



RICOH The Impact of Emoji in imagine. change. **Workplace Communication**

Legal & Compliance Considerations,
Case Law, and Discovery Challenges

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Introduction

Emoji as we know them today emerged more than twenty years ago and have proliferated greatly in type and use. Today it is unusual to receive a communication without them. What began as a way to add emotional nuance to “flat text” communications has become the content itself. Entire sentences are “written” using strings of emoji like hieroglyphics that replace text entirely. Emoji are language.

Like all language, emoji-speak is a living thing. Meanings and usage differ across cultures, geographies, demographics, and time. Just as with words, an individual emoji's meaning can change. And because of its very nature, these changes can happen even faster than with written and spoken languages. Certainly, faster than most corporate policies can be amended, approved, disseminated, and enforced (if indeed such policies are in place).

As we have all seen, the errant use of emoji (however unintentional) in social communications on public-facing platforms such as Twitter and Facebook can have significant repercussions: friends lost, reputations damaged, careers forfeited, and near-total social ostracization.

The inappropriate use of emoji in the workplace (the definition of inappropriate itself a moving target) not only carries the stigma and repercussion of social misuse but can create legal liabilities too. As described in this paper, a case can be brought on the basis of the emoji used in a communication and its adjudication won or lost on its accepted meaning. A meaning that is not merely tacit, but often explicit.

This paper also details some of the existing case law that illustrates the centrality of emoji in both civil and criminal matters, and their significance in arguments postulated by prosecutors, plaintiffs, and defendants alike.

Many aspects of the legal ecosystem have not kept pace with this new language. And while the case law referencing emoji appears to be growing exponentially, court opinions only refer to emoji by names that often lack necessary specificity or do not conform to accepted and recognized definitions when available. This is particularly problematic for custom emoji that are not part of the Unicode Consortium approved emoji collection. This means that researching opinions involving emoji is difficult and uncertain. The same is true for research platforms such as Thomson Reuters Westlaw™ and LexisNexis™, which currently lack emoji-specific search capabilities.

For corporate legal departments definitional work is pre-requisite from the legal, risk, and compliance perspective, and policies and protocols regarding the use of emoji, requisite. What emoji can be used, in what types of communications they are allowed, and understanding their meanings must be codified to mitigate risk and avoid potential liability. This includes any custom emoji created by the organization.

For attorneys involved in litigations and investigations, comprehending emoji (in all their relevant contexts and meanings) is as necessary as understanding written and spoken language. A single emoji may prove or disprove a central hypothesis or derail strategy. Case management strategies concerning emoji relevant to discovery must be employed as well.

For eDiscovery professionals the emerging mandate is to deliver technology and processes that support emoji, not as a graphic file, but as content. As delineated in this whitepaper, the need to manage emoji in a manner that allows their analysis, segmentation, prioritization, searching, coding, and tagging, just as is done with text-based concepts, is rapidly gaining importance. So too is the need to train reviewers on the meaning of emoji and their potential relevance to the matter under review. Again, the need for definitional guidance is paramount.

This is the impact of emoji in the workplace. This is their governance, legal, risk, and compliance considerations. This is very much an eDiscovery technology challenge.

A Selected History of Emoji

The emoticon (the text-based precursor to emoji) was first used in 1982 in a Carnegie Mellon University Computer Science Lab. Students using the lab's chat rooms weren't sure if messages were a joke or serious, so computer scientist Scott Fahlman used a colon and parenthesis smiley face to signify "just kidding." This added the needed emotional nuance to the otherwise flat text.

1999

[The Wired Guide to Emoji](#) details emoji milestones and notes that seventeen years later what we have come to know as the "emoji" was invented in Japan where "they first appeared on Japanese mobile phones." These emoji were created by Japanese artist Shigetaka who worked on the development team for "i-mode," an early mobile internet platform from Japan's main mobile carrier, DOCOMO. Kurita's original 176 emoji — now part of the permanent collection at New York's Museum of Modern Art — privileged symbols over faces, because DOCOMO's goal was to find new ways to express **information**.¹

2007

Google incorporates emoji into Gmail.²

2009

Apple engineers, Yasuo Kida and Peter Edberg, submitted an official proposal to adopt 625 new emoji characters into the Unicode Standard.

2010

Emoji was accepted into the Unicode standard with the release of Unicode 6.0. Emoji was officially on their way to becoming a language.³

2011

Apple adds an official emoji keyboard to its iOS.

It is worth noting that the Unicode Consortium requires a lengthy submission and approval process and it can take up to two years for an emoji to travel from first draft to your phone.

2014

Diversity and Inclusion: "As the emoji vocabulary began to grow, some people wondered why certain images were privileged over others. Why were there half a dozen icons to describe sushi, but zero tacos, burritos, or enchiladas? There were a growing number of emoji professionals — doctors, chefs, policemen — but why did they all appear to be men? And why, among the many different emoji representing humans, were all of them white people?" By 2014, the Great Emoji Politicization had begun.⁴

2015

The 🤩 "Face with Tears of Joy" emoji (not the words but the emoji itself) became the Oxford Dictionaries word of the year. It appeared in 17% and 20% of emails in the US and UK, respectively.

2015

Varied skin tones are introduced.



2016

73% of connected population is using emoji in personal communication and 33% are using emoji in the workplace. 2.3 Trillion mobile messages that incorporate emoji are sent.⁵

2017 The world's first emoji translator.

2017 Facebook revealed that while 60-million emoji are sent over Facebook each day, an average of 5-billion emoji are sent via Messenger daily.⁶

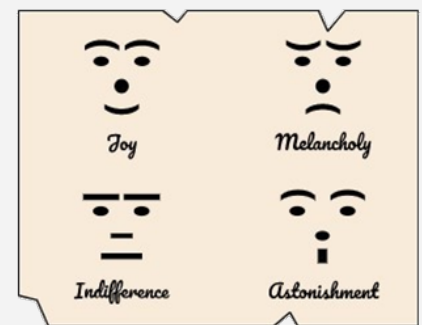
Emoji Pre-History

The [app institute](#) in their Illustrated history of the emoji notes that "Likely a misprint, The New York Times is responsible for the first use of an emoticon

– :) –

when they printed a transcribed copy of a speech given by President Abraham Lincoln in August 1862."

