

1 **1-034. Production of documents and things and entry ~~upon~~ on land for inspection**
2 **and other purposes.**

3 A. **Scope.** Any party may serve on any other party a request:

4 (1) to produce and permit the party making the request, or someone
5 acting on the requestor's behalf, to inspect, copy, test, or sample any designated
6 ~~[documents,]~~ documents, electronically stored information, or any tangible things, which
7 constitute or contain matters within the scope of Rule 1-026 NMRA, and which are in the
8 possession, custody, or control of the party ~~upon~~ on whom the request is served; or

9 (2) to permit entry ~~upon~~ on designated land or other property in the
10 possession or control of the party ~~upon~~ on whom the request is served for the purpose of
11 inspecting and measuring, surveying, photographing, testing, or sampling the property or
12 any designated object or operation ~~thereon~~ on the property, within the scope of Rule 1-
13 026 NMRA.

14 B. **Procedure.** The request may, without leave of court, be served ~~upon~~ on
15 the plaintiff after commencement of the action and ~~upon~~ on any other party with or after
16 service of the summons and complaint ~~upon~~ on that party. The request shall set forth the
17 items to be inspected either by individual item or by category and describe each item and
18 category with reasonable particularity. The request shall specify a reasonable time, place,
19 and manner of making the inspection and performing the related acts. The request may
20 specify the form or forms in which electronically stored information is to be produced.

21 The party ~~upon~~ on whom the request is served shall serve a written response

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1 within thirty (30) days after [~~the~~] service of the request, [~~except that~~] but a defendant may
2 serve a response within forty-five (45) days after service of the summons and complaint
3 [~~upon~~] on that defendant. The court may allow a shorter or longer time. The response
4 shall state, with respect to each item or category, that inspection and related activities will
5 be permitted in its entirety as requested, unless the request is objected to, including an
6 objection to the requested form or forms for producing electronically stored information,
7 stating the specific reasons for objection. If objection is made to part of an item or
8 category, the part shall be specified. If objection is made to the requested form or forms
9 for producing electronically stored information, or if no form was specified in the
10 request, the responding party must state the form or forms it intends to use. The
11 responding party shall state whether the response includes all responsive materials. If the
12 responding party withholds any responsive materials based on an objection, the objection
13 shall clearly describe with reasonable particularity what materials are being withheld for
14 each objection. The party submitting the request may move for an order under Rule 1-037
15 NMRA with respect to any objection to, or other failure to respond to [~~the request~~] all or
16 any part [~~thereof~~] of the request, or any failure to permit inspection as requested.

17 Unless the parties otherwise agree, or the court otherwise orders,

18 (1) a party who produces documents for inspection shall produce them
19 as they are kept in the usual course of business or shall organize and label them to

1 correspond with the categories in the request;

2 (2) if a request does not specify the form or forms for producing
3 electronically stored information, a responding party must produce the information in a
4 form or forms in which it is ordinarily maintained or in a form or forms that are
5 reasonably usable; and

6 (3) a party need not produce the same electronically stored
7 information in more than one form.

8 C. **Persons not parties.** A person not a party to the action may be compelled
9 to produce documents and things or to submit to an inspection as provided in Rule 1-045
10 NMRA.

11 [As amended, effective January 1, 1998; as amended by Supreme Court Order No. 09-
12 8300-007, effective May 15, 2009; as amended by Supreme Court Order No. 21-8300-
13 024, effective for all cases pending or filed on or after December 31, 2021.]

14 **Committee commentary for 2009 amendments.** — *See* the 2009 committee
15 commentary to Rule 1-026 NMRA for additional information.

16 **Committee commentary for 2021 amendments.** — The 2021 amendments to
17 Rule 1-034(B) require the responding party “state whether the response includes all
18 responsive materials,” and, if it does not, the responding party “clearly describe with
19 reasonable particularity what materials are being withheld for each objection.” The
20 purpose of this amendment is to disincentivize, if not eliminate, obfuscation of the

1 existence, volume, or nature of documents withheld from a production, or the basis for
2 doing so, through the interposition of objections. The default response to a request for
3 production is the production of responsive materials. While withholding documents
4 pursuant to objections is often legitimate, failure to divulge that material documents have
5 been withheld, failure to identify what materials have been disclosed, and failure to
6 clearly state the reasons for withholding materials is not.

7 The “reasonable particularity” standard mirrors the standard for a proper request
8 for production under Rule 1-034(B) NMRA and is likewise flexible and circumstance
9 dependent. Parties seeking the production or inspection of documents within the scope of
10 discovery “must set forth the items to be inspected either by individual item or by
11 category and describe each item and category with reasonable particularity.” Rule 1-
12 034(B). In this context, a discovery request “should be sufficiently definite and limited in
13 scope that it can be said to ‘apprise a person of ordinary intelligence what documents are
14 required and [to enable] the court ... to ascertain whether the requested documents have
15 been produced.’ ” *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 649-50 (10th Cir. 2008)
16 (alterations in original) (citing Wright & Miller, 8A Federal Practice and Procedure §
17 2211, at 415).

