

More Than Words—The Evidentiary Value of Emoji

By John G. Browning and Gwendolyn Seale

“Frankly, I prefer emoticons to the written word, and if you disagree :(”—Stephen Colbert.¹

We’ve all seen them, and most of us have used them: the smiley face, the frowning face, the wink, and countless other examples of emoticons or “emoji.” One appellate court has described them as the “little cartoon face(s) that can be added to the text of an instant message,” adding that “[T]he 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.”² Emoji are part of the language of our digital age, conveying emotional context, affection, frustration, joy, and sarcasm to our online conversations that mere words cannot. They are, as one observer noted, “a splash of color in black and white communication,” serving as “the thumbs up to a question, the wink to our wit, the peach to our eggplant.”³

And because emoji, like tweets, posts, and texts, are becoming an increasingly common and crucial part of the way people communicate online, they are appearing with greater frequency in cases. Emoji can add context, clarify meaning, or even completely transform a sentence by turning what initially appeared to be a serious statement into a joke simply by adding a winking or smiling face to indicate sarcasm or joking. Because of this, emoji have evidentiary significance, and lawyers who want the finder of fact to fully understand an online conversation or a text message cannot afford to leave them out or not address them as a vital part of a larger piece of evidence. Did a defendant truly express a terroristic threat or make a libelous statement, or does the “smiley face” tacked on at the end of the message indicate a humorous intent? Was the plaintiff in an employment discrimination case truly impacted by “hostile” statements, or do her “smiley face” responses

and “likes” negate such an effect? This article explores the shifting evidentiary landscape of this aspect of digital communications by examining not only the expanding use of emoji, but also by looking at cases in the criminal and civil arenas in which such symbolic language has played a key role.

Consider emoji (and their more rudimentary predecessor, the emoticon) as a kind of modern hieroglyphics—simply another form of speech utilizing pictures to convey ideas. With technology developers recognizing that with online discussions people want to communicate in the briefest, most efficient way possible, the rise in popularity and use of emoji is inextricably intertwined with the rapid spread of social media. Since 2006, social media use has increased by 356 percent in the United States.⁴ As of 2013, 74 percent of Internet users have at least one social media account, with 52 percent of Americans holding more than one account.⁵ Every minute, Facebook users share 684,478 pieces of content; Tumblr bloggers publish 27,778 new posts; YouTubers upload 48 hours of new video; Foursquare users perform 2,083 check-ins; Flickr users add 3,125 new photos, and Instagrammers share 3,600 new photos.⁶ With the advent of emoji, people increasingly have employed them within their posts across all of the aforementioned platforms. Mobile keyboard company Swiftkey estimated that more than one billion emojis were sent out just from their keyboard application from October 2014 to January 2015.⁷ What is truly extraordinary is the fact that according to the Global Language Monitor, the most used word in social media posts, blogs, and news outlets actually was not even a word; rather, it was the “heart” emoji.⁸

Just how pervasive have emoji become? Ninety-two percent of all people online use emoji now, with a third of those doing so on a daily basis. On Instagram alone, nearly half of the posts contain emoji (in 2011, iOS even added an emoji keyboard). Small wonder, then, that one commenter called this “watching the birth of a new language.”⁹

There is even an emoji-only social network, *Emoji*, on which all conversations must be conducted entirely in emoji. If that sounds challenging, consider that there is now an emoji for just about any object (from guns to pizza), and that Herman Melville’s masterpiece *Moby Dick* has been translated into emoji—*Emoji Dick*—with every sentence written in its emoji equivalent. If controversy is a sign that a concept has truly arrived, then

John G. Browning is a shareholder at Passman & Jones in Dallas, TX. He defends a broad range of civil litigation in state and federal courts throughout Texas, including commercial litigation, personal injury defense, and professional liability. He is the author of three books and numerous articles on social media and the law, and he serves as an adjunct law professor at Southern Methodist University’s Dedman School of Law and Texas Tech School of Law. **Gwendolyn Seale** is a 2016 graduate of Southern Methodist University’s Dedman School of Law in Dallas and is licensed to practice in Texas.

