

Rapid Response

What you do after a fire or explosion can make or break a case.

BY WOLF PUCKETT AND RICK WOMACK

Your home catches on fire. You and your family make it out alive, but a portion of your house is damaged. You want to clear out the mess and start rebuilding. Is that a good idea? Winning or losing a fire or explosion case depends on the investigation in the first few days and weeks after the event. You should speak with an attorney for guidance and be familiar with proper investigation protocol. For example, the *National Fire Protection Association 921: Guide for Fire and Explosion Investigations* is widely accepted by experts and attorneys. An attorney or expert ignoring the 400-page guide should be replaced (before the investigation).¹ Some highlights of our past 10 years of investigations and cases follow.

Preserve and document the scene.

Rule No. 1 is to immediately preserve the evidence.² Rule No. 2 is that Rule No. 1 is outcome-determinative.³

In one fire, a landowner moved the overhead power lines that caused the fire—despite a warning by a co-defendant. Fortunately, one expert eventually produced his dispositive photographs of the lines. In another fire, before the investigators arrived, one defendant cleared the origin area under power lines. Yet the plaintiff's expert interviewed three witnesses who inspected this area during and immediately after the fire.

Interview witnesses. Interviewing witnesses, including all reporting parties and first responders, at the scene is critically important to do as soon as possible.⁴ While an attorney or investigator will most likely be han-

dling the interviewing, be sure to ask people who you think may be witnesses to stick around. "In some instances ... a witness may be found who saw the fire in its incipient stage and can provide the investigator with an area of fire origin."⁵

A witness establishing important facts should always be recorded at the scene for an affidavit and probable deposition (for admissibility).⁶ In one trial, the court prevented the jury from hearing the investigator's testimony about interviews with crucial "incipient-stage" fire witnesses and corresponding written notes, including one joint interview conducted on the scene with opposing counsel and their investigators—despite the NFPA 921's methodology and Texas Rules of Evidence 703 (Bases of Opinion Testimony by Experts) and 705 (Disclosure of Facts or Data Underlying Expert Opinion).

When interviewing or deposing witnesses, incorporate the level of certainty required for the investigator's opinion of "probable"—not "possible"—which means "more likely true than not" or "greater than 50 percent."⁷ "Only when the level of certainty is considered 'probable' should an opinion be expressed with reasonable certainty."⁸

Obtain copies of all 911 and other reports in admissible form, especially because the audio may become unavailable. Interviews and photographs taken by law enforcement, first responders, and fire marshals are invaluable.

The attorney and origin and cause fire investigator. Call an attorney as soon as possible. Our experience

is that the attorney should *always* accompany the fire investigator as a team, especially on joint inspections and interviews. Keep asking questions respectfully and repeatedly of as many people as possible. In one fire at a joint inspection, a foreman candidly admitted cause after the defendant repaired the power lines that started another fire.

A fire can be stressful, devastating, and overwhelming. Remember that safety should be of the utmost importance. Then we recommend contacting an attorney to help you through the investigation and insurance process so that you can focus on rebuilding. **TBJ**

NOTES

1. Current edition is 2014.
2. 921 at 174-76.
3. Texas spoliation and preservation letters are outside the scope of this article, and we recommend as a starting point *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014).
4. 921 at 154, 307 § 28.7.1.1-2.
5. 921 at 198 § 18.8.3.
6. 921 at 154 § 14.4.3.
7. 921 at 21 § 4.5.1(1).
8. 921 at 21 § 4.5.2.



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