



Getting a fire report without getting burned

The three types of fire reports – how to get them and how to use them

MARY CATHERINE WIEDERHOLD

You have a case involving a fire. Should you call 911 to obtain the fire report from the local fire department? Or do you obtain a fire investigation report from a private investigation company? Does this carry more or less weight than the municipal fire department report? This article explains the three different types of fire reports and how to obtain them.

The National Fire Incident Reporting System

The easiest report to obtain is the National Fire Incident Reporting System (NFIRS) report. The NFIRS report is a voluntary system of reporting fires that California participates in. The information obtained by the NFIRS is used by, among others, the United States Consumer Product Safety Commission and by the National Smoke Detector Project. In San Francisco, for example, you either call or write to the San Francisco Fire Department and your request will be processed.

An NFIRS report is required by the National Fire Administration (NFA) to be completed by every fire department in the country on every call. The call could be a car wreck, a sick person, structure fire, or water flow alarm. The information recorded includes the fire department units which responded, time of call, personnel identification numbers, type of call and a brief description of the work done and the disposition. It is always worthwhile to get the NFIRS on a structure fire because that is the first step in documenting an incident.

Typically, I review an NFIRS report to obtain an overview of the fire and the damage. In one case involving a public housing agency, the NFIRS report told me valuable information regarding the time the tenants made frantic telephone calls to 911 because the building did not have an alarm system tied to the fire department. The public housing agency had been cited by the municipal fire department, but no action had been taken to obtain a working system for more than five years. The NFIRS report stated it took 20 minutes for the fire trucks to arrive at the building, because the 911 calls had to be routed to the proper fire station and then the trucks had to get to the fire.

Municipal Fire Investigation Report

Fire investigation reports are done in addition to the NFIRS report if a fire department has an investigation unit. Many departments in the country do not have fire investigation units.



There is no requirement that a fire investigation report be done in addition to an NFIRS report, since the initial findings are documented in the NFIRS report if a fire department does not have a fire investigation unit.

Examples of situations that might lead to a fire investigation report might include major injury or death, large dollar loss from the fire, possible liability exposure to the City, or felony fire-related violations of the Penal Code. In San Francisco, a fire investigation report might not be done because no fire investigators were available to respond or the fire did not meet the criteria for a response.

A typical fire investigation report includes the incident date, alarm and arrival time, address, estimated losses, type of building, possible human factors (if any) for ignition and the presence of any detectors. The report is sent to the California Office of the State Fire Marshal, which then submits the data to the U.S. Fire Administration.



Most municipal fire investigation reports I have seen do not come to a conclusion about the origin and cause of the fire. The “origin” of a fire means where exactly in the building the fire started. The “cause” of a fire means how the fire started. If a municipal fire investigator does come to a conclusion, I would check with your expert. Usually, municipal fire investigators can be discredited in a deposition because they lack the educational background and experience to properly determine a fire origin and cause.

Private Fire Investigation Report

Insurance companies are well aware of the sketchy, incomplete information provided on NFIRS reports. Insurance companies want to know what happened in more detail because of possible fraud, liability issues and subrogation potential, so they will call in a private fire investigator to provide more information. They do not call a private fire investigator on every fire loss. The fire loss claims are screened by a claims manager, and a decision is made based on his or her evaluation of the loss. Many times the findings of the private investigator disagree with the findings of the municipal fire investigator as to the origin and cause of the fire. Private fire investigators have more experience and resources to help evaluate in more detail the circumstances surrounding a fire.

Discovery

Once litigation is underway, I specifically request the fire report in my request for documents. Usually this is done because I do not know whom the insurance company sent out to investigate the fire. However, in my public housing case, I received documents from a municipal housing authority that had the name of the insurance adjusting company on them. I then sent a subpoena to the company, and, of course, there was a dispute over the documents. But ultimately I received the private fire report.

If possible, in special interrogatories, I also ask for the name of the investigator,

the name of the company that he or she works for, to whom the report was sent, the role of each recipient of the fire report, if the investigator performed any destructive testing and, if so, what tests were done, and who prepared the report. All this information will be necessary if you want to send a subpoena to the insurance adjuster. You want to file a motion to compel if the defendant resists disclosure.

Motion to Compel

Below are some cases that have proven successful with various superior court judges. The defense sometimes argue the fire investigation report is privileged. I always contend to the court that the defense cannot show any privilege. In claiming attorney-client and work-product privileges, defendant must establish the preliminary facts necessary to support the exercise of the privilege. (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d at p. 1252.)

The fire investigation report does not fall within the attorney-client privilege

Defendants sometimes claim the fire investigator’s report falls under attorney-client privilege. Under the Evidence Code a “client means a person who . . . consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity” (Evid. Code, § 951.) “But the [attorney-client] privilege is to be strictly construed in the interest of bringing to light relevant facts.” For example, when a defendant “sought only the opinion of the expert as to the fair market value of property he had appraised. The inquiry goes only to matters of the appraiser’s subjective knowledge, as distinguished from his disclosures to plaintiff’s counsel. *This knowledge, in and of itself, is not privileged, nor does it acquire a privileged status merely because it may have been communicated to the attorney.*” (*People ex rel. Department of Public Works v. Donovan* (1962) 57 Cal.2d 346, 354-355, emphasis added.)