emoji certainly qualifies. In early 2015, Apple unveiled 300 new emoji with several variations for skin tone and race, only to be greeted by charges of racism for its “yellow face” Asian emoji.¹⁰ Facebook removed its “feeling fat” emoji (complete with double chin) in response to pressure from online activists.¹¹ Detergent company Clorox had to apologize after it tweeted “New emojis are alright but where’s the bleach,” a post seen as racially insensitive because it was sent shortly after Apple’s introduction of diverse emoji.¹² The National Basketball Association’s Houston Rockets fired their social media editor after a tweet during a playoff series with the Dallas Mavericks in which he said, “Shhhhh. Close your eyes. It will all be over soon,” accompanied by a gun emoji pointed at a horse emoji.¹³

In early 2015, Apple unveiled 300 new emoji with several variations for skin tone and race, only to be greeted by charges of racism for its “yellow face” Asian emoji.

Simply put, emoji are a nonverbal form of communication, and courts already have recognized the significance of nonverbal expression. In *Bland v. Roberts*, the Fourth Circuit recognized that a Facebook “like,” depicted with a “thumbs up” icon is in fact a statement protected by the First Amendment.¹⁴ In the 2015 US Supreme Court decision in *Elonis v. United States*, the Court considered whether Facebook postings by a Pennsylvania man threatening his ex-wife were protected free speech or “true threats” meriting no First Amendment protection.¹⁵ Among other positions, *Elonis* maintained that certain posts were made in jest because they were accompanied by an emoji of a smiley face sticking its tongue out. Ultimately, the Court reversed *Elonis*’ conviction, but without ruling on the constitutional issues presented by the case.

Because emoji provide context by standing in for facial expressions, adding emotion, and even replacing entire words, they are critical to fully understanding a text phrase or online conversation. As such, they can have significant evidentiary value. As the following sections demonstrate, courts considering both criminal and civil cases are beginning to recognize this.

Emoji in Criminal Cases

Perhaps no case highlighted the evidentiary value of emoji in a criminal context quite like the recent and high-profile trial of “Silk Road” Internet entrepreneur Ross Ulbricht. Charged with running the eBay-like

online black-market bazaar in which drugs and other illicit wares were bought with the electronic currency Bitcoin, Ulbricht mounted a vigorous defense to the federal prosecutor’s claims that he—under the pseudonym “Dread Pirate Roberts”—was the operation’s mastermind. Seeking to tie Ulbricht to the illegal activities through the use of chat logs, forum posts, emails, and other online communications, prosecutors wished to treat these like wiretapped conversations and read them aloud to the jury. But defense attorney Joshua Dratel objected, arguing in a letter filed with the court that these Internet communications were created and intended to be read, not spoken or heard, and consequently should be transmitted to the jury in that way.¹⁶ Not only could reading these communications aloud add an inflection and create an impression that the creator never intended, Dratel argued that there were “aspects of the written form that cannot be reliably or adequately conveyed orally.”¹⁷ These included such things as a series of question marks (“????”), emoticons, dashes, abbreviations, all capital letters, misspelled or distortion of words (*i.e.*, “soooo”), and other symbols or non-verbal characters that couldn’t be readily translated into speech. US District Judge Katherine Forrest of Manhattan agreed, ordering that although the online communications could be read in court, jurors should also read the indications. “They are meant to be read,” wrote Judge Forrest. “The jury should note the punctuation and emoticons.”¹⁸

Other criminal cases that received their fair share of media attention also have featured emoji evidence that figured prominently. For example, in the murder trial of 27-year-old Lacey Spears, a Scottsville, Kentucky, woman accused of killing her five-year-old son with salt, emoji played a part in the defense strategy of portraying Spears as a caring mother. Prosecutors charged her with a depraved murder and manslaughter, claiming that Spears intentionally gave her child toxic levels of salt through a feeding tube into his stomach, leading to a swollen brain, surgeries, and ultimately, death.¹⁹ Spears actively blogged and posted on social media sites about her son’s declining health. The court ruled that these postings were relevant and could be introduced as evidence along with Internet research Spears had done on her iPhone on the dangers of sodium in children. Faced with the potentially damaging postings, Spears’ defense counsel sought to introduce tweets with emoji painting her as a devoted mother. These included a November 9, 2007, tweet that read “My Sweet Angel is in the Hospital for the 23rd Time. Please Pray he Gets to Come Home Soon,” accompanied by a sad-faced emoji with tears.²⁰ Spears was ultimately convicted, and is now serving a 20-year sentence.