And "[t]he first intentional use of emoticons happened soon after, when Puck, an American satirical magazine, included a small piece on 'Typographical Art' in the issue published on 30 March 1881. The art depicted Joy, Melancholy, Indifference, and Astonishment using only typography."



2018

As diversity and social inclusion pictographs began appearing, concern arose regarding the potential for their inappropriate use. However, “After sifting through a billion tweets, researchers at the University of Edinburgh found that most people who modified their emoji picked ones with skin tones similar to their own” as reported by National Geographic in 2018. It appears that skin tones are overwhelmingly used to communicate social inclusion, not exclusion.

2019

Continuing the trend of diversity and inclusion, a New York Times article, [New Emoji Are Coming: Interracial Couples, Guide Dogs, Falafel and More](#), notes on new emoji:

The list — which includes 59 new emoji, as well as variants for a total of 230 options — emphasizes inclusivity. People will soon be able to create a holding hands emoji to reflect their own relationship, selecting for the skin color and gender identity of each individual. Other options include emoji showing a hearing aid, prosthetic limbs, sign language, a cane, or a wheelchair.⁷

This along with a host of additional Unicode Consortium approved emoji.

2019

92% of the connected population is using emoji in personal communication and fully 61% utilizing emoji at work.⁸

2020

The [New York Post](#)⁹ reports on a Vermont bill proposal allowing the addition of emoji on license plates. “State Rep. Rebecca White wants to let drivers express their emotions and has introduced a bill to allow emoji on vanity license plates. The bill states that symbols could be added ‘in addition to the plate’s registration number and would not replace any letters or numbers assigned by the Commissioner of Motor Vehicles nor those selected by the vehicle’s owner.’” 3,000 emoji are offered for use.

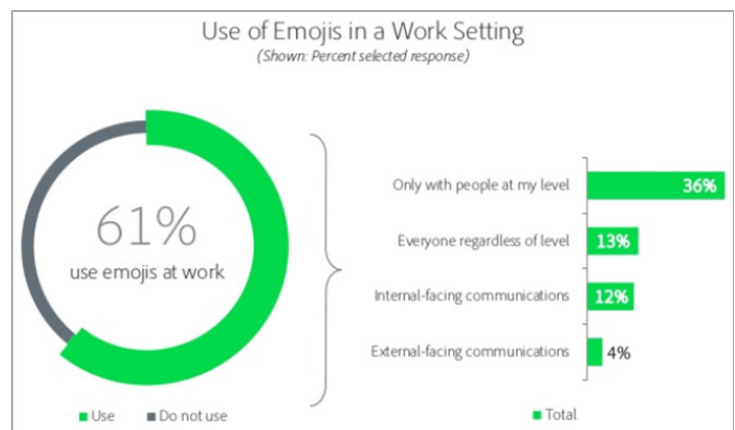
Unicode.org provides a [Full Emoji List](#), currently v13.0 (totaling 3,304 emoji).¹⁰ See also [emojipedia.org](#) as an additional source of detailed information.¹¹

How Are Emoji Being Used?

As reported in a [2019 Adobe Survey](#)¹², by 2019, 92% of the connected population used emoji in personal communication with 61% utilizing emoji at work (a 33% increase from 2016 figures).

As illustrated in this graph, of the 61% of survey respondents who use emoji at work, 36% indicate they use emoji “only with people at [their] level” and a fraction of that (13%) “regardless of level.” However only 12% of respondents claim to use emoji in internal-facing communications and a meager 4% claim they use them in external-facing communications.

The 4% use for external-facing communications strikes this author as low but this is as reported.



Legal Issues and Consequent Discovery Challenges

There is rapidly growing civil and criminal caselaw involving emoji and this paper highlights a few of those cases. But despite the growing use of emoji and its potential impact it appears that most attorneys are not incorporating emojis into their discovery strategies. This paper posits that ignoring the impact of emoji in communications is akin to dismissing documents or communications as non-relevant because they are in another language. The following hypotheticals offered by Barnes & Thornburg LLP in a 2015 [article](#) are instructive in this regard.¹³

Firstly, consider that in 2015, eDiscovery technology used to collect, process, or review an email exchange such as this might not accurately capture the emoji as it appeared, and possibly not at all. Certainly, no review platform technology existed to enable searching emoji. It is (now more than ever, as we will see) critically important that the review platform presents emoji as they appear in the multiple platforms in which their use has become widespread and enable searching on these pictographic concepts.

In the above hypothetical, consider the impact of the defense going to trial with “☒” or “?” displayed in place of the actual emoji used – or nothing at all – while plaintiff produces the above correct rendering? Without the emoji, would the text present an issue? (Note that the repetitive use of the emoji is considered equivalent to using multiple exclamation points – with very derogatory connotations in this example.)

Or consider an exchange of this nature:

In this example Barnes & Thornburg construct a scenario where “The company terminates Todd’s employment two days later. Todd then files a lawsuit alleging violations of the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). A key piece of evidence in this lawsuit is the supervisor’s response.”¹⁴

In the above, not farfetched scenario, the “game over” emoji can certainly be perceived as unprofessional. It is not very sympathetic, but worse, denotes a lack of seriousness in the context of the FMLA or ADA. It is a piece of evidence the company’s lawyers would have to try and explain away. Todd can also argue that the emoji combination conclusively establishes that the company had no plans to engage in an interactive process in order to determine whether a short extension of his leave would be a reasonable accommodation. Instead, the company took a very formulaic approach to the termination decision: leave expired + cannot return to work = automatic termination.

