

# How Social Media Can Make Or Break IRL Family Court Feuds

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Southern California family law attorney Holly J. Moore suspected that her client's ex-wife was lying about being too sick to work just to avoid paying child support. It turned out, the truth was just a Facebook click away.

"She comes to court with IVs hooked up to her, but on social media, she's at a country concert and there are no IVs in that video of her," Moore told Law360 Pulse. "She's at bars, dancing on the bar, walking tons of steps at [Disneyland](#)."

As social media has become ubiquitous and more people are sharing large chunks of their lives online, apps such as Facebook have become a fertile bed of information for family lawyers.

Divorce lawyer Nick Rice of Memphis, Tennessee-based Rice Law told Law360 Pulse that, especially in divorce and custody court, a picture is worth a thousand words — and most family pictures exist online nowadays. Sometimes this can benefit a client, and sometimes it can be a hassle.

"If you've got somebody on the stand who's lying, and you've got the Facebook post that shows it, that carries weight," Rice said. "But what I also try to explain to my clients is, lawyers can twist things to their advantage. They're going to be looking to turn anything that they can find out there against you."

Lawyers told Law360 Pulse that only a few years ago, introducing a social media post into evidence or asking for a post in discovery used to require a lot more explaining. But now, it's become fairly commonplace.

That doesn't mean, however, there aren't still lingering legal questions.

"Lawyers have to do continuing legal education, and we're seeing so many new educational courses pop up about the admissibility of social media because it's becoming such a huge source of evidence," Moore said.

### **Caught Red-Handed**

Moore said it's remarkable what people will share on social media assuming it won't come back to bite them when they lie in court.

For instance, she said she once had an opposing party tell her they couldn't find a job only to turn around and update their Facebook page to say, "Started a new job."

"I mean, how stupid do you have to be?" Moore said.

Social media can give the illusion of privacy, Rice and his father, founding Rice Law partner Larry Rice, both told Law360 Pulse. But this should not be confused with the expectation of privacy, they noted — even if someone's Facebook or [Instagram](#) page is closed to just friends, they're not protected from that information being used in court.

"You're going to have a hard time saying, 'My Facebook page is private, but I've got 250 friends that I'm sending each communication to,'" Nick Rice said.

Social media can be a smoking gun in a number of circumstances, from proving that a parent has violated a child protective order to showing that a party was cheating on their spouse.

"When I start asking for dating app information, we get into settlement talks real quick," Nick Rice said.

Moore said one issue that comes up again and again is parents' monitoring of their children's social media accounts. Looking at how much presence a young child is able to have online and which parent has been paying the most attention or concern to their child's activity is often a good way to prove which party is the most responsible, she said.

"It gets very messy because the court won't necessarily make a decision on whether it's OK for a kid to be on social media," she said. "But they're just kind of looking to see who is looking out for the kid in a better way."

Some protective orders ask that parents don't drink or use drugs around their children, or that they don't take their children out of state. But lawyers said many people brazenly show themselves violating these rules online.

"They'll post pictures of being at a party where you can, like, see beer on the table next to them, and you know the kid is at the party, too," Moore said.

Social media can be used to show specific instances of breaking the rules, but it can also be used to bolster a more general image the lawyers are trying to present about the opposing parties. The Rices said they do this often in custody cases, where one parent is seeking to gain more time with their child.

"Using the mom's Facebook, we took the temporary parenting plan and charted all the times she was at pool parties, going to different bars and giving up over half of the parenting time she already has," Nick Rice said. "She's surrendering that parenting time to her parents, who are taking care of the child while she's going out and doing all of this stuff."

But at the same time, social media doesn't always have to be used to highlight the negative. Larry Rice said that it can also serve as a kind of character witness for his clients.

"Judges determine the best interest of the child not in their head, by and large, but in their heart. Or in their gut," he said. "A photo is the best way to get your message to someone on the inside. So if you don't have a camera full of pictures, if you go back through social media, you may be able to find some pictures so the parent can tell their story with the child and the events and the time that they spend with the child."

## **Legal Questions**

The Rices say they frequently request social media content in discovery, asking for a range of material such as specific posts, the entire history of someone's account, or direct messages on apps such as Facebook and Instagram.

The opposing parties will usually ignore the request at first, Nick Rice said, or they may file objections. One strategy he said he sees often is opposing counsel, without having responded to his request, turning around and asking his client for all their social media information.

"They're banking on the fact that we're not going to provide it," he said. "But we do, and then we're in a really good situation to say, if they filed an objection, 'That means one of two things — either they served me with a request of documents that they knew was

objectionable, or they know that their objection is invalid because they served me with the exact same question."

Moore did note that judges could have some valid concerns about digging for someone's social media posts.

One issue is an evidentiary rule that says in some cases you can't use evidence that would be considered to be a so-called present sense impression, or something someone said or did right in the moment without a lot of forethought. Some argue this could include a tweet or Facebook post that was written in the heat of the moment.

There are also rules about the completeness of evidence and not taking something out of context, Moore said.

"Is one isolated post complete evidence, or do you need the person's entire thread or profile?" she said.

Although Nick Rice said he's had judges request that he cut back on the breadth of information he asks for in discovery, it often benefits both parties to be more specific with social media discovery requests and limit the scope of what's provided, he said.

"As long as it goes to an actual court issue, the judges are allowing it to come in, and it's carrying a lot of weight," he said. "It's just like any other type of evidence that I've seen that you would want to use."

However, parties could get in trouble for deleting social media posts that might be damning after litigation has begun, Nick and Larry Rice said. In some cases, this could be considered spoliation of evidence.

The Federal Rules of Civil Procedure were amended in 2015 to explicitly state that "electronically stored information" must be preserved in anticipation of litigation.

And in one 2013 civil suit, *Lester vs. Allied Concrete Co.*, a plaintiff's attorney instructed him to "clean up" his Facebook page and delete certain photos. He later deactivated his entire Facebook account. This was revealed through the course of litigation and resulted in sanctions against both the plaintiff and his attorney for spoliation.

Nick Rice said that while he does encourage his clients to deactivate their social media accounts during the course of trial just to keep them from posting anything new and make it a little more challenging for the opposing side to get ahold of information that could be used against them, he said all the information is still accessible on a deactivated account, so it doesn't count as spoliation.

Moore said she doesn't tell her clients to stop using social media — she just asks that they be mindful.

"The problem comes in if you're not being honest and doing the right thing, and then you're posting about what's really going on, and you forgot that you lied over here," she said. "We just tell our clients, 'Make sure that your life is consistent with what you are claiming to us and to the court.'"

## **True Colors?**

Larry Rice said social media might actually be most useful as a vetting tool for potential clients — sometimes what a person posts can tell you all you need to know about them, he said.

However, Nick Rice noted that social media isn't always as transparent as it seems, pointing to a recent deposition in which the opposing party in a custody case gutted his cross-examination.

"She says that my guy's a deadbeat. He's a no-good father, he's never done anything for his kids," he said. "So I start with pulling out all of her Facebook posts and the most recent one from Father's Day. It says, 'To the most amazing father that I could ever hope for for my two children,' all this great, glowing stuff."

When he asked the woman if the post had come from her, he said she responded, "Yeah, and?"

"And I go, 'And what?' And she says, 'Everybody lies on social media!'" he said. "She kinda got me. Everybody does lie on social media."

--Editing by Alanna Weissman and Jay Jackson Jr.

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