Evidence

In November 2014, University of Pittsburgh researcher Dr. Robert Ferrante was convicted of murder in the cyanide poisoning death of his wife, Dr. Autumn Klein. In addition to evidence of Internet research Ferrante had done on cyanide poisoning and its possible detection, there was evidence of a text message Ferrante had sent his wife about getting rid of a headache by drinking a serving of creatine (which he had laced with cyanide); the message was punctuated with a “smiley face” emoticon.²¹ In Elko, Nevada, 56-year-old Ron Culley was charged with shooting Lester Alderman on December 20, 2013, following a confrontation at a local bar. Over defense objections, the court ruled at Culley’s December 2014 trial that the posts the defendant had made online, many of which contain emoji, could be introduced as evidence that contradicted his claim of self-defense.²² In Baton Rouge, Louisiana, 23-year-old Christopher Levi Jackson was not indicted by a grand jury weighing murder charges in the death of 25-year-old Travis Mitchell, whose house was sprayed by bullets in April 2014. Police had arrested Jackson on the basis of a chilling text message sent to the sister of the person they believed to be the intended target. That message, purportedly by Jackson, read “It’s a chess game. I’m up two moves ahead ... try again. Bang, bang, bang,”—followed by 27 emoji depicting firearms.²³

Meanwhile, in Beaver Falls, Pennsylvania, prosecutors are using a text message containing emoji to convict defendant Michael St. Clair of double homicide, or as they put it, “double-emojicide.”²⁴ St. Clair allegedly sent three text messages before he and a friend went to make a drug buy at another person’s house. The text read “we’re going to hit that lick” and “Let’s get at it,” along with a series of emoji that showed a running man, an explosion, and a firearm. Prosecutors argue that the text and emoji demonstrate that St. Clair knew there was going to be gun-related violence associated with the facts.

Other high-profile prosecutions have centered on violent threats that incorporated emoji. For example, in January 2015, 17-year-old Osiris Aristy was arrested and charged with making terroristic threats toward police officers via emoji-riddled Facebook status updates. Although the Facebook posts didn’t explicitly identify specific officers, they did reference particular police precincts, along with emoji guns pointing at emoji of police officers.²⁵ The very broad New York penal statute in question—passed in the aftermath of the September 11 terrorist attacks—provides that any statement intending to intimidate civilians or the government by threatening to commit a specific offense qualifies as a terroristic threat, and adds that the defendant’s inability or unwillingness to actually carry out the threat “shall be no defense.” The statute does require the statement being

intended as a threat, rather than, say, as a joke or a hollow boast. Perhaps anticipating the difficulty in proving an actual threat rather than just a disdain for the police force, on February 5, 2015, the grand jury dropped the threat charges against Aristy.

In a case involving international terrorism, three teenagers from suburban Chicago—19-year-old Mohammed Hamzah Khan, his 17-year-old sister, and his 16-year-old brother—were detained at the airport as they attempted to leave the United States and travel to Syria to join ISIS. They were charged with providing material support for terrorism. Among the evidence prosecutors are relying on are various tweets and emoji by the siblings that purportedly reflect their “twisted delight” at the violent tactics employed by the Islamic State and their intent to participate in them. One example was a tweet by Khan’s sister about watching an ISIS propaganda video entitled “Saleel Sawarim,” which featured beheadings and other violent content; the tweet contained emoji of a heart and a “smiley face.”²⁶

From a defense perspective, it is understandable why attorneys would want a complete, unedited version of an online communication considered as evidence rather than one lacking the emoji. After all, under Federal Rule of Evidence (FRE) 1002, to prove the content of a writing, “the original writing ... is required, except as otherwise provided in these rules or by law.” Under FRE 1001(3), “if data are stored in a computer, or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ‘original.’” In an argument that would be echoed later in the Silk Road case, defense counsel in the case of *United States v. Ciesiolka* maintained that the texts between the defendant and the alleged victim he solicited online wouldn’t pass evidentiary muster.²⁷ Using a version lacking the emoticons, or lacking the misspelling and irregular use of language, Ciesiolka’s attorney argued, did not set forth the true nature of the communications at issue. Calling the use of emoticons “significant” in that case, defense counsel characterized the use of emoticons and particularly “at key times in the chat” by chatter/alleged victim “ashley13_km” as “key to the defendant’s theory of defense.”

