

THE SCRIVENER

Emoji and Emoticons in Legal Writing: 🙄

By Scott Moise

Let me say this up front before we even get started: emoticons and emoji should not be used in formal legal writing or in any business communications. **Do not do it**—not in court documents, not in e-mails, not in letters, not in texts, not in tweets.

However, we cannot pretend like they do not exist. In fact, 92 percent of the online population use emoji, and 2.3 trillion mobile messages incorporate emoji in a single year. See Eric Goldman, *Emojis and the Law*, 93 Wash. L. Rev. 1227, 1229 (2018). The “Face With Tears of Joy” emoji, alone, has been used in over two billion tweets. *Id.*

Therefore, whether or not you like emoticons and emoji, they are extremely popular and have even infiltrated the courts, so now they are a part of our great body of law. For that reason, lawyers should know more about them and their potential legal consequences.

What are emoticons and emoji?

Emoticons :)

An emoticon is “a little cartoon face that can be added to the text of an instant message. The faces come in numerous expressions and are used to illustrate how the speaker is feeling or the intended meaning of what he or she has written.” *State v. Nero*, 1 A.3d 184, 191 n.9 (Conn. App. Ct. 2010). Emoticons are made and transmitted by typing on a ASCII 128-character keyboard. See *Intellect Wireless, Inc. v. HTC Corp.*, 910 F. Supp. 2d 1056, 1070 (N.D. Ill. 2012).

Emoji 🙄

“An emoji is ‘a small digital image or icon used to express an idea or emotion in electronic

communication’.” *Oxford Dictionaries Word of the Year 2015 is . . .*, Oxford Dictionaries (Nov. 16, 2015) (found at <http://blog.oxforddictionaries.com/2015/11/word-of-the-year-2015-emoji/> [<https://perma.cc/A9JB-NSFU>]).

Note that authorities differ on the plural of the word “emoji,” spelling it both *emoji* (like the plural of “deer” is “deer”) and *emojis*. See Robinson Meyer, *What’s the Plural of Emoji?* *The Atlantic* (Jan. 6, 2016) (found at www.theatlantic.com/technology/archive/2016/01/whats-the-plural-of-emoji-emojis/422763/) (favoring “emoji” because “[i]t is undeniable that the word emojis invites aging actors and unknowing grandparents to pronounce it like/uh-MO-jiss/, the last syllable rhyming with kiss. And that’s just ghastly.”).

For purposes of this column, the word “emoji” will mean both emoji and emoticons unless stated otherwise.

How did emoticons and emoji get into court, anyway?

At least 33 court opinions have addressed emojis since 2009. Before you think otherwise, judges and justices themselves did not start this. (“After careful consideration, the Court has decided that recusal is not warranted and denies the motion. However, the Court hereby enters sanctions for bringing the motion in the first place. ☹”). To the contrary, for the most part, courts just deal with them because they come up in the facts of the case.

However, at least one judge used his own emoji. In a court opinion in England concerning a family of children in foster care, Mr. Justice Peter Jackson interpret-

ed a smiley face found in a note from the children’s mother. The decision was intended to explain to the children that he was awarding visitation to certain relatives in their lives and the reasons for it. The opinion is straightforward and charming, and the emoji are both part of the facts and of the explanation:

The mother left a message in the caravan [a trailer, with beds, pulled by a vehicle] for the father’s sister, who I will call the aunt. It told her how to look after the family’s pets. The message said that the family would be back on 3 August. It has a ☺ beside the date. After the family left, the police searched the caravan. They found the message and say that the ☺ is winking, meaning that the mother knew they wouldn’t be coming back. I don’t agree that the ☺ is winking. It is just a ☺. The police are wrong about that, and anyhow they didn’t find anything else when they searched the caravan.

See *Lancashire Cty. Council v. Mr. A, Mr. B, & The Children* [2016] EWFC 9, Case No. PR15C00240, Queen Elizabeth II Law Courts, Liverpool (Eng. Feb. 4, 2016) (found at www.bailii.org/ew/cases/EWFC/HCJ/2016/9.html).