The company’s failure to engage in the interactive process is problematic. This failure, however, is even more compelling in light of the supervisor’s emoji combination. It’s crude, unprofessional, and it just doesn’t look good.

While a theoretical, it is a good example of the proclivity of people to be much looser in their use of emoji to express ideas than they would be in their use of text. Do individuals write in the same manner as they use the language of emoji? Do attempts at, albeit inappropriate, cleverness sometimes overcome professionalism? Consider your own experiences.

Subject: Re: Need coverage for James

On Nov 14, 2015, at 7:04 AM, Donaldson, Ron <rdonaldson@company123.com> wrote:

Seriously, James called off again. What’s the deal???

Subject: Re: Need coverage for James

Why does that surprise you? 🎮🎮🎮

Todd's leave is up tomorrow. I don't think he is going to be able to return right now. What should we do?



Um, ok. So if he doesn't return, we terminate?



Delivered

Another “Nightmare Scenario”¹⁵

Subject: Re: Complaint

On Nov 19, 2015, at 11:00 AM, Smith, Jane
<jsmith@companyxyz.com> wrote:

Mary came into my office today. Apparently John is making suggestive comments about something she was wearing yesterday. Can you please look into this? I'll be out on vacation until next week.

Are you kidding me? She complains about everything. Yeah, I'll look into it. 🙄

In this conjectural, the text alone denotes an unseriousness and a predisposition to disbelieving the complaint (whether this disbelief is warranted or unwarranted is immaterial). The included emoji, which is commonly understood to mean “I’ve got better things to do” or “I couldn’t care less” is icing on the textual cake. It is unprofessional and reveals a lack of duty and care regarding the complaint.

It would be difficult to conclude from this message that a proper investigation was made. The onus is now squarely on the defense to demonstrate (overwhelmingly in light of this communication) that the investigation was done thoroughly and with great care in accordance with company policy and as required by governing authorities.

It would be unfortunate for the defense if, in this example, “The supervisor...fails to investigate and...then files a charge of discrimination and lawsuit alleging that she was subjected to unlawful sexual harassment. Again, a key piece of evidence would be this email exchange. Mary can successfully argue that the “nail painting” emoji is frequently used as a way of saying: ‘don’t care.’” This emoji use would be “evidence that her supervisor did not take the harassment and/or the investigation seriously.”¹⁶

A key takeaway is the need for counsel to understand emoji meaning in various contexts. This is made more difficult in that the meaning may have changed over time. And further complicated by the fact that, just as with writing and speaking, what the sender intended to communicate is different from the recipient’s interpretation. Which interpretation or meaning is the correct one – which should the court consider? It may come to pass that an emoji dictionary will necessarily comprise as many or more volumes as the Oxford English Dictionary (OED). No doubt the Urban Dictionary will supplement.

Consider the tendency for people to communicate less carefully with emoji than they would using the written word. This paves the way for a plethora of adverse reactions including litigation. Would a person as readily type the words “I couldn’t care less” as they would use the nail painting emoji 🙄 which has a (misplaced) patina of cuteness? There is nothing clever or cute about the words “I don’t care.”

There is a strong case to be made (supported by growing caselaw) that not only do attorneys need to understand emoji uses, but of equal importance, organizations need to consider clear guidelines – even prohibitions – concerning emoji use in business communications whether internally or externally. These hypotheticals as it happens played out in actual fact in the case **Apatoff v Munich Re** which is detailed herein. Perhaps nothing speaks more to the complexity and perils of emoji usage and the need for emoji literacy than the advent of the world’s first emoji translator.

Are Emoji Daubert Hearings Inevitable?

[Meet the World's First Emoji Translator](#)¹⁷ heralds a Vice article of July 2017.¹⁸

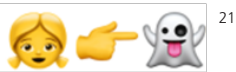
Vice reports that in 2016 the global consulting firm Today Translations hired [Keith Broni](#) for the newly created position of emoji translator. Today Translations noted that “His qualifications included a “master’s in business psychology at University College London, where his dissertation was on ‘the influence that emoji can have in digital context when brands are using them to communicate with potential consumers.’”

Your review platform can manage some auto-translation, but can it translate emoji?

Marketing companies who must be sensitive to cultural differences in text and symbols are likely well ahead of legal practitioners in parsing emoji speak. Just as when counsel requires a translation for a foreign-language document contained in a review corpus, counsel may now need a language, geographic, demographic, and culture-specific translation of emoji contained within that corpus.

To date, careful and considered **emoji translation** is largely a feature of the marketing world. But for how long? In the context of high-stakes litigations or investigations, is a Daubert hearing and subsequent testimony concerning the interpretation of an emoji string so farfetched?

Can you read these Hieroglyphics?



What about this sentence?






What could be more anodyne than a picture of a bunny and a puppy. As an attorney (say in an employment practice) you will need to know what this means. So will the document reviewers responsible for issue coding and “hot docs” tagging.

While authoritative definitional standards for emoji do not exist, an informal research method to gather the common usage meaning of emoji or emoji strings could include using them as the “search term” within twitter to find tweets that contain those particular emoji and ascertain common usage based on the results.

Cross-Operating System Issues

Another challenge in eDiscovery is the inconsistent cross-platform display of emoji. An emoji sent from an Apple iPad, for example, may display differently on various platforms. What you receive may not be what was actually sent.

Note the significant differences:

Sent	Received		
			Blank
Sent from iPad	i. Received in Lotus Notes Mail	ii. Received in Samsung Galaxy As Previewed	iii. Received in Samsung Galaxy When Opened

i. a smile transforms to a rather sinister looking smirk. How would the recipient interpret this, and is it the same meaning as intended by the sender?

ii. while the text from the iPad showed as intended in the Samsung Galaxy preview,

iii. when opened the message was blank. No emoji appeared at all.

One can readily comprehend the issues this creates when collecting and reviewing data relevant to a litigation.

