

Development In Social Media Discovery

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Social media postings, messages and records are subject to discovery in lawsuits. But like other forms of discovery, there are limits.

Courts don't like fishing expeditions and will use state and federal laws to deny requests that are overly broad, lack specificity or fail for other reasons (e.g. the burden or expense of discovery outweighs the likely benefit).

Under the Federal Rules of Civil Procedure, discovery requests "must describe with reasonable particularity each item or category of items to be inspected." [Rule 34(b)]

This requirement posed a problem in a recent Los Angeles case involving Home Depot and an employee who sued the company for gender discrimination and failure to accommodate a physical disability. [[Mailhoit v. Home Depot](#), 9/7/12]

Home Depot made a broad request for the plaintiff to produce documents from social media sites including, among other things, "profiles, postings or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) . . . that reveal, refer, or relate to any emotion, feeling, or mental state of Plaintiff . . .".

The trial court denied this and two other categories of requests, citing earlier cases which held that "[t]he test for reasonable particularity is whether the request places a party upon `reasonable notice of what is called for and what is not.'"

The court recognized that content from social media networking sites, and information related to a party's emotional state, may be subject to discovery, but found several of the requests at issue failed the "reasonable particularity" test in FRCP 34(b)(1)(a) because they fail "to put a 'reasonable person of ordinary intelligence' on notice of which specific documents or information would be responsive to the request."

It remains important to request production of content from social media networking sites during discovery, but as *Mailhoit* points out the request should be tailored to guide the responding party to responsive material or you face the possibility of the request being denied.

As more cases are heard, and appellate decisions reached, on issues related to discovery of social media content, we may gain a clearer understanding and further guidance on what may or may not be appropriate in this context.

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