

SPOLIATION AND ITS IMPACT ON FIRE INVESTIGATION

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ABSTRACT

There have been many advances in fire investigation over the past 30 years. These advances have seen the profession grow from an art based upon unsupported and untested theories and guidelines to a more rigorous discipline rooted in science and objective, tested theories and methodologies. This has been evidenced by the progression of documents such as NFPA 921 and 1033 and by the latest texts, such as those by Lentini and Gorbett. The changes brought about by these documents have had a significant impact on the profession of fire investigation, the manner in which fires are investigated and the basis for determining the origin and cause of a fire. These are all welcome changes. However, fire investigation is not only a profession, it is also a business. One of the areas that has resulted in significant impact on the business side of fire investigation has been the concept of spoliation of evidence. It has progressed from a little known idea to becoming a driver for the manner in which fires are investigated. This paper will look at the ways that the concept of spoliation has affected the business side of the profession.

INTRODUCTION

As fire investigation has progressed over the years, the concept of spoliation has progressed as well, resulting in a significant impact on the manner in which fire investigations have been conducted. One way to track the progress and impact of spoliation would be a case review of legal decisions. The drawback to this approach is the considerable time necessary to identify and review all pertinent court rulings, but, more importantly, many of the decisions are specific to a jurisdiction and do not carry over to other jurisdictions. Further, most court rulings identify what the investigator failed to do, but do not provide guidance, other than by inference, of what to do to avoid spoliation issues. A more practical approach was taken for purposes of this paper. The changes to NFPA 921, "Guide to Fire and Explosion Investigations" concerning spoliation and related issues were tracked. The members of the NFPA 921 committee and those who have presented proposals for changes to the document were the practitioners who were being impacted by the court decisions. Thus, the changes to NFPA 921 reflect the decisions from the courts.

NFPA 921 AND SPOILIATION

The first edition of NFPA 921 was issued in 1992. Spoliation was not defined nor was the term used in this edition of the document. However, the 1992 edition did recognize the need to collect and preserve physical evidence. It also recognized the fact that the fire scene itself should be considered evidence. This first edition of NFPA 921 was concerned with possible contamination of the fire scene and the possible loss of evidence. There was no mention in this

edition of preserving the fire scene so other parties would have an opportunity to examine and document the scene.

Several changes to the 1995 edition of NFPA 921 are worth noting. This edition added Chapter 16, "Management of Major Investigations." This chapter included a section on the collection of evidence, which recognized the need for all parties at a fire scene to have input as to what evidence to collect. In addition, a proposal was submitted and accepted for this edition to include references to ASTM E-1188 "Standard Practice for Collection and Preservation of Information and Physical Items by a Technical Investigator," and ASTM E-1459 "Standard Guide for Physical Evidence Labeling and Related Documentation." These were some of the first steps in recognizing the need for other parties to be involved in the fire scene investigation and for them to have input regarding the evidence to be collected and retained from the fire scene.

The first time that the entire fire scene was considered evidence that needed to be preserved was in the 1998 edition of NFPA 921 (section 9-3). Part of the idea behind this change was the fact that it was usually not until the latter part of a fire investigation that one has determined the origin and more specifically the cause of the incident. Therefore, it may not be until the final stages of the investigation that the significance of the pieces of physical evidence could be determined. Thus the scene needed to remain intact and undisturbed until the investigation had been completed.

The 1998 edition of NFPA 921 introduced the idea that fire patterns had evidentiary and interpretive value (section 9-3). This further supported the concept that the entire fire scene was physical evidence that needed to be preserved.

With the 2001 edition of NFPA 921, spoliation was finally defined. Not only was spoliation defined, but this was also the first time that the idea of preserving not only the evidence that supported the theory of causation, but also the importance of retaining evidence that may support alternate theories of causation was introduced (9.3.6.3). Further, this edition mentioned the idea that all interested parties that could be reasonably determined by the investigator should be afforded the opportunity to participate in the scene examination. It also stated that once the evidence had been removed from the fire scene, the evidence should be maintained and not destroyed or altered until others who have a reasonable interest in the matter have been notified (9.3.6.7). Reference was made to ASTM E-860 and ASTM E-1188 as providing guidance regarding notification of parties and proper evidence collection and preservation procedures.

The concept of bagging and/or tarping debris removed from the fire scene as well as labeling this debris as to where in the structure it originated from was introduced in the 2004 edition of NFPA 921 (16.3.1.1). This process was important to assist in searching for smaller component parts of appliances that may have separated from the main appliance during fire fighting and/or overhaul operations. This change recognized the fact that smaller parts may dislodge from an appliance. If only the appliance is collected, important physical evidence may remain at the fire scene and would no longer be available for examination. This could impact the ability to properly examine and evaluate the appliance.

