentage of the full insurable value which must be reached by the policy limits taken out – most commonly 80 or 90 percent, although sometimes 100 percent. To enforce this requirement, co-insurance clauses contain a “co-insurance penalty” in the event an insured is found to be under-insured. The policy contains a formula for determining the co-insurance penalty, which usually states that the amount by which the property is found to be under-insured (as a percentage basis) will result in the damages being paid on the same percentage basis. In other words, a property insured at only 50 percent of its true value will result in a claim being paid at only 50 percent of the actual damages – even if it is only a partial loss within the policy limits. The other portion of the loss is said to be “co-insured” or absorbed by the policyholder. This could become an issue in an arson-for profit case. An insured who deliberately destroys his property may not want to destroy all of it but may just want to destroy obsolete or outdated inventory, machinery or equipment, or an area in the building needing renovation. In such cases, the co-insurance requirement should be examined. In most states, a

policy containing a co-insurance clause must be on an approved form with the fact that it is a co-insurance policy conspicuously stamped on the fact of the policy.

D. Subrogation

Subrogation is the legal means for an insurance company to recover a payment it has made from the party responsible for causing the loss. Some examples are:

- When a welder working at a property negligently causes a fire.
- When a manufacturer's defective product overheats or short circuits.
- When a visitor carelessly discards smoking materials.
- When an improperly installed electrical fixture malfunctions.

An insurance company which has paid a claim has a right of subrogation which is usually specified in the policy itself, although most states recognize an insurer's subrogation right even without specific policy language. It is an issue of major importance to the insurance industry.

A basic insurance law principle states that an insurance company cannot subrogate against its own insured. When the insured has done something to cause a fire, subrogation is usually not available. In a case of arson by the insured, this means the insurance company cannot subrogate against the insured for any payment it may be required to make, such as to a mortgagee or innocent co-insured. While at least one court has held subrogation may be available against an insured in a case of arson, as a general rule, it is not available. Of course, an insurance company has several other options available when its insured's arson has caused it to issue payments. An insurer may take an assignment of the mortgage note to recover payments made to the mortgagee after it is proven the insured was responsible for the fire. The insurer may also sue its insured for fraud, civil theft, breach of contract and even racketeering (RICO) under certain circumstances to recover payments issued.

Where the loss has been caused by a third party, subrogation is the most common method of recovering the claim payment from the responsible party. Under the policy, the insured is required to cooperate in any subrogation action and participate in the litigation. At the same time, the insured has a right to join in the litigation to recover any uninsured losses it may have suffered. In most jurisdictions, the insured has the right to have its uninsured losses paid from the recovery before anything goes to the insurance company.

In the case of arson by a third-party, subrogation is a likely recourse for the insurer to pursue. However, there are obvious limitations to this remedy. Unless the arsonist has substantial financial assets to satisfy a judgment the insurance company may obtain, there is little purpose in proceeding. Unfortunately, that is the situation in most cases.

However, even in an arson case, there may be other issues which make subrogation a practical consideration. A defective or improperly installed fire detection or sprinkler system or fire-resistant building components or inadequate "firewalls" may have failed to control the fire, causing far more damage than should have occurred, creating a subrogation claim against the manufacturer or installer. In a few cases, insurers have even pursued a subrogation claim against a fire department which failed to properly respond to the fire incident and suppress the fire, although governmental immunity may preclude such a subrogation action.

E. Increase of Hazard

In the earlier forms of insurance policies, this was the only specific provision which could be cited to deny coverage for intentional losses, such as arson, whereas today, most policies have specific language against intentional loss or criminal acts. The increase of hazard language remains a viable issue when something has been done to increase the likelihood of a loss, such as operating a drug lab or explosives factory in a home or business using dangerous chemicals or materials. The policy may also require the insured to take necessary steps to prevent a loss or protect property against imminent loss.

F. Reinsurance

Often referred to as “insurance for insurers” or “stop-loss insurance”, reinsurance is the practice through which insurers transfer portions of their risk portfolios to other parties or reinsurers to reduce their liability for large or multiple loss claims, such as catastrophic hurricane, wildfire or earthquake claims or claims related to large industrial accidents, such as Deepwater Horizon or the Exxon-Mobil oil spill. It enables insurers to withstand the financial burden of such losses, recover some or all amounts paid to claimants, and, stay solvent.

While it is extremely unlikely a public investigator would directly encounter any reinsurance-related issues in a criminal investigation, an insurer may have certain obligations to its reinsurers which may impact the insurance claim investigation.

VII. Conclusion

As stated at the outset, it is imperative for criminal and civil investigators to have a basic understanding of the participants, documents and terminology involved in the world of insurance in order to effectively investigate type of insurance-related matter, including a potential arson, application or claims fraud case.



Unit 3

Lesson 2: Understanding the Insurance World – Part II Claims Investigations

Enabling Learning Objectives:

At the end of this session, the student will be able to:

1. Explain the objective of an insurance company's claim investigation in a suspected arson or fraud case.
2. Describe key steps in the claim investigation process.
3. Explain the significance of documents examined or generated during the insurance process, including the application, cancellation or non-renewal notices, notice of loss, reservations of rights letter, and non-waiver agreements.
4. Explain when a loss payment occurs and its impact on a criminal investigation.
5. Discuss other defenses insurers may assert in a suspected arson case.
6. Describe how "bad faith" and "confidentiality" affect an insurance claim.
7. Explain the use of informants/confidential sources in an insurance claim.
8. Describe when a denial letter is issued.
9. Identify key insurance representatives to be contacted during an arson or fraud investigation.
10. Describe the different types of insurance witnesses.
11. Describe where and how to find key documents for a criminal investigation.

I. Introduction

Insurers doing business in Florida are required to report suspected arson or insurance fraud to law enforcement and cooperate with public arson and fraud investigators conducting criminal investigations.⁹³ Through this process, criminal investigators can obtain invaluable information which may lead to an arrest or conviction of an arsonist or fraudster. However, in order to effectively utilize information obtained from insurers, public investigators must understand the insurance claim investigation's objective and process, as well as the critical witnesses and documents involved in that process. They should also become familiar with the difference between civil and criminal arson and fraud investigations and cases.

II. Civil v. Criminal Arson and Fraud Investigations

Although the evidence and facts utilized in a civil and criminal arson or fraud case may be similar, the two types of cases have different objectives and results. The ultimate objective in a civil arson or insurance fraud case is to prevent fraud by a claimant who has deliberately caused

⁹³ See Sections 633.126 and 626.989, Florida Statutes.

a fire loss or engaged in fraudulent conduct related to the insurance policy in order to recover insurance proceeds. For that reason, the object of the insurer's claim investigation is to determine whether the insured breached the insurance policy by deliberately causing a loss or making material misrepresentations during the insurance application or claim process. If the insurer's investigation results in proof that the insured committed arson or fraud, it can deny the insured's claim pursuant to the policy's intentional loss or fraud exclusions. The insurer cannot have the insured arrested for violating the terms of the policy but is limited to denying coverage for the insured's breach of the policy. The insured can then sue the insurer alleging breach of contract for denying the claim, leaving it up to a judge or jury to decide if the insurer made the correct decision, based on a preponderance of the evidence.

A civil arson or fraud trial is really all about the money. In returning a verdict on the issue of arson or fraud, the jury is deciding whether the claimant will receive money. In most states, including Florida, if a claimant wins a civil arson or fraud case, they are entitled to recover everything covered by the insurance policy plus pre-judgment interest, court costs and attorney's fees. The insured may then pursue a bad faith claim against the insurer seeking extra-contractual damages, including punitive damages.

If the insurer wins, it may be entitled to recover attorney's fees and costs. If the insurer files a counterclaim against the insured in response to the breach of contract suit and prevails, the insurer may be awarded damages against the insured for monies paid to the insured, mortgagee, additional insureds and other parties during the claim. The prospect of extra-contractual damages, particularly punitive damages, as well as attorney's fees and costs, can make a civil arson or fraud trial a high stakes game.

By contrast, the criminal arson or fraud investigator's goal is to determine whether a crime has been committed, the identity of the person or persons responsible for the crime's commission, and to develop sufficient probable cause and evidence for an arrest and conviction. At the criminal arson or fraud trial, a judge or jury determines whether the government has proven beyond a reasonable doubt that the defendant committed the crime of arson or insurance fraud.

If the defendant is found guilty, the court may sentence him to a period of incarceration or probation and order him to pay restitution to the victim, as well as court costs, fines and costs of investigation. While the defendant's criminal conviction will likely result in the dismissal of any civil case he may have brought against the insurer, his acquittal does not mean he will prevail in the civil case because the burden of proof in a civil case is lower than that of a criminal case.

III. The Insurance Claim Investigation

A. Claim Investigation Participants and Documentation

The insurance company begins its claim investigation once it receives notice a loss has occurred. From that point, the "clock starts ticking" on the policy's time limits for the insurer to make a claim decision. This contrasts with the criminal "time clock", which gives the government several years from the commission of the crime to bring criminal charges, governed by the applicable statute of limitations.

The **insurance company's claim file** contains documents which chronicle the claim from its

first report to the insurer's decision to pay or deny it. An insured may report a loss directly to the insurer through its toll-free claims line or may do so through her **agent** or **public adjuster** by contacting them directly. At times, an insurer may receive a loss notice from public officials or even news reports. The time, manner and content of the first loss notice may become significant in a suspicious loss or claim, such as when an insured reports to their insurer that a kitchen appliance caused their house fire before fire officials have determined the fire's origin and cause.

The **Notice of Loss** is usually on an "ACORD"⁹⁴ form, and most often completed by the insured's agent, and contains the following information:

- Named insured
- Mortgagee/Lien Holder
- Insured location
- Policy term of coverage
- Amount of coverage under the policy
- Policy number
- Producing agent or producer responsible for the policy

The notice of loss form, which is often maintained in the **agent's file** as well as the **insurance company's claim file**, also contains specific information about the loss as reported by the insured, including the date, time and type of loss, preliminary estimate of damage, the person reporting the loss, the time it was reported and the insured or insured's representative's contact information. While the form is filled in by the agent, most of this information comes directly from the insured – such as the time when the insured learned of the loss and the time it was reported to the agent or insurance company. This may raise questions about an insured's alibi and activities at the time the loss was discovered. As the insured's statement, it will likely be considered admissible evidence in a criminal or civil trial, even if the insured never testifies (as an admission against interest or party statement). So, it is a critical document in the case.

Most of the other information in the **claim file** follows the chronology of the claim process. Most insurance companies keep a "**claim log**" or "**claim diary**" documenting every activity in the handling of the file on a daily basis, including contacts with the claimant or the claimant's representatives. Entries into the claim log may be made by various participants in the claim process, including the **desk adjuster, field adjuster, claim managers and supervisors**. This document provides a useful chronicle of the claim history from the time it was first reported to the insurance company.

As the various activities noted in the log or diaries are conducted, the claim file will contain the documents and records associated with those activities. When a fire investigator is hired to determine the origin and cause of the fire, the **fire investigator's report, photographs, diagrams**, and related documents will be in the claim file. The **analytical reports** of any forensic laboratories who examined evidence from the fire scene will be in the claim file. **The insured's preliminary recorded statement** is usually taken within the first few days after the loss is reported and may contain significant information about the circumstances of the fire, the insured's activities around the time of the fire, how the insured learned of the fire, anything

⁹⁴ ACORD (Association for Cooperative Operations Research and Development) is a non-profit organization that provides a number of services to the insurance and related financial services industries, including standardized forms utilized in the insurance industry.

significant noted by the insured at the fire scene, the insured's knowledge of any potential or actual cause of the fire, the estimated damages from the fire and other such information. As the insured's statement, it will generally be admissible evidence at trial.

The assigned **field adjuster** will usually visit the fire scene and prepare an **inspection report** with **photographs** and a **preliminary estimate of the damages** called a "**scope of damages**". The insurer may retain a licensed contractor or a contractor specializing in fire reconstruction to prepare a **detailed contractor's report and estimate** which is part of a claim file. Other **retained specialists' reports** may be part of the claim file, such as **structural or mechanical engineers, equipment specialists, inventory specialists, salvors and forensic accountants**.

The insured's claim will be found in the claim file, consisting of the **sworn statement in proof of loss** and **contents inventory** of damaged property, and a **business interruption calculation** in the case of a commercial fire, together with any supporting documentation. The insured may submit her own estimate prepared by a contractor or public adjuster.

All of the **correspondence to and from the insured** (letters, e-mails, faxes) will be in the claim file and will generally be admissible evidence in a criminal or civil trial. These documents will generally include a **reservation of rights ("ROR") letter** commonly used in insurance claims handling and required in many jurisdictions for an insurer to preserve potential defenses to coverage. A statement to the effect of "The claim remains under investigation and no decision has been made as to coverage or liability, if any, for the damages claimed" will be considered appropriate to prevent any detrimental reliance in most jurisdictions. While an ROR sent to an insured must indicate the insurer's specific concerns about coverage, e.g., whether the loss was intentional, the insurance company is not required to reveal the results of its ongoing investigation. For there to be a waiver of coverage defense, the insured usually must prove lack of knowledge for the coverage issue resulting in detrimental reliance by the insured, such as commencing the repair or reconstruction of the property.

The **non-waiver agreement** is a document which states that the insured acknowledges that the insurer's investigation or defense of a claim against the insured does not waive the insurer's right to contest coverage later. This is another commonly used device in claim investigations as another way of ensuring the insurer does not waive any potential coverage defenses or the requirement for compliance with all duties after loss. However, the non-waiver agreement has its limitations and may be unnecessary as many jurisdictions have state laws, insurance code provisions and case law already preserving the insurer's rights while conducting a claim investigation. Moreover, the validity of the non-waiver "agreement" has been challenged as being merely a unilateral preservation of the insurance company's rights since the insured's rights cannot realistically be "waived" during a claim investigation. An appropriate ROR and routine correspondence with the insured containing a reservation of rights statement, may be legally sufficient.

When an insurance company recognizes a potential arson-for-profit claim or insurance fraud claim, additional records will become part of the claim file, including:

- Forensic accountant report
- Insured's recorded statements
- Interviews and recorded statements of various witnesses

- Records from creditors, suppliers, vendors and others
- Tax returns and filings
- Bank records, including canceled checks and monthly statements
- Business books and records, including payroll and employee records
- Records of the purchase of the insured property
- Liens or judgments recorded against the property
- Appraisals on the property, before and after the fire
- Mortgage records and other loan documents
- Shipping/receiving records
- Initial payments provided to the insured as an “advance” and any insurance settlement payments to the insured

Additional documents which may be in the claim file include **various public records**, such as those from the building department and other agencies establishing code violations, environmental violations, and other problems, courthouse records of any criminal or civil proceedings involving the insured or related parties, records of other insurance claims by the insured and related parties, and a **Property Insurance Loss Register (PILR)**, **Insurance Services Office (ISO)** and other insurance industry database reports. In states, such as Florida, which permit insurance companies investigating a claim to obtain records from other insurance companies who have previously handled claims from the insured or previously provided coverage for the insured property, those records may also be contained in the claim file.

Where a request for information from the insurance company has been made by an investigative agency under the applicable arson or fraud reporting act, it should be documented in the claim file. Any information obtained from the investigating agency will usually be recorded in the file as well.

When an **examination under oath (“EUO”)** has been taken of the named insured or others, the transcript and exhibits and the insured’s errata sheet will be found in the claim file. Also, in the file; a summary and evaluation of the examination under oath by the insurance company or the attorney who conducted the examination. When the claim has been assigned to the **Special Investigation Unit (SIU)** most of the investigative activities will have been conducted by the SIU. Confidential reports on the results of the investigation may be found in the claim file or in a separately maintained **SIU file**.

When the insurance company is at the completion of the investigation and must make a decision on coverage, there will be reports summarizing the investigation and evaluating coverage issues. These are sometimes submitted to a “claim committee” for a final decision and contain a complete summary of a claim and its investigation. When a decision is made to deny the claim, the formal **denial letter** or **declination of coverage letter** is found in the claim file, together with any correspondence received from the insured or its representatives/attorneys following denial of the claim.

The **denial letter** is a critical document as it must inform the insured of the basis, in the policy, for the denial. However, a denial based upon arson or fraud raises several concerns. Even though it is in the context of an insurance claim, the insurer is essentially accusing the insured of a crime which is most certain to provoke a strong reaction from the insured. However, by law, an insurance company must communicate the specific basis for the denial of a claim, even

though it may be difficult to find a diplomatic way to do so. The insured should be informed the claim was thoroughly investigated and as a result of the evidence obtained during the claim investigation, the claim must be denied. When misrepresentation/fraud is a basis for denial, the specific misrepresentations should be stated. The letter should be sent to the insured (or his attorney, if represented) by certified mail with a return receipt requested to confirm its receipt by the insured and the date it was received. The denial letter should be marked “personal and confidential, to be opened by the addressee only” and the envelope should be similarly marked to avoid the denial letter being inadvertently read by another person, which constitutes “publication” for purposes of a defamation or libel claim. (See Attachment H.)

B. Insurance Company’s Fire Scene Investigation Report

When a public fire investigator reviews the insurance company’s fire investigation report, it is important to understand its significance in the context of a civil case. In a civil arson case, the cause of the fire must be incendiary or there will be no basis for an intentional loss defense. A fire determined to be “suspicious” can never be the basis for an arson or intentional loss defense, no matter how suspicious the circumstances might be. So, the use of a private origin and cause investigator (“O & C”) in civil arson cases – even when there has been a public criminal fire investigation – is absolutely required for several reasons:

First, the insurance company needs an independent fire scene investigation. Where an insurer depends entirely upon public fire investigators’ findings, it may appear that the insurer is working too closely with law enforcement and trying to get the claimant prosecuted. This can lead to “bad faith” claims and potential punitive damage awards if those claims succeed.

Second, the insurance company cannot afford to base its case on the public authorities’ fire investigation in which it has no direct involvement, control or input, including the selection of the fire investigator. By hiring a private O & C, the insurer can have some control over how the fire scene is investigated.

Third, retaining a private O & C investigator will help ensure the fire scene analysis is completed and a report is provided to the insurer as soon as possible. Unfortunately, there are too few public sector fire investigators who are spread very thin. Considering the insurance policy’s short-term claim decision deadlines, insurers must complete claim investigations in as short a time as 30 days after the fire. Indeed, it is a violation of the insurance code in most states as well as an insurance policy violation to unjustifiably delay a claim decision.

Fourth, the insurer and the private O & C have greater available investigative resources. Particularly in commercial fire cases, the insurance company and private investigator can devote the time and resources necessary to fully investigate the fire and determine its origin and cause. When faced with a large loss and high dollar claim, an insurer will devote the time and money to ensure a thorough and prompt fire scene investigation by hiring an O & C willing and able to take on the task with the resources necessary to do it right.

1. The Fire Triangle: Motive, Opportunity and Incendiary Origin

Like all arson cases, civil arson cases invariably depend almost entirely upon circumstantial evidence. Typically, there are no eyewitnesses, no direct evidence implicating the claimant and

no confession from the responsible party. In order to prove a civil arson case, the insurance company must show motive, opportunity and incendiary origin. If an insurer is continuing to investigate the circumstances surrounding a fire after its O & C has issued a report, it can be assumed the proof of incendiary origin is already there. Without it, the claim would likely have been resolved.

Once the fire has been shown to be incendiary, the insurance company's claim investigation will focus on motive and opportunity. Although a criminal investigator and prosecutor do not have to prove motive in a criminal arson case, the information obtained by the insurer as to motive will still be extremely beneficial in establishing the identity of the insured as the person who committed an arson.

a. Motive

In a civil arson case, the motive is usually money, that is, collecting insurance proceeds. However, there are many variations on the theme of motive. Sometimes, the motive is obvious: a property in foreclosure and about to be lost to the bank is a classic example of motive. Other motives, like the following, may not be so obvious:

- A property in need of remodeling or heavily damaged by termites
- An impending divorce involving a property settlement
- A desire to move to a new house with the inability to sell the current house
- A property worth as much or more without the building on it
- Deteriorating neighborhoods or business areas
- Changes in zoning and building laws
- Consolidating business locations
- Gambling debts
- Balloon mortgage payments coming due
- A desire for attention and sympathy, or "Munchausen by fire"

Unlike a criminal case where the prosecutor only has to prove the defendant willfully and unlawfully set the fire, in a civil arson case, the insurance company must discover the motive and prove it at trial. To do so, a detailed investigation is required.

In a "classic" arson-for-profit case, the reason is financial problems. To prove this, the insurance company will often retain a forensic accountant to analyze the case and offer expert testimony at trial. A qualified forensic accountant can uncover the motive and clearly present it to a jury using demonstrative evidence such as charts and graphs, which is compelling evidence. Testimony about trends and projected future financial problems can show a jury that the fire was almost predictable. Retaining an accountant to conduct a complete financial analysis can be an expensive undertaking. However, an insurer facing a substantial claim can justify the expenditure as necessary to present this important testimony at trial.

b. Opportunity

As a practical matter, proof of opportunity is seldom difficult as it is not necessary to prove the claimant was physically present at the time of the fire. Indeed, a claimant who has carefully planned out a fire inevitably establishes an alibi in the belief this will prove she was not

responsible for the fire. In fact, establishing an alibi is often more likely to implicate claimants than to exculpate them. A visit to a friend or relative out of town for the first time in many years, a vacation when the claimant is struggling financially, or a hastily scheduled business trip only heightens the suspicion that the claimant was involved in causing the fire.