A collection taken from the Lotus Notes custodian could imply sinister intent. A collection taken from the Samsung Galaxy custodian would show only a blank message. Meanwhile, a collection from the sender would show an unmistakable positive intent. Equally damaging is the possibility that the defense and plaintiff would enter competing versions as evidence – evidence that may be fundamental to either litigator’s hypothesis.

While emoji have a common Unicode basis, each platform develops its own version. The emoji created are the intellectual property of the particular platform (e.g., Google, Apple, Samsung) so each platform will necessarily display its own version. Consequently, what is sent on an iPhone is not exactly what appears on a Samsung and so on.

While in some instances the different renderings between what is received and what was sent to another platform may not be an issue, there are those instances where it can be problematic, if not potentially catastrophic if one is not aware of this issue.

Consider these two examples from the [Unicode.org Full Emoji List, v13.0](https://unicode.org/emoji/charts/full-emoji-list.html):²⁴

No	Code	Browser	Appl	Goog	FB	Wind	Twtr	Joy	Sams	GMail	SB	DCM	KDDI	CLDR Short Name
1	U+1F600										—	—	—	grinning face
1261	U+1F52B										—	—	—	pistol

The different presentations of “grinning face” would appear inconsequential. However, in the second example, “pistol,” where the playful water gun transforming into a realistic firearm is a different matter.

While context usually matters, in this case it might not. The Gmail recipient of an Apple message may feel threatened or perceive hostility – even if the context of the written message indicates otherwise.

These cross-platform transformations add even more complexity to discovery. It is necessary for the attorney to understand what platform the message was sent from and the one on which it was received and comprehend any material difference. How all of this is rendered in your review tool’s short message application may be another requirement to consider.

Developing Normative Emoji-Speak

As everyone is now keenly aware, a text or social media post in poor taste or otherwise perceived as inappropriate can result in job loss. It does not have to be legally problematic, rather just socially unacceptable or run afoul of the public-facing image your employer prefers to project.

Emoji can amplify this – particularly as they enable joking in a manner that cannot be executed (forgive the pun) quite as well in text alone:



This post following a [Houston Rockets win over the Dallas Mavericks](#), cost a social media manager his job.

The marketing manager's impetus for using the emoji is likely to increase interactions (likes and shares) as studies show that posts with emoji earn higher viewership than those without them. Obviously, a joke, but one that was widely perceived to be in bad taste. The Houston Rockets likely want to project a positive sportsman-like image which this post does not.





This kind of banter can take on more significance than merely socially or policy-inappropriate in highly regulated industries. In these industries it behooves the organization to take a close look at the use of emoji in messaging (whether internal or external) and develop clear policies and procedures regarding their use.

From Social Liability to Legal Liability

Investment news and analysis firm ThinkAdvisor notes in their April 2017 article "[These 4 Emoji are a No-No on Wall Street](#)" that "investment and social media compliance firms warn that financial advisors shouldn't be so quick to include [emoji] in client communications."²⁵ The article points out that "if the content is specific to financial products or services, then an advisor's comments, likes, or emoji can be construed as an endorsement or advertisement of a product, person or service in violation of regulation" according to Yasmin Zarabi, vice president of compliance at Hearsay Systems.

Some emoji use could even be construed as promissory. In other words, in a regulated environment one can easily go from social liability to **legal** liability.

The four "no-no emoji:"²⁶

			
Stack of dollar banknotes Can imply a quantity of money and may be seen as promissory.	Money-mouth face Indicates a love of money, or a feeling of wealth. The sentiment may not be appropriate in client communication.	Flying money Indicates money being lost, or frivolous spending.	Bag of money Applies a quantity of money and may be seen as promissory

Here too the image an organization wishes to project can be greatly damaged. Does "money-mouth face" project an image of fiduciary responsibility or the gravitas of an investment advisor? Is there an inherent frivolity in the use of emoji that runs counter to the professionalism and seriousness one expects from financiers, medical practitioners, lawyers, accountants, and other professionals?

The Double (Now Triple) Entendre

Not only can meanings change but secondary meanings can emerge. With emoji, the change can happen quickly. So, when is a peach a peach? This emoji now has no less than three meanings:

1. a peach,
2. a buttock, and now,
3. a symbol of the anti-Trump "resistance."

As written about in a [Washington Post](#) style piece (June 2020) "In certain online circles, the peach is becoming a protest emoji.... 'It's not the first time an emoji has had several layers of meaning... but it seems to be the most prominent case of it being used phonetically.'"²⁷



If a manager from Georgia sends a text to a direct report that reads "It's all about the 🍑," is it state pride, sexual harassment, or a political statement that may be construed as creating a hostile work environment?

Perhaps there is a text thread that provides context. Perhaps not. Would the time of day, say late evening, imbue meaning?

Is it "okay?"

Then there are those symbols or gesture representations that take on new meaning (or perhaps have had an alternative meaning for just a subgroup of people, an organization, or demographic) that eclipses the original widely recognized meaning. Consider the "Okay" sign.

It is no longer okay.

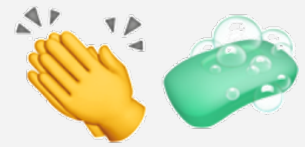
For many this only ever meant one thing. Now its usage is ascribed to white supremacy first and foremost. As was [reported](#) in September 2019, "The Anti-Defamation League has added the symbol to [their hate] list as recent years have found it to also be used as a symbol for white supremacy."²⁸

One can imagine an EEO or other workplace litigation that has a lookback of several years that would require **parsing the time the emoji** was used versus the timeframe in which the hateful use of this emoji was widely known (or considered) to refer to the Ku Klux Klan or white supremacy more generally. Again, usage in written language can change, but it rarely if ever does it do so nearly overnight.