In 2008, clarifying language was added to the section on Legal Considerations (Chapter 11) regarding the need to notify other interested parties of a scene examination. It also presented guidance on methods to provide that notification. In addition, the paragraph regarding Documentation Prior to Alteration (11.3.5.5) was changed to state that prior to any significant alteration of the fire scene all known interested parties should be notified and offered the

opportunity to participate in the scene examination. This was a change from the idea of simply documenting and photographing the fire scene and preserving relevant evidence.

The chapter on Physical Evidence (Chapter 16) changed the guidance about being aware of issues related to spoliation of evidence. Previously, it was stated that the investigator should be aware of spoliation issues. This new version of NFPA 921 strengthened the language to a requirement that the investigator should be aware of standards and procedures relating to evidentiary issues (16.2.2). This appeared to be a reference to various ASTM standards regarding evidence collections, labeling, etc.

The 2011 edition of NFPA 921 added several paragraphs in Chapter 16 (Physical Evidence). These paragraphs addressed the concept that there were activities that are part of the collection and examination of physical evidence that may involve alteration of the evidence (e.g. debris removal) but this alteration does not impact the evidentiary value of the artifacts. Examples are given of the types of activities that fall under this category.

In the 2014 edition of NFPA 921, the chapter on legal considerations was revised to provide stronger guidance on spoliation issues. The paragraph on Responsibility (12.3.5.1) was revised to include the idea that spoliation could also involve material alteration. The paragraph also offered guidance to use the techniques in this document (NFPA 921) to preserve the evidentiary value of artifacts. This was a direct reference to ASTM standards.

Paragraph 12.3.5.6.1 of NFPA 921 added language indicating that the guidance in this document (NFPA 921) should be used to preserve the evidentiary value of artifacts should it be necessary to remove the item from the scene (e.g. to prevent theft) or to undertake other activities (such as debris removal) that may be necessary to identify the manufacturer of a product. This recognized the idea that some types of alteration or movement of an artifact did not constitute spoliation. Further, some amount of alteration may be necessary to properly identify the product and its manufacturer.

The section on Protecting Evidence (17.3.4) added several paragraphs (17.3.4.3 and subparagraphs) regarding flagging, bagging and tagging of evidence. This was added to provide guidance on how to identify potential evidence at a fire scene such that other parties, including non-investigators, could be alerted to the location of potential evidence.

SPOLIATION'S IMPACT ON FIRE INVESTIGATION

As a seasoned fire investigator and forensic engineer with 30+ years in this industry, I have first hand knowledge of the progression of the concept of spoliation and how it has impacted the way we conduct business. When I first started in this industry it was standard practice to have a single investigator conduct the entire fire scene investigation. The examination most often could be completed in one day as a single site visit. The scene was processed, evidence identified and collected, and in many cases the evidence was further examined, all without any other parties being present. This was accepted practice at the time and was consistent with the training many fire investigators and engineers received. I can remember disassembling appliances at the fire scene to determine if there was evidence of a possible failure within the appliance that may have caused the loss. Obviously that approach is absolutely unacceptable and a recipe for disaster today.

Over the years the approach to fire investigation has changed, in large part as a response to challenges to lawsuits alleging spoliation of evidence, thereby adversely impacting the challenging party's ability to properly investigate the loss. This prevented the challenging party from being able to fully assert a positive defense against the claim that their product or service caused the loss. This was not an overnight change, but rather a progression over time. The first response was to collect the pertinent evidence from the scene and to schedule a joint laboratory examination with those identified as the appropriate parties. One key to making this work was not only to collect the artifacts directly related to the alleged cause of the loss but also to retain those artifacts that might reasonably be considered as alternate ignition sources of the fire.

As NFPA 921 evolved and the attorneys and courts became more knowledgeable about fire investigation and spoliation, it was argued that the entire fire scene was evidence and that opposing parties not only needed to be part of all evidence examinations, but they also needed to have an opportunity to examine the entire fire scene. This was necessary to allow their experts to make an independent assessment of the origin of the fire and to identify those artifacts that they deemed important for the defense of the claims against their client.

This evolution brings us to where we are today. The typical fire investigation starts with a scene visit from the insurance company's fire investigator. This initial scene examination attempts to identify at a minimum, a general area of origin (e.g. room or in a larger structure a smaller area within the structure). Once this general area of origin is identified, then the investigator attempts to determine what appliances are in the area that could represent a potential ignition source. Further, the investigator will determine if there had been any repairs, service work, or remodeling that might have been a factor in the cause of the fire. A list of parties that should be invited to the fire scene is generated. These parties are then invited to a joint scene examination where the fire scene can be more thoroughly examined and overhauled. Items of interest are collected as evidence and placed into storage for later examination.