When an alibi is offered, the insurance company will thoroughly investigate it. Even if the alibi cannot be completely disproved, it may not be so airtight. The fact a claimant was spending the night in a hotel fifty miles away does not preclude him driving back to the fire scene in time to set it. Credit card statements, gas receipts, telephone and toll records and even traffic tickets can be used to successfully refute an alibi. Even a truly “airtight” alibi only means the individual could not have personally set the fire. A person who procured an accomplice to set the fire can be proven in several ways. For example, calls made to and from an accomplice or payments made to a “torch” may be discovered in the claimant’s phone and bank records.

The method by which a fire is set tells a story. There are several types of arson fires with their own characteristics which have been universally recognized.

- Juvenile vandalism fires are typically set in the after school or early evening hours.
- Revenge/spite fires are generally set with a “splash and dash” method and there will be evidence that the claimant had enemies capable of setting a fire.
- Fires set to cover a crime should have evidence that, in fact, a crime occurred.
- Psychological fire setter or pyromaniac fires are typically set with the use of available combustibles or minimal amounts of accelerants, usually outside of the building.
- Arson-for-profit fires show unique evidence of a premeditated fire: set at a time when the fire is unlikely to be discovered right away, when the claimant or owner of the property has established an alibi, with the widespread use of accelerants to maximize the damage and where the claimant stands to profit from a fire.

Expert testimony from the fire investigator on the characteristics of the various types of arson can provide powerful testimony linking the claimant to the fire where the circumstances fit the profile of an arson-for-profit fire to the exclusion of any other type of arson fire.

A commercial fire set without any attempt to steal property from the business can only be viewed as suspicious. A fire set in the area of the building where all of the valuable equipment or inventory is located usually indicates an arson-for-profit scheme. The lack of forcible entry evidence can be the most compelling evidence of an “inside job” pointing to arson-for-profit, which is something which must be carefully documented immediately after the fire.

When a fire department arrives at the scene and finds the building completely secure, this must be thoroughly documented. Investigators must take close-up photographs of all entries and inspect all doors and locking mechanisms for any signs of tampering or “jimmying”. Even where there is evidence of forcible entry, it must be determined whether forcible entry was actually made or merely made to look like it. This evidence must be documented and preserved.

Investigators must examine and test alarm systems, even those which failed, to see if they are operational and were activated at the time of the loss. Monitored alarm systems which record the activation of the system can establish a time frame within which the fire had to have been set. A fire discovered almost immediately after the building was locked up and the alarm system

activated may indicate the fire was already started before the last occupant left and disprove the claimant's alibi. A claimant who "forgot" to turn on the alarm system the night of the fire after faithfully turning it on every other night must be considered a prime suspect. All of this is critical evidence in a civil arson case and will undoubtedly be useful to public fire investigators at some point.

2. Intentional Loss/Criminal Acts Exclusion

If the insurer develops information through its O & C and other evidence that the claimant deliberately caused or procured the setting of the fire, the insurer may deny coverage on that basis alone under the policy's intentional loss or criminal acts exclusion. The following are examples of such exclusions:

(Homeowners Policy)

SECTION I – EXCLUSIONS

1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

* * *

- h. Intentional Loss, meaning any loss arising out of any act committed:

- (1) By or at the direction of an "insured; and
- (2) With the intent to cause a loss.

(Commercial Businessowners Policy)

CAUSES OF LOSS - SPECIAL FORM

B. Exclusions

* * *

2. We will not pay for loss or damage caused by or resulting from any of the following:

- h. Dishonest or criminal act by you, any of your partners, members, officers, managers, employees (including leased employees), directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose:

- (1) Acting alone or in collusion with others;
- (2) Whether or not occurring during the hours of employment.
This exclusion does not apply to acts of destruction by your employees (including leased employees); but theft by employees (including leased employees) is not covered.

While the above has mentioned most of the items found in a claim file, every claim file is unique. The particular facts and circumstances of the claim will determine what is contained in the claim file, which can include hundreds of pages of records and documents. The key to accessing this information is the applicable arson or fraud reporting act in the jurisdiction. The proper use of a request under the act will enable the investigator to obtain all of this information. Most immunity acts do not catalog all of the information which can be found in a claim file and usually contain only a limited number of common documents such as the application, policy, premium payment records, claim documents, prior claim records and claim payment records. However, most immunity acts are intended to allow law enforcement or public fire officials access to almost everything in the claim file and the investigator must be aware of the full range of materials which can be found in a claim file to be sure all relevant materials are obtained and reviewed.

IV. Other Sources of Information for the Public Investigator

For an investigator assigned to the investigation of a fire, there are other sources of information aside from the claim and SIU files that can be used to help gather information concerning the insurance policy and claim. It is therefore important to include these sources in any request to the insurance company.

A. The Agent's File

The insurance agent's file – whether it is an independent or captive agent – is an important source of information in any investigation. Most of the pre-loss and some of the post-loss direct communications with the insured take place through the insurance agent. When the policy is initially obtained and the application submitted, it is through the insurance agent. When a claim is reported by the insured, it is usually through the insurance agent.

There may be any number of relevant documents in the agent's file. Some of those items are:

- (1) Original application for insurance
- (2) Related application documents prepared by the agent or insured
- (3) Photographs of the property of the insured
- (4) Detailed information about the size, age, construction type and value of the insured property
- (5) Rating sheets used to determine the insurable value and premium rate
- (6) Premium finance agreements and payment records
- (7) Notices to the insured about delinquent premium payments or payments which have not been made
- (8) Cancellation/Non-renewal notices to the insured indicating that coverage will be terminated
- (9) Request for changes to the coverage and endorsements issued to make those changes
- (10) The initial notice of loss (usually on an "ACORD" form).
- (11) Correspondence and phone records of communications with insured before and after a loss is reported.

(12) Any number of other records.

This information must be obtained from the insurance agent/broker who dealt with the insured locally. Most agents' files contain notes, phone messages, slips of paper and even notes written on the file folder which must be reviewed. The best way to be sure that all of this is made available to the investigator is to go to the agent's office to obtain the file directly. In addition to the agent, clerical and secretarial staff may have been involved in various matters referenced in the file. With a visit to the agent's office, the investigator is able to speak with responsible person(s) to answer any questions about the contents of the file.

B. The Underwriting File

There are many potentially significant documents in the underwriting file which should be reviewed by the investigator in any arson case. If the case is an arson-for-profit fire, the application and related documents used in the issuance of the policy may reveal fraud in the procurement of coverage – especially information about the size, age, condition and value of the property. Information about the applicant's loss history is another common area of fraud. The information about the ownership of the property and the insured's failure to disclose the existence of any mortgagees, lienholders or others having an interest in the property may be another source of fraud. In addition to the insurance application, the underwriting file typically contains a number of other documents which should always be reviewed. Those include:

- (1) Agents' supplemental application form (basically an application submitted by the agent in conjunction with the application of the insured)
- (2) The "rating sheet" which describes the property by its construction type, size, design and other features to establish the insurable value and the premium to be charged
- (3) Appraisals or evaluation reports used to verify the insurable value
- (4) Premium payment records and finance agreements
- (5) Cancellation/non-renewal notices
- (6) Credit reports
- (7) "Dunn and Bradstreet" reports on an insured business which provide information about the operations of the business, its history, ownership, sales volume and credit rating
- (8) Binders providing temporary coverage
- (9) Loss control reports and other inspection reports on the physical layout of the insured property noting any potential fire hazards or hazardous operations
- (10) Pre-loss photographs, diagrams, building plans or blueprints
- (11) Information about other properties or coverage the insured has or previously had with the insurer

Additionally, there may be correspondence and internal memoranda with the agent/broker or insured concerning the coverage. If there have been any changes to the coverage originally provided, there will be records showing the reason for the requested changes and copies of the “endorsements” to the policy making those changes. Obtaining and reviewing the underwriting file should be routinely done in all investigations and particularly those involving arson-for-profit. In order to obtain the underwriting file, it must be requested from the insurance company through the appropriate office. The underwriting file is not contained in the records of the insurance agent and cannot be obtained there. Similarly, it is not in the possession of the claims office of the insurance company. Underwriting is a separate division of the insurance company and the records must be requested directly from that division, usually in the regional office or home office of the insurance company.

V. Other Insurance Company Defenses Utilized in Suspected Arson Cases

In most civil arson cases, the insurance company is not just fighting the claim on grounds of arson. Other defenses to the claim can be raised which are often even more effective and easier to prove. Many arson cases are lost on the issue of arson but won on these other defenses.

A. Misrepresentation and Fraud

Virtually every insurance policy contains an exclusion or forfeiture clause which provides that an insured forfeits recovery for the claim in the event of any “misrepresentation or concealment of material facts or circumstances” relating to the claim. This provision means that an insured who lies or withholds information about an issue material to the evaluation of the claim will not be permitted to recover anything, even if they are not responsible for the loss.

As one federal judge noted, “Fraudulent claims seemingly go hand-in-hand with arson.” Anyone bold enough to set a fire is not going to hesitate about telling a lie. Obviously, an arsonist will want to divert suspicion by lying about such matters as financial problems which would suggest a motive, suspicious activities preceding a fire, and the activities and alibi at the precise time of the fire. Moreover, since an arson-for-profit fire is set to collect money, the claimant will usually seek to maximize the recovery by inflating the value of the claim. A fire to a modest house in an average neighborhood sometimes results in a claim for expensive furniture, valuable art work, jewelry, furs and enough property to fill a warehouse. In most states, when fraud in the claim is proved, there will be no recovery by the claimant for any of the coverage under the policy. This is one of the reasons why it is so important to carefully investigate the fire scene and document the presence or absence and type of a home or building’s contents.

The proof of such fraud is objective and irrefutable. Photographs of the fire scene can conclusively prove what was and was not there at the time of the fire. False information about the claimant’s financial condition can be demonstrated through financial documents. A person who claims to have been making \$100,000 a year when their federal income tax returns shows only \$30,000 a year in earnings is faced with the dilemma of either admitting to insurance fraud or tax fraud. When a person has claimed to have never been late with a mortgage payment or the payment of a bill, the records of a mortgage company or creditor can expose the lie. In a circumstantial arson case, there is usually no way to directly prove the claimant has set the fire. However, where the claimant has lied about these other matters, there will be direct and objective evidence to conclusively prove it and establish a misrepresentation and fraud defense.

For this reason, a misrepresentation and fraud defense is far more easily proved than an arson defense. Moreover, while juries are naturally hesitant about calling a claimant an arsonist even in the face of strong circumstantial evidence, objective and irrefutable proof of misrepresentation and fraud will enable a jury to return a verdict for the insurance company without having to more difficult issue of arson. In civil arson cases, insurance companies will often lose the arson defense but win the trial based upon the misrepresentation and fraud defense.

The situation is no different in a criminal prosecution of arson. A charge of filing a false and fraudulent insurance claim, a felony offense in Florida, is much easier to prove than a charge of arson and there is probably direct evidence to prove it. Unfortunately, the charge is seldom filed in a criminal arson case, as many prosecutors are not even aware of the crime.

B. The Application Defense

A person who will set a fire to defraud an insurance company will often have lied to obtain coverage. So, in the course of investigating the civil arson case, an insurer will always examine the circumstances surrounding the issuance of the policy and the application for insurance the claimant submitted. This can provide an even more effective weapon in fighting against arson claims. As application fraud is a felony in Florida, the evidence obtained by the insurer can form the basis for criminal charges. Common lies on applications relate to prior loss and insurance history.

When a civil arson scheme is uncovered, it is often not the first time the claimant has had a fire or a property loss. In fact, the fact the claimant was quickly and easily paid for a prior claim may serve as an incentive to try it again. The previous loss may even have been accidental in origin or without suspicious circumstances. The insurance company may have paid the claim without asking any questions. The claimant may even have been able to add in a few extra items to his claim “to cover the deductible”. Seeing how easy it was to get money the last time around, a claimant may decide to go for the “big hit” by causing a total fire loss. The low clearance rate for arson contributes to this situation, as does the ineffectiveness of many insurance companies in handling civil arson claims.

After a prior loss, the claimant may have been cancelled or non-renewed by his former insurance company. Where the claimant has had a series of insurance claims, it is almost certain this will have happened as this claimant would fall into a high-risk category. Insurance coverage may not even be available with standard insurance companies and the rates for coverage with sub-standard companies or surplus lines carriers can be exorbitant. In order to get insurance at an affordable rate or to even be able to get insurance at all, the claimant will often lie on the application for insurance. This will provide the opportunity for yet another defense to the claim.

The strength of a civil application defense is that it often does not even require proof of fraud. In many states, even a “mistake” innocently made by the applicant will enable the insurance company to declare the policy void *ab initio*. This means the policy can be declared void “from the beginning” so that it never legally came into existence at all. Without a policy, of course, there is no claim and the issue of arson does not even have to be addressed. The inherent problems of proving the claimant’s fraudulent intent do not have to be faced. All that the insurance company has to prove is that the application contained a misstatement or omission

concerning something material or important to the underwriting decision to issue a policy in the first place. Almost all insurance companies have written standards for underwriting policies. A prior fire loss, even an accidental one, may be enough to disqualify the applicant for insurance as it would most certainly be material under the underwriting guidelines.

Of course, in a criminal application fraud case, the fraudulent statement would have to be intentional. This is why it is important for a public investigator to understand that an insurer's determination the policy is void *ab initio* is not the end of the criminal investigation, but merely evidence to support further investigation.

To investigate an application fraud case, both the producing agent and the underwriter should be interviewed. All of the circumstances surrounding the issuance of the policy should be discussed with them. The application form and all related documents should be reviewed. Records of any contacts or communications with the insured during the application process and afterward – up through the time of the loss – should be documented. There are a number of things to look for.

As a beginning point, it should be confirmed the applicant properly identified himself and was the proper person to be obtaining insurance. Some questions to ask:

- Did the applicant own the property or have valid insurable interest?
- In a commercial case, did the applicant have the authority to secure coverage on behalf of the business or corporation?
- Did the business or corporation have a valid insurable interest in the property and was it properly disclosed?

It should be confirmed that the insured properly identified all mortgagees or loss payee/lien holders. The failure to disclose a mortgagee or loss payee may constitute fraud in the application process. Similarly, were all parties having any legal interest in the property disclosed? The failure to disclose a co-owner, partner or shareholder in the business may indicate a fraudulent scheme.

The description of the insured risk is vital information. It should be confirmed the information on the application and the related underwriting documents are accurate. This includes information about the size, age, construction, and value of the risk. When information has been provided about the purchase price paid by the applicant, it should be verified. Where corporate entities are involved on either side of the transaction, it is easy to create false records of the sales transaction. In a number of major arson-for-profit rings uncovered during the 1970's, deteriorated properties were purchased and subsequently resold several times by fictitious corporations with an ever-increasing sales price. When the insurance was then taken out, it was shown as property having a high commercial value justifying the corresponding coverage limits. This remains a scheme used to over-insure properties in anticipation of an arson.

The insurance history of the applicant should be closely scrutinized. When the application reveals that there has been no significant loss history or no adverse underwriting history (such as cancellations or non-renewals), this should be confirmed. There are a number of industry databases today to obtain this information. A review of building department records may reveal prior restoration and repair of damages at the insured risk location. If the insured's prior

residences or business facilities can be ascertained, a similar check should be conducted.

If a mortgagee or lien holder is shown or later discovered, information about the financing of the property may indicate its true value and condition. The loan file may contain appraisals of the property, obtained in the processing of the loan or mortgage. There may be records from the purchase of the property by the insured.

As a matter of routine, the prior insurer should be identified and contacted for information about previous coverage. When there has been a significant change or increase in the amount or type of coverage under the new policy, further investigation may be warranted. The most common area of application fraud concerns the prior loss history of the individual or business. Even though a prior loss may have been disclosed, the claim file should be reviewed to confirm the circumstances and extent of the loss as reported on the application. Additionally, there may be important information indicating fraud in the pending claim such as items previously claimed as lost or destroyed and unrepaired damages.

C. Other Coverage Defenses

There are several other potential coverage defenses to a claim. One of the more effective defenses is the vacancy defense. Many insurance policies contain an exclusion for losses caused by vandalism or malicious mischief when the property has been vacant or unoccupied for a period in excess of sixty consecutive days. This is because a vacant property, whether residential or commercial, is a prime target for acts of vandalism, such as arson. Since arson in many states is by definition an act of vandalism or malicious mischief, the insurer does not even have to prove the claimant was responsible for setting the fire if the property has been vacant for more than sixty days.

Another coverage defense is the “increase of hazard” where the claimant has done something to increase the hazard or risk of a loss, such as storing explosives or setting up a meth lab on the property. Under the appropriate circumstances, the insurer can utilize this defense to deny coverage without proof that the claimant was responsible for the loss.

In business policies, it is not uncommon to have an alarm warranty requiring the insured to maintain a burglar and fire alarm system, most often a central station alarm which will notify police and fire departments or the alarm company, in order to claim coverage for theft or fire losses. If an insurer discovers during a theft or fire claim investigation that the insured failed to comply with this requirement or deliberately disabled the system, then it may deny the claim solely on this basis.

Every insurance policy requires proof of insurable interest which means the claimant must show she actually had a true legal interest in the property. Particularly in commercial arson cases, the property may have been transferred to another person or entity, the claimant may have had only a limited ownership interest in the property or may no longer had an ownership interest in the property but only a leasehold interest at the time of the fire. The insurance company can raise the defense of insurable interest to deny the claim or at least limit its liability to the amount of the claimant’s actual insurable interest.

Another coverage defense can arise from the use of the property. A house originally insured

under a homeowner's policy which is subsequently rented out can provide a complete defense to the claim. It may even provide the basis for an application defense if the property was never used for the purpose disclosed on the application. There are a number of other coverage defenses which may apply to any particular situation. An insurance company will generally raise a separate coverage defense whenever the facts support it, since it is a "second chance" at winning the case should the arson defense fail.

VI. Other Insurance Company Issues

It is important for the public investigator to understand why insurance companies do or do not take certain actions during or following a claim investigation, which may seem contrary to common sense or logic in the non-insurance world. It is equally important for law enforcement investigators to know that the actions of an insurer in regard to a particular claim will not foreclose criminal charges being brought against a claimant if there is evidence to support them.

A. Cancellation/Non-Renewal

A cancellation or non-renewal of a policy unrelated to a claim investigation will not be discussed here. Instead, consideration will be given to the situation where a cancellation or non-renewal arises during the pendency of a claim investigation.

Even if a clear reason for an insurer to cancel an insurance policy arises during a claim investigation, an insurer will likely not cancel the policy until the investigation is complete. One reason is that a cancellation or non-renewal of a policy while an application fraud issue is under investigation may waive the defense as it implies the insurer is terminating coverage which has already been in effect. Another complication may arise when cancellation is being considered after a loss has occurred, for reasons which preceded the loss – such as non-payment of premium. Although the premium payment may never have been made before a loss occurs, the particular jurisdiction may determine whether it will serve as the basis for canceling the policy retroactive to before the loss. While the potential for such a cancellation exists, the acceptance of a premium payment after the loss may waive the defense. The producing agent and insurer's premium processing department will likely be advised not to accept any premium payments from the insured. Most jurisdictions have specific statutes and regulations under the insurance code for the method and basis of canceling or non-renewing a policy. Before any such action is taken during the pendency of a claim investigation, compliance with all applicable statutes and insurance code regulations must be ensured.

B. Advances and Loss Payments

It is sometimes puzzling to public investigators why an insurer issues an advance payment to a claimant in the face of substantial evidence of arson or fraud. As discussed below, the specter of a bad faith claim is always lurking behind every insurance claim. For that reason, until an insurance company completes its investigation and is able to cite to conclusive evidence that there is no coverage under the policy, it may issue advances to an insured for temporary housing, cleanup costs, employees' paychecks, etc.

There are also situations in which an insurer must accept coverage and issue payment on even the most suspicious claims. The investigation of a suspected arson or fraud claim may be a

lengthy process and often cannot be completed before the claim is deemed payable under the terms of the policy or applicable state statutes or codes (usually thirty to sixty days after submission of the sworn proof of loss and compliance with the other duties after loss). An insurer's failure to timely act upon a claim may be considered an unfair claim practice in many jurisdictions, subjecting the insurer to potential bad faith claims. This can create a very difficult situation for the claim handler or SIU representative conducting the investigation. Depending upon the reason for the inability to complete the investigation, the insurer may have several alternative courses of action.

Where the delay is caused by the insured failing to substantiate the claim, appear for an EUO or produce records, the claim will not be considered due and payable in most jurisdictions. This should be well documented in correspondence to the insured informing him of the conditions which he has not met and reiterating the demand for compliance with policy terms before the claim will be considered payable. However, when the delay is caused by factors outside the insured's control, the situation is problematic. In most jurisdictions, the claim is considered due and payable once the insured has complied with all policy conditions. The fact that the insurer has been unable to complete the claim investigation will not serve to avoid the responsibility for the claim payment or denial.

