**1-026. General provisions governing discovery.**

A. **Discovery methods.** Parties may obtain discovery by any of the following methods: depositions; interrogatories; requests for production or to enter land; physical and mental examinations and requests for admission.

B. **Scope of discovery.** Unless otherwise limited by the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery of any information, not privileged, which is relevant to the subject matter involved in the pending action. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. A party responding to discovery requests shall provide all non-privileged responsive information then known to the party, subject to the limitations in these rules or as ordered by the court.

(2) Limitations. The court shall limit use of discovery methods set forth in this rule if it determines that:

(a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(b) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(c) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

(3) Witnesses and exhibits. Parties may obtain discovery of the identity of each person expected to be called as a witness at trial, the subject matter of the witness’s expected

testimony and the substance of the witness's testimony. Parties may also discover the name, address, and telephone number of each individual likely to have discoverable information that another party may use to support its claims or defenses as well as the subjects of [~~such~~] that information. Parties may obtain a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that a party may use to support its claims or defenses.

(4) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. For purposes of this paragraph, an application for insurance is not part of an insurance agreement.

(5) Trial preparation materials.

(a) *Documents and tangible things.* [~~Subject to the provisions of Subparagraph (6) of this paragraph,~~] Ordinarily, a party may [~~obtain discovery of~~] not discover documents, electronically stored information, and tangible things [~~otherwise discoverable under Subparagraph (1) of this paragraph and prepared in anticipation of litigation or for trial by or for another party or that party's~~] 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 Subparagraph (B)(6) of this rule, those materials may be discovered if:

(i) they are otherwise discoverable under Subparagraph (B)(1) of this rule; and

(ii) the party shows that it [~~only upon a showing that the party seeking discovery~~] has substantial need [~~of~~] for the materials [~~in the preparation of the party's~~] to prepare its case and [~~that the party is unable~~] cannot, without undue hardship, [~~to~~] obtain [~~the~~] their substantial equivalent [~~of the materials~~] by other means.

(b) *Protection against disclosure.* [~~In ordering~~] If the court orders discovery of [~~such~~] those materials[ ~~when the required showing has been made~~], [~~the court shall~~] it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of [~~an~~] a party's attorney or other representative [~~of a party concerning~~] about the litigation.

(c) *Previous statement.* [~~A~~] Any party or other person may, on request and without the required showing, obtain [~~without the required showing a~~] the person's own previous statement [~~that the party made concerning~~]about the action or its subject matter. [~~Upon request, a person not a party may obtain without the required showing a statement that the person made concerning the action or its subject matter.~~] If the request is refused, the person may move for a court order[~~, compelling production of the statement~~]. The provisions of Rule 1-037 NMRA apply to the award of expenses incurred in relation to the motion. [~~For purposes of this paragraph, a~~] A previous statement is either:

[~~(a)~~](i) a written statement that the person has signed[~~,~~] or otherwise adopted or approved[~~, by the person making it~~], or

[~~(b)~~](ii) a contemporaneous[~~, substantially verbatim recital of an~~] stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement[~~, by a person~~].

(6) Experts.

(a) *Expert witnesses who may testify at trial.* A party may through interrogatories and requests for production discover the identity of each person the other party may call as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. In addition, a party may discover the qualifications of the expert, including a copy of or the name and address of the custodian of any reports prepared by the expert [~~regarding~~] about the pending action, a list of all publications authored by the witness within the preceding ten (10) years, and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four (4) years.

(b) *Deposition of an expert who may testify at trial.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial.

(c) *Trial-preparation protection for draft reports or disclosures.* Subparagraphs (B)(5)(a) and (b) of this rule protect drafts of any report or disclosure required by this rule or court order, regardless of the form in which the draft is recorded.

(d) *Trial-preparation protection for communications between a party's attorney and expert witnesses.* Subparagraphs (B)(5)(a) and (b) of this rule protect communications between the party's attorney and any expert witness required by this rule or court order to provide a report or disclosure, regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify 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 on in forming the opinions to be expressed.

[~~(c)~~] (e) *Expert employed only for trial preparation.* Ordinarily, a [~~A~~] party may not, by interrogatories or deposition, discover facts known or opinions held by an expert [~~that another party~~] who has been retained or specially employed by another party in anticipation of litigation or to prepare[~~preparation~~] 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 1-035 NMRA; or

(ii) [~~upon~~]on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

[~~(d)~~](f) *Payment.* Unless manifest injustice would result, the party seeking discovery shall pay the expert a reasonable fee related to the deposition or for time spent in responding to discovery under this subparagraph

(7) Claims of privilege or protection of trial preparation materials.