But not all courts have been as receptive as Silk Road Judge Katherine Forrest to the notion that emoji are a necessary contextual element of an online communication. In *State v. Jacques*, for example, the Wisconsin Court of Appeals rejected the claim of convicted defendant Jacques that emoji in the online chat sessions were “clear evidence of enticement and encouragement” by the officer serving as part of the undercover sting operation that ensnared him. Jacques argued that had the animated emoticons of a “blushing smiley face” and other “various smiley face(s)” been shown, they would

have supported his defense of entrapment. Pointing out that the use of emoticons was revealed in the transcripts of the online exchanges and that “the static emoticons were clearly visible to the jury,” the court held that it failed to see “how viewing the emoticons as animations would have led the jury to conclude that [defendant] was the victim of ‘excessive incitement, urging, persuasion, or temptation.’”²⁸ In a recent Texas case involving the appeal of a sexual assault conviction, the appellate court was dismissive of the defendant’s claim that being texted “a winkie face emoticon” by the victim prior to the act constituted consent, pointing to her torn clothing and bloodied, bruised appearance afterward.²⁹

In an even more recent California decision, an appellate court took a similarly skeptical view regarding the emoji contained in threatening statements made by a juvenile. In May 2014, a Fairfield High School student identified as “L.F.” posted a series of tweets in which she claimed to be planning a school shooting.³⁰ Among the tweets in questions were the following:

- “I’m dead a** [three laughing emojis] not scared to go to jail for shooting up FHS warning everybody duck;”
- “Ain’t nobody safe [‘100’ emoji];”
- “I feel sorry for whoever got c wing 1st period [four laughing emojis];” and
- “I’m leaving school early and going to get my cousin gun now [three laughing emojis and two clapping hands emojis].”

Despite the frequent use of emojis denoting an attempt at humor, at least one parent who saw the tweets notified the police. L.F. was charged with violating California’s criminal threat statute (which requires specific intent to make a threat that is both unequivocal and that results in “sustained and reasonable fear”), and convicted. L.F. argued that she didn’t intend to convey the threats—which, taken in context—were meant as a joke, not a threat. Among other evidence, she pointed to testimony from friends who were fellow students (and among her 500 or so Twitter followers) who didn’t regard the tweets as threats. However, the court disagreed, finding that providing specific details (such as location and naming at least one school staff member) made the threat real. The court rejected L.F.’s position that the statements were ambiguous or joking, despite the fact that “many of them were accented by symbols of laughing faces and some were accompanied by terms such as ‘jk’ or ‘lmao.’” [“just kidding” and “laughing

my a** off,” respectively].³¹ The minor’s conviction for making a felony threat was upheld.

Emoji also are popping up in domestic violence cases. In *People v. Cramer*, an unpublished California case, the appellate court had little trouble affirming the trial court’s denial of probation for an abuser who had sent the victim a series of text messages after the attack—one of which, the court noted, “included several emoji images of bombs, guns, knives, needles, and [a] fork and knife.”³² However, in another case, the court did not hesitate to dismiss an Application of Relief from Abuse on grounds of stalking after it was disclosed that the exchange of text messages between the purported victim and the alleged abuser began with “the respondent sending the applicant an emoji of a ‘smiley face’,” and the applicant responding “with an emoji of a gun.”³³ As the court wryly observed, “the exchange deteriorated from there.”³⁴