A joint laboratory examination is scheduled with the inclusion of all the involved parties. This may involve a single day exam, a multi-day exam or even examinations spread out over an extended period of time. It is possible that during these examinations additional parties may be identified that need to be involved, such as component part manufacturers from a larger product or appliance. When this happens, the examination may be placed on hold and reconvened once the newly identified parties can be notified of the loss.

In the early days of fire investigation a typical investigation involved a single investigator (maybe an engineer was also included) conducting a one day scene examination and a possible follow-up laboratory examination. This has transitioned over the years to where the original scene investigator may have two, three or more trips to the fire scene. There are one or more days of scene examination involving multiple investigators, representing multiple parties whose clients' products or services may or may not be ultimately determined to be responsible for the loss. After the joint scene examination, one or more laboratory examinations may occur, once again involving multiple parties and thus multiple experts.

To compound this issue, there are many instances when a manufacturer's product or a service provider is placed on notice of a loss not because there is any real belief or evidence that their product or service caused this loss, but to prevent the "empty chair" defense. This is defined as a party whose product is suspected of being the cause of the fire raising the possibility that another item located near their product may in fact be the cause of the loss. To counter this scenario and to prevent issues that may arise during a scene inspection that could potentially cause the examination to be delayed, attorneys are placing all identified parties on notice, with the

idea that parties can be dismissed as the evidence (or lack thereof) dictates. This approach is preferred since it is more difficult to add a party once the process is underway. This results in many parties being invited to participate in the initial scene inspection and possibly even the follow-up evidence inspections even when there is no clear evidence that the party's product or service is involved in the loss.

Looking at the business side of this evolution one is reminded of the simplicity of the early days where the typical investigation consisted of one or maybe two investigators who spent one to two days on the entire investigation. This has grown to a range of three to four, to potentially ten to twenty or more investigators involved on the loss, each representing a different party. Each investigator is now billing for multiple days of work. This has created many opportunities for additional work that did not exist twenty years ago. This also translates to additional cost and expenses for both the first party insurers who are doing the primary investigation and also for the manufacturers and service providers who must allocate resources to defending allegations against their products. For the first party insurers, this raises the overall cost associated with their investigation of fire claims. Offsetting this additional cost is the potential recovery associated with a successful subrogation action. For most insurers a properly managed subrogation program recovers more money than is spent in investigating the losses.

For manufacturers, the cost of investigating alleged product failures must be considered as a cost of doing business. This expense will be factored into the cost of the products they produce and is passed on to the consumers.

CONCLUSION

Given the current state of the industry, I do not see any significant changes to the manner in which fires are investigated, at least as relates to spoliation and evidence collection and retention. The concept of large, multi-party scene and evidence examinations is going to be the standard practice, at least for the foreseeable future, in my opinion.

There are however several issues that will become more problematic in the future. First, is the issue of serving proper notice on the parties. In years past, it was common to send notice letters via Certified Mail. This provided proof that the letter was received and could be used to protect against claims that a party had not been properly put on notice. In today's electronic age it is becoming more common to send notice letters via email. One problem with sending notice letters via email is getting confirmation that the letter was received by the party it was sent to. Emails can wind up in a junk or spam folder. The intended recipient's email address may have been mistyped and thus not delivered. The person may have left the company and their email has not being forwarded to an alternate representative. How can the party sending out the notice letters be assured that the intended party received the letter and more importantly, should a question arise, how do they confirm that the appropriate person received the letter?

Another issue that may present a challenge is the consolidation of manufacturers for many different products. If we take major household appliances as an example, there are many brand names, but only a limited number of manufacturers. To further compound this issue, Kenmore products are sold by Sears, but are manufactured by many different companies. Even within a specific appliance type such as clothes dryers, there may be multiple manufacturers depending on the specific model. With the more recognizable brand names, even these companies use other manufacturers to produce some of these products. If you only put the party whose name is on the outside of the appliance on notice, this may not be the ultimate end manufacturer who

needs to be represented at the scene and laboratory examinations. This requires not only knowledgeable investigators, but also knowledgeable subrogation partners such as attorneys and claims handlers who have the experience to recognize how to identify the parties that truly need to be put on notice.

Spoliation has, and will continue to have a significant influence on the field of fire investigation. It impacts everything from how we secure a fire scene, what evidence to collect (or not to collect) and the determination of the parties that are put on notice of a loss. Spoliation is an evolving concept that is clarified with each case that is ruled on by the courts. It is imperative that fire investigators and forensic engineers keep abreast of the latest court rulings and standards updates to make sure that they are following the industry's best practices, thus minimizing their chances of being on the wrong side of a spoliation ruling.

ABOUT THE AUTHOR

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