Emoji as partners in crime

Despite the happy faces, emoji and emoticons usually find themselves in bad situations in court opinions. In fact, the first six mentions of emoticons found in Westlaw cases all involved criminal defendants who thought they were

engaging in online sexual chats with underage girls, who were actually police detectives. *See, e.g., United States v. Cochran*, 534 F.3d 631, 632, 632 n.1 (7th Cir. 2008) (defendant sent various emoticons, such as a French kiss, in his messages to the police officer); *State v. Pischel*, 762 N.W.2d 595, 600 (Neb. 2009) (police officer used an emoticon to express anger during the communications). Emoticons were off to a bad start.

Since then, things have not gotten much better for emoticons in court. Just last year, emoji showed up again in a court martial involving communications between an airman and an agent who posed as a 14-year-old girl who placed an ad on Craigslist. *See United States v. Schweitzer*, No. ACM 39212, 2018 WL 3326645, at *2 (A.F. Ct. Crim. App. May 8, 2018).

Emoji as evidence

Emoji cause the same problems in the courtroom as they do in everyday life: misunderstanding what the emoji are supposed to mean. Last year, I sent a text to my adored daughter-in-law, sending a picture of a dress I had gotten for her in San Francisco. She responded simply with the “Face With Tears of Joy” emoji. I had never seen that emoji before, and I thought it meant she was laughing to the point of tears at the thought of wearing such a ridiculous dress. I was crushed until I finally looked up a chart of emoji and learned that it meant she loved the dress. I have never liked that emoji ever since, though.

In legal situations, parties to a lawsuit have tried to take advantage of the confusion that emoji can cause. For example, in *In re L.F.*, No. A142296, 2015 WL 3500616, at *1 (Cal. Ct. App. June 3, 2015), a high school student laughed her way to jail by three hours of tweets telling how she was going to “shoot up the school,” including the following: “If I get a gun it’s fact I’m spraying [five laughing emojis] everybody better duck or get wet”; “[W]e ain’t fighting I’m bringing a gun [six laughing emojis]”; “I feel sorry for whoever got c wing 1st period [four laughing

emojis]”; “Ain’t nobody safe [‘100’ emoji]”; and “I’m leaving school early and going to get my cousin gun now [three laughing emojis and two clapping hands emojis]”; and “Y’all gonna make me go to jail before I step foot on campus [laughing emoji].” *Id.* Sure enough, she went to jail before stepping foot on campus that next day.

After the juvenile court found that the tweets constituted a felony threat, the student moved to reduce the sentence to a misdemeanor, arguing that that some tweets said she was “jk [just kidding],” and that the laughing emojis showed her statements were intended to be a joke and not intended to be a criminal threat. *Id.* at *4. The appellate court, however, affirmed the student’s sentence, holding that it was reasonable for the juvenile court to conclude that her statements were intended to be taken as a threat, laughing emoji and all. *Id.*

In another case of solicitation of a minor, the jury was provided a transcript of the defendant’s online chats with the minors. The defen-

dant argued that he was entrapped, as evidenced by the prosecution’s failure to disclose a computer application that would have shown the various smiley-face emoticons in their animated form, instead of static form, in the transcript of his online chats with “Ashliee” and “Annie” (also known as police officer Crystal Sedevie). *See State v. Jacques*, No. 2010AP82–CR, 2011 WI App 58, at *1 (2011). The court held that *Brady v. Maryland*, 373 U.S. 83, 87 (1963), did not apply because the computer application was free and available to the defendant. *Id.* at *2. Also, the animated emoticons were not material to his entrapment defense, since viewing the emoticons as animations would not have led the jury to conclude that he was the victim of “excessive incitement, urging, persuasion, or temptation” by the officer. *Id.* For those reasons, the court affirmed Mr. Jacques’ judgment and order, finding him guilty of using a computer to facilitate a child sex crime.

Another case involved a law student who was accused of

harassing a fellow student with text messages and other communications. See *Enjaian v. Schlissel*, No. 14-CV-13297, 2015 WL 3408805 (E.D. Mich. May 27, 2015). In that case, the charges were eventually dropped against the accused student, who brought a lawsuit, claiming that a search warrant (which allowed the police to seize his computer and telephone) was maliciously false. One of the alleged falsities in the affidavit was the omission of an emoticon—a “-D,” which is meant to describe a wide-mouth smile—when quoting one of his texts. The student claimed that the missing emoticon would have showed he was merely “deeply unhappy . . . rather than sadistically bloodthirsty for revenge.” *Id.* at *6. The court disagreed, finding that the text messages simply showed that the plaintiff may have had an intent to harass his fellow student and explain why she would be upset and frightened by otherwise innocuous looking transmissions. The emoticon did not help the plain-

tiff’s argument because it did not materially alter the meaning of the text message. *Id.* at *7 n.10.