(a) Information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection [~~pursuant to~~] under Subparagraph [~~(5) of this paragraph~~] (B)(5) of this rule as trial preparation materials, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(b) Information produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. By motion, a receiving party may promptly present the information to the court for in camera review and a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

C. **Protective orders.** Upon motion by any party or interested person for good cause, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) prohibiting the disclosure or discovery;

(2) limiting the terms or conditions of the disclosure or discovery;

(3) designating the time or place of the disclosure or discovery;

(4) directing the method of discovery including a method different than the party seeking discovery selected;

(5) barring or limiting inquiry into certain matters;

(6) directing that discovery be conducted with no one present except persons designated by the court;

(7) sealing disclosures, responses, or deposition transcripts;

(8) authorizing, prohibiting, or limiting the discovery of a trade secret or other confidential research, development, or commercial information; and

(9) directing that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may order that any party or person provide or permit discovery. The provisions of Rule 1-037 [~~NMRA~~] apply to the award of expenses incurred in relation to the motion.

A motion filed [~~pursuant to~~] under Paragraph C of this rule shall set forth or attach a copy of the discovery request at issue.

D. **Sequence and timing of discovery.** Unless the court for good cause orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not delay any other party's discovery. A party responding to discovery requests may not refuse to provide responsive information on grounds that discovery is continuing or that future scheduling deadlines exist such as those for exchange of trial witness and exhibits lists.

E. **Supplementation of responses.** A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time [~~prior to~~] before trial through new requests for supplementation of prior responses. In addition, a party has a duty to seasonably supplement or amend a prior response to an interrogatory, request for production, or request for admission if a party learns that the response is materially incomplete or incorrect and if additional or corrective information has not otherwise been made known to the parties during the discovery process or in writing.

F. **Discovery conference.** At any time, the court may direct the attorneys for the parties to appear for a discovery conference. The court shall also conduct a discovery conference

upon motion by any party, unless the court determines that good cause exists not to conduct [~~such~~] a conference.

[~~Following~~] After the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting [~~limitations~~] limits on discovery, if any, and determining [~~such~~] any other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. Upon request of a party or when good cause otherwise exists, the court shall establish deadlines for identifying expert witnesses and conducting discovery related to expert testimony. An order may be altered or amended for good cause or by stipulation of the parties with court approval.

The court may combine the discovery conference with a pretrial conference authorized by Rule 1-016 NMRA.

[As amended, effective October 15, 1986; August 1, 1989; January 1, 1998; May 1, 2002; as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009; as amended by Supreme Court Order No. S-1-RCR-2024-00069, effective for all cases pending or filed on or after December 31, 2026.]

**[~~Committee Commentary for 2009 Amendments.~~ ]**

**Committee commentary for 2009 amendments.** — The 2009 amendments to Rule 1-026 NMRA consist of numerous changes as described below.

**Stylistic and Grammatical Changes**

The stylistic and grammatical changes to Rule 1-026 are numerous. Unless otherwise noted below, these changes were not intended to impact the substantive provisions of Rule 1-026.

***Discovery Methods.*** The new language in Rule 1-026(A) is more concise. The provisions for requests for production or to enter land apply to both Rule 1-034 NMRA, which has to do with such discovery requests made upon parties, as well as Rule 1-045 NMRA, which has to do with such discovery via a subpoena to non-parties.

***Scope of Discovery.*** The amendments consolidate the prior language in Rule 1-026(B)(1) to express the well-established standard for liberal pretrial discovery. *E.g., Marchiondo v. Brown*[~~,~~], 1982-NMSC-076, 98 N.M. 394, 649 P.2d 462[~~ (1982)~~]. The parties may obtain discovery of any information not privileged which is relevant to the subject matter involved in the pending litigation. The amendment retains the provision that the information sought need not be admissible at trial if the information appears to be reasonably calculated to lead to the discovery of admissible evidence. The rule further explains that parties responding to discovery requests seeking such information must provide responsive information then known to the party and may not delay discovery of such information simply because discovery is not complete or future pretrial deadlines may exist.

***Witnesses and Exhibits.*** This paragraph explicitly provides for discovery related to witnesses, documents, electronically stored information, and tangible things. One of the principal purposes of these provisions is to facilitate early discovery of necessary pretrial information to focus later discovery. Early identification of potential witnesses and exhibits should expedite the litigation process.

***Insurance information.*** Although Rule 1-026(B)(4) does not include an insurance application as part of an insurance agreement, such applications may be discoverable when reasonably calculated to lead to the discovery of admissible evidence. The revisions to Rule 1-026(B)(4) are not intended to change existing law governing the admissibility of information

concerning insurance agreements. The Rules of Evidence continue to control the admissibility of insurance information.

***Expert Discovery.*** Rule 1-026(B)(4) concerns discovery of experts. The previous rule required a court order for taking a deposition of an expert, a procedure not uniformly followed. The rule now provides for requests for production and interrogatories as well as depositions of experts without court order.

***Privilege Issues.*** These revisions consist mostly of stylistic changes. It is desirable that a party comply with the provisions of Rule 1-026(B)(7)(a) by producing a privilege log of any information being withheld from discovery on the grounds of privilege. The provisions in Rule 1-026(B)(7)(b) are new. They are modeled after amendments to the Federal Rules of Civil Procedure adopted with provisions for the discovery of electronically-stored information as explained in more detail below.

