



# EMOJI: THEIR ROLE IN DISCOVERY AND TRIAL

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**E**moji and emoticons<sup>1</sup> have migrated from personal texts and social media to business and to the courtroom—are you prepared to work with them?

## Emoji Idiosyncrasies

At one time, emoji and emoticons were of little concern to lawyers because the symbols were rarely used in serious business communications. But that is changing. As discovery in corporate and commercial litigation expands beyond email into social media and other communication applications—including IM, Facebook, Twitter, Snapchat, Slack, and Instagram—business communications increasingly include a variety of emoji that may need to be preserved, collected, reviewed, and produced.

Emoji in discovery can be challenging for many reasons. First, there are many different emoji, and the variety expands almost daily. As of the end of 2018, there were over 3,000 emoji listed in the Unicode Standard. Unicode is a computing industry standard for the consistent encoding, representation, and handling of text expressed in most of the world's writing systems, and the Unicode Standard is a character coding system designed to support the worldwide interchange, processing, and displaying of the written texts.

Second, some emoji render differently across platforms (e.g., platforms sponsored by Apple, Google, Microsoft, Samsung, Facebook, etc.). Thus, the display as seen by the writer who originally inserted the emoji and the display as seen by the recipient may not be the same. Further, when the data is collected and processed for review and production, the emoji may be displayed differently yet again. How the emoji is handled during processing will affect the way

the image is produced, and the way the requesting party is able to view the image. For example, you could send yourself a “grimacing face with clenched teeth” emoji from your iPhone to your Outlook address, where it is rendered as an empty rectangle; on other platforms, the same emoji may appear angry, worried, embarrassed, or sad. The Apple version of the “screaming face” emoji 🎭 seems inspired by Edvard Munch, while Samsung's versions 🎭 are closer to a Halloween decoration.<sup>2</sup>

Third, without experience and context, deciphering the meaning of an emoji can be difficult. The meanings of many emoji are more or less obvious, although some are still open to interpretation. For example, 🙏 could mean please, thank you, prayer, high five, or Namaste. The meanings of many other emoji are not at all obvious. Thus, while 😞 is commonly interpreted to mean complaining, anguished, or distraught, it originally was intended to mean “tired.”<sup>3</sup> This can create significant communication difficulties. In one study, participants could not agree on a quarter of images reviewed whether the sentiment of an emoji was positive, neutral, or negative.<sup>4</sup> In addition, some emoji have different cultural connotations: When used by a U.S. writer, the angel emoji can denote innocence or having performed a good deed; but to a Chinese reader, the same emoji can be interpreted as a sign for death and may be perceived as threatening.<sup>5</sup>

Fourth, many different emoji appear to communicate the same concept. As this piece is published, there are 18 columns of “smileys” on an iPhone and six columns of hand gestures. Some of the smiley emoji are distinguished only by different size eyes or the presence of eyebrows; others have hearts for eyes or around them. There appear to be three “hold up” or “wait” emoji—one left hand, one right hand, and one with the fingers slightly splayed. Different writers may use entirely different emoji to attempt to communicate the same message.

## **Emoji in Motion Practice**

Assuming a lawyer concludes emoji are relevant in a case, the next question may be how to incorporate emoji in a brief. The lawyer must decide whether reproducing an actual emoji in a brief is important, whether to describe the emoji with words instead of a picture, or whether to omit reference to the emoji entirely. A lawyer could decide to use a stylized cartoon gun emoji instead of the word gun because the picture might be perceived as less threatening. Conversely, a lawyer could decide to describe in words emoji that have known secondary meanings where the problematic connotation is more evident in the image than the words themselves (e.g., eggplant, banana, and peach emoji all have secondary meanings associated with human anatomy). If the emoji itself is not relevant, or is argued to be not relevant, the lawyer also could decide to replace the emoji with ellipses or simply indicate the omission of the emoji.

Lawyers also can insert pictures of emoji into text instead of emoji created by typing code. This would eliminate the risk that the platform used by the reader will render the emoji differently than the platform used by the writer. (We have done so in this article by saving emoji as pictures in Outlook and then inserting them into the Word document submitted for publication.)

Whatever the option selected, the lawyer must ensure that the emoji being presented to the court accurately represents the emoji that was used originally.