What a Difference a Day Makes

A [June 2020 Vice article](#) based on Facebook internal documents reports that "A single emoji can make all the difference between an innocent joke and a hateful message. With that in mind, Facebook trains its moderators in how a slew of different emoji can violate any number of the social network giant's content policies, including **poops for hate speech, vomit faces for bullying, and crowns for sexual solicitation**, according to internal Facebook documents obtained by Motherboard" (emphasis added).


Universal Language



This is not to say that there is no use for Emoji within these sectors. Emoji can have broad, even universal understanding that can resolve language barriers. While cultural differences exist, and meanings of the same word or symbol can mean different things, there are commonalities. We see their effectiveness in signage used across the globe making it easy for foreign travelers to navigate without comprehending the native language.

With this in mind, a February 2020 article "[Emoji in public health and how they might be used for hand hygiene and infection prevention and control](#)" concludes in part: "Emoji may empower IPC [Infection Prevention and Control] in different aspects such as raising awareness with no language barrier...It is recommended to evaluate the relevance and appropriateness of the current set of emoji...to harness the potential beneficial impact of these symbols" ([emphasis added](#)).

Here, context for parsing meaning is paramount – particularly if an emoji has more than one widely accepted meaning or varied use based on demographics, group affiliations, or geography. Again, not only must the attorney understand the accepted meaning of the emoji, but that emoji not properly collected and accurately rendered for review could have significant impact in demonstrating facts.

An expert of that table:
(note for example that a symbol as historically innocuous and still widely used on signage around the world –  – is defined by Facebook as “hate speech.”

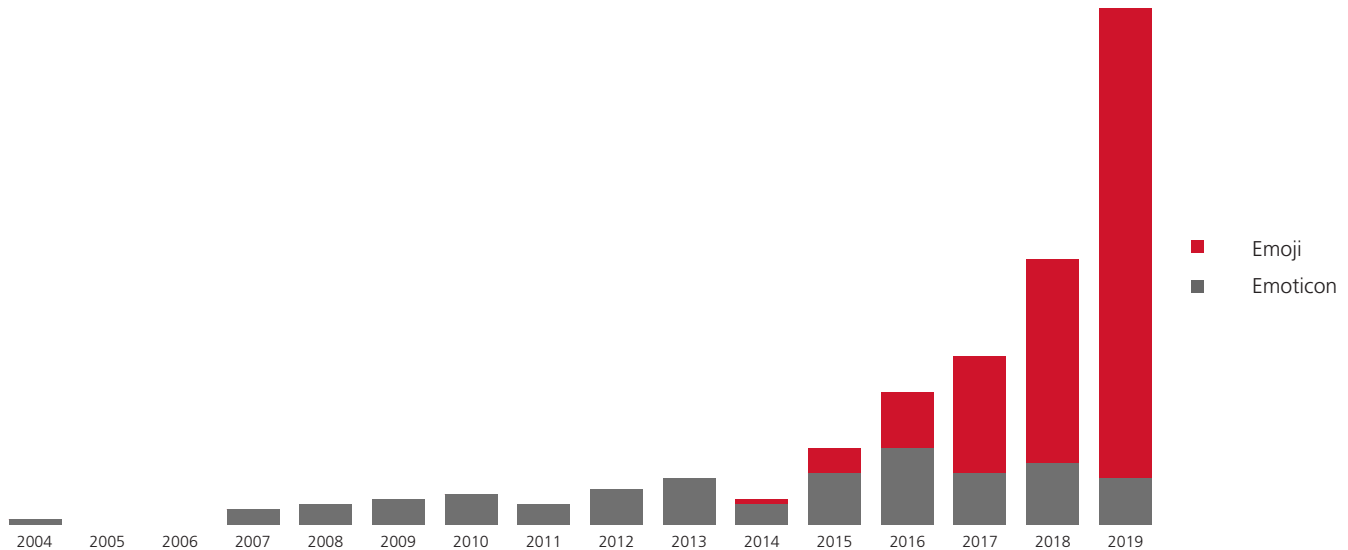
This drives home the point that a new language is literally (perhaps more accurately – **hieroglyphically**) being created yet has no definitive lexicon. Legal professionals must be cognizant of these developments.

Case Law

Not A One-Off

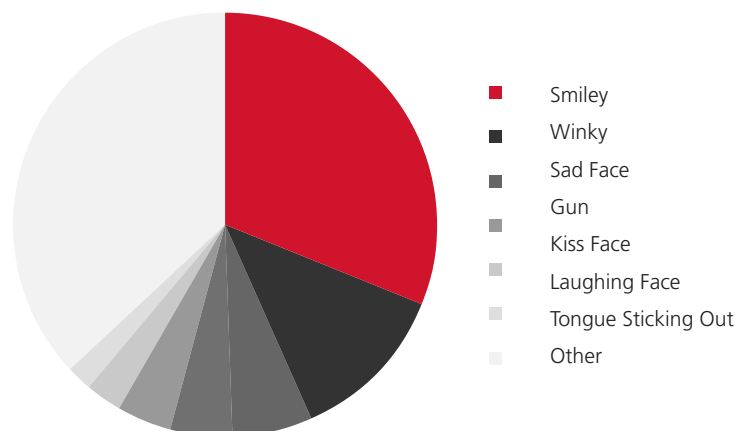
The relevance of emoji in legal matters is not a one-off oddity. In fact, as [Eric Goldman](#),³⁰ Professor of Law at Santa Clara University School of Law and recognized expert notes in his [2019 Emoji Law Year-in-Review](#): he “found 101 cases in 2019 that referenced “emoji” or “emoticon.”³¹ This nearly doubles the number from 2018, indicating that the relevance of emoji in the law is growing exponentially. He presents the following chart:

Cases Referencing Emojis/Emoticons



Goldman has also published a [dataset of caselaw](#) referencing both emoticons (the precursor to emoji) and emoji which cites 271 cases from 2004 to January 31, 2019.³² There is little reason to expect this trend not to continue.