Emoji in Civil Cases

Civil cases in which emoji figure prominently in communications present the same concerns for defense attorneys. Statements containing emoji have to be viewed in context to determine how, if at all, the emoji change, detract from, or add emphasis to the meaning of the statement at issue. For example, in a breach of contract case in which one party contends that the other agreed to a material change in terms based on a series of online communications, the inclusion of emoji reflecting sarcasm by the party supposedly “agreeing” is likely to be significant, and worthy of being weighed by the finder of fact. For example, in what the federal court described as “a ‘whodunit’ of a contract case,” there were conflicting motions for summary judgment.³⁵ The plaintiff, Parcel Management Auditing and Consulting, Inc. (PMAC) claimed it had a written agreement in which the defendant—the high-end handbag and accessory company Dooney & Bourke—had agreed to pay PMAC for advisory services rendered to reduce Dooney’s UPS shipping costs. But the “agreement” in question was signed not by any of Dooney’s upper-level management, but rather by a peripheral Dooney employee, a part-time computer programmer working primarily out of his home. In denying the plaintiff’s motion for summary judgment and granting the defendant’s motion on the grounds that this computer programmer lacked authority to bind the company, the court noted the casual nature of the communications between the parties, even including a visual depiction in its opinion of the “smiley face” emoji contained in the initial communication from PMAC’s president.³⁶

Libel is another area in which evidence in the form of emoji can play an influential role. Was a statement made with malicious intent, or does the presence

Evidence

of emoji point to a more comic or sarcastic tone? In *Ghanam v. Does*, a Detroit city official brought a defamation action against multiple anonymous commenters on an Internet message board devoted to local politics for their allegedly libelous postings.³⁷ In reversing the trial court's denial of the Web site operator's motion for a protective order, the Michigan Court of Appeals found that the city official had failed to state a claim for defamation. Among other grounds, the court noted that the statement could not be taken as fact because of their "joking, hostile, and sarcastic manner," as evidenced by the use of the ":P" emoticon. Observing that the ":P" emoticon is used to represent "a face with its tongue sticking out to denote a joke or sarcasm," the court proclaimed that it was "patently clear that the commenter was making a joke" and thus "a reasonable reader cannot view the statement as defamatory."³⁸ In another libel case, *Piping Rock Partners, Inc. v. David Lerner Associates, Inc.*, federal Judge Susan Illston of the US District Court for the Northern District of California had to consider the personal jurisdiction issues involved in a case in which New York citizens (David Lerner and his business) had allegedly ratified the libelous actions of a former employee (co-defendant George Dobbs) directed against the California plaintiff.³⁹ Finding that there was evidence of a post on a David Lerner Associates computer approving of Dobbs' "smear posts" with "a 'smear cheer' series of six laughing face emoticons," the court held that this ratification of its agent's intentional act was sufficient to warrant exercising personal jurisdiction over the New York defendants.⁴⁰

In a breach of contract case in which one party contends that the other agreed to a material change in terms based on a series of online communications, the inclusion of emoji reflecting sarcasm by the party supposedly "agreeing" is likely to be significant, and worthy of being weighed by the finder of fact.

Emoji also can figure prominently in trade secret and other IP cases. In *Microstrategy, Inc. v. Business Objects, S.A.*, a Virginia-based software manufacturer brought a lawsuit against a competitor for misappropriation of trade secrets.⁴¹ Rejecting Microstrategy's claim that its rival had a "spy" inside Microstrategy, the court noted that the sole basis for that allegation was the use of the term "spy" in an email referring to a friend of a Business Objects employee. The court skeptically observed that the use of

this term "was followed by a 'smiley face' emoticon."⁴² In a copyright infringement case involving a mother who had uploaded a video of her child to YouTube (*Lenz v. Universal Music Corp.*), federal Judge Jeremy Fogel of the US District Court for the Northern District of California had to consider Lenz's claim for irreparable harm brought on by a takedown notice.⁴³ Universal Music argued that an email exchange between Lenz and a friend undermined that claim because Lenz had replied to a statement about how she was irreparably harmed with the ";-)" symbol, described by Lenz as "a 'wink' emoticon which signifies something along the lines of 'just kidding'."⁴⁴ But accepting Lenz's explanation that she and her friend were discussing the "stilted language" that "lawyers sometimes use" and that her use of the emoticon was a reply to the word that her friend had used, the court granted Lenz's motion for summary judgment on the affirmative defenses Universal Music had lodged.