Sometimes, insurers must make a difficult "business" decision when it is unknown when or if it will receive crucial information which could affect the final claim decision. The insurer must decide if it is willing to take the risk of delaying the claim decision to complete the investigation or making the decision without the anticipated investigative information. That choice is usually based upon the importance of the information.

Where the insurer is awaiting the results of an investigation by the public authorities, the failure to timely act upon the claim poses significant risk. Even if there are strong indications an arrest is imminent, this should not be used as a basis for delaying the decision. It is not enough to simply "hope" the authorities come up with something.

C. Bad Faith

Bad faith claims are an all too common product of arson or fraud investigations and denials. Notably, many of the highest verdicts ever awarded in bad faith cases resulted from arson claims. The contentious nature of an arson investigation and the implications of denying a claim based upon arson by the insured contribute to this situation. As a result, the insurance adjuster and/or investigator are always mindful of the potential for creating bad faith issues.

Publicizing the fact that a fire has been determined to be incendiary should always be avoided. Other than public officials engaged in an investigation of the fire, there is no valid reason for disclosing this fact to other parties. It may become apparent arson is an issue when interviewing witnesses about any suspicious activities observed around the time of the fire, suspicious factors about the fire itself, or their knowledge of any persons having reason to set fire to the insured's property. But an insurer should never give the impression the insured is a prime suspect in setting the fire. When approaching friends, relatives, and neighbors of the insured, insurers will take special care in how the questions are asked.

Avoiding bad faith allegations is the reason the public authorities' fire investigation must

always be considered a separate and distinct investigation. The insurer's claim decision should never be based upon the outcome of the public officials' investigation. An insurer implying a claimant may face criminal charges unless the claim is dropped is one sure way to provoke a bad faith claim. Of course, this does not mean insurers can shirk their obligation to contact or cooperate with law enforcement in a suspected arson or fraud situation. However, an insurer should never try to influence the outcome of the public investigation other than to report the facts – both incriminating and exculpatory – which have been uncovered in the investigation.

When a claim is denied based upon arson or fraud by the insured, great care must be taken to avoid bad faith issues and other problems, such as defamation by libel or slander. When communicating with a mortgagee or loss payee/lien holder, for example, an insurer should not disclose the reason for the denial but simply state a determination was made that the loss was not covered. When contacted by a friend, relatives, neighbors, business associates, creditors, media (in high profile cases) and others who may have an interest in the outcome of the claim, insurers will likely respond that the claim is a confidential matter between the insured and insurance company. It is far better to have the media report that the insurance company offered “no comment” than to create a claim by the insured for defamation by libel or slander.

Even after denial of a claim, an insurer may negotiate a settlement with an insured to avoid protracted litigation and the potential for a bad faith claim.

D. Confidentiality Issues

There are a number of confidentiality issues which arise in an arson or fraud investigation. Many states have statutory or even constitutional privacy rights for all citizens which can come into play. Certain information such as medical records, tax returns and other financial records are strictly confidential. The insurer may only obtain them with the insured's legal authorization and may not disclose them to anyone outside the insurance investigation, except to law enforcement through the appropriate information sharing/immunity act.

When conducting an investigation of the fire scene, confidential records and documents may be uncovered. Even after a fire has destroyed the premises, an insured retains a privacy right in such records and they should not be considered as discarded by the insured. Insurers must avoid reviewing and copying confidential records, personal correspondence, diaries and other such items, even though tempting.

Information about the insured's personal affairs or the insured's business operations should always be kept confidential. In commercial cases, there may be “trade secret” issues related to the business' operations. Disclosure of such information can have adverse consequences for the insured leading to even more extreme consequences for the insurer.

Information developed through an EUO often contains a great deal of confidential material which is why insurers consider an EUO to be a confidential proceeding. When information is revealed to other parties, it can constitute an actionable invasion of privacy. An insured or their attorney will often ask the insurer's attorney or SIU investigator if the information in an EUO will be kept confidential. It should be stated that the information will be kept confidential, except as to the disclosure of information required by law.

Insurers may also receive inquiries about the insured from various law enforcement agencies on matters unrelated to the subject claim investigation. Unless the agency is authorized to receive the information under the immunity act or other appropriate statutory basis, insurers will require a subpoena or advise that the information has already been provided to other law enforcement agencies engaged in the investigation of the loss, so that the information may be sought through those agencies using appropriate means.

E. Informants/Confidential Sources

In many arson and fraud cases, information will be received from an informant or confidential source. This poses special problems for the insurance company investigator who must view such information with caution or skepticism. A rival, ex-employee, ex-spouse, or other person having a grudge against the insured may become aware of the investigation and try to falsely implicate the insured. The recommended practice is to direct such sources to the public authorities. An informant or confidential source who will not speak with the public authorities should be considered an unreliable source unless there is a valid reason they are unwilling or unable to speak with the authorities. Informants who request “rewards” or money for their information raise special concerns. Paid information is generally considered unreliable by courts and most juries. Unless there is corroborating evidence which can be independently established, the information may not be usable. While it is permissible for an insurer to offer a reward for information in a case, it should be properly handled, preferably through a law enforcement agency or independent organization like “Crime Stoppers”. When an insurance company pays money to an informant directly for information, the source may become useless as a trial witness and the payment may create serious problems for the insurer.

VII. Conclusion

As demonstrated by the above discussion, the insurance company’s pre-loss and post-loss files contain invaluable information and documentation which may be highly relevant to the public investigator’s criminal investigation. However, it is important to keep in mind that while both the public and civil investigations have some common objectives – determining the cause of a loss, the person(s) responsible and whether there has been any fraud committed relating to the insurance – there are also important differences. The civil investigation is governed by the policy, insurance code and applicable case law. The criminal investigation is governed by the criminal statutes, federal and state constitutions, and applicable statute of limitations.

Accordingly, it is important for the public investigator to have a working knowledge of the insurance process, participants and documentation. It is equally important for the public investigator that the outcome of an insurance claim investigation, whether favorable or unfavorable to the insured, is not determinative of the outcome of a criminal investigation.



Unit 4

Lesson 1: Spoliation of Evidence

Close up photograph of a burned/stolen VIN.
Homosassa, FL
Courtesy of Det. Tom Hall, Bureau of Fire, Arson & Explosives
Investigations
(2008)

Enabling Learning Objectives:

At the end of this session, the student will be able to:

1. Define the term “spoliation”.
2. Discuss significant cases involving spoliation.
3. Identify what a judge can do when spoliation occurs.
4. Identify the elements needed to prove a criminal charge of Tampering with Evidence.

I. Introduction

The term “spoliation” refers to the loss, destruction or alteration of an object which is evidence or potential evidence in a pending or future legal proceeding. It is a concept first recognized by English courts more than a century ago which has become significant in U.S. courts. However, it is an important issue in the fire investigation field and will likely become increasingly significant as courts are called upon to decide the consequences of lost, altered, abandoned or unpreserved physical evidence in fire litigation cases.

In *County of Solano v. Delancy*, the California Court of Appeals defined the legal meaning of spoliation:

[W]e find no definition of “Spoliation” in the California opinions that have dealt with [the torts of intentional or negligent spoliation of evidence], even those that first recognized “Spoliation” as a tort. We therefore offer one of our own, at least for purposes of this opinion: “Spoliation” means failure to preserve property for another’s use as evidence in pending or future litigation.⁹⁵

In *Miller v. Montgomery*, a Maryland Court defined “spoliation” as “[T]he destruction, mutilation or alteration of evidence by a party to an action.”

The Courts have now extended spoliation to include the failure to preserve evidence, as well as the intentional destruction of evidence. Passive conduct which simply permits evidence to be lost or destroyed by others will now also be considered spoliation.⁹⁶

Spoliation of evidence is an issue which can affect any investigation involving evidence

⁹⁵ 264 Cal. Rptr. 721, 724 (Cal. App. 1 Dist. 1999).

⁹⁶ 494 A.2d 761 (Md. Ct. Spec. App. 1985)

collection and forensic analysis. One of the most celebrated claims of spoliation was seen in the O.J. Simpson murder case where the defense claimed cross-contamination of evidence used to test for DNA. Fire scene investigations are especially vulnerable to spoliation problems by their very nature. In order to effectively avoid the prospect of a spoliation claim, it is important to understand the concept and the ways courts have responded to this issue when it arises.

II. Spoliation in Litigation

Litigants in cases where a critical issue turns on the condition or existence of physical evidence that is now unavailable or has not been properly preserved will have a difficult (sometimes impossible) time proving a claim or establishing a defense to another party's claim. This is particularly true when the object itself would have been proof required to establish or refute the claim. Fire litigation cases exemplify this problem. In those situations, the jury is left with only witnesses' descriptions or recollections of key evidence. Courts must provide an appropriate remedy for the disadvantaged party by imposing a commensurate punishment on the wrongdoing party in order to balance the proverbial scales of justice.

The remedies employed by the courts include:

- Dismissal of the claim or striking the defenses to a claim.
- Discovery sanctions under the court's "inherent powers" or under the rules of discovery.
- Application of evidentiary inferences or limitations under the rules of evidence.
- Independent tort actions for the intentional or negligent destruction of evidence.
- Prosecution under criminal statutes relating to the obstruction of justice.

A. Dismissal

If the spoliation was the result of deliberate or malicious conduct by a party or one of its agents in a conscious effort to thwart the claim or defense of another party, courts have imposed the most severe sanction and have dismissed actions or stricken the defenses to actions.⁹⁷ Several cases have arisen in the area of fire scene investigations and the loss of evidence from the scene. In *Allstate Insurance Co. v. Sunbeam Corp.*,⁹⁸ Allstate filed a subrogation claim against Sunbeam seeking recovery of the payment to its insured for fire which damaged their house. Sunbeam moved to dismiss the case, alleging Allstate failed to preserve certain evidence which was essential to its defense.

Allstate's theory was that the fire started in a Sunbeam gas grill, caused by a leak in the pipes, valves and hoses that supplied gas from the tank to the grill burners. The fire was intensified as the propane continued to leak, overheating the tank, causing it to over-pressurize and vent additional propane, ultimately spreading to the adjacent residence and destroying it. Allstate claimed that the fire would not have developed to the point it overheated the tank, and the resultant fire to the house would not have occurred, if the grill had been equipped with a

⁹⁷ *Iverson v. Xpert Tune, Inc.*, 553 So 2d 82 (Ala. 1989); *Matter of Estate of Soderholm*, 127 Ill. App. 3d 871, 469 N.E.2d 410, 417 (1984) (destruction of evidence in a non-products action; judgment by default against plaintiffs); *Merck & Co. v. Biorganic Laboratories, Inc.*, 82 N.J. Super. 86, 196 A.2d 688 (1964) (destruction of documents justified default judgment).

⁹⁸ 65 F. Supp. 1267 (N.D. Ill. 1994).

thermal shutoff or safety disconnect device. In response, Sunbeam asserted it was more likely that the fire was caused by a spare tank of propane stored near the grill which has been overfilled. Sunbeam claimed the propane in the spare tank had expanded as a result of a combination of the direct pressure to sun's heat, the ambient air temperature and radiant heat from the nearby grill. The expansion of the overfilled tank after it was heated caused the relief valve to open, releasing propane gas which ultimately reached the burners and ignited.

Sunbeam could not prove its defense because, as a result of the actions of an Allstate investigator, the spare tank had been discarded and could not be found to be examined. The grill frame and accessories were also unavailable, because they had not been preserved by Allstate's investigator.

The magistrate concluded that the missing evidence was highly relevant, and its absence prejudiced Sunbeam's defense "significantly and irrevocably." The fact that the allegedly defective product itself was not destroyed was of no consequence, since "[T]he rule requiring preservation of evidence rests on basic fairness, and there is no reason to limit it to the product itself." The magistrate ruled that the case should be dismissed. In doing so, he admonished Allstate, stating:

By reason of plaintiff's act in destroying material evidence, we conclude that dismissal of the case is an appropriate sanction deserving Allstate's cavalier attitude in the case. Knowing full well that subrogation efforts towards Sunbeam were a distinct possibility, Allstate nonetheless destroyed all evidence available for Sunbeam to formulate a cause and origin analysis, and present that analysis to the fact finder. Sunbeam was inextricably harmed in its ability to defend the lawsuit. Accordingly, plaintiff's conduct requires, as an appropriate sanction, that the complaint be dismissed.

Similarly, in *Capital Chevrolet, INC. v. Smedley*, 614 So. 2d 439 (Ala. 1993), Auto-Owners Insurance Company sued the manufacturer and retailer of a conversion van that was destroyed by fire which began in the engine compartment of the vehicle. After investigating the cause of the fire and paying its insured's claim, Auto-Owners authorized disposal of the van so that it would not accrue any more charges for having the van stored. Eleven months later, the subrogation action was commenced.

The trial court denied General Motors' request to have the case dismissed because of the spoliation of the evidence. On appeal, however, the Supreme Court of Alabama held dismissal to be the appropriate remedy, noting: "[T]his is basically a subrogation claim brought by the same insurance company that ordered the destruction of items that would have been crucial evidence in that company's action."

While the sanction of dismissal has been imposed in many cases, courts will look to see if some lesser form of sanction will be sufficient to punish the conduct and restore fairness to the process. In *Transamerica Insurance Group v. Maytag, Inc.*,⁹⁹ a fire occurred at a residence

⁹⁹ 650 N.E.2D 169 (Ohio App. 1994)

insured by Transamerica. Transamerica hired an investigator to evaluate the scene and determine the origin and cause of the fire. The investigator concluded that the cause of the fire was faulty power cord on a Maytag refrigerator. Pictures were taken of the refrigerator and the power cord was preserved but the refrigerator itself was not preserved.

Transamerica filed a subrogation action against Maytag alleging negligence and breach of implied warranties. Maytag filed a summary judgment motion alleging that since the refrigerator was destroyed prior to the suit, the doctrine of spoliation provided a complete defense to its liability. The trial court dismissed the action as a sanction for the spoliation.

On appeal, the court noted that Ohio courts have traditionally followed a policy of imposing a sanction short of outright dismissal of the action unless the plaintiff's conduct evidences bad faith. The court observed that there was no suggestion that the destruction of the refrigerator could be directly attributed to Transamerica, and overturned the dismissal based upon the absence of bad faith. The court stated that it believed the trial court went too far in ordering an outright dismissal of the action for Transamerica's failure to insure the refrigerator would be preserved. The court held that the sanction of dismissal was disproportionate to the wrongdoing of Transamerica. See *Id.* at 171.

The standard in criminal cases appears to require a strict showing of bad faith before the evidence will be suppressed and/or the case dismissed. For example, in *State of Florida v. Bletard*¹⁰⁰, the Bradford County circuit court refused to dismiss a case based on spoliation of evidence. On February 22, 1994, a fire occurred at a building that was being leased by the defendant. BFAEI investigated and determined the fire to be incendiary. Before the defendant's arrest, control of the building was released to the owner who then repaired the damage. The defendant filed a motion to suppress the evidence collected from the fire scene because "the state failed to preserve discoverable evidence, i.e. the building, thereby placing the defendant in a position of not being able to refute any testimony given by [the state's] expert." The defendant also alleged his constitutional due process rights were prejudiced by the introduction of expert opinion testimony for the state, having no ability to challenge that testimony through his own expert after the fire scene had been destroyed. The court denied the motion and held that:

Whatever duty the Constitution imposes on the state to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of Constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means (*California v. Trombetta*, 467 U.S. 479, 488-89 (1984)).

The defendant has not shown anything beyond a remote possibility of an exculpatory value in the building and has not shown that there was any apparent exculpatory value in the building.

¹⁰⁰ Case No. 94-227-CFA (8th Judicial Circuit, 1995)

Independent testing is not the only means available to the defense and does not encompass a prosecutorial duty to produce the state's sample for testing. An accused's due process right to attack the credibility of the results of the tests is preserved, and the extreme sanction of suppression is unnecessary *Houser v. State*¹⁰¹.

The defendant retains the right to cross-examine the investigator from the fire marshal's office and to attempt to raise doubts in the mind of the fact finder whether the investigation was properly administered (*Trombetta*, 467 U.S. AT 490).

Absent a showing of bad faith by the state, and absent any apparent exculpatory value prior to the failure to preserve the building, the defendant's due process rights have not been infringed upon. Furthermore, the defendant's due process rights are protected by the defense's opportunity for cross-examination.

The practical effect of suppression of this evidence would have been dismissal of the case, as the state would not have been able to prove that the fire was intentionally set. Thus, without a showing of bad faith and establishing the exculpatory value of the destroyed evidence, criminal courts are unwilling to suppress the evidence or dismiss the charges based upon spoliation.

Similarly, in *Houser v. State*, the defendant was driving a vehicle when he struck a concrete wall. The passenger in the car died on impact. At the time of the accident, the police took a blood sample from the accused which showed a blood alcohol level of 0.18 %, substantially in excess of the legal limit for intoxication. Four months after the accident, Houser's attorney sought the blood sample to have it independently tested. The sample had not been refrigerated and thus had lost any forensic value for testing purposes. The court rejected the defendant's due process argument and held that:

The United States Supreme Court has already held that there is no federal constitutional requirement to preserve breath samples taken to determine blood alcohol levels...routine, good faith destruction of remnants of the sampling showed no conscious effort to suppress exculpatory evidence. More importantly, the court held, due process requires preservation of evidence only if it is likely to be significant in the suspect's defense...we see no difference between the...rationale for breath samples and the situation regarding blood samples... we therefore hold that the state is not obligated to take affirmative steps to preserve a blood sample...on behalf of criminal defendants.¹⁰²

In *Melendez v. State*, the defendant argued that he was denied due process because the

¹⁰¹ 474 So. 2d 1193, 1195 (Fla.1985)(superseded by statute on other grounds)

¹⁰² *Ibid.*

police investigators failed to collect and preserve certain physical evidence that might have been exculpatory. A blood sample was taken from the scene, a stain on the victim's car seat, the clothes and shoes of several witnesses and the victim and a gun and a hunting knife found in the victim's desk drawer. The court held that:

This claim, relating to the opportunity to present a defense, involves "what might loosely be called the area of Constitutionally guaranteed access to evidence."...taken together, this group of Constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system."..."the concern is that the accused have access to exculpatory evidence, not all possible pieces of evidence that the police have rejected to play a significant role in the suspects defense." The evidence must "possess an exculpatory value that the prosecution makes a complete and detailed accounting to the defense of all police investigatory work on a case." ...most of the alleged negligent non-preservation of evidence in this case occurred prior to the time appellant became a suspect. We find neither evidence of conscious effort by the police to suppress exculpatory value. We affirm this point relating to the collection and preservation of evidence.¹⁰³

B. Exclusion of Expert Testimony

The exclusion of expert testimony has been imposed as a sanction for Spoliation based on "the unfair prejudice that may result from allowing an expert to deliberately or negligently put himself or herself in the position of being the only expert with first-hand knowledge of the physical evidence on which expert opinions as to defects and causation may be grounded."¹⁰⁴ The exclusion of testimony has been upheld with respect to testimony that is based on physical evidence which the expert has destroyed. This sanction has been imposed regardless of whether the destruction was deliberate or negligent, and regardless of whether it occurred before or after the expert was retained by a party to the litigation.¹⁰⁵

In *Bright v. Ford Motor Co.*, 578 N.D.2d 547 (Ohio App. 1990), the plaintiff had several parts of the vehicle at issue cleaned and "degreased" prior to providing the parts to Ford's experts for examination and inspection. Ford moved for dismissal of the action contending it had been deprived of the use of the evidence. The lower court did not dismiss the case but prohibited both plaintiff's experts from testifying with regard to the parts at issue.

On appeal, the court recognized that the failure to preserve evidence is sanctionable. However, the sanction must be just and a sanction which, in effect, puts a party "out of court" must be based on a demonstrable prejudice to the opposing party. *Id.* at 549.

¹⁰³ 498 So. 2d. 1258 (Fla. 1986)

¹⁰⁴ *Nally v. Volkswagen*, 405 Mass. 191, 539 N.W. 2d 1017, 1021 (1989).

¹⁰⁵ *Id.*; *Bolton v. Massachusetts Bay Transp. Auth.*, 32 Mass. App. Ct. 654, 656-57, 593 N.E. 2d 248, 249 rev. den. 413 Mass. 1104, 598 N.E.2d 1133 (1992).

The court put forth what is deemed “a workable formulation of prejudice”, holding that the defendants should enjoy a presumption of prejudice and that the plaintiffs should have the burden of establishing that there was no prejudice. The court also stated that if it is impossible for either party to meet their burden of persuasion on that issue, the party who destroyed the evidence must suffer the presumption that the loss of such evidence was prejudicial to the innocent party’s case. The court observed that it would be “manifestly unjust” to place this burden of persuasion upon the innocent party. *Id.* at 550.

In *Cincinnati Insurance Co. v. General Motors Corporation*, 1994 Ohio App. LEXIS 4960 (Ottawa County Oct 28, 1994), the insured’s home was damaged by fire. The insurer filed suit against General Motors, alleging that a manufacturing or design defect in the insured’s motor vehicle was the cause of the fire. *Id.* at *2. General Motors alleged that the insurance company destroyed evidence and failed to allow them to examine the vehicle in its “after the fire” condition. *Id.*

First, the court determined that in a product liability action where evidence is intentionally or negligently “spoiled” or destroyed by a plaintiff or his expert before the defense has an opportunity to examine that evidence for any alleged defects, a court may preclude any and all expert testimony as a sanction for “spoliation of evidence”. This case relied on the holdings in *Hirsh v. General Motors Acceptance Corp.*, 628 A.2d 1108 (N.J. Super. L. 1993) in reaching this decision. The court also concluded that when a defendant alleges that a plaintiff has destroyed a piece of relevant evidence, the trial court must determine the degree of prejudice to the defendant and impose a sanction commensurate with that degree of prejudice.

