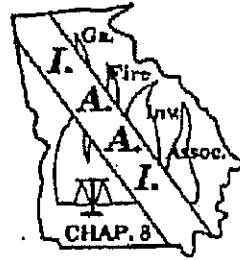


## **Section 10**

Georgia Fire Investigators Association resolution regarding Chapter 18 of NFPA 921 (2011 Edition); excellent summary of Chapter 18 of NFPA 921 (2011 Edition) authored by Attorney Mark T. Dietrichs of the law firm Swift, Currie, McGhee & Hiers, LLP

# Georgia Fire Investigator's

P. O. Box 382 Snellville GA



# Association

30078

August 3, 2011,  
Savannah, Georgia

The following is a resolution voted on by the members of the Georgia Fire Investigators during their "General Meeting".

The Georgia Chapter of the IAAI (#8) acknowledge and recognize the National Fire Protection Association (NFPA) publication 921 (2011 Edition) as a resource guide, training manual, and not a standard or required guideline to be complied with in a fire investigation.

Furthermore, it is our sense that the alteration of NFPA 921 (2011 Edition) Chapter 18 "Fire Cause Determination" does not accurately reflect existing evidentiary standards, or acknowledge and recognized investigative procedures. NFPA 921 (2011 Edition) Chapter 18 seeks to impose unreasonable and over-reaching standards upon the investigator often in conflict with existing judicial, legislative and executive standards as set forth in the State of Georgia.

The attached documentation is Georgia Case law the Georgia Chapter of the IAAI utilizes in regards to the National Fire Protection Association publication 921 (2011 Edition).

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Re: NFPA 921 (2011 Ed.), Chapter 18

Dear Kevin:

On August 3, 2011, the GFIA passed a resolution with respect to recent changes in NFPA 921, Chapter 18, Fire Cause Determination. The resolution stated, in part, that "NFPA 921(2011 ed.), Chapter 18 seeks to impose unreasonable and overreaching standards upon the investigator often in conflict with existing judicial, legislative and executive standards." In conjunction with the presentation of the motion to pass the resolution, I discussed each of these aspects.

Specifically, NFPA 921, Chapter 18 states that it is inappropriate to use the process of elimination to determine that a fire is of incendiary origin. See NFPA 921, § 18.6.5. As you know, this is frequently referred to as "negative corpus." As was noted, previous editions of NFPA 921 allowed the use of the process of elimination in order for an investigator to arrive at a determination that a fire was of incendiary origin. See NFPA 921, § 18.2.1 (2008 ed.). The courts in Georgia have also recognized that a fire can be determined to have been intentionally set based upon "negative corpus." In Jackson v. State, 157 Ga. App. 580 (1981), the defendant attacked a conviction of first degree arson on the basis that there was insufficient evidence to

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establish that the fire was of incendiary origin. In the Jackson decision, the investigator based his opinion that the fire was intentionally set "not on positive evidence that the fire had been deliberately set, but, rather, on the absence of evidence that the fire had accidental or providential origins." *Id.* The court ruled that the testimony of the expert was admissible and that the weight to be given to the testimony was within the exclusive province of the jury. The conviction was ultimately affirmed by the Georgia Court of Appeals. It is important to note that this decision arose in the context of a criminal case in which the State had the burden to prove every element of the case, including the incendiary nature of the fire, by proof "beyond a reasonable doubt." This is a higher standard of proof than appears in a civil context when allegations of an incendiary fire have been raised.

The Georgia legislature has also adopted specific standards applying to the introduction of opinion testimony by experts. In 2005, a law was passed with respect to expert opinion in criminal cases. O.C.G.A. § 24-9-67 states:

In criminal cases, the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses.

In 2010, the Georgia legislature addressed the issue of expert opinion evidence in civil cases. O.C.G.A. § 24-9-67.1 deals with expert opinion testimony in civil cases. This provision was specifically incorporated into the Georgia law code in order to adopt the federal guidelines associated with Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and its progeny. *See* O.C.G.A. § 24-9-67.1(f). Specifically, a Georgia court is to use the same standards used by federal courts in determining whether or not expert evidence is admissible. In effect, the Daubert guidelines have now been expanded to be applicable to both criminal and civil cases in state and federal courts in Georgia.

Daubert and subsequent decisions specifically allow expert testimony if ...

- (1) The testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;
- (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.

O.C.G.A. § 24-9-67.1(b). However, it is the responsibility of the trial judge to determine if the expert's opinion meets these standards. Nowhere is the court directed to apply only a single standard set by a single entity as controlling with respect to the analysis of the expert's opinion.

In Bailey v. Annistown Road Baptist Church Inc., 301 Ga. App. 677 (2009), the Court addressed efforts to exclude an expert's testimony when the expert could not testify to a

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conclusion based upon a "scientific degree of certainty," but reached his opinion through elimination of all other possibilities. The expert reached a conclusion based upon probability, not absolute certainty. The Court applied the principles of O.C.G.A. § 24-9-67.1 and found the testimony to be admissible. The Bailey case involved water runoff potentially creating underground voids. The expert "personally inspected the property and surrounding properties, reviewed relevant documents and videotapes, analyzed the topography including the slope and direction of the underground utility lines, conducted multiple tests on the property including ground penetrating radar, and relied on the law of gravity, all in order to form his opinion." *Id.* at 690. However, the expert had to admit that he could not do experiments to validate his hypothesis. Furthermore, he had to rely on work performed by other experts and machinery. He admitted that he could not testify "to a scientific degree of certainty" regarding the voids.