***Protective Orders.*** The amendments consist essentially of stylistic changes with one notable exception. The rule previously provided that a party or other person could seek a protective order from the court in which the action is pending or, alternatively, on matters relating to a deposition, from a court in the district where the deposition is to be taken. The provision applicable "to the district where the deposition is to be taken" is a vestige from the adoption of portions of the federal rule, which envisions discovery outside the federal district of the pending action. The federal rule has a nationwide application. New Mexico has a much smaller geographic area, and consequently, the committee felt that the burdens imposed by requiring parties or non-parties to seek a protective order in the district court where the action is filed did not outweigh the judicial economy and consistency of having that particular court decide the issue.

***Supplementation.*** The amendments to Paragraph E concern a party's duty to supplement and amend discovery responses. The rule does not require supplementation or amendment if the additional or corrective information has otherwise been made known to the parties during the discovery process or in writing. The amendment does not otherwise significantly change the substantive requirements of the existing rule; it is intended to restate those requirements more concisely.

***Discovery Conferences.*** The revisions streamline the procedures applicable to discovery conferences and eliminate provisions that litigants were not typically following in routine practice. The rule provides parties the opportunity to have the court enter scheduling deadlines related to expert witnesses.

***Discovery of Electronically Stored Information.*** In September, 2005, the Committee on Rules of Practice and Procedure proposed amendments to the Federal Rules of Civil Procedure. The committee found that discovery of electronically stored information "raises markedly different issues from conventional discovery of paper records" and that existing discovery rules "provide inadequate guidance to litigants, judges, and lawyers in determining discovery rights and obligations in particular cases." *September 2005 Report of the Committee on Rules of Practice and Procedure.* The advisory committee submitted proposed amendments to Federal Rules 16, 26, 33, 34, 37, 45, and Form 35 to address these problems. The proposals were adopted and went into effect in the federal courts in December, 2006.

The New Mexico Rules of Civil Procedure for the District Courts Committee reviewed these new federal rules and the advisory committee's accompanying commentary. With three substantive changes and additional minor editing changes, the committee recommended that New Mexico amend Rules 1-016, 1-026, 1-033, 1-034, 1-037, and 1-045 of the New Mexico Rules of

Civil Procedure for the District Courts to incorporate the new federal rules concerning discovery of electronically stored information.

One recommended change occurs in Rule 1-026(B)(7)(b) [~~NMRA~~], which deals with the assertion of privilege or other protection for information already produced by a party. Both Federal Rule 26(b)(5)(B) and Rule 1-026(B)(7)(b) provide that the party who is notified that the party has received information subject to the claim of privilege or protection must sequester it and not use it until the claim is resolved. Federal Rule 26(b)(5)(B) provides that the party in possession of the disputed information "may promptly present the information to the court under seal for a determination of the claim." Because New Mexico law provides that documents are sealed only after a motion to seal has been made and granted, *see, e.g., Thomas v. Thomas*, 1999-NMCA-135, 128 N.M. 177, 991 P.2d 7 [~~(Ct. App. 1999)~~] (noting that a party sought a protective order to seal the district court record of the proceedings); LR2-111 NMRA [withdrawn] ("... a court may seal a file or other record upon a party's written motion or the court's own motion, and showing of good cause."), New Mexico Rule 1-026(B)(7)(b) provides instead: "By motion, a receiving party may promptly present the information to the court for in camera review and determination of the claim." The committee does not intend that the adoption of Rule 1-026(B)(7) will otherwise affect the burdens of production and persuasion that apply when claims of privilege are made. *See* Rule 1-026(B)(7)(a)); *see also Pina v. Espinoza*, 2001-NMCA-055, 130 N.M. 661, 29 P.3d 1062.

The second change is the omission from the amendments to New Mexico Rule 1-037 of that portion of the 2006 amendment that added Rule 37(f) to the Federal Rule. Federal Rule 37(f) provides:

(f) **Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

The committee is of the view that nothing in the nature of discovery of electronically stored information requires curtailment of the existing discretion of the district court to determine an appropriate sanction for violation of discovery rules.

The third change is the omission of a provision in Federal Rule 26(b)(2)(B), which provides:

(B) **Specific Limitations on Electronically Stored Information.** A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

The committee is of the view that the discovery of electronically stored information should be subject to the same provisions in these rules for motions to compel discovery and motions for protective orders that currently govern the discovery of non-electronic information.

**Committee commentary for 2026 amendments.** — The 2026 amendments to Subparagraph (B)(6) of this rule are intended to provide protections to expert witness draft reports

or disclosures and communications to the same extent provided in the Federal Rules of Civil Procedure. Subparagraph (B)(6)(c) of this rule provides work-product protection for drafts of expert reports and disclosures regardless of whether those drafts and disclosures are required by the rule, by a court order, or in response to an interrogatory or request for production. *See* Fed. R. Civ. P. 26(b)(4)(B) advisory committee's note to 2010 amendment. Subparagraph (B)(6)(d) of this rule provides work-product protection for attorney-expert communications regardless of the form of the communications. *See* Fed. R. Civ. P. 26(b)(4)(C) advisory committee's note to 2010 amendment.

[As amended by Supreme Court Order No. 09-8300-007[~~, effective May 15, 2009~~]; as amended by Supreme Court Order No. S-1-RCR-2024-00069.]