## **Emoji in the Courtroom or the Law of Unintended Consequences**

With this background as context, it should come as no surprise that there can be a number of quirky and unintended legal and technical consequences associated with using emoji. In fact, judges have been faced with some interesting choices when it comes to dealing with emoji and what they mean.<sup>6</sup>

For example, in *United States v. Westley*,<sup>7</sup> the court addressed a motion to suppress evidence obtained from the Facebook accounts of criminal defendants, and the issue was whether there had been probable cause to search the Facebook accounts. An agent from the Bureau of Alcohol, Tobacco, Firearms and Explosives submitted an affidavit in support of the proposition that the target accounts would contain direct evidence of drug trafficking, firearms offenses, and racketeering, in which he testified to the meanings of certain emoji based on his experience investigating street gangs, firearms offenses, and narcotics trafficking. Among other things, the agent testified that he believed that a “cloud” emoji in a posting referred to drugs and that a “gas” emoji in a defendant’s text message was a symbol for “gang.” The court found that the agent could rely on his training to interpret facts—in this case, emoji—to establish probable cause.

In a civil case, a judge was asked to interpret the significance of a “Hitler emoji” that appeared in an email between defendants in a civil rights case.<sup>8</sup> The plaintiffs argued the emoji supported their retaliation and First Amendment claims, but the court disagreed: “While any image evoking Hitler obviously can be offensive, the emoji was contained in an internal email between two work colleagues in which, taken in context, one was jokingly calling the other a ‘meanie’ and a taskmaster.”<sup>9</sup>

In *Commonwealth v. Castano*,<sup>10</sup> the defendant argued he had shot and killed his friend accidentally. However, the defendant had texted another friend an emoji face with “x’s” for eyes and the victim’s nickname, and the prosecution argued this meant the fatal shooting had already occurred when the defendant sent the text.

The prosecution showed there was no evidence that the shooter called 911 or tried to obtain help for the victim until approximately nine hours after sending that text. The jury concluded that the shooting was not accidental. The conviction and sentence were affirmed on the ground that the text message was “irreconcilable with an accidental shooting.”<sup>11</sup> This conviction thus was based, in part, on the prosecution and jury’s assumption that the shooter used an emoji with “x’s” for eyes to connote death.

Another challenge that may arise in litigation involves oral testimony concerning communications that include an emoji. For example, in the *Silk Road* trial, the judge permitted the admission of emoji into evidence. When the prosecution began reading quotes from Silk Road founder Ross Ulbricht’s text messages, the prosecutor omitted the smiley face at the end of one of the sentences. After the defense attorney objected, the prosecution was required to read the emoji,<sup>12</sup> but as noted above, this can and does get tricky depending on which emoji is depicted and what meaning is ascribed to that emoji.<sup>13</sup>

It’s also important to remember that judges and juries most likely encounter some emoji in their private lives, and, contrary to the situation with highly technical or scientific matters, they may have their own assumptions and interpretations of emoji that affect how they interpret emoji that are presented to them in court.

What does all this mean? That emoji are here to stay and, in all likelihood, will become increasingly widespread in business communications and implicated with all their complexities in litigation.

## **Guidance for Handling Emoji at Work**

Your employees and co-workers are using emoji amongst themselves, as well as with clients and vendors. Word 2010 and 2013 both offer users the option to download preselected emoji (Word 2010 offers clip art emoji; Word 2013 allows users to install emoji keyboards), and users can download additional emoji from the internet. In fact, users can create emoji themselves.<sup>14</sup> Mobile phones, whether personal phones used for business or corporate phones, come preloaded with hundreds of emoji. Slack offers numerous emoji-related apps.

Do you understand what platforms and programs your company or your client makes available or allows employees to utilize?

Do you or your client have a policy governing the use of emoji in internal or external communications? If so, is it followed?

Consider educating employees about the pitfalls of using emoji, or consider addressing this in the context of an official bring-your-own-device or social media policy.

## **Guidance for Handling Emoji in Discovery**

Images matter but context is king—and don’t forget to account for sarcasm. A winky face 😜 or an upside down smiley face 😒 at the end of a text sentence could change the meaning of the text significantly.

When preparing witnesses for deposition or interviewing record custodians, determine whether emoji have been used in relevant communications, which emoji are used frequently, and the meaning attributed to those emoji. Don’t assume the meaning you attribute to an emoji is universal.