Emoji evidence can appear in virtually any kind of case featuring online communications that purportedly support or detract from a party's claims or defenses. For example, in *Arnold v. Reliant Bank*, a discharged bank employee brought a gender discrimination lawsuit against her former employer.⁴⁵ In ruling that the alleged harassment wasn't sufficiently severe or pervasive to create a hostile work environment, the court pointed to evidence that up until termination, the plaintiff repeatedly said that she liked the work environment at Reliant Bank. This evidence included Arnold's own testimony, a rejection of a more lucrative offer from another bank shortly before her termination, and her use of "a smiling emoticon" in completing an employee self-assessment form about her job satisfaction.⁴⁶ In *Scroggin v. Credit Bureau of Jonesboro, Inc.*, a Fair Debt Collection Practices Act case before the federal court for the Eastern District of Arkansas, Judge Susan Webber Wright found that the debtor had brought the action in bad faith and for the purpose of harassment.⁴⁷ Among the many examples of Scroggin's uncivil statements and harassing behavior pointed out by the court was his online post that read in part "so walk into that federal courtroom with me and get ready for the biggest [train wreck emoticon] ever."⁴⁸ But in an Anti-Cybersquatting Consumer Protection Act case in federal court in Michigan, emoticons were viewed as far more benign. In *Career Agents Network, Inc. v. Careeragents network.biz*, a seller of recruiting industry business opportunities filed suit against a former customer and his Web sites, alleging cybersquatting.⁴⁹ Although the court found that the plaintiff's case was unbounded, it was less persuaded by some of the claims of vexatious behavior made against the company's chief operating officer and which centered on certain text messages. The court observed that the "smiley face" and

“winky” emoticons that appeared in the text for no apparent purpose did “not appear to convey anything threatening or in any other way support a claim of vexatious behavior.”⁵⁰

Emoji evidence can appear in virtually any kind of case featuring online communications that purportedly support or detract from a party’s claims or defenses.

Sometimes, judges even get into the spirit by incorporating emoji into their opinions. In the United Kingdom, High Court Justice Peter Jackson was faced with the difficult task of explaining—for the benefit of not only the public, but also the 10-year-old and 12-year-old children of a British Muslim convert who had tried to illegally take the children to Syria—why the father was serving a prison sentence. Avoiding legalese and using clear, simple language, Justice Jackson even incorporated emoji into his opinion to better describe the events leading up to the father being taken into custody.⁵¹ British legal observers called it a “refreshing approach” and remarked “every judgment should be like this.” In an insurance coverage dispute over whether or not there was coverage for the defamation in question (an alleged insult to the cooking skills of the defamation plaintiff), the central issue for the court was whether or not the defamation—done via emoji—met the definition of “oral or written publication of material.”⁵² The allegedly defamatory “statement” consisted of three emoji conveying the sentiment that Ms. Hopkins’ Thanksgiving turkey was dry: a turkey emoji, followed by the ø (symbol for “no”) and an umbrella with raindrops. However, the court didn’t merely content itself with simply stating that the three emoji symbols did not constitute “written material.” It also expressed its conclusion that the plaintiff would not receive a written monetary judgment by using emoji itself; in this instance, the ø symbol followed by a document emoji and a money bags emoji.⁵³

Of course, attorneys are human, too, and our own use of emoji in professional communications can sometimes be an issue. In *United States v. Christensen*, Montana federal Judge Richard Cebull rejected the *pro se* defendant’s claim of ineffective assistance of counsel, which was based on a joking email his court-appointed lawyer had sent to the prosecutor offering “to stipulate that my client is guilty. ☺.”⁵⁴ The court noted the presence of an emoticon and the fact that “No one took [his] frivolous e-mail as an actual stipulation.”⁵⁵ In a more troubling scenario, in *In re Oladiran*, Arizona attorney Tajudeen

Oladiran faced disbarment from the US District Court for the District of Arizona following a number of disciplinary charges—including filing frivolous lawsuits against four federal judges and filing a “motion for an honest and honorable court system,” that impugned the integrity of one judge in particular, Judge Bolton.⁵⁶ That motion, the court noted, appeared on the national legal blog *AbovetheLaw.com* as “one of the craziest motions ever,” a “lesson on how not to address the court,” and for Oladiran’s use of “the most menacing smiley emoticon ever.”⁵⁷ Perhaps it’s wise for lawyers to remember, as one guide to “e-mail Netiquette for lawyers” reminds us, that emoticons don’t belong in the professional setting that lawyers inhabit.⁵⁸

