# INVESTIGATING AND DEFENDING COMPLEX AND CATASTROPHIC CLAIMS

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## I. COMPLEX CLAIMS

**A. Complex claims are claims which involve multiple entities and legal issues.**

**B. Indicators:**

1. Multiple plaintiffs
2. Multiple defendants
3. Multiple types of legal claims
4. Multiple types of damages
5. Involve multiple governmental agencies:
   a. F.A.A.
   b. F.D.A.
   c. E.P.A.
   d. N.T.S.B.
   e. N.O.A.A.
   f. F.E.M.A.
6. Highly specialized topic areas
7. Multiple jurisdictions and/or crossing state or federal boundaries

## II. CATASTROPHIC CLAIMS

**A. Catastrophic Claims involve the matter of degree or breadth of damages involved.**



 

**B. Indicators:**

1. Multiple deaths or severe physical injury

2. Loss of ability to work

3. Closing of large, successful, business(es)

4. Damages exceeding several million dollars

**C. Types of Claims or Occurrences That are Capable of Producing Catastrophic Losses:**

1. Environmental Disasters (natural and manmade):

    a. Hurricanes
    b. Tornados
    c. Oil spill
    d. Train derailment
    e. Floods
    f. Nuclear meltdown

2. Commercial construction claims

3. Fire loss claims

4. Food or drug contamination

5. Product defect cases / product recalls

6. Multiple tenant sick building claims.

## II. CLAIM INVESTIGATION

**A. Types:**

1. Pre-suit

2. Post-suit

**B. Interview potential witnesses, including claimants**

1. Are pre-suit interviews appropriate?

2. Who is going to conduct the interviews?

    a. Claims agent

    b. Attorney

    c. Investigator

    e. Expert

3. Do I want or need to protect this information from disclosure?

    a. Protection v. Reliability

    b. Discoverability
        - Notes from conversation
        - Handwritten statements
        - Audio recordings
        - Affidavits -"Proof of claim forms"

4. What information do I need to obtain?

    a. Factual "incident" information

    b. Factual "damages" information

    c. Avoid gathering "less relevant" facts

5. Limit the number of persons whose depositions need to be taken

**C. Identify Potential Claimants**

1. How / sources of information.

    a. Tenant lists
    b. Interviews
    c. Investigators
    d. Phone books / listings
    e. Internet searches
    f. Local chambers of Commerce

g. Local trade associations
h. Licensing boards
i. Calling a town hall meeting or informational setting
j. Governmental oversight organizations
k. Publication or toll-free call center

2. Benefits:

a. Early assessment of potential liability

b. Gather information on the community opinion toward an event

c. Gather information on potential number of claimants involved

d. Opportunity to mold public and individual claimants' opinions

e. Make a good first impression

**D. Inspection of the Premises**

1. The sooner the better.

2. Can be best / only method of analyzing potential liability.

3. Can be single most important information gathering event.

4. Attorney and expert(s) should be present almost without exception.

**E. Evidence Collection / Preservation**

1. External:

a Photos or videos taken by witnesses

b. Documents in their possession
- Manuals
- Promotional material
- Warranties
- Correspondence or mass mailings
- Flyers that may have been circulated
- Union publications

2. Internal:

a Photos or videos

b. Documents in their possession
- Manuals
- Quality control / testing
- Promotional material
- Warranty language

c. Litigation hold on electronically stored / updated information

d. Employee lists, schedules, and contact information

e. Investigation conducted "In anticipation of litigation"

f. Designate someone higher up to direct investigation
- Not part of normal job duties to investigate a claim
- This investigation is different

3. Preservation of Evidence letters:

a. Correspondence to all potential claimants and defendants directing them to either maintain evidence, make it available for inspection, or that you are making it available for inspection and testing before it is materially altered (fixed or remediated).

b. Why are preservation letters important?
- Puts all potential parties on notice of claim
- Use as sword or shield
  - Evidentiary inferences
  - Rebuttable presumptions
  - Exclusion of evidence
  - Exclusion of experts
  - Dismissal
- Standard of reviews are different amongst potential remedies

**F. Union Investigations / Adversary Hearings**

**G. F.O.I.A. Document Requests**

**H. O.S.H.A. Investigations and Reports**

**I. F.E.M.A. Investigations and Reports**

**J. Early Identification and Retention of Experts**:

1. Testifying.

2. Consulting.

   a. Can be used to sequester an expert from the opposition.

   b. Especially useful if their opinion might contradict your position.

   c. An "adverse" expert can provide a different point a view.