Furthermore, a nonconfidential “document is a written statement made by a nonparty, disinterested witness, of facts he or she observed, which is given to one of the parties to a dispute. Even though the party transmits the written statement to his or her lawyer, the adverse party may inspect the statement by making the appropriate discovery motion.” (1 Jefferson, Cal. Evid. Benchbook (Cont.Ed.Bar 3d ed. 2002) § 40.17, p. 307, discussing *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355 [“the trial court was justified in requiring petitioner to disclose the written statements of the independent witnesses.”].)

The investigator’s report obtained by an adjuster for the insurance company is a nonconfidential document that shows the origin and cause of the fire. Part of a proper fire investigation is to develop and then to write a report based on the investigator’s working hypothesis. The report will have citations to the leading authority on fire codes and standards, the National Fire Protection Association (NFPA). A typical origin and cause report will also show an analysis of the fire indicators, behavior, fuel load and witness statements. After ruling out other sources such as candles or spontaneous combustion, the investigator will then come to a likely conclusion of the fire.

The fire investigation report does not fall within the attorney work-product privilege

Defendant might also claim the fire investigation report is privileged under attorney work product. The work-product privilege is “[a] writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories [which] is not discoverable under any circumstances.” (Code Civ. Proc., § 2018.030(a).)

The court of appeal has held that nonderivative material, such as a fire investigation report, is not considered attorney work product. “Material that is considered of a nonderivative or noninterpretative nature and that is



evidentiary in character does not constitute the attorney's work product. This distinction between derivative and non-derivative matter strikes a reasonable balance between the competing policies of encouraging thorough trial preparation by lawyers, by making work product a privilege from disclosure and, at the same time, of *permitting broad discovery to prevent trials from constituting games of chance.*

Major categories of nonderivative evidentiary material excluded from the concept of an attorney's work product include (1) the identity or location of evidentiary matter, such as material objects; (2) material objects themselves that constitute admissible evidence; (3) information about prospective or potential witnesses, such as their names, phone numbers, addresses, and occupations; and (4) written or recorded statements of prospective witnesses." (*Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 69, emphasis added.)

Typically, the insurance company hires a licensed claims adjuster who is not a fire investigator. To be clear, it is the insurance company who hires the adjuster who hires the fire investigator to go into plaintiffs' home, look at the evidence and prepare an origin and cause report for the insurance company. A fire investigator's report does not contain any "attorney's impressions, conclusions, opinions, or legal research or theories." A fire report should be considered "nonderivative or noninterpretative [in] nature and that is evidentiary in character" and thus it does not fall within the attorney work product privilege.

Good cause justifies discovery of the fire investigation report

Even if the court finds that the report is work product, the report still must be produced so that plaintiffs will not be unfairly prejudiced. The Code of Civil Procedure states: "The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will *unfairly prejudice the party seeking discovery in preparing that party's claim* or defense or will result in an injustice." (Code Civ. Proc., § 2018.030(b), emphasis added.)

The court of appeal held in *Grand Lake Drive In, Inc. v. Superior Court of Alameda County* (1960) 179 Cal.App.2d 122, that where comparable tests cannot be recreated, then the evidence should be turned over. "It is clear that if the object inspected and tested by the expert is no longer available and has not been examined or tested by the opponent's experts, good cause to interrogate the expert exists. Similarly, where the testing has so altered the object tested that the opponent cannot make like tests, inquiry should be allowed." (*Grand Lake Drive In, Inc. v. Superior Court of Alameda County, supra*, 179 Cal.App.2d 122, 131, citations omitted.)

I argue plaintiffs will be unfairly prejudiced because they have no opportunity to "generate comparable evidence" regarding the fire investigation. In one case involving an apartment building in Berkeley, the defense argued plaintiffs should have hired their own expert to investigate the fire. This argument was not

credible since the building was torn down under an order by the city within a week of the fire. In another case, one of the plaintiffs was in the hospital with third degree burns over 40 percent of his body while his partner was out of the country in Asia. Still, defendants argued to the judge at the hearing on plaintiffs' motion to compel that the plaintiffs should have hired their own expert fire investigator. Realistically, there is usually no opportunity to generate comparable evidence. The fire investigator's report does not fall within the attorney-client privilege and should be produced.



Wiederhold

Mary Catherine Wiederhold is a litigator who has analyzed and evaluated more than 16 cases involving fire and tenants. Her practice concentrates on representing residential tenants in disputes with landlords. Mary Catherine is a graduate of UC Berkeley where she received a B.A. in English. She received her J.D. from the University of San Francisco School of Law. Mary Catherine is on the Board of Directors for the San Francisco Trial Lawyer's Association and is the membership co-chair for the San Francisco Lawyer's Club Inns of Court. Mary Catherine received the Bar Association of San Francisco's 2010 Housing Justice award for her outstanding pro bono work.