Conclusion

Just as social media and other forms of online communication and information sharing are here to stay, emoji cannot be overlooked by trial lawyers. In light of the thoughts and emotions that emoji can express and the context they can provide, lawyers must take care during discovery and trial to ensure that the whole online or text communication—including emoji—are preserved for and considered by the finder of fact. There may be issues to confront, especially given the fact that no text communication can fully replace how we represent ourselves in speech; certain expressions, such as sarcasm, are best communicated through in-person interaction. And like the spoken word, emoji can be open to interpretation by the recipient. A “praying hands” emoji, for example, can represent not just prayer in some cultures, but gratitude in others. But trial lawyers are in the business of communicating, so they cannot afford to ignore the evidentiary value of this form of communication. Some may be resistant to it, but just as in the case of the hieroglyphics of a bygone age, the writing is on the wall.

Notes

1. Stephen Colbert, “A Mock Columnist, Amok,” *The New York Times* (Oct. 14, 2007).
2. *State of Connecticut v. Nero*, 122 Conn. App. 763, 1 A. 3d 184 (July 27, 2010). For purposes of this article, we will use the term “emoji” to describe not only the single character face or object, but also its predecessor, the emoticon, that consisted of several keyboard characters.
3. Julia Greenberg, “That ;) You Type Can and Will Be Used Against You in a Court of Law,” *Wired* (Feb. 12, 2015).
4. Justin P. Murphy and Adrian Fontecilla, “Social Media Evidence in Criminal Proceedings: An Uncertain Frontier,” *Bloomberg Law* (Jan. 14, 2015), <http://www.bna.com/social-media-evidence-in-criminal-proceedings-an-uncertain-frontier-by-justin-p-murphy-and-adrian-fontecilla/>.