**K. The Internet**:

1. Social media sites

2. Blogs

3. Research / fact gathering

4. The opposition's website

5. Make a free virtual site inspection

## IV. LITIGATION CHALLENGES AND PRACTICE POINTERS

### A. Early Recognition That a Claim is Complex, Catastrophic, or Both.

1. "The sky is falling, or is it?"

   a. Not feasible to treat every claim as complex or catastrophic

   b. Not prudent to do so either

   c. Get help
      - Counsel
      - Internal round table either in person or electronically

2. More difficult when the first notice of a claim is the complaint.

**B. Assembling the Right Defense Team**

1. Attorneys

2. Experts

3. Investigators

4. Consultants

5. Temporary / part time workers

6. Public relations firm / media consultant

**C. Creating a Workable Matrix for Processing Multiple Claims**:

1. Intake of claims

2. Categorization of claims

    a. By severity

    b. By monetary amount

    c. By type of damage suffered

**D. Early Analysis of Pre-Suit Resolution Potential:**

1. Is it advisable to set up a claim fund?

    a. Similar to bankruptcy proof of claims processing.

    b. Limited generally to claims with hundreds or more claimants.

    c. Can lead to paying more in the value of individual claims.

    d. Increased settlement values should be off-set by savings realized regarding investigation, litigation, and processing fees.

    e. Beware of claim "feeding frenzies":
        - the easier it is to process a claim, the more claimants will file
        - can lead to compensating "dubious" claims

    f. Can create the "psychosomatic" plaintiff:

- The publication of potential symptoms leads more people to report those particular symptoms.

2. Pre-suit settlement:

   a. Liability probably or "not disputed" for purposes of negotiation.

   b. Small enough number of claimants that damages can be evaluated on a more in-depth case by case basis.

   c. Need to ensure consistency amongst all claims that are resolved:
      - "But my neighbor Jimmy got $X"

   d. Confidentiality mandatory

3. Maintain your right to contribution or indemnity if appropriate.

**E. Create a Means to Process Documents and Information:**

1. Technology - coding documents.

2. Only as good as the person coding the information.

3. Searchable electronic documents - Optical Character Recognition ("OCR").

**G. Avoid Information Overload:**

1. Due to the size of these types of claims, likely to get much more information than you need

2. Need a means to filter and discard the less relevant

3. Identifying the "Needle in the haystack" of documents

**H. Joint Defense Agreements:**

1. Allows multiple parties to divide investigation or litigation costs.

2. Should be in writing addressing:

   a. Confidential nature of communications amongst member only.

   b. Division and payment of expert fees / costs.

c. The use of “joint defense experts” by non-settling defendants.

d. The non-use of any information gained while part of the joint defense group.

**I. Personality Conflicts Among Both Internal and External Participants**

**J. Scheduling - Must be Much More Pro-Active and Regimented:**

1. Internal with all or parts of the defense team

2. External with all parties

3. Experts conferences

4. Depositions

5. Court hearings

   a. Schedule multiple/periodic status conferences up front with the Court

   b. Allow more than ample time for discovery

6. Inspections and destructive testing

**K. Managing Multiple Experts:**

1. Integrating multiple disciplines into one cohesive theme or defense.

2. Shift the focus from what an expert wants to stress or say to what you want or need them to emphasize in their testimony or reports.