The court adopted the reasoning in the *Bright* case (cited above) giving the innocent party a presumption of prejudice and placing the burden of persuasion on the “Spoliator” to rebut this presumption, but added that the innocent party must first establish (1) that the evidence is relevant, (2) that the “Spoliator’s” expert had an unfair opportunity to examine the lost or altered evidence and (3) that even though the “Spoliator” was contemplating litigation against the innocent party, the evidence was intentionally or negligently destroyed or altered without providing an opportunity for inspection by the innocent party.

In *Travelers Insurance Co. v. Dayton Power and Light Co.*, 663 N.E.2d 1383 (Ohio Misc. 1996), the court was faced with determining the appropriate sanction for the disposal of evidence at a fire scene. In that case, a fire broke out at the insured’s business and damaged two pieces of electrical equipment in a transition cabinet serviced by Dayton Power. The insured contacted Travelers, who in turn contacted SEA, Inc., to examine the damage and determine the cause of the loss. Individuals from Dayton Power were also on the scene after the fire but they only restored the electrical power and did not conduct an investigation. However, they did take photographs of the transition cabinet.

An individual from SEA examined both the pieces and issued a report alleging that the fire was probably caused by the failure of Dayton Power to sufficiently tighten a bolt when they connected new cables to the transformer five years earlier. After the fire, the insured disposed of the transition cabinet after being told by SEA. that it was not necessary to keep the piece. Travelers paid the insured’s claim and filed a subrogation action against Dayton Power, claiming that the fire was caused by its negligence in connecting the cables. Dayton Power responded with a motion for summary judgment alleging that Travelers’ disposal of the cabinet amounted to Spoliation of evidence. *Id.* at 1385.

The court initially determined that the spoliation of evidence doctrine is not limited to product liability cases and applies in negligence cases. Although there was no intentional destruction of evidence in this case, the court determined that negligent or inadvertent destruction of evidence is sufficient to trigger sanctions where the opposing party is disadvantaged by the loss. In determining the proper sanction, it is necessary to look at the relative importance of the evidence and its relevance. The court found that Travelers and the insured should have known at the time they disposed of the cabinet that it would be material evidence in a subsequent lawsuit and that its importance should have been obvious. Further, the court reasoned that although not all items at a fire scene are essential to preserve, the important evidence should be retained. As such, Dayton Power should have been given a chance to inspect the cabinet before it was discarded. *Id.*

Considering all these facts, the court next evaluated the appropriate sanctions to impose upon Travelers. The court found that Dayton Power had personnel on the scene immediately after the fire and failed to closely inspect the cabinet at that time which mitigated the effect of any prejudice. However, it was still clear that Dayton Power had been prejudiced to some extent and was deprived of potentially favorable evidence when the cabinet was discarded. *Id. at 1387.* In seeking to counteract the prejudicial effect caused by the disposal of the cabinet, the court ordered the deposition testimony of the SEA Investigator stricken and precluded him from testifying at trial. Further, the court ruled that no other witness could rely on the investigator's findings and the jury was instructed that if it deemed the destroyed evidence significant in determining the cause of the fire, it should infer that the evidence would reveal facts damaging to Travelers' case. *Id. at 1388.*

In *Travelers Insurance Co. v. Knight Electric Company*, 1992 Ohio App. LEXIS 6664 (Stark County Dec. 21, 1992), the appeals court determined that the trial court did not abuse its discretion by striking the opinion evidence of the plaintiff's expert that was based upon physical evidence no longer available to the defendant. In that case, an electrical fire caused damage to property insured by Travelers. Prior to the fire, Knight was called to examine the circuit breaker and fix any electrical problems. Knight made some adjustments, after which some light fixtures began smoking. Shortly thereafter, it was discovered that the electrical wiring in the ceiling was on fire. *Id. at *2.*

Travelers hired an independent adjusting company to determine the cause of the fire. The light fixture and several other pieces of equipment were removed from the property for testing. After the tests were complete, the items were disposed of by the independent adjuster. The trial court ruled that the expert's deposition and affidavit must be stricken because the items and the tests performed on those items provided the basis for his opinion that Knight's negligence caused the fire. On appeal, the court upheld the trial court's ruling that the party who spoils the evidence has the burden of persuading the trial court that there was no reasonable possibility that the opposing party was deprived of favorable evidence.

C. Evidentiary Inferences

Another response by courts dealing with spoliation of evidence has been termed the "spoliation Inference. Where spoliation has occurred, the court can impose this sanction by instructing the jury that the missing or altered evidence should be presumed to have been unfavorable to the party causing its loss or destruction. As might be imagined, the admonition to the jury can have a direct impact on their verdict. The application of the inference is intended

to serve as a deterrent, by placing the risk on an adverse judgment on the party who created the problem.¹⁰⁶ As a general rule, most jurisdictions require that the conduct resulting in the loss or destruction was intentional and in bad faith for the inference to apply.¹⁰⁷

In *State of Ohio v. Strub*, 355 N.D.2d 819 (Ohio App. 1975), the court stated that in a criminal case, attempts to destroy evidence indicate a consciousness of guilt and when made by the defendant, are admissible as evidence of committing the crime charged. The court also recognized the general rule that the intentional spoliation or destruction of evidence relevant to a case raises an inference that the evidence would have been unfavorable to the cause of the Spoliator. See also *U.S. v. Mendez-Ortiz*, 810 F.2d 76 (6th Cir., 1986).

D. Independent Torts

The first Florida appellate court to recognize a claim for spoliation, allowing litigants to bring independent actions for the intentional or negligent spoliation of evidence was one in which there was a cause of action for negligent destruction of evidence. See, *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. 3rd DCA 1984), *rev. den*, 484 So. 2d 7 (FLA. 1986). In *Bondu*, the court held the party whose spouse died during surgery was entitled to sue the hospital and its physicians for the tort of spoliation when they misplaced the deceased spouse's medical records which were critical to a medical malpractice action. Following *Bondu*, the court in *Miller v. Allstate Insurance Co.*, 573 So. 2d 24 (FLA. 3rd DCA 1990), set forth what became known as the Florida Approach to this cause of action, which allows a plaintiff to recover even when damages are uncertain. The *Miller* plaintiff brought a breach of promise action against Allstate for its failure to return a wrecked automobile to her – instead selling to a salvage yard which destroyed the car which was vital to a planned product liability action against the manufacturer. When Allstate argued that it had no legal duty to Miller because of the uncertainty of damages in the contemplated product liability suit, the court pointed out that when the difficulty in establishing damages is created by the defendant's actions in failing to preserve critical evidence, the defendant, rather than the plaintiff, should bear the consequences. Thus, recovery may be permitted upon showing they were “deprived of an opportunity or chance to gain an award or profit even where damages are uncertain.” *Miller* at 29.

Even when a party meets its burden of establishing there was a duty to preserve, and later spoliated the evidence, the severity of sanctions varies depending on three factors: Willfulness or bad faith, extent of the prejudice suffered by the other party and what is required to cure the prejudice. *Landry v Charlotte Motor Cars, LLC*, 226 So.3d 1053 (Fla. 2nd DCA 2017). Generally, without willfulness or bad faith, a court will not dismiss a case unless the victim can show, usually through expert testimony, that its case was fatally prejudiced by the inability to examine the spoliated evidence.

In 2003, Florida's Fourth DCA determined, contrary to the *Bondu* decision, that an

¹⁰⁶ *Nation-wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 218 (1st Cir. 1982).

¹⁰⁷ See, e.g., *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983) (evidence accidentally destroyed does not give rise to adverse inference); *Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1974) (destruction must be intentional act); *INA Aviation Corp. v. United States*, 468 F. Supp. 695, 700 (E.D.N.Y. 1979) (unfavorable inference arises against the spoiler of evidence only if destruction intentional). *aff'd without opinion*, 610 F.2d 806 (2d Cir. 1979).

independent cause of action for spoliation is not necessary where the spoliator and the defendant in the underlying action are one and the same (first party spoliator claims). In *Martino v. Wal-Mart Stores, Inc.*, 835 So.2d 1251 (Fla.4th DCA), the plaintiff was hurt when her shopping cart collapsed. Wal-Mart did not preserve the cart even though she requested that it do so. There was also security footage of the incident. Plaintiff then amended her complaint to add a count for spoliation of evidence. The trial court dismissed the claim and she appealed. The 4th DCA affirmed the trial court, in part, and certified its conflict with *Bondu*. The Florida Supreme Court sided with the 4th DCA and held that the proper remedy against a first-party defendant for spoliation of evidence should be a rebuttable presumption of negligence and not an independent cause of action for first party spoliation of evidence, thus disapproving *Bondu*. The Court reinforced what most Florida courts had been doing which was imposing varying degrees and types of sanctions short of permitting the independent cause of action. *Martino v Wal-Mart Stores, Inc.*, 908 So.2d 342 (Fl. 2005).¹⁰⁸

An example of the drastic consequences which may result from a party's failure to preserve evidence in its custody was seen in *Sponco Manufacturing v. Alcover*, 656 So. 2d 629 (Fla. 3d DCA 1995). The plaintiff in that case sued Sponco, among other parties, when he was injured in a fall while using a ladder manufactured by Sponco. When the plaintiff requested an inspection of the ladder which Sponco retained in its possession, it was discovered that Sponco had discarded the ladder. The 3rd DCA affirmed the entry of a default against Sponco on the issue of liability when the plaintiff demonstrated he could not proceed without the evidence which Sponco had destroyed. Thus, the ultimate sanction of dismissal is reserved for cases in which one party's loss of evidence renders the opposing party completely unable to proceed with its case or defense. *Fleury v. Biomet, Inc.*, 865 So.2d 537 (Fla. 2nd DCA 2003).

E. Criminal Statutes

Another potential remedy for the wrongful destruction of evidence is prosecution under Federal and State Criminal Statutes for obstruction of justice or tampering with evidence. However, the threat of criminal prosecution for spoliation of evidence is largely theoretical, as it has rarely been pursued by the criminal justice system, especially if it occurs in the course of civil litigation.

In Florida, section 918.13, Florida Statutes, prohibits the alteration, destruction, concealment, or removal of physical evidence "knowing that a criminal trial or proceeding or an investigation by a duly constituted prosecuting authority, law enforcement agency, grand jury or legislative committee of this state is pending or is about to be instituted."¹⁰⁹ Thus, it appears there is no criminal penalty in Florida for tampering with evidence in a civil case. As to criminal cases, tampering with evidence is a third-degree felony. Even when the evidence that has been altered or destroyed is potential evidence in a criminal case, it must have been done with an improper purpose to "impair a criminal investigation or prosecution."¹¹⁰ Most of the prosecutions brought under this Florida Statute typically involve individuals swallowing or disposing of illegal drugs in an attempt to conceal them from law enforcement as they are about to be apprehended. See, *State v Jennings*, 666 So.2d 131 (Fla. 1995).

¹⁰⁸ The 4th DCA specifically recognized the spoliation of evidence cause of action and the criteria set forth in Herman in *St. Mary's Hospital v. Brinson*, 685 So.2d 33 (1996) and *Digiulio v. Prudential*, 710 So.2d 3 (1998).

Where a defendant just throws evidence away (drugs, weapons, contraband) a factual issue is created as to whether the defendant was just abandoning the item or intentionally concealing, destroying, or removing the item.

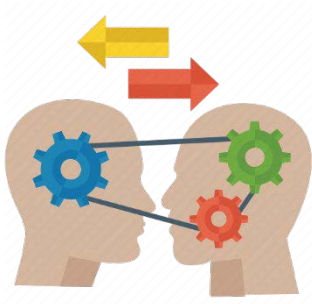
To prove the crime of Tampering with or Fabricating Physical Evidence, the State must prove two elements beyond a reasonable doubt. First, that the defendant knew that a criminal trial or proceeding or investigation by a duly constituted prosecuting authority or law enforcement agency or grand jury or legislative committee of this state was pending or about to be instituted. Second, that the defendant altered or destroyed or concealed or removed any record or document or thing, with the purpose to impair its verity or availability in the investigation or proceeding. *Fla. Std. Jury Instr. (Crim) 21.8.*¹⁰⁹

III. Conclusion

Spoliation should be a matter of concern to every adjuster, investigator and attorney involved in fire litigation cases. When spoliation occurs, the first victim is the truth. Only by permitting an objective analysis of the fire scene evidence by both sides can a fire investigator fulfill the mission of being a truth-seeker, rather than a case-maker. The consequences of improperly destroying or failing to preserve evidence can be severe and should serve as a deterrent to those who fail to consider the importance of the issue.¹¹⁰ Recognition of the need to carefully document the fire scene and to collect and preserve all potentially relevant evidence will help to avoid the pitfall of spoliation.

¹⁰⁹ Tampering with or Fabricating Physical Evidence, Florida Statute §918.13.

¹¹⁰ *State v. News-Press*, 338 So2d 1313 (Fla. 2nd DCA 1976) upheld dismissal of an indictment charging destruction of evidence brought against a reporter who destroyed tape recordings of a potential homicide witness in the absence of evidence pointing to an improper purpose in destroying the tapes or an intent to impair the criminal investigation.



Unit 4

Lesson 2: SIU Information Sharing

Enabling Learning Objectives:

At the end of this section, the student will be able to:

1. Explain the methods for public investigators to obtain information from insurance company investigators in fire and fraud cases.
2. Discuss the key provisions of section 626.989, Florida Statutes.
3. Describe the key provisions of section 633.126, Florida Statutes.
4. Explain the differences between the two statutes.
5. Discuss insurance companies' potential tort liability for improperly released information.
6. Explain the method for insurance companies to exchange information regarding suspected fraud or arson without facing exposure to tort liability.

In this section, we will discuss two statutes important to the investigation of insurance fraud and arson. These statutes provide the public fire or fraud investigator with the ability to obtain information from an insurance company while avoiding exposure to tort liability to the investigator's agency as well as to the insurance companies. These laws are commonly referred to as "Immunity Statutes".

I. Underlying Policy & Philosophy for the Reporting/Immunity Acts

A. Parallel Investigations

Criminal and civil arson and insurance fraud investigations are often conducted simultaneously by law enforcement and the insurance company special investigative units ("SIU"). However, there are significant differences in the two types of investigations that make the ability to share information so critical.

B. Access, Time Limits and Resource Differences

1. Insurance Company Claim Investigation

Section 626.9891, Florida Statutes, requires all insurers doing business in Florida to establish and maintain a designated anti-fraud unit within the company or to contract with an outside investigative group to investigate and report suspected insurance fraud. These anti-fraud units are generally referred to as a Special Investigative Unit or SIU.

During the insurer's investigation into a suspicious claim, based on the insurance policy's "duties after loss" provision, insurers can obtain recorded statements and Examinations Under Oath of insureds, both named and definitional, a sworn proof of loss statement, and financial and other records in support of the claim. If the insured refuses to answer questions at an EUO or to produce records, she risks denial of her claim on that basis alone. However, the insurer cannot require non-insureds, such as the insured's neighbors, non-residential family members and co-workers to provide statements or information.

Insurers generally have the resources to retain experts to assist in an origin and cause investigation, such as electrical and chemical engineers. Insurance companies can retain forensic accountants to analyze an insured's financial records to determine financial motive and follow up on other leads. However, the records available to the insurer are limited to those the insured can obtain or permit the insurer to obtain through a release, such as for their financial institutions, medical providers or employers. An insurance company generally cannot obtain information, such as cell tower records, only available to law enforcement upon obtaining a search warrant or court order.

Insurers are limited by policy language regarding the length of an investigation and often must make a claim decision within 30 or 60 days following the loss or the insured's compliance with the policy conditions. Additionally, if an insured withdraws his claim, the insurer must close its investigation.

2. Law Enforcement Investigations

Public fire and insurance fraud investigators' access to potential suspects, including insureds who have submitted a claim to an insurance company, is limited by the Fourth, Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution. That means that a public investigator cannot require an insured who is a suspect to submit to an interview or to produce documents relevant to the criminal investigation.

However, unlike insurers, public criminal investigators can obtain information on insureds and non-insureds, such as cell tower information, computer hard drives, information from electronic data recorders, access to social media and e-mail accounts through subpoenas, search warrants, wiretaps, and confidential informants.

Depending on the jurisdiction and case load, law enforcement agencies may have limited resources staffing an investigation, especially a complex one, and may not have the financial resources to retain the types of experts available to insurance companies.

However, law enforcement has years, rather than days or months to complete a criminal investigation, limited only by the statute of limitations for arson and insurance fraud, which is five (5) years in Florida. Public investigators can also continue to investigate a potential arson or insurance fraud even after the insurance company pays or denies a claim or otherwise closes out its investigation.

C. Pre-Immunity Act Perils of Information Sharing

Despite the benefits and need for information sharing between the public and private sector in

cases involving suspected arson or fraud, prior to the passing of the Florida immunity acts, insurers risked exposure to liability for defamation, breach of contract, malicious prosecution, and bad faith for sharing information. Likewise, without the protection of the immunity acts, law enforcement officials who shared information regarding an ongoing arson or fraud investigation with someone in the private sector, even an insurance company SIU representative, risked compromising criminal investigations, exposing confidential informants and tipping off targets if the information got out to the public.

D. Reporting/Immunity Acts – An Avenue for Information Sharing

In the late 1970s, the Florida Legislature enacted the first arson and fraud reporting and immunity acts, section 633.175¹¹¹, Florida Statutes, sometimes referred to as the “arson reporting act” and section 626.989, also known as the “insurance fraud reporting act”.¹¹² These laws were passed to facilitate and encourage information sharing between the public and private sectors to advance the public policy of detecting and preventing arson and insurance fraud. Additionally, the acts provided some measure of protection to both the private and public sectors against civil tort liability for sharing confidential investigative information. The acts provide a means for the public and private sector to share available information to enable insurers to make an informed claim decision and law enforcement to determine if probable cause exists for an arrest.

Although there are some differences, discussed below, between the arson and insurance fraud reporting acts, these immunity laws, which have been amended several times since their initial enactment, provide the following:

1. Insurers have qualified immunity from civil suit for sharing information. This immunity is not self-executing but must be invoked.
2. Law Enforcement can maintain confidentiality of investigations by ensuring only designated employees of insurers are privy to sensitive information.
3. The acts provide for the following type of cooperation:
 - a. Insurance company (SIU) to law enforcement (mandatory)
 - b. Law enforcement to insurance company/SIU (very limited)
 - c. Inter-Company/SIU to SIU (permissive, not mandatory)

II. Florida’s Insurance Fraud Reporting Act - §626.989, F.S.

While the original version of the insurance fraud reporting act required insurers to report suspected fraud only to the Department of Insurance – Division of Insurance Fraud, in 1995, an amendment authorized the exchange of information between insurance companies and with the National Association of Insurance Commissioners (NAIC) and the National Insurance Crime Bureau (NICB). The current version of the law has been updated to require insurers to report suspected fraud to the Florida Department of Financial Services – Division of Investigative and Forensic Services, and affords qualified immunity to insurers for reporting fraud to, or responding to requests from, NAIC, NICB, or any local, state or federal law enforcement agency.

¹¹¹ Changed to section 633.126, Florida Statutes, in 2015.

¹¹² In 1993, section 440.105, Florida Statutes, was enacted regarding mandatory reporting, cooperation and inter-company exchange of information regarding workers’ compensation insurance. A copy of the statute appears at the end of this lesson.

The statute states, in part:

[A]ny insurer, agent, or other person licensed under the code, or an employee thereof, having knowledge or who believes that a fraudulent insurance act or any other act or practice which, upon conviction, constitutes a felony or a misdemeanor under the code, or under s. 817.234, is being or has been committed shall send to the Division of Investigative and Forensic Services a report or information pertinent to such knowledge or belief and such additional information relative thereto as the department may require.¹¹³

... In the absence of fraud or bad faith, a person is not subject to civil liability for libel, slander, or any other relevant tort by virtue of filing reports, without malice, or furnishing other information, without malice, required by this section or required by the department or division under the authority granted in this section, and no civil cause of action of any nature shall arise against such person:

For any information relating to suspected fraudulent insurance acts or persons suspected of engaging in such acts furnished to or received from law enforcement officials, their agents, or employees,¹¹⁴

The qualified civil immunity afforded insurance companies for sharing information with other insurers is dependent on the insurers following specific statutory requirements.

A. The Statute Provides the Following Procedures:

1. Insurers, in compliance with section 626.9891, Florida Statutes, must provide prior written notice to the Department of Financial Services which identifies the name and job title of designated employees whose responsibilities include the investigation and disposition of fraudulent claims.
2. Both the requestor and provider of information must be on file with DFS as designated investigators or claim handlers/supervisors responsible for investigating suspected fraudulent claims.

B. The Statute Grants Qualified Immunity:

1. To insurance companies, its designated SIU employees and claims handlers/supervisors.
2. From civil liability for defamation or any other relevant tort.
3. For sharing information about suspected fraudulent insurance

¹¹³ Section 626.989(6), Florida Statutes.