Despite the alleged flaws in the expert's investigation, the Georgia Court of Appeals affirmed the trial court's holding that the expert's testimony was admissible. The Court stated:

[S]ome speculation or conjecture is allowed:

[T]he appropriate standard for assessing the admissibility of the opinion of [Bailey's] expert is not whether it is speculative or conjectural to some degree, but whether it is wholly so. An expert is not required to prove within a reasonable degree of scientific certainty his opinion of how an [incident] occurred.

*Id.* at 691. (Citations omitted.) *See also*, Savannah Cemetery Group Inc. v. Depue-Wilbert Vault Co., 307 Ga. App. 206 (2010).

The question is simple: Why should fire investigators face a higher standard of proof and be unable to rely upon the process of elimination while engineers are allowed this privilege? The answer is obvious – there should be no distinction regardless of the opinion of the NFPA 921 Committee members.

Ultimately, the burden is upon the party proffering the expert's opinion to establish for the court the reliability of the opinion before that opinion can be presented to a jury. Even at that point, the jury weighs the ultimate credibility of the opinion in reaching its determination. At both steps during this process, counsel for the party opposing the opinion has a right to challenge its reliability and credibility through cross-examination and the introduction of alternative evidence or opinions. These safeguards are more than sufficient to challenge the viability of an expert's opinion with respect to the cause and origin of a fire loss.

Finally, in Georgia there has been a consideration of the impact of NFPA 921 by the executive branch. In 1996, the Office of Insurance and Safety Fire Commissioner issued a "Notice to Staff Fire and Arson Investigators" dealing with the applicability of NFPA 921. This Notice was published in the *Fire Trailer News*. As set forth in the current Resolution, the Department of Insurance recognized NFPA 921 as a "credible, nonbinding reference guide." Fire investigators were instructed to "be familiar with the concepts presented by NFPA 921.

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However, compliance with NFPA 921 procedures and recommendations should not be considered minimal requirements in order to effectively investigate and prove the origin and cause of fire losses." The Department of Insurance recognized that supplements and revisions to NFPA 921 should be reviewed. There have been five editions of NFPA 921 published since this Notice was issued by the Department of Insurance and at no time has the Department withdrawn or altered its formal position regarding the applicability of NFPA 921. Since the Department of Insurance supervises the activities of the Georgia State Fire Marshal's Office and its investigators, this Notice is the basis upon which State criminal investigators are utilizing NFPA 921. The recent GFIA Resolution with respect to the 2011 edition of the NFPA 921 is inconsistent with the 1996 Notice issued by the Department of Insurance.

It should also be noted that the position taken by the GFIA in its resolution is not inconsistent with the representations contained in NFPA 921. In Chapter 1, § 1.1, NFPA 921 proclaims itself to be a

[D]ocument ... designed to assist individuals who are charged with the responsibility of investigating and analyzing fire and explosion incidents and rendering opinions as to the origin, cause, responsibility, or prevention of such incidents, and the damage and injuries which arise from such incidents.

The NFPA goes on to state that "the purpose of this document is to establish guidelines and recommendations . . . This document has been developed as a model for the advancement and practice of fire and explosion investigation, fire science, technology, and methodology." § 1.2.1.

NFPA 921 essentially recognizes that its application is not exclusive or controlling. Section 1.3 *Application*. states, "[d]eviations from these procedures, however, are not necessarily wrong or inferior but need to be justified." This section recognizes the limits of NFPA 921 based upon the unique aspects of fire investigation. Section 1.3.3 states, "[n]ot every portion of this document may be applicable to every fire or explosion incident." The realities of the investigator's "assignment, time and resource limitations, or existing policies may limit the degree to which the recommendations or techniques in this document will be applied in a given investigation." § 1.3.4. NFPA 921 recognizes that "this document is not intended as a comprehensive scientific or engineering text." § 1.3.5.

Even the NFPA's disclaimer set forth on the cover of NFPA 921 confirms that the statements contained in NFPA 921 should be given limited enforceability based upon the doctrines and theories emphasized in the document. NFPA "does not independently test, evaluate, or verify the accuracy of any information or the soundness of any judgment contained in NFPA Documents. . . . Anyone using this document should rely on his or her own independent judgment or, as appropriate, seek the advice of a competent professional in determining the exercise of reasonable care in any give circumstances." See *IMPORTANT NOTICES AND DISCLAIMERS CONCERNING NFPA® DOCUMENTS*.

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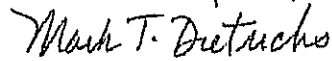
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NFPA 921 remains a valuable tool for fire investigation and should be treated as a resource much like other fire investigation treatises. See Kirk's Fire Investigation and The Ignition Handbook by Vytenis Babrauskas. However, to the extent its authors aim to expand the impact of NFPA 921 from a guideline and training manual to a binding set of laws which must be complied with by fire investigators, all efforts should be taken to resist this over-reaching extension of NFPA's influence with respect to fire investigation.

Respectfully submitted,

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