Evidence

5. Social Networking Fact Sheet, Pew Research Center, <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/>.
6. *Id.*
7. Clair Carter, "The most popular word of 2014 was the heart emoji," *Daily Mail*, <http://www.dailymail.co.uk/news/article-2889949/Heart-emoji-widely-used-character-social-media-blogs-global-news-outlets-2014.html>.
8. *Id.*
9. Clive Thompson, "The Emoji is the Birth of a New Type of Language," *Wired* (April 19, 2016).
10. Caitlin Dewey, "Are Apple's new 'yellow face' emoji racist?," *The Washington Post* (Feb. 24, 2015), <https://www.washingtonpost.com/news/the-intersect/wp/2015/02/24/are-apples-new-yellow-face-emoji-racist/>.
11. "Facebook removes 'feeling fat' emoticon under pressure from online activists," <http://www.msn.com> (March 11, 2015).
12. Brandon Bailey, "Clorox Apologizes After Critics Blast Company Over Emoji Tweet," *Associated Press* (April 11, 2015).
13. Marissa Payne, "Rockets fire their social media editor for trolling Mavericks with gun emoji tweet," *The Washington Post* (April 29, 2015), <http://www.washingtonpost.com/blogs/early-lead/up/2015/04/29/rockets-fire-their-social-media-editor-for-trolling-mavericks-with-gun-emoji-tweet>.
14. *Bland v. Roberts*, 2013 WL 5228033 (4th Cir. Sept. 18, 2013). This was the first time a federal circuit court discussed whether nonverbal social media conduct was a statement.
15. *Elonis v. United States*, 13-983 U.S. _____ (decided June 1, 2015).
16. Benjamin Weiser, "At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji," *The New York Times* (Jan. 28, 2015), <http://www.nytimes.com/2015/01/29/nyregion/trial-silk-road-online-black-market-debating-emojis.html>.
17. Jan. 9, 2015 letter of Joshua Dratel to Hon. Katherine B. Forrest in *United States v. Ross Ulbricht*, 14 Cr. 68 (KBF).
18. Debra Casseas Weiss, "Emoticons matter, judge rules in Silk Road trial," *ABA Journal* (Jan. 30, 2015), http://www.abajournal.com/news/article/emoticons_matter_judge_rules_in_silk_road_trial.
19. "Defense in case of woman accused of poisoning son with salt faces uphill battle, legal experts say," *Fox News* (Feb. 1, 2015).
20. *Id.*
21. "Pittsburg researcher convicted of poisoning wife with cyanide," *CBS News* (Nov. 7, 2014).
22. Dylan Harris, "Judge rules shooting defendant's Internet posts are evidence," *Elko Daily Free Press* (Dec. 11, 2014) (Culley's case ended in a mistrial).
23. Joe Gyan, Jr., "Grand Jury takes no action in Baton Rouge murder case, suspect to be set free," *The Advocate* (Feb. 18, 2015).
24. Jason Cate, "Beaver Falls man held for trial in Sheraden double-homicide 'emoji-cide' case," <http://triblive.com/news/adminpage/8239267-74/clair-berquist-brown#ixzz3zncmxzb>.
25. Colin Daileida, "Emoji Arrest Raises Questions of First Amendment Protection," *Mashable.com* (Feb. 7, 2015), <http://mashable.com/2015/02/07/emoji-arrests/>.
26. Kevin Sullivan, "Three American Teens, recruited online, are caught trying to join the Islamic State," *The Washington Post* (Dec. 8, 2014).
27. *U.S. v. Ciesiolka*, 2008WL 6797620 (N.D. Ind., Feb. 25, 2008).
28. *State of Wisconsin v. Jacques*, 332 Wis. 2d 804, 798 N.W. 2d 319 (2011).
29. *Kinsey v. State of Texas*, 2014 WL 2459690 (Tex. App. Eastland, 2014).
30. *In re L.F.*, Cal. Ct. App. (1st App. Dist.) June 3, 2015.
31. *Id.*
32. *People v. Cramer*, 2016 WL 4087259, Cal. Ct. App. (3d Dist.), August 2016.
33. *Ragunauth v. Bisailon*, 2016 WL 3451762, Conn. Supp. Ct., June 2016.
34. *Id.*
35. *Parcel Management Auditing and Consulting, Inc. v. Dooney & Bourke, Inc.*, 2015 WL 796851 (D. Conn., Feb. 25, 2015).
36. *Id.*
37. *Ghanam v. Does*, 845 N.W. 2d 128, 303 Mich. App. 522 (2014).
38. *Id.*
39. *Piping Rock Partners, Inc. v. David Lerner Associates, Inc.*, 2012 WL 5471143 (N.D. Cal., Nov. 2012).
40. *Id.*
41. *Microstrategy, Inc. v. Business Objects, S.A.*, 331 F. Supp. 396 (E.D. Va. Aug. 6, 2004).
42. *Id.*
43. *Lenz v. Universal Music Corp.*, 2010 WL 702466 (N.D. Cal. Feb. 25, 2010).
44. *Id.*
45. *Arnold v. Reliant Bank*, 932 F. Supp. 2d 840 (M.D. Tenn., March 21, 2013).
46. *Id.*
47. *Scroggin v. Credit Bureau of Jonesboro, Inc.*, 973 F. Supp. 2d 961 (E.D. Ark., Sep. 20, 2013).
48. *Id.*
49. *Career Agents Network, Inc. v. Careeragents network.biz*, 722 F. Supp. 2d 814 (E.D. Mich., June 29, 2010).
50. *Id.*
51. *Lancashire County Council v. M. and Others*, 2016 EWFC9 in the Family Court, Case No. PR15C00240 (Sept. 13, 2016).
52. *Bertha Hopkins, as assignee of Linda Hopkins v. Roger Williams Ins. Co.*, Case No. 15-5696, Superior Court of Rhoda Island (March 3, 2016). Reported in Vol. 5, Issue 4 of *Coverage Opinions* (March 30, 2016).
53. *Id.*
54. *U.S. v. Christensen*, 2013 WL 1498950 (D. Montana, April 11, 2013).
55. *Id.*
56. *In re Oladiran*, 2010 WL 3775074 (D. Az., Sep. 21, 2010).
57. *Id.*
58. Gerald Lebovits, "E-mail Netiquette for Lawyers," 81 (Dec.) *N.Y. St. B.J.* 64 (Nov./Dec. 2009).

Copyright of Computer & Internet Lawyer is the property of Aspen Publishers Inc. and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.