18 “Requests which are worded too broadly or are too all inclusive of a general topic
19 function like a giant broom, sweeping everything in their path, useful or not.” *Audiotext*

1 Commc'ns v. U.S. Telecom, Inc., No. CIV. A. 94-2395-GTV, 1995 WL 18759, at *1 (D.
2 Kan. Jan. 17, 1995). They “require the respondent either to guess or move through mental
3 gymnastics which are unreasonably time-consuming and burdensome to determine which
4 of many pieces of paper may conceivably contain some detail, either obvious or hidden,
5 within the scope of the request.” *Benavidez v. New Mexico Dep't of Transportation*, No.
6 CV 12-919 MV/ACT, 2013 WL 12330028, at *6 (D.N.M. May 20, 2013) (internal
7 quotation marks and citation omitted). Such requests are objectionable as overly broad.
8 *Id.*; *Taylor v. Grisham*, No. 1:20-CV-00267-JB-JHR, 2020 WL 6449159, *3 (D.N.M.
9 Nov. 3, 2020); see also *Marquez v. Frank Larrabee and Larrabee, Inc.*, 2016-NMCA-
10 087, ¶ 12, 382 P.3d 968 (stating that the New Mexico Rules of Civil Procedure are
11 modeled after the Federal Rules of Civil Procedure and holding that where the state rule
12 closely tracks its federal counterpart, the federal construction of the federal rule is
13 persuasive authority for construction of the corresponding state rule).

14 Reasonable shortcomings in the initial objections can permissibly be rectified
15 during the parties’ good faith efforts to resolve disputed discovery issues leading up to
16 the filing of a motion to compel as required by Rule 1-037(A)(4) NMRA. However, as a
17 component of these good faith efforts, the responding party is expected, upon request, to
18 describe the selection and production methodologies used, including both the initial
19 search for potentially responsive documents—e.g., the search terms used, the places or
20 accounts searched and those not searched, the individuals consulted in the search, and

1 why each of the foregoing was selected—and any subsequent culling of documents from
2 those initially returned subject to that search. The expectation is that, at a minimum,
3 parties to discovery will answer each other’s questions during their good faith
4 discussions, including, for example, that the requesting party will answer inquiries from
5 the responding party about the relevance and proportionality of the requested documents,
6 and that the responding party will answer questions about the legal bases of the
7 objections, the factual burdens that would be imposed by the requested search(es), and
8 the nature and volume of those documents withheld with at least as much robustness as
9 they intend to include in their submissions to the Court during the briefing or hearing on
10 any subsequent motion to compel.

11 The purpose of this amendment is not to place additional substantive discovery
12 burdens on the responding party. For example, the amendment does not require the
13 conducting of an initial, objectionably burdensome search for responsive documents. See
14 Rule 1-026(E) NMRA (implicitly acknowledging that there will be times when a party
15 performs a reasonable search but does not uncover all responsive materials, thereby
16 demonstrating that there are legitimate limits to a party’s obligation in performing an
17 initial search). Nor does the amendment require the disclosure of details about
18 responsive documents when the details themselves can be validly withheld subject to the
19 objection in question; and, more generally, it does not require any action by the

1 responding party that would effectively moot the lawful purpose for the objection. This
2 amendment also does not seek to punish the imposition of even those objections that the
3 Court ultimately overrules. It merely requires more detail and openness from the
4 objections themselves.

5 For example, an objection to the burdensomeness of a request for all documents
6 referring to a given individual or subject matter and created in the past ten (10) years
7 might be validly supported by a statement that the party only retains documents for five
8 (5) years, that the party keeps thirteen (13) filing cabinets of hardcopy documents in a
9 centralized location and that those documents are not electronically searchable, and that
10 the party has employed thirty (30) individuals in that time period who each maintain their
11 own emails. The response might then be augmented with an offer to conduct a search the
12 email accounts of the five (5) employees with the most involvement in the subject matter
13 for emails containing certain specified search terms (as opposed to an individualized
14 review of each email for responsiveness). If the same request is objected to on the basis
15 of overbreadth—i.e., that not every document referring to the individual is relevant to the
16 action—then it might be necessary to state that a specified number of documents were
17 withheld after an individualized review because those documents, while mentioning the
18 individual or subject matter in question, dealt exclusively with, for example, the setting
19 up of the requested individual’s retirement account, or a collection of documents or
20 discussion of the requested subject matter that arose in a context that renders that

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1 collection or discussion wholly irrelevant to the instant action in a way that the
2 responding party can articulate in its objection. The amended rule does not, however,
3 allow a blanket assertion of these two (2) objections, and perhaps a litany of others,
4 followed by a statement that an unspecified number of documents is being withheld of
5 the basis of the collective objections.

6 [As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009; as
7 amended by Supreme Court Order No. 21-8300-024, effective for all cases pending or
8 filed on or after December 31, 2021.]