¹¹⁴ Section 626.989(4)(c), Florida Statutes.

acts with designated SIU employees and claim handlers/
supervisors of other companies or NAIC or NICB representatives.

C. Immunity Does Not Apply If:

1. Designated employees act in bad faith or reckless disregard for the rights of any insured, as in the following scenarios:

SIU for “X” insurance company responds to proper request under the statute but inserts handwritten note in the file materials that “Mr. Insured is a crook and liar; hope you hang the cheat.”

SIU for “X” insurance company learns that insured has claim with “Y” insurance company and sends unsolicited information directly to “Y” seeking to cause claim to be denied.

2. Designated employees publish defamatory information to third persons not expressly statutorily authorized to share information.

SIU member tells his friends and neighbors about Mr. Insured’s fraudulent acts.

At lunch, SIU member tells fellow “X” insurance company employee who works in another department that Mrs. Insured is a crook because her claim was denied based on arson and fraud.

3. Designated employees fail to strictly follow the statutory procedures.

SIU for “X” insurance company responds to request for information received from underwriting representative at “Y” insurance company who is not on DFS list, fails to indicate “Y” is investigating suspected fraud and states the information is for underwriting purposes.

SIU for “X” insurance company sends information to private investigator working on behalf of “Y” insurance company who is not a designated SIU representative with DFS.

D. Sharing Information at Meetings, Seminars, and Gatherings

1. All participants must qualify under the statute. “Provided, however, that the qualified immunity against civil liability conferred on any insurer or its designated employees shall be forfeited with respect to the exchange or publication of any defamatory information with third-persons not expressly authorized by this paragraph to share in such information.”

2. Problem where all the participants do not have a “need to know” (i.e., group discussions).
3. Dangers of defamation.
4. Discussions about individual fraud suspects should be done in a non-defamatory manner. Objective sharing of facts is not actionable under any circumstances.
5. SIUs will often use DIFS or NICB to disseminate information of concern to the general SIU community or even the public to preserve the insurer’s immunity from potential tort claims.

E. Reciprocity Between Public and Private Sector

1. Although the qualified immunity extends to public-to-private sector information exchange, law enforcement must maintain the confidentiality of information obtained in an active criminal investigation.
2. F.S. §626.989 establishes confidentiality of documents, reports and evidence in DIFS’ possession while an investigation is still "active", including a specific exemption from Chapter 119, Florida Statutes.
3. Papers, documents, reports and evidence from a closed file may still be kept confidential and exempt under limited circumstances if covered by specific statutory exemptions.
4. DIFS investigators are exempt from subpoena process in civil actions, and confidential materials are exempt from disclosure in criminal discovery process while investigation is still active.

II. Florida’s Arson Reporting Act - §633.126, F.S.

This statute is the corollary to section 626.989, Florida Statutes, for suspected arson and criminal explosion cases. It provides:

- A.** Agents of the State Fire Marshal, the Division of Investigative and Forensic Services, any state or federal law enforcement officer or any fire service provider engaged in the investigation of a fire or explosion may request any insurance company or its representatives, including contract origin and cause investigators, to provide any and all information relative to a fire or explosion loss. (See Attachment I for sample request letter.)
- B.** Insurers must comply with the above requests. It is a misdemeanor for any person, including an insurance representative, to willfully refuse to comply.
- C.** Notably, the agencies which may request information from insurers include non-law enforcement entities, namely, fire service providers.

- D. Additionally, an amendment since the law was enacted enables contractors retained by an insurance company, including contract SIU investigators and origin and cause investigators and other retained experts, to provide information to the above entities and receive immunity for doing so.
- E. **Mandatory Reporting:** If an insurance company has reason to suspect that a fire or explosion loss to its insured's real or personal property was caused by intentional means, the company shall notify the State Fire Marshal and furnish her or him with all material acquired by the company during its investigation.
- F. No insurance company or person who furnishes information on its behalf shall be liable for damages in a civil action or subject to criminal prosecution for any oral or written statement made or any other necessary action taken to comply with the act.
- G. When the release of the investigative records is legally required, the official or agency in possession of such records shall provide written notice to the insurance company providing the information and to all parties, at least 10 days prior to releasing such records. This 10-day notice requirement is not in section 626.989, Florida Statutes, the insurance fraud immunity statute.
- H. Official, departmental, or agency personnel may discuss such matters with other official, departmental, or agency personnel, and any insurance company complying with this section, and may share such information, if such discussion is necessary to enable the orderly and efficient conduct of the investigation. These discussions are confidential and exempt from the provisions of s. 286.011.
- I. **Inter-Company SIU to SIU Exchange:** In the absence of fraud, bad faith, or malice, an insurer or NICB representative or consultant employed to adjust or investigate fire or explosion losses is not liable for damages in a civil action for furnishing information concerning fires or explosions suspected to be other than accidental to investigators employed by other insurance companies or NICB.
- J. **No Waiver** – By complying with the act, an insurer does not waive or abandon any work product, attorney-client or trade secret privileges in the information or documents provided to law enforcement or fire officials.

III. Potential Tort Liability for Improperly Released Information

The immunities afforded by the arson and insurance fraud reporting acts are not self-executing or absolute. If an insurer provides information to law enforcement or other insurers without strictly complying with the requirements of the laws, it could still face a civil suit for various civil torts, including the following:

A. Defamation (Libel/Slander)

1. Defamation *per se* (accusing person of crime, infectious disease,

conduct incompatible with business or profession) is always actionable in the absence of immunity, even if the target of the defamatory statement does not suffer any damages. For example, stating an individual has deliberately set a fire to obtain insurance proceeds in front of their boss would be defamation *per se* as arson and insurance fraud are crimes, even if the target of the statement does not lose their job or suffer any other consequences.

2. Defamation *per quod* (extrinsic facts show communication was defamatory) is actionable depending upon the circumstances and absence of immunity. So, if someone stated publicly that Mrs. Insured's claim for fire damage to her business was denied by her Insurance company because it was suspicious, and thus, the business closes because customers go elsewhere, she may have a defamation *per quod* claim against the person making the statement.

B. Malicious Prosecution

This action may be brought against someone for causing or promoting the criminal prosecution of an individual on groundless charges. Such an action requires a favorable resolution of the criminal case, i.e. dismissal or acquittal.

C. Intentional Infliction of Emotional Distress

This action requires proof that someone deliberately and maliciously caused psychological or emotional injury to another by their words or actions.

D. Invasion of Privacy

This tort is an unwarranted and unnecessary intrusion into one's personal affairs or the disclosure of one's personal affairs to others.

E. Interference with Business Relationship

The intentional disruption, obstruction or damaging of a business or contractual relationship by providing negative information to someone's creditors, suppliers and customers.

IV. Conclusion

While the reporting/immunity acts are a valuable tool for insurance companies and law enforcement to detect and prevent fraud and arson, as well as bring the perpetrators of such crimes to justice, it is important to keep in mind that these statutes are meant to facilitate public-private cooperation and not collusion. It is, therefore, critical for the two sides to keep a clear wall between civil and criminal investigations, and to avoid the appearance that criminal investigators are directing civil investigations or vice-versa.

633.126. Investigation of fraudulent insurance claims and crimes; immunity of insurance companies supplying information

(1)(a) As used in this section, the term “consultant” means any individual or entity, or employee of the individual or entity, retained by an insurer to assist in the investigation of a fire, explosion, or suspected fraudulent insurance act.

(b) The State Fire Marshal or an agent appointed pursuant to s. 633.114, an agent of the Division of Investigative and Forensic Services, any law enforcement officer as defined in s. 111.065, any law enforcement officer of a federal agency, or any fire service provider official who is engaged in the investigation of a fire or explosion loss may request any insurance company or its agent, adjuster, employee, or attorney, investigating a claim under an insurance policy or contract with respect to a fire or explosion to release any information whatsoever in the possession of the insurance company or its agent, adjuster, employee, or attorney relative to a loss from that fire or explosion. The insurance company shall release the available information to and cooperate with any official authorized to request such information pursuant to this section. The information shall include, but shall not be limited to:

1. Any insurance policy relevant to a loss under investigation and any application for such a policy.
2. Any policy premium payment records.
3. The records, reports, and all material pertaining to any previous claims made by the insured with the reporting company.
4. Material relating to the investigation of the loss, including statements of a person, proof of loss, and other relevant evidence.
5. Memoranda, notes, and correspondence relating to the investigation of the loss in the possession of the insurance company or its agents, adjusters, employees, or attorneys.

(2) If an insurance company has reason to suspect that a fire or explosion loss to its insured’s real or personal property was caused by intentional means, the company shall notify the State Fire Marshal and shall furnish her or him with all material acquired by the company during its investigation. The State Fire Marshal may adopt rules to implement this subsection.

(3) In the absence of fraud, bad faith, or malice, a representative of or consultant to an insurance company or of the National Insurance Crime Bureau employed to adjust or investigate losses caused by fire or explosion is not liable for damages in a civil action for furnishing information concerning fires or explosions suspected to be other than accidental to investigators employed by other insurance companies or the National Insurance Crime Bureau.

(4) No insurance company or person who furnishes information on its behalf shall be liable for damages in a civil action or subject to criminal prosecution for any oral or written statement made or any other action taken that is necessary and required by the provisions of this section.

(5) At such time as the release of the investigative records is required by law, the official or agency in possession of such records shall provide written notice to the insurance company providing the information and to all parties, at least 10 days prior to releasing such records. Official,

departmental, or agency personnel may discuss such matters with other official, departmental, or agency personnel, and any insurance company complying with this section, and may share such information, if such discussion is necessary to enable the orderly and efficient conduct of the investigation. These discussions are confidential and exempt from the provisions of s. 286.011.

(6) The actions of an insurance company or of its agents, employees, adjusters, consultants, or attorneys, in complying with the statutory obligation of this section may not be construed by a court as a waiver or abandonment of any privilege or confidentiality of attorney work product, attorney-client communication, or such other privilege or immunity as is provided by law.

(7) Any official described in subsection (1) may be required to testify as to any information in her or his possession regarding an insurance loss in any civil action in which any person seeks recovery under a policy against an insurance company for an insurance loss, subject to the provisions of subsection (6).

(8) No person may intentionally refuse to release any information requested pursuant to this section.

(9) A person who willfully violates this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

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626.989. Investigation by department or Division of Investigative and Forensic Services; compliance; immunity; confidential information; reports to division; division investigator's power of arrest

(1) For the purposes of this section:

(a) A person commits a “fraudulent insurance act” if the person:

1. Knowingly and with intent to defraud presents, causes to be presented, or prepares with knowledge or belief that it will be presented, to or by an insurer, self-insurer, self-insurance fund, servicing corporation, purported insurer, broker, or any agent thereof, any written statement as part of, or in support of, an application for the issuance of, or the rating of, any insurance policy, or a claim for payment or other benefit pursuant to any insurance policy, which the person knows to contain materially false information concerning any fact material thereto or if the person conceals, for the purpose of misleading another, information concerning any fact material thereto.

2. Knowingly submits:

a. A false, misleading, or fraudulent application or other document when applying for licensure as a health care clinic, seeking an exemption from licensure as a health care clinic, or demonstrating compliance with part X of chapter 400 with an intent to use the license, exemption from licensure, or demonstration of compliance to provide services or seek reimbursement under the Florida Motor Vehicle No-Fault Law.

b. A claim for payment or other benefit pursuant to a personal injury protection insurance policy under the Florida Motor Vehicle No-Fault Law if the person knows that the payee knowingly submitted a false, misleading, or fraudulent application or other document when applying for licensure as a health care clinic, seeking an exemption from licensure as a health care clinic, or demonstrating compliance with part X of chapter 400.

(b) The term “insurer” also includes a health maintenance organization, and the term “insurance policy” also includes a health maintenance organization subscriber contract.

(2) If, by its own inquiries or as a result of complaints, the department or its Division of Investigative and Forensic Services has reason to believe that a person has engaged in, or is engaging in, a fraudulent insurance act, an act or practice that violates s. 626.9541 or s. 817.234, or an act or practice punishable under s. 624.15, it may administer oaths and affirmations, request the attendance of witnesses or proffering of matter, and collect evidence. The department or its Division of Investigative and Forensic Services shall not compel the attendance of any person or matter in any such investigation except pursuant to subsection (4).

(3) If matter that the department or its division seeks to obtain by request is located outside the state, the person so requested may make it available to the division or its representative to examine the matter at the place where it is located. The division may designate representatives, including officials of the state in which the matter is located, to inspect the matter on its behalf, and it may respond to similar requests from officials of other states.

(4)(a) The department or its division may request that an individual who refuses to comply with any such request be ordered by the circuit court to provide the testimony or matter. The court shall not order such compliance unless the department or its division has demonstrated to the satisfaction

of the court that the testimony of the witness or the matter under request has a direct bearing on the commission of a fraudulent insurance act, on a violation of s. 626.9541 or s. 817.234, or on an act or practice punishable under s. 624.15 or is pertinent and necessary to further such investigation.

(b) Except in a prosecution for perjury, an individual who complies with a court order to provide testimony or matter after asserting a privilege against self-incrimination to which the individual is entitled by law may not be subjected to a criminal proceeding or to a civil penalty with respect to the act concerning which the individual is required to testify or produce relevant matter.

(c) In the absence of fraud or bad faith, a person is not subject to civil liability for libel, slander, or any other relevant tort by virtue of filing reports, without malice, or furnishing other information, without malice, required by this section or required by the department or division under the authority granted in this section, and no civil cause of action of any nature shall arise against such person:

1. For any information relating to suspected fraudulent insurance acts or persons suspected of engaging in such acts furnished to or received from law enforcement officials, their agents, or employees;

2. For any information relating to suspected fraudulent insurance acts or persons suspected of engaging in such acts furnished to or received from other persons subject to the provisions of this chapter;

3. For any such information furnished in reports to the department, the division, the National Insurance Crime Bureau, the National Association of Insurance Commissioners, or any local, state, or federal enforcement officials or their agents or employees; or

4. For other actions taken in cooperation with any of the agencies or individuals specified in this paragraph in the lawful investigation of suspected fraudulent insurance acts.

(d) In addition to the immunity granted in paragraph (c), persons identified as designated employees whose responsibilities include the investigation and disposition of claims relating to suspected fraudulent insurance acts may share information relating to persons suspected of committing fraudulent insurance acts with other designated employees employed by the same or other insurers whose responsibilities include the investigation and disposition of claims relating to fraudulent insurance acts, provided the department has been given written notice of the names and job titles of such designated employees prior to such designated employees sharing information. Unless the designated employees of the insurer act in bad faith or in reckless disregard for the rights of any insured, neither the insurer nor its designated employees are civilly liable for libel, slander, or any other relevant tort, and a civil action does not arise against the insurer or its designated employees:

1. For any information related to suspected fraudulent insurance acts provided to an insurer; or

2. For any information relating to suspected fraudulent insurance acts provided to the National Insurance Crime Bureau or the National Association of Insurance Commissioners.

Provided, however, that the qualified immunity against civil liability conferred on any insurer or its designated employees shall be forfeited with respect to the exchange or publication of any defamatory information with third persons not expressly authorized by this paragraph to share in

such information.

(e) The Chief Financial Officer and any employee or agent of the department, commission, office, or division, when acting without malice and in the absence of fraud or bad faith, is not subject to civil liability for libel, slander, or any other relevant tort, and no civil cause of action of any nature exists against such person by virtue of the execution of official activities or duties of the department, commission, or office under this section or by virtue of the publication of any report or bulletin related to the official activities or duties of the department, division, commission, or office under this section.

(f) This section does not abrogate or modify in any way any common-law or statutory privilege or immunity heretofore enjoyed by any person.

(5) The office's and the department's papers, documents, reports, or evidence relative to the subject of an investigation under this section are confidential and exempt from the provisions of s. 119.07(1) until such investigation is completed or ceases to be active. For purposes of this subsection, an investigation is considered "active" while the investigation is being conducted by the office or department with a reasonable, good faith belief that it could lead to the filing of administrative, civil, or criminal proceedings. An investigation does not cease to be active if the office or department is proceeding with reasonable dispatch and has a good faith belief that action could be initiated by the office or department or other administrative or law enforcement agency. After an investigation is completed or ceases to be active, portions of records relating to the investigation shall remain exempt from the provisions of s. 119.07(1) if disclosure would:

(a) Jeopardize the integrity of another active investigation;

(b) Impair the safety and soundness of an insurer;

(c) Reveal personal financial information;

(d) Reveal the identity of a confidential source;

(e) Defame or cause unwarranted damage to the good name or reputation of an individual or jeopardize the safety of an individual; or

(f) Reveal investigative techniques or procedures. Further, such papers, documents, reports, or evidence relative to the subject of an investigation under this section shall not be subject to discovery until the investigation is completed or ceases to be active. Office, department, or division investigators shall not be subject to subpoena in civil actions by any court of this state to testify concerning any matter of which they have knowledge pursuant to a pending insurance fraud investigation by the division.

(6) Any person, other than an insurer, agent, or other person licensed under the code, or an employee thereof, having knowledge or who believes that a fraudulent insurance act or any other act or practice which, upon conviction, constitutes a felony or a misdemeanor under the code, or under s. 817.234, is being or has been committed may send to the Division of Investigative and Forensic Services a report or information pertinent to such knowledge or belief and such additional information relative thereto as the department may request. Any professional practitioner licensed or regulated by the Department of Business and Professional Regulation, except as otherwise provided by law, any medical review committee as defined in s. 766.101, any private medical

review committee, and any insurer, agent, or other person licensed under the code, or an employee thereof, having knowledge or who believes that a fraudulent insurance act or any other act or practice which, upon conviction, constitutes a felony or a misdemeanor under the code, or under s. 817.234, is being or has been committed shall send to the Division of Investigative and Forensic Services a report or information pertinent to such knowledge or belief and such additional information relative thereto as the department may require. The Division of Investigative and Forensic Services shall review such information or reports and select such information or reports as, in its judgment, may require further investigation. It shall then cause an independent examination of the facts surrounding such information or report to be made to determine the extent, if any, to which a fraudulent insurance act or any other act or practice which, upon conviction, constitutes a felony or a misdemeanor under the code, or under s. 817.234, is being committed. The Division of Investigative and Forensic Services shall report any alleged violations of law which its investigations disclose to the appropriate licensing agency and state attorney or other prosecuting agency having jurisdiction with respect to any such violation, as provided in s. 624.310. If prosecution by the state attorney or other prosecuting agency having jurisdiction with respect to such violation is not begun within 60 days of the division's report, the state attorney or other prosecuting agency having jurisdiction with respect to such violation shall inform the division of the reasons for the lack of prosecution.

(7) Division investigators shall have the power to make arrests for criminal violations established as a result of investigations. Such investigators shall also be considered state law enforcement officers for all purposes and shall have the power to execute arrest warrants and search warrants; to serve subpoenas issued for the examination, investigation, and trial of all offenses; and to arrest upon probable cause without warrant any person found in the act of violating any of the provisions of applicable laws. Investigators empowered to make arrests under this section shall be empowered to bear arms in the performance of their duties. In such a situation, the investigator must be certified in compliance with the provisions of s. 943.1395 or must meet the temporary employment or appointment exemption requirements of s. 943.131 until certified.

(8) It is unlawful for any person to resist an arrest authorized by this section or in any manner to interfere, either by abetting or assisting such resistance or otherwise interfering, with division investigators in the duties imposed upon them by law or department rule.

(9) In recognition of the complementary roles of investigating instances of workers' compensation fraud and enforcing compliance with the workers' compensation coverage requirements under chapter 440, the Department of Financial Services shall prepare and submit a joint performance report to the President of the Senate and the Speaker of the House of Representatives by January 1 of each year. The annual report must include, but need not be limited to:

(a) The total number of initial referrals received, cases opened, cases presented for prosecution, cases closed, and convictions resulting from cases presented for prosecution by the Bureau of Workers' Compensation Insurance Fraud by type of workers' compensation fraud and circuit.

(b) The number of referrals received from insurers and the Division of Workers' Compensation and the outcome of those referrals.

(c) The number of investigations undertaken by the Bureau of Workers' Compensation Insurance Fraud which were not the result of a referral from an insurer or the Division of Workers' Compensation.

- (d) The number of investigations that resulted in a referral to a regulatory agency and the disposition of those referrals.
- (e) The number and reasons provided by local prosecutors or the statewide prosecutor for declining prosecution of a case presented by the Bureau of Workers' Compensation Insurance Fraud by circuit.
- (f) The total number of employees assigned to the Bureau of Workers' Compensation Insurance Fraud and the Division of Workers' Compensation Bureau of Compliance delineated by location of staff assigned; and the number and location of employees assigned to the Bureau of Workers' Compensation Insurance Fraud who were assigned to work other types of fraud cases.
- (g) The average caseload and turnaround time by type of case for each investigator and division compliance employee.
- (h) The training provided during the year to workers' compensation fraud investigators and the division's compliance employees.