On the other hand, another court decided that an emoticon was proof that a commenter did not have defamatory intent in a statement he or she made on an Internet message board dedicated to the discussion of local politics:

The third allegedly defamatory statement was posted by hatersrlosers in this thread and stated:

They are only getting more garbage trucks because Gus needs more tires to sell to get more money for his pockets :P

This statement on its face cannot be taken seriously as asserting a fact. **The use of the “:P” emoticon makes it patently clear that the commenter was making a joke.** As noted earlier, a “:P” emoticon is used to represent a face with its

tongue sticking out to denote a joke or sarcasm. Thus, a reasonable reader could not view the statement as defamatory.

Ghanam v. Does, 845 N.W.2d 128, 145 (Mich. Ct. App. 2014) (emphasis added).

Other courts also have given the benefit of the doubt to emoji. See *Bellue v. E. Baton Rouge Sheriff*, No. CV 17-00576-BAJ-RLB, 2018 WL 4365529, at *1 (M.D. La. Sept. 13, 2018) (refusing to dismiss employment retaliation claim that was based, in part, on a supervisor’s texts to the employee, containing “winking smiley” emoji); *Doe v. W. New England Univ.*, 228 F. Supp. 3d 154, 163 (D. Mass. 2017) (denying motion to dismiss breach of contract claim by college student who was suspended for two years for sexual misconduct when, among many other things, he presented evidence of texts from his accuser with “positive” emoji); *Doe v. Brown Univ.*, 210 F. Supp. 3d 310, 321 (D.R.I. 2016) (holding that college investigator’s failure to request text

messages between a complainant and witness concerning alleged sexual assault—including the complainant’s text stating, “Perfect, sounds like we’ve got a plan [winking emoji] [I]m super pumped for the drunk scrimmage but more excited to see you finally! Haha”—violated student’s contractual right to be given every opportunity to offer evidence before disciplinary panel). Saved by the emoji!

Emoji hit the big time.

In *Elonis v. United States*, 135 S. Ct. 2001 (2015), the United States Supreme Court considered a case in which Facebook posts to an ex-wife, co-worker, and local elementary schools were alleged to be statutory “true threats,” rendering them unprotected speech under the First Amendment. Similar to the *Ghanam* case, *Elonis* argued that he inserted an emoji with its tongue sticking out adjacent to his text to show that the post was a joke and was not intended to be taken seriously. Unlike the *Ghanam* case, the argument did not work.

Emoji hit Spartanburg.

Closer to home, two men in Spartanburg, SC were arrested for sending threatening messages on Facebook via emoji without any words. In that matter, the men posted a message with emoji for (1) a fist, (2) a hand pointing, and (3) an image of a white ambulance. Detectives claimed that the images indicated that the two men were planning to beat the victim, sending him to the hospital in an ambulance. See Mike Flacy, *Two men arrested for sending threatening emoji over Facebook*, Digital Trends (June 9, 2015) (found at www.digitaltrends.com/social-media/two-men-arrested-for-sending-threatening-emoji-over-facebook/).

But they are so cute. Why can’t I use them?

By now you know that emoji can cause a lot of trouble because they can be misinterpreted. If the “Face With Tears of Joy” emoji can cause as much anxiety as I felt when I thought it was “Face With Tears of Laughter,” imagine

what the others can do. Think about emoji that ended up being discussed in published opinions because of misunderstandings.

Also, without benefit of scientific testing, I believe that emoji do not exactly convey professionalism and maturity. I am not being judgmental, because I personally use smiley face emoji about 10 times a day in texts with my friends and family. I love them. However, I do not ever use them except among people who already know me well and do not care if I am acting less than mature. However, clients will care about things like that when deciding who to hire to represent them in their business and personal lives.

The bottom line is that emoji are here to stay. They will continue entering our courts and cause problems with intent, hearsay, foundations, and all other substantive and evidentiary issues that come with any evidence. However, try not to let them cause you problems in your own business, professional, and personal lives. That will make you 😞.