If emoji are going to be the subject of discovery, take good care when designing the discovery process to ensure that the integrity of the emoji or emoticon depictions are maintained.

Emoji are not easily searchable using standard text- or data-min-

ing tools. If you learn through custodian interviews that emoji may be relevant, work with an e-discovery vendor to understand your options.

Do some homework into the various possibilities before deciding which emoji to search for when collecting data, communicating these emoji accurately to your vendor, and confirming that the custodians from whom you are collecting used the same rendition of the relevant emoji.

Understand how emoji will present on different platforms when they are produced.

Pay attention to details—emoji can look very similar but have drastically different meanings. ☺



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## Endnotes

<sup>1</sup>An emoji is a small image or pictograph 😊 that can be created either by pasting an image into text or by typing code into text. An emoticon is created from symbols on a keyboard, primarily using punctuation marks :-( [sad face].

<sup>2</sup>To see the various ways emoji present on different platforms and the various meanings for each emoji, see EMOJIPEDIA, <https://emojipedia.org> (last visited Aug. 9, 2019).

<sup>3</sup>Tired Face, EMOJIPEDIA, <https://emojipedia.org/tired-face> (last visited Aug. 9, 2019); Eyder Peralta, *Lost In Translation:*

*Study Finds Interpretation of Emojis Can Vary Widely*, NPR (Apr. 12, 2016, 5:05 PM), <https://www.npr.org/sections/thetwo-way/2016/04/12/473965971/lost-in-translation-study-finds-interpretation-of-emojis-can-vary-widely>.

<sup>4</sup>See Hannah Miller et al., “Blissfully Happy” or “Ready To Fight”: Varying Interpretations of Emoji, Presented at Proceedings of the Tenth International Conference on Web and Social Media (ICWSM 2016) (May 18, 2016).

<sup>5</sup>Alex Rawlings, *Why Emoji Mean Different Things in Different Cultures*, BBC FUTURE (Dec. 11, 2018), <http://www.bbc.com/future/story/20181211-why-emoji-mean-different-things-in-different-cultures>.

<sup>6</sup>As of July 1, 2019, “emoji” appeared in 41 cases published on Westlaw in the last six months and in 115 cases published in the last three years.

<sup>7</sup>*United States v. Westley*, No. 3:17-CR-171, 2018 WL 3448161 (D. Conn. July 17, 2018).

<sup>8</sup>See *NEXUS Servs. Inc. v. Moran*, No. 5:16-cv-00035, 2018 WL 1461750 (W.D. Va. Mar. 23, 2018).

<sup>9</sup>*Id.* at \*4.

<sup>10</sup>*Commonwealth v. Castano*, 82 N.E.3d 974, 982-83 (Mass. 2017).

<sup>11</sup>*Id.*

<sup>12</sup>Benjamin Weiser, *At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji*, N.Y. TIMES (Jan. 28, 2015), <https://www.nytimes.com/2015/01/29/nyregion/trial-silk-road-online-black-market-debating-emojis.html>; see also Eric Goldman, *Emoji and the Law*, 93 WASH. L. REV. 1227, 1263 (Oct. 2018).

<sup>13</sup>If a key piece of evidence includes an emoji, can a party ever obtain summary judgment or will the interpretation of an emoji always be a question to be resolved by the trier of fact?

<sup>14</sup>Leslie Walker, *Free Emoji Makers*, LIFEWIRE (May 21, 2019), <https://www.lifewire.com/create-your-own-emoji-with-custom-apps-2654847>.

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which you practice. Do your research to uncover pitfalls that might exist in your particular jurisdiction. And consider what many corporate clients and individuals with high-stakes disputes are starting to do: Bring in an appellate lawyer at the trial stage to keep an eye on preservation concerns and help shape the record with the appeal in mind.

We know trial lawyers have a lot to worry about without also having to think about their prospects on appeal. But paying attention to these tips can help ensure that your chances on appeal—if it comes to that—are as good as they can possibly be. ☺

clerked on the Ninth Circuit Court of Appeals, Yorke twice. They are also both appellate lawyer representatives to the Ninth Circuit, a body of two dozen attorneys hand-selected by the court's judges to liaise between bench and bar. You can learn more about them at [www.calapplaw.com](http://www.calapplaw.com). © 2019 Ben Feuer and Susan Yorke. All rights reserved.



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