**L. Unsympathetic or Overly-Sympathetic Judges**

1. No urgency to accomplish anything.

2. No reasonable time to investigate and prepare your case.

**M. Avoid Class Action Certification**

**N. Get Ahead of the Information Curve**

1. The sooner you know more than your opponent the better.

2. The longer you can stay ahead of their knowledge base the better.

**O. Jurisdictional Analysis and Choice of Law**

1. Are there any differences amongst the potential forum states or counties?

   a. Jury demographics

   b. Local practice by the bench
      - Active
      - Allow attorneys to manage the case
      - Time limits and case calendars

2. Is the law on liability or damages amongst jurisdictions different / better

   a. Statutes of limitations

   b. Choice of law provisions

   c. Recognition of torts at issue

   d. Damage caps

**P. Build a Defense Plan that Can Apply to a Majority of Claims**

1. Sacrifice potential defenses for the overall best interests of the client.

2. Winning a minor legal battle may lose you the war.

**Q. Alternative Litigation Mechanisms**

1. Focus groups

2. Jury verdict research

3. Mock jury trials

4. Bifurcation of liability and damages

5. Reverse Bifurcation

6. Tolling agreements

7. Filing a lawsuit

**R. Create "Litigation Credibility": Trust and Goodwill in You by Your Opponents**

1. Consistently know more about the subject matter of the claim before your opponents.

2. Recognize and foretell key facts to the opposition that are clearly going to be discovered.

3. Take a pro-active leadership role in joint defense meetings and agreements.

4. Be honest, fair, and respectful treatment of opposing counsel and their clients.

5. Get to know and socialize with the other counsel if possible and tolerable.

# Federal Rule of Civil Procedure 26(a)(2)

**Amendments to prior Rule indicated**[1]

**Rule 26. Duty to Disclose; General Provisions Governing Discovery**

**(a) Required Disclosures.**

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**(2)** ***Disclosure of Expert Testimony.***

**(A)** *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

**(B)** *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

**(i)** a complete statement of all opinions the witness will express and the basis and reasons for them;

**(ii)** the facts or data ~~or other information~~ considered by the witness in forming them;

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[1]Material added after the public comment period is indicated by double underlining, and material deleted after the public comment period is indicated by underlining and overstriking. New material is indicated by underlining and deleted material by overstriking.

**(iii)** any exhibits that will be used to summarize or support them;

**(iv)** the witness's qualifications, including a list of all publications authored in the previous 10 years;

**(v)** a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

**(vi)** a statement of the compensation to be paid for the study and testimony in the case.

**(C)** *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this ~~the Rule 26(a)(2)(A)~~ disclosure must state:

**(i)** the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

**(ii)** a summary of the facts and opinions to which the witness is expected to testify.

**(D~~C~~)** *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

**(i)** at least 90 days before the date set for trial or for the case to be ready for trial; or

**(ii)** if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

**(E~~D~~)** *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

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**(b) Discovery Scope and Limits.**

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**(3)** ***Trial Preparation: Materials.***

**(A)** *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

**(i)** they are otherwise discoverable under Rule 26(b)(1); and

**(ii)** the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

**(B)** *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

**(C)** *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of

expenses. A previous statement is either:

**(i)** a written statement that the person has signed or otherwise adopted or approved; or

**(ii)** a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

**(4)** ***Trial Preparation: Experts.***

**(A)** *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

**(B)** *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which ~~of~~ the draft is recorded.

**(C)** *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

**(i)** r~~R~~elate to compensation for the expert's study or testimony;

**(ii)** i~~I~~dentify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

**(iii)** identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

**(DB)** *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

**(i)** as provided in Rule 35(b); or

**(ii)** on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

**(EC)** *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

**(i)** pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (DB); and

**(ii)** for discovery under (DB), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

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**Committee Note**

**Rule 26.** Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery

regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including — for many experts — an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts — one for purposes of consultation and another to testify at trial — because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

**Subdivision (a)(2)(B).** Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered, rather than the "data or other information" disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

**Subdivision (a)(2)(C).** Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

**Subdivision (a)(2)(D).** This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

**Subdivision (b)(4).** Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than

the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and "the party's attorney" should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the "party's attorney" concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii) — that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).