In a [presentation](#) at Santa Clara University School of Law, Goldman provides the following chart detailing which emoji are most cited in court opinions.³³ It is important to note that “smiley face” has many versions and this chart encompasses them all. The dozens of variations of smiley faces are routinely labeled simply as smiley faces despite their often significantly different “meanings” or emotional nuance.



It should be noted that emoji is not yet searchable as a concept (let alone individual emoji types) within legal research tools. As such, it would be reasonable to conclude that Goldman's case listings are incomplete (as he himself acknowledges) and there are more case in which emoticons and emoji are relevant.

Apatoff v Munich Re: Emoticons and Explanation Points

(Am. Servs., 2014 US Dist. LEXISNEXIS 106665 (D.N.J., August 1, 2014))

In *Apatoff v Munich Re*, plaintiff's doctor suggested that the environment at work was causing the worsening asthma condition of Apatoff and suggested she take a medical leave to see if that would improve her health.

While Elaina Apatoff was on medical leave her employer, Munich Re, received an anonymous tip that Elaina was seen doing yard work as well as doing work associated with moving from house the house. This led to defendant Munich Re hiring a private investigator who confirmed the information detailed in the anonymous tip. The defendant claimed she was acting in accordance with her doctor's suggestion (her doctor affirmed) that she gets exercise to assist with the asthma condition and improve her health.

Munich Re employed an "honest mistake" defense: **Had we known this we would have not terminated.** Does internal email containing smiley face emoticons and exclamation points support this defense?

:-)) did Ray chat with you about Elaina?

Yes he did. Thank you for your help. That deserves a big :-))!!!

It did not.

"The Court believes that a reasonable jury could find that the 'emoticons,' attached to the emails of two Munich Re managers late in the day on which Plaintiff was terminated, are evidence that the decisionmakers at Munich Re were happy to be able to terminate Plaintiff. This was viewed very unfavorably by the court." (citation omitted)

United States v. Ulbricht. What Happened to the Emoji?

In this *Silk Road* drug dealing case, transcripts of chats were submitted into evidence that omitted the actual emoji or emoticons and replaced them with indicators that an emoji or emoticon was present only. The defense wanted those emoji and emoticons produced as they appeared in the messages.

The Hon. Katherine B. Forrest ruled that emoji and emoticons are "part of the evidence of the document." **The jury should read them, they are meant to be read. The jury should note the punctuation and emoticons.** (citation omitted)

It is important to consider that even if the type of emoji (e.g., a smiley face) was inserted into the transcript, or read aloud, this would still be insufficient to understanding the emotion or messaging meant to be conveyed. In the example of a "smiley face" emoji, as noted above, we understand there to be dozens of variations that can communicate anything from joy to sinister intent. How would that be distinguished with placeholder text reading "smiley face." And what precisely should each emoji or version of an emoji be called by the reviewer making such a reaction?

Expurgation of emoji or emoticons from a transcript or other documents entered into evidence in whole or in part does not appear to be tenable position.

Professional Ethics



A Las Vegas Nevada attorney was using Twitter **burner accounts** to send a simple emoji-only tweet to a witness due to testify against her client in what authorities believe to be an attempt to intimidate the witness.¹

As reported in June 2020, "Attorney Alexis Plunkett was arrested and jailed Tuesday on warrants accusing her of one count of bribing or intimidating a witness and one count of dissuading or preventing a person from testifying" [using a] "fictitious social media account to post a rat emoji...with the intent 'that the statement would threaten, intimidate, and/or place witness in danger of being harmed.'"²

¹Burner accounts maintain anonymity. They use a "key" for access rather than requiring personal identification.

² [Link](#)

United States v. Westley. Clouds and Fuel Pumps

No. 3:17-CR-171, 2018 WL 3448161 (D. Conn. July 17, 2018)

The court addressed inter alia the probable cause for warrant to search Facebook accounts. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) agent provided an affidavit stating that public facing Facebook posts contained emoji including a cloud emoji (which is, in context, a drugs reference) and a gas emoji (which, again contextually, is a symbol for gangs).

Here is an instance of law enforcement understanding street lingo inclusive of emoji use and thusly being able to translate their intended message within the well-established context. This expertise formed a basis for the probable cause warrant to search the Facebook accounts.

The court denied defendants motion to suppress the evidence from the Facebook accounts.

Israeli Court Says Emoji Can Signal Your Intent



In June of 2016 as detailed here, in response to a rental advert, a couple sent a tweet that reads (translated from the Hebrew):³⁴

Good morning 😊 interested in the house 🐱🐶👤🕊️☀️🐿️🍷 just need to discuss the details...
when is a good time for you?

As noted by Judge Amir Weizebluth in his ruling “these icons convey great optimism.”

In response to this exceptionally positive text, the landlord “removed his advertisement after he received the text and proceeded to negotiate with the couple. After a few back and forths, [which including agreeing to changes in the contract as requested] though, the couple stopped responding.” While the landlord did eventually find another renter, he took the couple to small claims court.

The judge’s ruling reads in part: “Although this message did not constitute a binding contract between the parties, this message naturally led to the Plaintiff’s great reliance on the defendants’ desire to rent his apartment. ” (citation omitted)³⁵

Plaintiff was awarded \$2,200.00.

What’s with the chipmunk?

It would be difficult to imagine anyone interpreting the emoji string as anything other than highly positive and celebratory (as in “this is a done deal!”). But what’s with the chipmunk? Some have offered that it symbolizes finding an apartment (like the chipmunk finding a nut). Eric Goldman has posited that everyone has their favorite emoji and when you go to your emoji keyboard the most frequently used are displayed for convenience. Perhaps the sender simply put their favorited emoji into the string despite its apparent randomness.