440.105. Prohibited activities; reports; penalties; limitations

(1)(a) Any insurance carrier, any individual self-insured, any commercial or group self-insurance fund, any professional practitioner licensed or regulated by the Department of Health, except as otherwise provided by law, any medical review committee as defined in s. 766.101, any private medical review committee, and any insurer, agent, or other person licensed under the insurance code, or any employee thereof, having knowledge or who believes that a fraudulent act or any other act or practice which, upon conviction, constitutes a felony or misdemeanor under this chapter is being or has been committed shall send to the Division of Investigative and Forensic Services, Bureau of Workers' Compensation Fraud, a report or information pertinent to such knowledge or belief and such additional information relative thereto as the bureau may require. The bureau shall review such information or reports and select such information or reports as, in its judgment, may require further investigation. It shall then cause an independent examination of the facts surrounding such information or report to be made to determine the extent, if any, to which a fraudulent act or any other act or practice which, upon conviction, constitutes a felony or a misdemeanor under this chapter is being committed. The bureau shall report any alleged violations of law which its investigations disclose to the appropriate licensing agency and state attorney or other prosecuting agency having jurisdiction with respect to any such violations of this chapter. If prosecution by the state attorney or other prosecuting agency having jurisdiction with respect to such violation is not begun within 60 days of the bureau's report, the state attorney or other prosecuting agency having jurisdiction with respect to such violation shall inform the bureau of the reasons for the lack of prosecution.

(b) In the absence of fraud or bad faith, a person is not subject to civil liability for libel, slander, or any other relevant tort by virtue of filing reports, without malice, or furnishing other information, without malice, required by this section or required by the bureau, and no civil cause of action of any nature shall arise against such person:

1. For any information relating to suspected fraudulent acts furnished to or received from law enforcement officials, their agents, or employees;
2. For any information relating to suspected fraudulent acts furnished to or received from other persons subject to the provisions of this chapter; or
3. For any such information relating to suspected fraudulent acts furnished in reports to the bureau, or the National Association of Insurance Commissioners.

(2) Whoever violates any provision of this subsection commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(a) It shall be unlawful for any employer to knowingly:

1. Coerce or attempt to coerce, as a precondition to employment or otherwise, an employee to obtain a certificate of election of exemption pursuant to s. 440.05.
2. Discharge or refuse to hire an employee or job applicant because the employee or applicant has filed a claim for benefits under this chapter.
3. Discharge, discipline, or take any other adverse personnel action against any employee for

disclosing information to the department or any law enforcement agency relating to any violation or suspected violation of any of the provisions of this chapter or rules promulgated hereunder.

(b) It shall be unlawful for any insurance entity to revoke or cancel a workers' compensation insurance policy or membership because an employer has returned an employee to work or hired an employee who has filed a workers' compensation claim.

(3) Whoever violates any provision of this subsection commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(a) It shall be unlawful for any employer to knowingly fail to update applications for coverage as required by s. 440.381(1) and department¹ rules within 7 days after the reporting date for any change in the required information, or to post notice of coverage pursuant to s. 440.40.

(b) It shall be unlawful for any employer to knowingly participate in the creation of the employment relationship in which the employee has used any false, fraudulent, or misleading oral or written statement as evidence of identity.

(c) It is unlawful for any attorney or other person, in his or her individual capacity or in his or her capacity as a public or private employee, or for any firm, corporation, partnership, or association to receive any fee or other consideration or any gratuity from a person on account of services rendered for a person in connection with any proceedings arising under this chapter, unless such fee, consideration, or gratuity is approved by a judge of compensation claims or by the Deputy Chief Judge of Compensation Claims.

(4) Whoever violates any provision of this subsection commits insurance fraud, punishable as provided in paragraph (f).

(a) It shall be unlawful for any employer to knowingly:

1. Present or cause to be presented any false, fraudulent, or misleading oral or written statement to any person as evidence of compliance with s. 440.38.

2. Make a deduction from the pay of any employee entitled to the benefits of this chapter for the purpose of requiring the employee to pay any portion of premium paid by the employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter.

3. Fail to secure workers' compensation insurance coverage if required to do so by this chapter.

(b) It shall be unlawful for any person:

1. To knowingly make, or cause to be made, any false, fraudulent, or misleading oral or written statement for the purpose of obtaining or denying any benefit or payment under this chapter.

2. To present or cause to be presented any written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to any provision of this chapter, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim.

3. To prepare or cause to be prepared any written or oral statement that is intended to be presented to any employer, insurance company, or self-insured program in connection with, or in support of,

any claim for payment or other benefit pursuant to any provision of this chapter, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim.

4. To knowingly assist, conspire with, or urge any person to engage in activity prohibited by this section.

5. To knowingly make any false, fraudulent, or misleading oral or written statement, or to knowingly omit or conceal material information, required by s. 440.185 or s. 440.381, for the purpose of obtaining workers' compensation coverage or for the purpose of avoiding, delaying, or diminishing the amount of payment of any workers' compensation premiums.

6. To knowingly misrepresent or conceal payroll, classification of workers, or information regarding an employer's loss history which would be material to the computation and application of an experience rating modification factor for the purpose of avoiding or diminishing the amount of payment of any workers' compensation premiums.

7. To knowingly present or cause to be presented any false, fraudulent, or misleading oral or written statement to any person as evidence of compliance with s. 440.38, as evidence of eligibility for a certificate of exemption under s. 440.05.

8. To knowingly violate a stop-work order issued by the department pursuant to s. 440.107.

9. To knowingly present or cause to be presented any false, fraudulent, or misleading oral or written statement to any person as evidence of identity for the purpose of obtaining employment or filing or supporting a claim for workers' compensation benefits.

(c) It shall be unlawful for any physician licensed under chapter 458, osteopathic physician licensed under chapter 459, chiropractic physician licensed under chapter 460, podiatric physician licensed under chapter 461, optometric physician licensed under chapter 463, or any other practitioner licensed under the laws of this state to knowingly and willfully assist, conspire with, or urge any person to fraudulently violate any of the provisions of this chapter.

(d) It shall be unlawful for any person or governmental entity licensed under chapter 395 to maintain or operate a hospital in such a manner so that such person or governmental entity knowingly and willfully allows the use of the facilities of such hospital by any person, in a scheme or conspiracy to fraudulently violate any of the provisions of this chapter.

(e) It shall be unlawful for any attorney or other person, in his or her individual capacity or in his or her capacity as a public or private employee, or any firm, corporation, partnership, or association, to knowingly assist, conspire with, or urge any person to fraudulently violate any of the provisions of this chapter.

(f) If the monetary value of any violation of this subsection:

1. Is less than \$20,000, the offender commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. Is \$20,000 or more, but less than \$100,000, the offender commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. Is \$100,000 or more, the offender commits a felony of the first degree, punishable as provided

in s. 775.082, s. 775.083, or s. 775.084.

(5) It shall be unlawful for any attorney or other person, in his or her individual capacity or in his or her capacity as a public or private employee or for any firm, corporation, partnership, or association, to unlawfully solicit any business in and about city or county hospitals, courts, or any public institution or public place; in and about private hospitals or sanitariums; in and about any private institution; or upon private property of any character whatsoever for the purpose of making workers' compensation claims. Whoever violates any provision of this subsection commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(6) This section shall not be construed to preclude the applicability of any other provision of criminal law that applies or may apply to any transaction.

(7) An injured employee or any other party making a claim under this chapter shall provide his or her personal signature attesting that he or she has reviewed, understands, and acknowledges the following statement: "Any person who, knowingly and with intent to injure, defraud, or deceive any employer or employee, insurance company, or self-insured program, files a statement of claim containing any false or misleading information commits insurance fraud, punishable as provided in s. 817.234." If the injured employee or other party refuses to sign the document attesting that he or she has reviewed, understands, and acknowledges the statement, benefits, or payments under this chapter shall be suspended until such signature is obtained.



Unit 5

Lesson 1: Arson-For-Profit Cases

Courtesy of Det. Max Melendez,
Bureau of Fire, Arson & Explosives Investigations
(2009)

Enabling Learning Objectives:

1. Explain arson-for-profit cases in terms of frequency and terms of damages and dollar loss.
2. Identify the most common characteristics of all arson-for-profit schemes.
3. Describe “red flags” of arson-for-profit fires.
4. Identify documents that need to be found when pursuing the paper chase.

Arson-for-profit cases, commonly known as Insurance Fraud Fires, are not the most common type of incendiary fires. However, they are the most widely recognized fires. In the public’s eye, arson fires are equated with insurance fraud schemes. In truth, juvenile fire setters are the largest group of arsonists by a wide margin. Yet while arson-for-profit fires occur less frequently, they are the number one category of arson fires when measuring the damages and dollar losses resulting from incendiary fire losses. No other type of arson fire even approximates the level of destruction caused by these premeditated criminal schemes.

Arson-for-profit fires run the gamut from the true professional torch job to the ill-planned amateur attempt at fire setting. The particular method used to start the fire can include virtually anything imaginable. The most common characteristic found in all arson-for-profit schemes are the elements of planning and profit. These fires are premeditated and they are motivated – usually by money. For that reason, these schemes can be uncovered and brought to justice.

The key to successfully investigating these fires is a systematic and comprehensive approach by the investigator. It requires a commitment of investigative resources, especially manpower. It is a complex process, to be sure. But for the investigator willing and able to face the challenge of investigating the Arson-For-Profit fire, it can yield the results every investigator strives to achieve: arrest and prosecution.

I. Recognizing Arson-For-Profit Schemes

Unless the investigator recognizes the signs of an arson-for-profit fire, the investigation will never be pointed in the right direction.

Recognition begins at the fire scene. The indicators are present in the debris, burn patterns and other physical evidence left after the fire. The indicators exist in the nature and extent of the fire itself. The indicators are there in the observations of the responding firefighters, bystanders and witnesses to the discovery of the fire. Finally, the indicators are discoverable at the courthouse, the bank, through the neighbors and various other sources that must be contacted.

The recognition of arson-for-profit schemes requires an awareness of the “red flags”. Here are some of the classic “red flags” of an arson-for-profit fire that the investigator should learn to recognize.

A. The Fire:

- (1) Total fire loss indicating wide-spread use of accelerants.
- (2) Discovery of incendiary devices or elaborate set-ups.
- (3) Multiple points of origin.
- (4) No evidence of forcible entry.
- (5) Fire debris does not contain the remains of furnishings, personal property and other items which should have been present at the time of the fire (photographs and mementos, financial records, clothing, jewelry, paintings, and pictures, trophies and awards, diplomas and degrees, family bible, food in cabinets and refrigerator, kitchen utensils, family pets, etc.)
- (6) Presence of out-of-place items brought in for the fire, such as junk furniture, salvage clothing, inoperable appliances and other items intended to replace the normal furnishings and property.
- (7) Disabled or failed alarm or sprinkler system.

B. The Property Site:

- (1) Building was vacant or unoccupied at time of fire.
- (2) Building was under condemnation order, “Red tagged” or under court ordered seizure.
- (3) Property or business in foreclosure or other litigation affecting the site (eminent domain, environmental issues, etc.).
- (4) Property recently remodeled or renovated or in the process.
- (5) Business at loss site going out of business or changing its business operation.
- (6) Deteriorating neighborhood area, change in neighborhood conditions, zoning changes, traffic access problems.
- (7) Building and premises in despair, deteriorating condition or poor upkeep.
- (8) Property recently purchased or up for sale at time of fire.
- (9) Property under long-term lease, recently leased or in process of negotiating/renegotiating lease.
- (10) New business in area adversely impacting the property, such as adult bookstores, or nightclubs, new competition, etc.

C. The Property or Business Owner:

There are a number of factors which can implicate a property or business owner in the fire.

An arson-for-profit scheme can be uncovered when these factors are identified. Some of the “red flags” include the following:

- (1) An evasive, unavailable or uncooperative owner.
- (2) An owner involved in civil or criminal litigation such as business disputes, creditor or supplier collections matters, tax audits, forfeiture proceedings, bankruptcy, divorce or criminal charges unrelated to the fire itself.
- (3) An owner recently fired, demoted, laid-off or unable to work due to a disability or injury.
- (4) An owner with an extensive prior insurance claim history.
- (5) An owner with an alibi too good to be true or conveniently away from the area at the time of the fire.
- (6) Multiple mortgages or loans taken out by the owner against the property or recently refinanced loans to raise money.

D. Insurance Issues:

Information about insurance on the property will identify the potential for an Arson- For-Profit case. The investigator should make note of any of the following circumstances:

- (1) A business or home insured for an amount in excess of the current market value of the building and furnishings/equipment or its current listing price, exclusive of the land value. Commercial property or waterfront residential property may have more remaining value in the land than the building.
- (2) An owner unusually knowledgeable about insurance matters or with a history of prior insurance claims.
- (3) An owner pushing to settle the claim quickly, even at a low settlement value.
- (4) Items claimed to be in a home or a business which are inconsistent with the income and financial status of the owner or the operations of the business.
- (5) Outdated equipment or accumulated inventory in a business at the time of the fire.
- (6) Personal property or equipment claimed to be in the building which cannot be verified and documented by the owner.
- (7) Insurance coverage recently obtained after a period of time with no insurance on the property.
- (8) Insurance coverage about to be cancelled or lapse.
- (9) Insurance coverage recently changed or “confirmed” shortly before the fire.
- (10) Duplicate insurance coverage taken out by the owner or by others which the owner knows about.

II. Investigating the Arson-For-Profit Scheme: The Paper Chase:

The investigation of an arson-for-profit scheme is a complex undertaking. It is a tedious process of digging through records that is often described as a “paper chase”. Although it often seems like a search for the proverbial needle in a haystack, in an arson- for-profit case there is almost always a needle or two at the bottom of the haystack. It takes a concerted effort to pursue a paper chase. It must begin at the right place and continue in the right direction to reach a successful conclusion. These are the beginning points and directions most commonly utilized in the paper chase of an arson-for-profit scheme.

A. The Property Owner (Individual):

- (1) FDLE/FCIC/NCIC History.
- (2) Courthouse records search including:
 - a). Criminal records or prior arrests, convictions and pending cases.
 - b). Civil litigation records of past lawsuits, judgments and pending cases.
 - c). Traffic citations bureau.
 - d). UCC filings.
 - e). Domestic relations (divorce or abuse) filings, past and pending.
 - f). Property ownership and tax roll records.
 - g). Bankruptcy court filings, past and pending (United States Bankruptcy Court).
- (3) City directories/chamber of commerce/better business bureau/occupational licensing bureau.
- (4) Workers comp/unemployment/child support.
- (5) Intelligence records of local and federal law enforcement agencies.
- (6) State Fire Marshal records and database.
- (7) Florida Division of Insurance Fraud Records and Database.
- (8) Insurance industry sources: PILR/All Claims Database, NICB and claims index bureaus.

B. The Property:

- (1) Ten-year ownership history of the property (deeds and titles).
- (2) Ten-year history of mortgages/liens on the property
- (3) Ten-year history of permit/zoning requests/inspections on the property.
- (4) Ten-year history of property tax assessments and payments.
- (5) Ten-year history of sales or sales listings of the property with realtors and others.
- (6) Use and occupancy of the property at the time of the fire and building department/occupational licensing records.
- (7) Utilities, electrical, gas and telephone service accounts for the property.
- (8) Postal service deliveries/change of address forwarding requests.

C. The Business/Corporation:

- (1) Secretary of State incorporation records and annual reports.
- (2) Department of Revenue Sales Tax filings.
- (3) Courthouse records of other property ownership by the same business or corporation within the past ten years.
- (4) Courthouse records of civil litigation, judgments and pending lawsuits involving the business or corporation.
- (5) UCC filings.
- (6) Fictitious name or d/b/a filings.
- (7) Chamber of Commerce/Better Business Bureau complaints.
- (8) Dun & Bradstreet Reports
- (9) Identification of business competition in the area.
- (10) Identification of vendors and suppliers of the business.
- (11) Determination of seasonal fluctuations in business sales.

D. Insurance Records:

- (1) Agency Records:
 - a). Application from insured
 - b). Agency application
 - c). Binder
 - d). Premium finance agreements
 - e). Inspection reports
 - f). Photographs
 - g). Change endorsement requests and forms
 - h). Cancellation/reinstatement notices
 - i.) ACORD¹¹⁵ form loss report
- (2) Underwriting Report
 - a). Application from insured
 - b). Agency application
 - c). Inspection/risk survey reports
 - d). Photographs
 - e). Loss control report
 - f). Change endorsement requests and forms
 - g). Cancellation notices
 - h). Renewal/nonrenewal notices
 - i.) Credit references and credit reports

¹¹⁵ ACORD (Association for Cooperative Operations Research and Development) is a non-profit organization that provides a number of services to the insurance and related financial services industries, including standardized forms utilized in the insurance industry.

(3) Claim File Records:

- a). Loss Report
- b). Proof of loss and claim
- c). Origin and Cause report
- d). Laboratory analysis report
- e). Witness statements
- f). Background investigative reports
- g). Financial records/financial analysis
- h). Examination Under Oath transcript and summary

E. Contact Sources:

- (1). Building occupant
- (2). Building owner
- (3). All insured parties
- (4). Lien holder/mortgagees
- (5). Creditors, suppliers and vendors
- (6). (6). Fire reporter/discoverer
- (7). Fire scene witnesses
- (8). Neighbors and adjoining property owners/businesses
- (9). Responding firefighters
- (10). Investigating law enforcement personnel
- (11). Prior owners of the property
- (12). Realtors and sales agents involved in the most recent sale or listing of the property
- (13). Insurance claim personnel: agent, adjuster, underwriter, in-house investigator, origin and cause investigator, private investigator and claims attorney

III. Bringing It All Together

As can be seen, the “paper chase” in the investigation of an Arson-For-Profit scheme can be complex and far reaching. It requires a significant commitment of resources and effort. However, the results of a successful investigation will always justify the effort. In almost every Arson-For-Profit case, there is a trail of evidence that can be uncovered by the investigator. If you are willing to look long enough, and hard enough, you can find a needle at the bottom of the haystack.



Unit 5

Lesson 2: Presenting a Case for Prosecution

Courtesy of the Citrus County Sheriffs Office (2009)

Enabling Learning Objectives:

1. Identify how a prosecution is commenced
2. Identify the types of charging documents
3. Explain the prosecutor's standard for filing a case
4. Describe best practices for presenting an investigation to a prosecutor

I. Introduction

Arson investigation is complex, tedious, and downright dirty work. The purpose of every investigation is to obtain the evidence necessary to identify, arrest, and successfully prosecute the perpetrator. That can go a long way toward making the investigator feel better about all of the work that went into the investigation. When the investigation does not lead to an arrest and prosecution, it can be a frustrating experience.

Arson is difficult to investigate. It takes traditional investigative acumen and specialized scientific knowledge. Unless the prosecutor is willing to accept a case for prosecution, in most situations, the investigator's time and effort has been wasted. While the primary factor to be considered in accepting a case for prosecution will always be its legal sufficiency, there are many other factors which come into play. You must be able to show the prosecutor that there is enough competent evidence to file charges. It is not enough to simply investigate the case. You must be able to convince the prosecutor to take the case. There are several considerations which the investigator must understand in order to do so.

II. The Charging Decision

The prosecution process begins with the filing of a formal charging instrument, regardless of whether or not the defendant has already been arrested. Federal courts and Florida state courts both use two different charging instruments and refer to them by the same terminology: one is called an indictment and the other is called an information. An indictment is issued by a grand jury. An information is issued by a prosecutor. Federal crimes must be charged by indictment by a grand jury unless this right is waived. There is no right to be charged by indictment in Florida state court unless charged with first degree murder. Juvenile cases are filed using a charging instrument called a petition. This is filed directly by the state attorney's office.

A. Indictment by Grand Jury

When a case is presented to the grand jury, there are several steps that occur. First, the grand jury will be convened. Typically, the members of a grand jury will serve a term of six

months. During that time, they will hear all cases appropriate for their review. A grand jury can return indictments as well as issue reports and findings on matters of public importance.

If a grand jury is to review a criminal case, the investigator will be called to testify. The grand jury meets in secret session behind closed doors. The only persons present are the grand jurors, the prosecutor and a court reporter. Neither the subject of the investigation nor their attorney will not be allowed to attend the sessions of the grand jury. The subject may be called to testify before the grand jury. The prosecutor will direct testimony from the investigator and any other witnesses to be called. Disclosing secret grand jury information is a crime punishable by Florida law or contempt of court. The prosecutor will advise the grand jury on the appropriate law and possible charges to be returned by way of indictment.

The members of the grand jury will then vote on returning an indictment based on the evidence which was presented to them. It does not require a unanimous vote. If an indictment is returned, it may be ordered sealed until the defendants are in custody. The judge will issue a capias or “bench warrant” for the arrest of all defendants named in the indictment. Typically, in state court, the grand jury will not be used except in cases of public importance, controversial cases, political cases and other “high profile” cases.

B. Information filed by the Prosecutor

In state court the usual process for initiating a prosecution is by the filing of an information. An information is the formal charging document prepared, sworn to, and signed by the state attorney or an authorized assistant state attorney which names the defendant and all criminal charges which have been filed against the defendant.

While the legal standard for arresting an individual is probable cause, the state attorney’s office is under an even higher standard in filing criminal charges by way of information. The prosecutor is charged with the responsibility of filing an information only where there is probable cause to believe the defendant has committed the charge and there is a likelihood or reasonable probability of conviction at trial. Because of this higher standard imposed upon the prosecutor, there are situations where an arrest has been properly made but charges will not be filed by the state attorney. The state attorney’s office will decline to file an information where there is not enough admissible evidence to create the reasonable probability of conviction at trial. The state attorney’s office has absolute discretion in making that determination.

Federal prosecutors can also charge crimes in federal court by way of information if the defendant waives their constitutional right to be charged by indictment through the grand jury process.

Thus, the investigator presenting a case of arson for prosecution must convince the prosecutor that there is a reasonable probability of conviction at trial in order to convince the prosecutor to file charges.

III. Advocating for your Investigation

When an investigator takes a case to the state attorney’s office to request a prosecution, he

or she may need to advocate for their investigation. They made need to explain the evidence and surrounding circumstances in a detailed manner in order to convince the prosecutor that a case of arson can be filed and proved at trial. There are several important considerations in effectively advocating for you investigation and make sure it is not declined without a fair and appropriate review by the prosecutor.

First, the investigator must have thoroughly investigated the case to uncover all of the evidence. There should be no unanswered questions when a case is taken to the prosecutor. All available witnesses should have been questioned, all of the background investigation should be complete, and all of the evidence should have been gathered, processed, and analyzed. The suspect should have been located given an opportunity to give an interview or to refuse to give an interview. When the case file is taken to the prosecutor, it should be a complete package. Evidence should be presented to prove an arson was committed and the identity of who committed the arson. The investigator should include sufficient evidence to overcome obvious defenses that the arsonist may raise.

Second, the case should be taken to a knowledgeable prosecutor whenever possible. Most of prosecutor offices in Florida have established specialized units for prosecuting certain types of crimes including economic crime units or maybe even arson units. If so, or if there is some other appropriate specialized unit, in the jurisdiction where a case is to be presented, then that is where the case should be brought. All major metropolitan areas of Florida also have dedicated insurance fraud prosecutors in a program that is overseen by the Division of Investigative and Forensic Services. If there is an insurance fraud angle to the arson, then these dedicated prosecutors would also be an appropriate place to take the case for prosecution. Absent a special unit or dedicated prosecutor, you should seek out the most experienced assistant state attorney in the office and ask to present you case directly to him or her. It is an unfortunate fact of life that in many offices there is no “experienced” arson prosecutor. This means your experience and ability to communicate the evidence as well as applicable fire science will be the primary mean through which the prosecutor learns about arson.

The prosecutor may have questions regarding fire prevention, fire suppression, accelerants, and cause & origin issues. They may not understand how these nuances relate to your specific case. One of your roles as an investigator presenting a case is to advocate for how the evidence shows a strong case of arson as well as a strong case for who committed that arson. Where there are questions, reservation, or hesitations by a prosecutor, an investigator advocating for their case can help explain the evidence in a way to give the prosecutor confidence that the case should be filed and there is a reasonable likelihood of conviction at trial.

Advocacy for an investigation with a prosecutor should always be professional and courteous. It is important to keep a professional tone in explaining the strengths of the investigation. Advocating for your case should never include harassing the prosecutor or being dismissive of their questions or concerns. Reviewing a case for the purpose of filing charges can be time consuming, especially in our overburdened criminal justice system. Within the confines of speedy trial rules and the statute of limitation, an investigator should remain patient as their investigation is reviewed.

The final consideration in presenting your case to the prosecutor is to have it properly

“packaged.” Your case should be packaged in such a way that it is attractive to the prosecutor. Your case must not only be complete; it must look complete which includes being organized and easy to read. Information about the case including all relevant details should be easy to find and understand. Consider including a table of contents, have documents in a binder separated by tabs, and a thorough witness list with all contact information for witnesses easily accessible. The presentation packaged should reflect the effort you have made to carry out a thorough investigation. A well-packaged case will cause the prosecutor to be more inclined to accept the case and have confidence the case is well-suited for trial if required.

When you present your case to the prosecutor you want to make a positive impression. Arson cases can typically be far more complicated than almost any other type of criminal case. There is more evidence, more witnesses, complex scientific knowledge required, and usually a chain of circumstantial evidence connecting the suspect to the crime. You want to show the prosecutor you have built a solid chain of circumstantial evidence linking the defendant to the fire.

You may already have a similar report form in your jurisdiction, but a formatted, styled prosecutor’s case referral report is a good form to use when submitting your case to the prosecutor. If you do not have one, it is recommended you create one similar to the form listed as Attachment J. Then, the prosecutor can be presented with a concise, orderly, and complete summary of the case you are presenting for prosecution. It brings together all of the information developed in your investigation and lays it before the prosecutor. It enables the prosecutor to review the case efficiently and diligently in order to determine if there is enough evidence to file charges and initiate a prosecution.



Unit 5

Lesson 3: Deposition, Hearing & Trial Testimony in Criminal and Civil Cases

Enabling Learning Objectives:

1. Describe the difference between the objectives of a civil arson or fraud case and a criminal arson or fraud case and how it affects the role of the public investigator.
2. Name the various proceedings in which a public investigator may be called to testify in each type of case.
3. Explain the difference between the rules applicable to depositions, hearings and trials.
4. Discuss the steps you should take in preparing to testify at any proceeding.
5. Describe the things you should bring with you to a deposition, hearing or trial.
5. Explain the differences between the confidentiality provisions applicable to conversations the public investigator has with a prosecutor in a criminal case and conversations with the attorneys representing a party to a civil case, e.g., the insurance company or plaintiff's attorneys.

I. Introduction

Witnesses are individuals who have relevant knowledge regarding a matter in dispute. Once the dispute is in litigation, a witness may be called to appear at a deposition, hearing or trial to answer questions regarding their knowledge under oath.

II. Witness Categories

There are several categories and sub-categories of witnesses in every case in litigation.

- A **“fact witness”** is an individual with relevant knowledge about the matter in dispute gained from any number of sources and includes eye and background witnesses.
- An **“eye witness”** is an individual with knowledge gained through sensory perception, that is, by seeing, hearing, smelling or feeling all or part of an event. In a fire case, an eye witness may have seen smoke, heard an explosion, smelled gasoline or felt heat.
- A **“background witness”** is a person with knowledge regarding facts and circumstances leading up to an event, such as the history of the occupancy or use of property involved in a fire or a dispute between the property's occupants which preceded the fire.
- A **“character witness”** is a person who, based on their knowledge of a party or witness in a case, is able to testify to a relevant character trait of that party or witness, such as their honesty, integrity, propensity for violence, etc. In Florida, character witnesses are

only permitted to testify to a person's reputation in the community as to a particular, relevant trait.

- An **“expert witness”** is a specialist retained or called by one of the parties, who, by education, training or experience, has specialized knowledge in a certain area at issue in a dispute, and who may testify to their opinion regarding that issue. In a fire case, the parties generally rely upon an origin and cause investigator as the main expert.
- A **“lay witness”** is the term used for someone testifying as an ordinary citizen versus in their official capacity or as a retained expert, such as an eyewitness to an accident they witnessed on their way home from the grocery store.
- An **“official witness”** is often used to denote a law enforcement, firefighter or other type of public official who is testifying in their official capacity. This type of witness is usually a fact witness, although in some instances, they may testify as expert or even character witnesses.

Public fire investigators, both sworn and non-sworn, are generally fact witnesses who testify about what they saw and did with respect to a fire investigation as well as any statements a defendant or witness may have made about the incident. In some cases, particularly when a matter in litigation concerns allegations of arson, a public fire investigator whose responsibility included determining the origin and cause of the fire, may also be qualified as an expert witness in that field. In either case, the deposition and testimony of a law enforcement officer may become critical to proving or disproving the elements of the crime or civil cause of action.

III. Testimonial Situations

A. Criminal v. Civil – Differences and Similarities

In a **civil** case, a plaintiff sues a defendant over an alleged civil wrong, such as a breach of contract, personal injury or property damage, seeking monetary compensation, injunctive relief or other civil remedy. The parties in a civil suit may be individuals, corporations or other legal entities. Each alleged wrong or cause of action in a civil complaint or petition is called a count.

A **criminal** case is brought by the government against an individual or entity (“defendant”) in the form of an information or indictment, alleging the defendant violated a state or federal criminal statute. If the defendant is found guilty of a crime, the punishment can be loss of liberty or other form of restricted activity such as prison, jail, house arrest or probation. Criminal costs, fines and restitution to victims or the government may be imposed as well. As in a civil case, each crime charged is a separate count.

In a civil case, the elements of the counts charged must be proven by either the greater weight of the evidence or a preponderance of the evidence, which essentially means the prevailing party must have 51% of the evidence on its side. It is a lesser standard of proof than in the criminal case in which the government must prove its case beyond a reasonable doubt, the highest burden of proof in our legal system. Thus, it is more difficult to obtain a conviction in a criminal case than to prevail in a civil case.

In a fire case, whether civil or criminal, the fire investigator's testimony regarding the cause and origin of a fire is very important. However, in a criminal arson case, due to the heightened standard of proof and the fact someone's liberty is at stake, it is absolutely critical.

Both criminal and civil trials require testimony from those witnesses who have relevant evidence. Public investigators, especially sworn law enforcement officers, due to the nature of their job in protecting the public and enforcing the law, will be one of, if not *the* key witness in any case, when their investigation results in criminal or civil proceedings. In some matters, the law enforcement officer may even be examined at trial in an expert capacity which requires specialized knowledge and methodology.

B. Fact or Expert Witness

The Rules governing the admissibility of evidence is found in the Florida Statutes, Chapter 90, which state that a fact witness may be anyone who has knowledge of any relevant fact which goes to prove or disprove any element of a civil or criminal case. As discussed above, a fact witness testifies about what they saw, did or possibly heard during the event in question or other information within their direct knowledge about an issue in the case. A fact witness generally cannot venture an opinion on the ultimate jury question which may be whether a defendant was the person who committed the crime(s) or wrongful act(s) charged.

An expert witness must be deemed so by the court following what is known as a *Daubert* hearing. In this type of proceeding, at which competing experts, including a public fire investigator, may be called to testify, the court must determine whether the expert is qualified by their credentials and used a sound methodology as the basis for their conclusion. Only then will the expert be permitted to offer an opinion on an ultimate issue or element in the case, which, in a criminal or civil arson case is the origin and cause of the fire.

C. Depositions

A **deposition** is a formal legal proceeding in federal and state cases in which a witness is questioned about their role in an investigation or case which is at issue after the case is filed and discovery is invoked. Depositions in Florida state court are addressed in both the Florida Rules of Civil Procedure 1.130 and Criminal Procedure, Rule 3.220. In both civil and criminal matters, either side may conduct a deposition of anyone with relevant information except that a deposition may not be conducted of the defendant in a criminal case. In a civil deposition, a law enforcement witness has no relationship with either of the civil parties' attorneys, so that any conversations with the parties or their attorneys are not privileged and are fair game for discovery. In contrast, in a criminal matter, the law enforcement witness, as a government witness, enjoys a privileged relationship with the prosecutor and all conversations with that prosecutor are confidential and not subject to disclosure.

A deposition is taken before a court reporter and is sworn testimony. The deposition may just involve the parties' attorneys, court reporter, and a videographer if the matter was noticed for a videotaped deposition. In a civil case, the parties may be present during depositions. In a criminal case, the criminal defendant is not permitted at depositions without an agreement of the parties or pursuant to court order.

Deposition testimony may later be used in trial either as trial testimony if the court finds a witness is legally unavailable or to impeach a witness on the witness stand in an effort to challenge their credibility. One should always assume their deposition will be used in trial and be prepared and dressed appropriately, if videotaped. In criminal cases, check with the prosecutor to see if you should wear your uniform. If not required, you should still dress professionally.

In a criminal matter, usually, only the defense attorney will ask questions of state witnesses, but the prosecutor may also ask questions following the defense questioning. This will be in order to clarify or supplement testimony and may be used in the event the law enforcement officer is unable to appear at trial. Expect both sides to question you in a civil matter.

Florida Rule of Criminal Procedure 3.220(h) governs deposition procedures in criminal cases. The depositions of witnesses residing in the county in which the trial is to take place can occur at the courthouse, in a court reporter's office or anyplace agreed upon by the parties. If a witness lives outside the county in which the trial is to take place, the deposition shall be at a court reporter's office in the county or state where the witness resides or other location as agreed upon by the parties ordered by the court.

Law enforcement witnesses shall appear for deposition without subpoena, upon written notice of taking deposition delivered to the address of the law enforcement agency or department, or an address designated by the law enforcement agency, delivered at least five (5) days prior to the date of the deposition. Failure to appear after being properly served notice may be considered contempt of court. In the event a law enforcement officer is served but not available for the deposition date specified in the notice, the attorney serving the notice should be contacted immediately to reschedule the deposition.

Florida Rule of Civil Procedure 1.140(e)(2) prescribes that a non-party witness, including public investigators, may only be required to attend a deposition in the county where they reside, are employed or regularly conduct business. Telephone depositions may be conducted in either civil or criminal cases.

Additionally, when receiving a subpoena for a deposition, always note whether the subpoena requires document production. In a criminal case, the prosecutor should have provided all of the discoverable documents to the defendant's attorney so that the public investigator should not bring anything to the deposition unless requested by the prosecutor. Further, be aware that if documents are brought to a civil or criminal deposition, such as notes, or anything to aid the witness' testimony, the party taking the deposition will almost certainly have those documents marked as an exhibit to the deposition.

Deposition testimony may be transcribed and later used in court for impeachment or as direct testimony in the event the deponent is deemed unavailable for trial. The court reporter will ask a witness at the deposition's conclusion whether they want to "read or waive" in the event the deposition is transcribed. A public investigator should always retain the right to read the deposition in order to make sure the transcript is accurate and to make any necessary corrections if there was an error made during the transcription or if he misspoke during the deposition.

D. Pre-Trial Hearings

Both sides in a civil or criminal case may file pretrial motions to obtain the court's ruling on the admissibility of certain evidence prior to trial in order to plan their trial strategy. If the parties cannot stipulate to such matters, the court will hold pretrial hearings which may include testimony as well as legal arguments. These pretrial hearings can also be used to save time at trial by asking the Court to issue evidentiary rulings and take judicial notice of certain matters in order to eliminate the need for trial testimony regarding the authenticity, relevance or veracity of

an item of evidence.

In criminal cases, the defense may file motions to suppress evidence the state plans to introduce at trial. These motions are often based on an alleged violation of a defendant's rights, such as a motion to suppress a confession or results of a search. They may also be based on the evidence being unduly prejudicial, such as a motion in limine to prevent the prosecutor from mentioning a defendant's criminal history or gang affiliation. The prosecutor may also file motions to restrict disclosure of certain matters, such as for a protective order under Florida Rule of Criminal Procedure 3.220(b)(2), which states: "If the court determines, in camera, that any police or investigative report contains irrelevant, sensitive information or information interrelated with other crimes or criminal activities and the disclosure of the contents of the police report may seriously impair law enforcement or jeopardize the investigation of those other crimes or activities, the court may prohibit or partially restrict the disclosure."

In both a civil or criminal case, in a *Daubert* hearing, either side may challenge an opposing expert based on the expert's credentials or methodology used in arriving at an opinion. Depending on the significance of the expert's testimony, a pretrial decision on the exclusion or admissibility of the testimony may result in a plea bargain or settlement of the case. For this reason, a public investigator's testimony at a deposition or pretrial hearing will be very critical.

Motion hearings are governed by the Florida Rules of Criminal Procedure or the Florida Rules of Civil Procedure, as applicable, and the judge may base her decision on the Florida Evidence Code and case law. Hearings differ from depositions because they are held before a judge, with a court reporter, parties and their attorneys generally in attendance. They may be held in the judge's chambers or in a courtroom. In high profile cases, the media may be in attendance.

E. Trials – Jury v. Non-Jury

Trials may be conducted with or without a jury. In the case of a jury, there are generally six members – 12 in a death penalty or eminent domain case – chosen from a panel of people, called a venire, who are called to report to the court as potential jurors based on their possession of a driver's license. There are also two alternate jurors in the event one or more of the original six jurors cannot finish out a trial. A trial can last anywhere from a few hours to months to years. A jury must be unanimous in its decision or the case will be declared a mistrial by the judge.

A non-jury or bench trial is conducted by the judge. It must be agreed upon by both parties. It is generally much shorter than a jury trial. Jury and non-jury trials are available in both criminal and civil matters.

Generally, at the beginning of the trial before the first witness is called, one of the parties will invoke the "Rule of Sequestration", often referred to simply as "the Rule", which is codified in the federal and Florida evidence codes. See section 90.616, Florida Statutes. This is a request by a party to require certain witnesses to remain outside the presence of testifying witnesses during a trial in order to prevent witnesses' testimony from being tainted or influenced by other witnesses' testimony. Once invoked, all witnesses must remain outside the court room until such time as they are called to testify. Usually, once the testimony is complete, the witness may remain in the courtroom to listen to the remaining testimony.

There are exceptions to who may be excluded from the courtroom when "the Rule" is invoked.

In a civil case, both parties, or their designated representative in the case of a corporation or legal entity, are entitled to be present during the entire trial. In a criminal case, the defendant's presence is not only permitted but guaranteed by the U.S. and Florida Constitutions.

Additionally, in both civil and criminal cases, individuals whose presence is demonstrated to the court to be essential to a party's cause, such as an expert witness or lead detective, may not be excluded. Also, in Florida, the victim of a crime, or next of kin or legal representative, has a constitutional and statutory right to be present during the trial unless, upon motion, the court determines the person's presence would be prejudicial to the criminal defendant.

F. Criminal Appeals and Post-Conviction Proceedings

Although the State cannot appeal an acquittal, a convicted defendant can file direct appeals as well as post-conviction proceedings regarding perceived errors made during the trial. These include alleged erroneous court rulings on defense motions to suppress or state motions for protective orders or in limine, arguments that the evidence presented to the judge or jury was insufficient to sustain a conviction, alleged prosecutorial misconduct or improper argument, and ineffective assistance of counsel. If an appeal fails at the district court level, the defendant may be able to appeal to the Florida Supreme Court or even up through the federal court system in some cases. In the event a defendant's appeal is successful, the case may be returned to the trial court for retrial.

A In cases involving alleged arson or fraud by an insured where an insurance company denies the insured's claim, the insured may sue the insurer for violating the insurance contract. In this type of case, the insured, who may also be a defendant in a criminal arson or fraud case, is the plaintiff, and the insurance company, rather than the government, is the opposing party or defendant.

The plaintiff has the burden of proving by a preponderance of the evidence that the insurance company breached the insurance contract. The defendant insurance company will then assert affirmative defenses under the insurance contract, most often that coverage is excluded due to the insured intentionally setting the fire or presenting a fraudulent claim. The public investigator may be called by either party as a fact or expert witness depending on his determination of the cause of the fire and the person(s) responsible for setting the fire. A plaintiff in a breach of contract suit seeks damages for the amount she would have received under the insurance contract, as well as attorney's fees and the costs of bringing the lawsuit. An insurer defendant seeks to avoid paying anything under the contract and may also seek attorney's fees and costs from the plaintiff, if successful.

If the insured plaintiff prevails in the breach of contract lawsuit, he may bring another lawsuit alleging that the insurer acted in bad faith during the course of the adjustment of her claim. The predicate for that lawsuit is the insured filing a Civil Remedy Notice under section 624.155, Florida Statutes. A successful plaintiff in a bad faith or extra-contractual lawsuit against an insurer is generally seeking consequential and punitive damages above and beyond those permitted under the insurance contract, to "punish" the insurer for its bad faith behavior. Successful bad faith actions can result in multi-million dollar verdicts against insurers.

Due to the high financial stakes involved in civil arson and fraud cases, the public investigator's testimony regarding her investigative findings and conclusions will be the subject

of great scrutiny by both parties during depositions, hearings and trial.

IV. Basics of Being an Effective Witness

A. Being a Witness Starts When You Leave the House or Office

A witness' cognizance about their appearance and imminent testimony should set the tone for their public persona. Additionally, one never knows who is observing them at any given time. For that reason, one should always act and appear professionally at the time of departure from the house or office on their way to a deposition, hearing or trial, throughout the duration of the testimony, in and out of court.

B. Appearance – Professionalism

A line in an old commercial states: "You never get a second chance to make a first impression." First impressions are critical! The physical and mental presence of a witness speaks volumes about them before they ever open their mouth to testify. This is true in a deposition, hearing or trial setting. As indicated above, check with the prosecutor or attorney calling you as a witness to determine the proper attire for the proceeding, i.e., in uniform, jacket or suit. This goes for both male and female witnesses.

C. Attitude and Demeanor – Professionalism and Credibility

The character of a witness is reflected in how they speak and carry themselves, otherwise known as attitude and demeanor. A poor attitude and demeanor can negate a witness' credibility and detract from their testimony. If properly prepared, a witness should be able to testify clearly, confidently and believably in a courteous and professional manner. Sarcasm, arrogance, defensiveness, apathy or tentativeness can undercut otherwise effective testimony.

D. Preparation (Case/Technical Review)

Preparation is the best way to stave off any attempt by the opposing party to undermine your testimony. It is highly recommended prospective witnesses attend a trial and watch the live direct and cross-examination testimony of a public investigator.