This is instructive in terms of eDiscovery. Understanding a custodian’s use of emoji – particularly their favorites – should be part of the analysis of messaging when collecting evidence, conducting custodian interviews, and understanding use.

eDiscovery: Catching Up & Looking Ahead

eDiscovery is just now addressing the requirements of properly processing and rendering emoji as they appear in messaging. For example, it is only in the last year – 2019, fully 20-years on from the introduction of emoji – that industry stalwart Relativity added the Relativity Short Message Format (RSMF) as a unified message format that processes and renders short message data (such as Slack, SMS, iMessage, Bloomberg, and Skype for example) along with their attachments. **Most notably, this feature includes processing and analysis of the emojis in the text including searchability.** The viewer presents an emoji dashboard that lists the emoji types by name. However, it appears that the naming conventions used in the RSM emoji dashboard are different than those used by [Unicode.org](https://unicode.org).³⁶ Whether this is an issue or not, and how the RSM might handle naming conventions of custom corporate emoji is unclear.

What is important, is that eDiscovery and forensic technology are finally catching up to the advent (and relevance) of emoji to legal matters and the need to create solutions for the capture, ingestion, review, and search of emoji. Ultimately, eDiscovery tools will need to manage emoji (as **language**, not something akin to a JPEG file) as deftly as it manages text. Lawyers and others responsible for document reviews should make note to take advantage of these capabilities.

The Need for Definitional Standards

Advancement in this regard will require definitional standards for emoji, just as for textual language. This includes emoji specific to organizations and technologies. Without consistent standards, discussing emoji, or using emoji analytics capabilities on different platforms would become quite difficult. Definitional standards not only has discovery implications, but speaks to information governance and workplace usage policies as well.

This is no easy task.

Consider that according to a [Wall Street Journal article](#) (July 2019), the very popular Slack platform now contains 26-million (yes **million**) emoji and notes that **just one corporate client of Slack has created more than 50,000 custom emoji alone**.³⁷ And, “for the 13 million daily active users of Microsoft Corp.’s Teams, emoji use is basically universal, [according to a] spokeswoman for Microsoft.”

One is tempted to ask: if a core value of communication is clarity, does this explosive creation and use of emoji aid or hinder in that goal? [Merriam-Webster](#) defines emoji in part as used to “convey information succinctly.”³⁸

Furthermore, within the context of discovery, one can readily imagine the challenges in analyzing reviewing a document population of email, text, chat, Slack, Team, Google Hangouts, and other messaging and collaboration platforms that contain custom emoji specific to an organization along with the already 3,304 Unicode (and growing) emoji.

Ignoring (or failing to capture) their presence in communications relevant to a litigations or investigations is not an acceptable option. This is to say nothing of the need for the development of use and retention policies and procedures across these fast-emerging and evolving platforms.

A Not Very Bold Prediction

Interestingly, informal surveys of forensic and eDiscovery peers indicate that requests for managing emoji happen rarely if at all. And many, if not most, handle emoji the same as any other graphic artifact.

This is surprising considering the high usage of emoji in business communications, and in light of the “J-curve” growth as illustrated in Eric Goldman’s graph “Cases Referencing Emoji/Emoticons” above.³⁹ Are we to intuit that this is an anomalous spike, or that it portends things to come? Is it much of a stretch to predict that there will only be ever more court cases, litigations, and investigations in which emoji are relevant to discovery in both criminal and civil matters? As we have seen above, a single emoji or emoticon can destroy a defense.⁴⁰

The likely place to address the need for emoji capture and analysis is the artificial intelligence (“AI”) and machine learning tools and techniques that are used to find relevant documents and messages. The current techniques incorporated (or integrated through available third-party integrations) in document review tools are aimed largely at analyzing text. There is also a great deal of development in speech and video analysis which has advanced greatly in recent years that can be integrated with popular review platforms. Image analysis (jpeg, png, gif, bmp, etc.), while having a long history, lags behind linguistic (aural and written) analysis in the context of legal analysis and review. The analysis of emoji, both in their contextual meaning and emotional conveyance may be an area of development that requires investment.

Here again, we will no doubt see challenges of disambiguation (what does the use of the peach emoji mean exactly in a particular sentence?) and other factors, just as had to be surmounted in linguistic analysis. One can imagine a time when it will be common for analytics tools to reveal emoji clusters, provide contextual “translations” based on established lexicons, integrated into the analytics dashboard of review platforms, and project managers allocating emoji-centric review assignments for tagging and issue coding.

A Larger Ecosystem at Play

It is not only eDiscovery that will need to rise to the challenge. The courts, research platforms like LexisNexis and Westlaw, and the way court opinions are written will surely need to accommodate emoji. As Eric Goldman says in his [Q&A: Getting Ready for the Emoji Law Revolution](#):⁴¹

Unfortunately, opinions still struggle with displaying emoji. Opinions routinely omit the emoji altogether, or the judge imprecisely characterizes the emoji in evidence. (It doesn't help to call an emoji a 'smiley' because there are a dozen different smiling emoji symbols). Furthermore, Westlaw and Lexis still usually do not display emoji, and neither makes it possible to search for emoji in court opinions. So, while the number of court opinions referencing emoji is growing rapidly, the court publication process remains woefully under-prepared.

As a result, even though the known references to emoji are growing considerably, there are likely even more instances than have been referenced in this paper and its sources. It would not be unreasonable to expect, that as technology or protocols for emoji references in opinions and research databases improve, we will perform find increasing references to emoji, consequent to our ability to find them.

The New Email

While the focus here is emoji, it must be kept in mind that the many collaboration platforms that are rich in their use of emoji are displacing the use of email – this is particularly true of remote and distributed workforces, themselves on the rise. (As of this writing social distancing and lockdown orders are in force around the world to varying degrees as a result of the SARS-CoV-2 pandemic which has initiated an **en masse** transition to work-from-home. There is much speculation about remote work arrangements increasing even after the pandemic is no longer perceived as an existential threat. This will likely fuel accelerated growth of these platforms.

First email, then chat and social media. Now Slack, Team, Go-to-Meeting, Zoom, and myriad other platforms contain rich discoverable data sets across desktops, laptops, tablets, phones, and the cloud: including attachments, and of course, emoji.

Custodian Interviews, Vendor Conversations, and 26F Conferences

The widespread use of emoji and its implications require that custodial interviews comprehend them, scope and production agreements comprise them, and planning with forensic and eDiscovery specialists include them as potentially relevant.

- Custodians should be asked if and how emoji are used in the workplace; if they use them; how, and in what context?
- Sources of information (including Slack, Teams, Skype, Text, WhatsApp, Snapchat, Twitter, Google Hangouts, and so on) should be ascertained and the emoji used considered in scope.
- Collection, processing, hosting, and review strategy involving emoji need to be developed
- Search term construction will need to consider the relevance of emoji. Can the proposed review platform support emoji-specific searches, clustering, review assignments, tagging, and other treatments?
- Production formats and requirements should be developed
- Agreement with opposing counsel regarding the handling of emoji should be contemplated.

Legal Department, Risk & Compliance, and HR Considerations

Susan Lahey is exactly right when she writes in her [zendesk blog post](#): “The trouble is that emoji are open to interpretation, and the context in which they are used matters.”⁴² Again, one can anticipate an argument over meaning wherein the defense claims an innocuous meaning, while plaintiff argues a nefarious cum legally problematic one. On what basis does the defense or plaintiff argue – or the judge decide – particularly if there is no case law relevant to the particular emoji or emoji sting at controversy (assuming you could find it)? Competing testimony from emoji translation experts?

Better for the defense would be the reliance on the documented corporate policies concerning the allowable use of emoji, detailed definitions for the emoji in use (that comport with common usage) and other such policies that clearly delineate corporate practices, agreed to and signature affixed by employees when onboarded. (Just as employees are asked to do concerning a plethora of corporate policies concerning such things as behaviors, confidentiality, and roles and responsibilities.)

While this may not protect the employee if s/he ventures outside of corporate guidelines, it may limit the organization’s liability. If the emoji used has a specific corporate-defined meaning (which should be a socially, culturally, and legally benign meaning) and comports with common usage, it may then become more difficult for plaintiff to claim otherwise.

Ms. Lahey details what could be considered some sound fundamentals for corporate policy and procedures concerning the use of emoji:

- “Which emoji are we going to use in business communication, and which are off limit?”
- “What forms of communication are good for emoji and which ones should be emoji-free?”
Restrictions on the use of Emoji in marketing are appropriate of course too (no guns for example)as illustrated above.⁴³
- “Who is responsible for using emoji on social media, which emoji will they use, and for which type of posts?”
- “When is an emoji an acceptable substitute for a word, and when is it not? Consider creating a glossary or cheat sheet so that everyone is on the same page.”

It could be argued that this is more than a consideration but a necessity requiring a codified corporate emoji dictionary. Cheat sheets are useful, but organizations need to be careful, as with any critical document, to ensure they are continually updated, and ensure out-of-date material is taken out of circulation or at the very least has clearly visible expiries.

- “When should customer service integrate emoji and through what channels?”

Customer communications, especially for a globally operating company, may be the most fraught with risk. This requires cultural acumen, understanding of any legal implications in multiple jurisdictions, and of course careful review of risk and compliance factors – particularly in heavily regulated industries.

Conclusion

That the use of emoji in workplace communications is here, accepted, and will continue to proliferate seems incontrovertible. So too the adoption of the platforms that encourage their custom creation and use.

As detailed herein, emoji can be highly relevant in both criminal and civil matters, and as an internal matter, their misuse can be the catalyst for not only disciplinary action including dismissal, but litigation.

Emoji are strong indicators of intent – even a person's thought process – and can represent compelling documentary evidence. This is not something that can be overlooked. They cannot be treated like any other graphic file that may include a company logo, marketing artwork, diagrams, illustrations, or other graphic elements that are irrelevant to the issue(s) at controversy. They are not a **file type**, they are content. This is a new **linguistics** challenge.

Because emoji exist precisely to communicate meaning, emotion, and add not just nuance but sometimes the overt meaning that may belie the **non-controversial text in the communication**, they cannot be overlooked. Rather, they must be **specifically targeted** in discovery.

Herein lies the ascendant challenge. This is not just a technology challenge. It involves the entirety of the discovery process from early case assessments (case research does not enable emoji-specific search); scope and planning (including developing custodian interviews); through discovery (forensic collection that accurately identifies and captures emoji and properly renders them); to review (display of emoji independent of the system that produced them and training reviewers on emoji-specific meanings and methods for tagging and issue coding); and ultimately, production.

To do this effectively will also require collecting, maintaining, and updating corporate glossaries that define custom emoji and researching as necessary the accepted definitions of Unicode emoji and the many custom emoji used by client organizations. This may need to include demographic, geographic, time stamp, and other definitional variations relevant to the matter at hand. This will support not only effective and consistent review schema but will necessarily form part of the complaint or defense.

The technology challenge will be to bring this all together effectively. To present emoji **concepts** as readily as text-based concepts. To enable the same level of analysis (e.g., search terms, concept clusters, relevancy rankings, and other analyses) that is currently provided (and continually refined) for text-based analysis and increasingly, video and voice.

Internal legal departments and risk and compliance groups are party to this challenge as well.

There does not appear to be the sense of urgency that this gap in capability deserves. Do not let a reputational damaging headline be the impetus.

About the Author



Matt Mahon has 14-years' experience with Ricoh supporting organizations with information governance and litigation support strategies including data remediation, litigation hold, preservation, collection, data processing, review, and production. As the National eDiscovery Sales Manager for Ricoh eDiscovery, Matt leads strategy and training for the sales team, and consults with clients, delivers CLE training, and is a frequent speaker and writer on eDiscovery issues.

Matt earned his B.A. in Mathematics and Applied Sciences from UC San Diego and is a Certified as an eDiscovery Specialist and Information Governance Professional.

Matt lectures widely on topics including IoT, the impact of emoji and social media in workplace communications, data governance, and eDiscovery.

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