The witness needs to meet with the prosecutor (or attorney on the civil case) to review the testimony and discuss any issues that may arise in the deposition, hearing or at trial in advance of the proceeding. The prosecutor or insurance defense attorney should be able to identify the issues that the opposing attorney will likely want to discuss and to provide an idea of what to expect from a particular attorney.

In preparing to testify, a witness should review and know the facts of the case along with the evidence obtained for the case contained in the case file. A witness should not testify as to any matters or documents which they did not author or personally witness. If notes on the file are needed to assist in testifying, this should be permitted, although they will likely become an exhibit to the deposition or proceeding. Also, if the subject case is a complex case, it would not be unusual to bring the case file to the proceeding. However, before doing so, the witness should make sure that everything in that case file was turned over to the criminal defense or civil plaintiff in discovery. Otherwise, whatever is brought to the proceeding that was not previously

disclosed will most likely become an exhibit in the proceeding. Additionally, there may be a delay while the party seeing it for the first time reviews it.

Once in deposition, the witness will be sworn by the court reporter. Whereas, at a court hearing or trial, the judge or clerk will swear in the witness. The witness will be asked basic questions about background. Do not provide personal information on the record, such as your social security number or home address. In a perfect world, the prosecutor will be present at your deposition and object to this request, but if not, you will have to fend for yourself. LISTEN to what is being asked and respond only to that question. If the question is not clear, concise and understandable, ask that it be re-asked. If the question is confusing, say so and ask that it be repeated or rephrased. If an attorney rephrases your response, listen carefully and advise if you do not agree with the paraphrasing. Remember, deposition testimony may be used at trial and if it is not clear, concise or accurate, it may be used against the witness if the testimony differs on the witness stand in a trial.

E. Testimony Dos and Don'ts

DO ...

- Always dress professionally and appropriately.
- Be cognizant of your demeanor, including body language, eye contact; tenor of your voice and cadence of your speech.
- Plan to arrive early to the proceeding so you will not be rushed or flustered.
- Listen very carefully to the question and respond only to that question.
- Pause before answering to ensure you understand the question.
- Pause to let the court rule on an objection if you are testifying at a hearing or trial.
- Answer only what you personally know.
- Watch your body language before, during and after you testify.
- Take a break if you need one or need to consult with prosecutor or attorney calling you as a witness. Remember that it is acceptable to confer with other investigators (unless prohibited under the Rule of Sequestration) or attorneys, although you may be asked about those discussions during the deposition or proceeding.
- At the end of a deposition, always tell the court reporter you want to “read and sign” so you will have the opportunity to check the transcript for accuracy!

DO NOT ...

- Arrive late or unprepared.
- Lose your temper, interrupt or argue with the questioner.
- Chew gum, tobacco or eat snacks during the proceeding.
- Be in a hurry to respond.
- Look to someone else for an answer.
- Volunteer information or answer in more detail than is required by the question.
- Guess or speculate; “I do not know” or “I do not recall” are acceptable answers.
- Answer a question if you did not hear it, see it or write it.
- Make faces, roll your eyes, sigh audibly, etc. Poker faces aren't just for the card table!

- Take telephone calls or read texts.
- Speak to anyone other than the prosecutor or attorney calling you regarding the case.
- Make jokes or light hearted conversation with others present at the deposition.
- Discuss what anyone else did unless you saw it.
- Answer hypotheticals, offensive, compound, misleading or confusing questions; or questions with incorrect facts.
- Rely on someone else's recollection of an event or document.
- Respond to a question that has "always" or "never" in it without using qualifying phrases; "to the best of my knowledge" or "I usually" or "it is my understanding that ..."
- Doubt yourself if confronted.
- Accept any gratuities or favors from attorneys involved.
- Answer non-verbally or with an "uh-huh" or "huh-huh".
- Let the deposing attorney put words in your mouth.
- Disclose personal information on the record.
- Leave a deposition or hearing without the name of the court reporter and opposing attorney.
- Leave the courthouse after you have testified at a hearing or trial without making sure you have been excused by the judge.

F. Current Curriculum Vitae (CV)

In order to effectively and efficiently respond to background questions, a public investigator should maintain and bring an up-to-date curriculum vita to any testimonial proceeding. This document is not just a resume but can be utilized to establish an expert witness' expertise in the field in which he is being offered as an expert. Even in the case of a non-expert fact witness, the information contained in the CV may establish the witness' proficiency or background in a field or subject matter relevant to the case at issue. For example, a public fire investigator's observations regarding the color and volume of smoke coming out of a building may be more credible or significant than those of a motorist driving by the scene simply due to the fire investigator's training and experience.

A CV should include education (schools, degrees, dates), continuing education (seminars, training, classes, including dates, certificates awarded, sponsors, etc.), specific training in the relevant field of expertise, any awards, publications or presentations in that field, and, in the case of an expert, a list of any legal proceedings (depositions, hearings, trials) in which the witness testified as an expert in the past four years, including the name of the case, the court, the date of the testimony, and the party for whom the expert testified.

Having a CV readily available will also assist the witness in presenting their background and credentials without hesitation and in a professional manner.

V. Conclusion

Testifying at a deposition, hearing or trial can certainly be an intimidating experience for even the most seasoned witness. However, being thoroughly prepared, appearing professional, and avoiding the pitfalls outlined above will go a long way toward lessening a witness' apprehension about testifying.



Unit 6

Lesson 1: Juvenile Fire Setters

Vehicle arson in Homosassa, FL
Courtesy of Det. Tom Hall, Bureau of Fire, Arson & Explosives
Investigations
(2009)

Enabling Learning Objectives

At the end of this session, the student will be able to:

1. Describe the differences between child, youth, and juvenile.
2. Describe the procedures for taking a juvenile into custody.
3. Identify reasons juveniles set fires.
4. Identify the procedures for interviewing and interrogating juveniles.
5. Identify the standards required for searching a juvenile's personal property at school.
6. Understand how to write an interagency agreement.
7. Identify how to build a juvenile intervention program.
8. Describe different types of juvenile fire setters.
9. Recognize types of fires set by juveniles at different ages.

I. Children, Juveniles, and Youth

A. Definition of Child, Juvenile or Youth

Florida Statute §985.03(7) defines *child*, *juvenile*, or *youth* as follows:

“Child” or “juvenile” or “youth” means any person under the age of 18 or any person who is alleged to have committed a violation of law occurring prior to the time that person reached the age of 18 years.¹¹⁶

While the procedures for handling juveniles may be different, the crimes with which they are charged are the same as if committed by an adult. Children who commit crimes are considered to be delinquent. The purpose of the juvenile system is rehabilitation rather than punishment.

B. Procedures for Taking a Juvenile into Custody

A law enforcement officer may take a child into custody pursuant to a court order or upon probable cause that the child committed a law violation. An officer has the authority to take a child into custody under the same circumstances and in the same

¹¹⁶ Section 985.03, Florida Statutes (2017)

manner as if the child were an adult. An officer is required to make a good faith effort to notify the parent, guardian, or legal custodian when the child is taken into custody as per s. 985.101(3), FS. Continue the attempt until the parent, guardian, or legal custody of the child is notified or the child is delivered to the Department of Juvenile Justice (DJJ).

If an arrest is made for a misdemeanor and the child admits to the offense a law enforcement officer has the option of issuing a warning, notify the parent or guardian, issuing a civil citation, or conducting an arrest. If the officer decides to arrest the juvenile, the officer must provide written documentation as to why an arrest was warranted. Upon arrival at the receiving facility, the officer must contact a representative of DJJ who will conduct an assessment to determine whether or not the child will be detained.

If the DJJ representative determines that the child is to be detained, the arresting officer will transport the child to the appropriate juvenile detention facility. If it is determined that the child is not to be detained, the child may be released to a parent, guardian, legal custodian, or any responsible adult.¹¹⁷

If the child's life or health is in such danger that he or she must be removed from his or her surroundings, an officer may take the child into protective custody. Likewise, if an officer reasonably believes a child has been abandoned, abused, or neglected, the officer may take that child into custody. In such situations, the child will normally be alleged to be dependent rather than delinquent. Contact the Department of Children and Families at 1-800-96-ABUSE for immediate assistance.

Officers have no arrest authority for a child who is a runaway or a truant from school. However, if an officer has reasonable grounds to believe a child is a truant, the officer can pick the child up and deliver him or her back to the school system. See *R.A.S. v. State*, 141 So. 3d 687, 689 (Fla. 2d DCA 2014). If an officer believes a child is a runaway, the officer should take the child into protective custody and contact the parent or legal guardian of the child. If the parent or guardian is not available, contact the Department of Children and Families. This protective custody is not a criminal arrest.

If a juvenile is arrested for a felony or a violent crime, s. 985.101(1)(b), F.S. requires the agency to notify the local school district. A child is not to be placed in any vehicle with an arrested adult unless the adult is involved in the same offense or transaction.

985.101(2), F.S. Florida Statute §985.03(23) provides the following:

“Family in need of services” means a family that has a child who is running away; who is persistently disobeying reasonable and lawful demands of the parent or legal custodian and is beyond the control of the parent or legal custodian; or who is habitually truant from school or engaging in other serious behaviors that place the child at risk of future abuse, neglect, or abandonment or at risk of entering the juvenile justice system. The child must be referred to a law enforcement agency, the Department of Juvenile Justice, or an agency contracted to provide services to children in need of services. A family is not eligible to receive services if,

¹¹⁷ Florida Department of Law Enforcement. (2017). Legal. Florida Basic Recruit Training Program: Law Enforcement, Volume 1 (99-100).

at the time of the referral, there is an open investigation into an allegation of abuse, neglect, or abandonment or if the child is currently under supervision by the Department of Juvenile Justice or the Department of Children and Families due to an adjudication of dependency or delinquency.¹¹⁸

C. Juvenile School Searches

The laws related to search and seizure apply to juveniles just as they do to adults. A school official that has reasonable suspicion that a prohibited or illegally possessed substance or object is contained within a student's locker or other storage area may search the locker or storage area. School officials have broader authority to search students than do law enforcement officers.

Such school searches may not be done at the direction or request of a law enforcement officer without probable cause. See s. 1006.09(9), F.S.; *M.E.J. v. State*, 805 So.2d 1093 (Fla. 2002); and *R.L. v. State*, 738 So.2d 507 (1999).¹¹⁹

D. Responding to Juvenile Offenders

Each situation involving a juvenile is unique; some situations may require more patience and understanding, while others may require a firmer and more direct approach. A high degree of self-control, patience, flexibility, and understanding is necessary to work effectively with youth. The officer must be able to adapt to whatever situation arises with a juvenile from truancy, rebellion, or dangerous actions. Establishing positive working relationships with the youth of the area will help build community networks that will benefit the overall law enforcement effort. An officer has a variety of options available when responding to juvenile offenders. Depending on the situation, an officer may issue a cursory warning or release the youth to parents or guardians with an explanation of the offense. It may be necessary to charge and then release the individual to a custodian.

A suitable referral such as counseling, social services, or a juvenile crime prevention program could provide guidance for the juvenile and family. Available community resources may include the Juvenile Division of local State Attorney's Office, the Runaway Switchboard at 1-800-RUNAWAY, or local counseling services.

Juveniles believed to be suffering from serious physical or mental conditions require prompt medical treatment. In the absence of EMS, officers may be called upon to transport such juveniles to a hospital, mental health service provider, or substance abuse or other treatment facility. The Baker Act and Marchman Act are applicable to juveniles as well as adults. Arrested juveniles who do not require medical or mental health treatment may be delivered to a Florida Department of Juvenile Justice (DJJ) Juvenile Assessment Center. The most desirable course of action is one that will be of greatest benefit to the juvenile and the community both now and in the future.¹²⁰

¹¹⁸ Section 985.03, Florida Statutes; see also section 984.03, Florida Statutes.

¹¹⁹ Florida Department of Law Enforcement. (2017). Legal. Florida Basic Recruit Training Program: Law Enforcement, Volume 1 (101).

¹²⁰ FDLE. (2010). Legal. Florida Basic Recruit Training Program: Law Enforcement, Volume 1(104).

II. Interviewing and Interrogating Juveniles

A. Interviewing

Although interviewing juveniles is similar to questioning adults, basic differences exist. By properly applying interviewing techniques, law enforcement officers will be successful in obtaining the information to resolve investigations. Parents have a right to talk to their children, if requested, and the children have a right to talk to their parents, if requested, before being questioned by law enforcement. Officers must be familiar with agency policies and procedures on parents' and children's access to each other during questioning.

All interviews with children who are victims or suspects should be recorded. The number of times a child may be interviewed is limited, and agency and local court policy should be consulted on this matter. A child may not be placed or transported in any law enforcement vehicle which at the same time contains an adult under arrest, unless the adult is alleged or believed to be involved in the same offense or transaction as the child. Whenever feasible, suspects should be transported separately to avoid collusion regarding their testimony.

B. Juvenile Custodial Interrogation Procedures

The standards for questioning a juvenile are the same as for adults. There is no statutory requirement for the parent's or guardian's consent before an officer may interrogate the child; however, officers should comply with department policy.

Be aware that *Miranda* applies to juveniles and a waiver of those rights will be closely scrutinized by the court. See *B.M.B. v. State*, 927 So.2d 219 (Fla. 2nd DCA 2006), *Lee v. State*, 985 So.2d 1210 (Fla. 1st DCA 2008), and *State v. Roman*, 983 So.2d 731 (Fla. 3rd DCA 2008). Factors to be considered in determining a juvenile's understanding of his or her rights and the significance of waiving those rights include his or her age, marital status, education, intellectual level, and experience in the criminal justice system. See *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011). Individual agency policies may be more restrictive regarding juvenile custodial interrogation procedures.

In order to ensure that the situation was clearly and accurately described to the juvenile, officers should document exactly what they say to a juvenile to indicate to him or her whether he or she is under arrest or not under arrest. Officers would be wise also to document what the area layout is when they speak to the juvenile, the number of people present, where they stood in the area, and whether any doors/gates/entry ways were open or closed at the time they discussed arrest with the subject juvenile.

Juvenile custodial interrogations may only last a reasonable length of time. Officers should consider and make adequate notes of the length of time the child is held before a custodial interrogation, any reasons for delay, and the number of breaks and rest periods given to the child.¹²¹

¹²¹ Florida Department of Law Enforcement. (2017). Legal. Florida Basic Recruit Training Program: Law Enforcement, Volume 1(100-101).

III. Charging a Juvenile

If a juvenile is charged with certain felony offenses, his or her case may be transferred to the adult criminal division where the juvenile will be prosecuted in the same way as adults charged with law violations. If a child is found guilty or pleads guilty in adult court and is sentenced as an adult, that child is forever considered an adult for future violations of state law. A juvenile's case may be transferred to adult criminal court in three ways:

A. Indictment

The State can seek to have a grand jury indict juveniles of any age. Indictments are usually for offenses that are punishable by death or life imprisonment and cases where the child is younger than 14 years old.

B. Waiver

A waiver motion is a request made by the prosecutor asking the juvenile court judge to transfer a child at least 14 years old to adult court. The judge conducts a hearing and reviews the child's history, the charge and potential for rehabilitation, then either grants or denies the prosecutor's request. The judge's decision is based on legal criteria, the facts of the case and the child's circumstances. A child of any age, with the consent of parent or guardian, can also request to be waived to adult court although this is extremely rare.

C. Direct File

There are two types of direct file: mandatory and discretionary. A direct file is a transfer to adult court by the prosecutor. The juvenile court judge has no authority to prevent the transfer and no hearing will take place. This means that these juveniles have been transferred without the benefit of a judicial hearing, so there has been no judgment by a neutral judicial officer that there are services in the adult system for them, or that they are inappropriate for services in a juvenile court.

Mandatory direct files stem from a state law requiring that for certain crimes, a child 16 years and older be tried as an adult. The law allows no exception.

The discretionary direct-file law allows the prosecutor to file charges for certain crimes against a child 14 years or older in adult court. The decision to send a discretionary case to the adult court lies solely with the prosecutor. A judge cannot reverse a prosecutor's discretionary decision to direct file a case, even if he disagrees. The prosecutorial decision to direct file a discretionary case is non-reviewable and non-appealable. If the prosecutor chooses to direct file, the charging document will be filed in adult criminal court.¹²²

¹²² 17th Judicial Circuit Juvenile Division (2010).

D. *Mens Rea* - “The Age of Reason”

- (1) Latin term for “guilty mind”.
- (2) Awareness of the fact that his or her conduct is criminal.
- (3) Act knowingly, purposely, or recklessly.

IV. Recognition of Juvenile Fires

A. Responding to Juvenile Fire Incidents

- (1) Each situation is unique
- (2) Officer must be able to adapt to the situation and has a variety of options.
 - a). Cursory warning or release to parent/guardian b). Charge and release
 - c). Referral to service
 - Counseling
 - Social service
 - d). Juvenile crime prevention program¹²³

V. Types of Juvenile Fire Setters

Juvenile Fire Setters typically fall into four categories. They share common characteristics in the reason the child is setting the fire and the severity of the fire.

A. Curious

The child sets the fire either accidentally or through curiosity, both caused by poor judgment.

- (1) Ages are typically between of 3 – 7 years old.
- (2) They are unaware of fire’s dangers and destructive nature.
- (3) Lighters and matches fascinate them.
- (4) They enjoy imitating adults who light candles, grills, fireplaces, or cigarettes.
- (5) Ignite household items.
- (6) Hide to light fires (under beds or in closets).

B. Troubled

The child sets fires as a way to act out anger, frustration and the feeling of being powerless.

- (1) Ages are typically between 7-14 years old.
- (2) Lights relatively simple fires.

¹²³ International Association of Fire Chiefs, Inc. (1988). Child Firesetter Handbook.

- (3) Uses matches or lighters.
- (4) Fire may symbolize a crisis in the child's life.
- (5) Actions may be the child's cry for help.

C. Delinquent

The juvenile uses the fire to cause malicious mischief or to rebel against authority.

- (1) Ages are typically older, between 13 – 18 years old.
- (2) The juvenile knows the dangers of fire.
- (3) Fires are set to cause purposeful harm or destruction.
- (4) Most often fires are set with peers.
- (5) Typical fires include school fires, fireworks, smoke bombs, false alarms, and outdoor locations such as dumpsters, brush, fences, and trash cans.

D. Severely Disturbed

The juvenile has a long history of behavioral, medical or neurological problems and a long history of fire setting.

- (1) Juvenile has a life-long fascination with fire.
- (2) Fire setting follows a distinct pattern.
- (3) Secretly proud of fires set.
- (4) Fires may be very sophisticated.
- (5) Fires set are very destructive.

VI Age of Juvenile Fire Setters

A. Juveniles 7 – 10 Years old

- (1) Usually set fire alone but might set fires in pairs/groups.
- (2) Fires are set fairly close to home.
- (3) Children often experiencing problems at home or school.
- (4) Often set to express anger towards parent or sibling.
- (5) Children and families often need help (psychotherapy) to stop fire setting behavior.

B. Juveniles 11-13 Years Old

- (1) Frequently collects fire starting tools.
- (2) Fire may be set farther from home.
- (3) Little remorse shown for fire being set.

C. Juvenile 14 – 18 Years Old

- (1) These fires are often planned and take place with one or two friends.

- (2) Seek out ignitable liquids or materials.
- (3) Often set for the purpose of malicious mischief to watch the fire burn or profit.
- (4) Likely to be involved with other anti-social behavior such as alcohol or drug consumption, vandalism, etc.¹²⁴

VII Components of an Intervention Program

There are two major components of the program: intervention and prevention.¹²⁵

A. Intervention

- (1) The intake and assessment of the juveniles by a mental health professional.
 - a). Establish appropriate counseling services.
- (2) Educational workshops
 - a). Fire and life-safety issues.

Goals:

- Reduce the recidivism rate of Juvenile Fire Setters.
- Avoid further entry into Juvenile Justice System.

Problem:

- Evaluating statistical data is difficult because fire departments are not required to report to Florida Fire Incident Reporting System (FFIRS) or National Fire Incident Reporting System (NFIRS) and reports are not changed after investigation is complete.
- Juvenile fires are under reported.
 - Schools do not report incidents to fire service therefore no investigation is conducted.

The identification of a juvenile set fire by the fire department is the first step:

Problem:

- Fire service personnel not trained
 - May not recognize the factors surrounding a juvenile fire
 - Reporting may not identify fire as juvenile
 - May not call for investigators
- Law Enforcement charging the juveniles (that meet criteria) for arson is the simplest way to ensure they will receive help.
- The court system will often refer juveniles charged with arson to a fire setting

¹²⁴ *Ibid.*

¹²⁵ Faranda, D.M., & Raiken, C. (2003). *Report to the Broward County Fire Chiefs Association, Broward County Juvenile Firesetter Intervention Report.*

- intervention program (if available) of psychiatric help if needed.
- Mental health professional will identify why the juvenile set a fire. It may be simple curiosity or a more severe problem.

Fire setting is not just the problem of the juvenile who set the fire, but the entire family.

B. Prevention

A fire prevention program should reduce the fire incidents and loss through informing the public about specific problems and the appropriate fire safety tips. These programs should include a wide range of educational groups including: schools, day care centers, community organizations, target hazard audiences and care givers. Each educational program should be geared for the specific audience.

Primary fire prevention programs are designed to teach children of all ages fire safety and survival skills. In addition, fire prevention should be a year round process, not just during one week in October.