

Gone are the Days of the Tear-Stained Letter: Emojis as Evidence in the Digital Age

By: Ashley L. Crank

Ashley L. Crank is an associate at Christian & Small LLP where she maintains a civil litigation practice focusing on insurance defense, insurance coverage, personal injury, and other civil matters. Ashley is an active member of the Alabama Defense Lawyers Association, Birmingham Bar Association, serves on the editorial board for the Birmingham Bar Bulletin, and serves on the Board of Trustees for the Birmingham Legal Aid Society. In addition, Ms. Crank is an active member of DRI's Insurance Section, Women's Section, and Young Lawyers' Section.

In today's culture, emails, text messages, and social media platforms are common methods of digital written communications. Non-digital and digital written communications tend to lack various emotional dimensions that in-person communications offer, such as vocal expressions, facial expressions, and body language. Just as written communications have evolved to adapt to today's digital culture, so have non-verbal communications. While different than non-verbal communications involved in in-person interactions, emojis¹ and emoticons² are pictographs that bridge the gap between non-verbal communications and emotions in written, digital communications. Emojis and emoticons, while different, both articulate and emphasize an author's tone or meaning, and potentially even an author's mood or mental state, in digital communications. The use of emojis in all forms of digital communications is ever-increasing.³ For example, the "heart eyes cat" emoji has appeared in over 66 million tweets on Twitter, and domain names incorporating emojis are currently being developed.⁴ As emojis and emoticons continue to play an extensive role in how we communicate digitally, they will continue to create evidentiary issues.

While a fairly new facet of digital communications, courts have begun to recognize and address emojis and emoticons in both the civil and criminal contexts.⁵ In 2012, the Middle District of Alabama evaluated the use of an emoticon in a text message, and coupled with other factors, held there was "a close-temporal proximity between [a supervisor's] love letters, the negative-performance review, *the emoticon-text message*, and [plaintiff's] termination."⁶ In a wrongful termination action in Ohio, a court analyzed the employer's use of "smiley face" and "frowning face" emoticons in emails regarding the plaintiff.⁷ The plaintiff argued the use of frowning emoticons in emails related to plaintiff's performance implied ill-will or malice toward him.⁸ The court ultimately held that while "the use of emoticons in [defendant's] emails may have been unprofessional or immature, the court finds that her opinions expressed in the emails do not rise to the level of malice, bad faith, or reckless conduct."⁹

Emojis and emoticons have also made their way into defamation lawsuits. In *Ghanam v. Does*, a defamation case, the Michigan Court of Appeals interpreted the use of an emoticon at the end of a digital statement and ultimately held that the emoticon displayed the author's intent at the time the statement was made.¹⁰ The statement and emoticon at issue was as follows:

They are only getting more garbage trucks because Gus needs more tires to sell to get more money for his pockets :P¹¹

The court concluded "[e]xamination of the statements *and the circumstances under which they were made* show them to be mere expressions of rhetorical hyperbole and not defamatory as a matter of law."¹² More specifically, the court reasoned the use of the ": P" emoticon made it clear the author intended the statement as a joke, and therefore, a reasonable reader could not have interpreted the statement as defamatory.¹³ Courts have also analyzed the use of emoticons in workplace harassment cases.¹⁴

Interestingly, an Israeli small claims court judge recently found that emojis served to prove the element of reliance in a contract dispute.¹⁵ In this lawsuit, a landlord posted an online ad seeking a prospective tenant.¹⁶ A prospective tenant digitally communicated with the landlord and included various emojis in his communication, such as a smiley, a bottle of champagne, dancing figures and more.¹⁷ The parties continued communicating back and forth, but the prospective tenant eventually ceased communications.¹⁸ However, as a result of the parties' communications, the landlord alleged he took down his online ad because he relied on the prospective tenant to lease the property based on the digital communications.¹⁹ As a result, the landlord sued the prospective tenant for damages.²⁰ According to the judge, the prospective tenant's positive emojis coupled with his words displayed interest, which the judge held the landlord relied upon.²¹ The judge specifically noted that emojis are an integral part of modern communication and are thereby subject to legal interpretation.²² The landlord was awarded 8,000 shekels in damages and legal fees, which amounts to approximately \$2,200.00.²³

As it relates to criminal cases, in September 2016, emojis depicting a police officer, a handgun, and a bomb included in a Facebook post led to probation of an Illinois citizen.²⁴ Recently, an Ohio court allowed testimony from a witness regarding the intent behind a "winky face" emoji found in digital communications in a criminal case involving aggravated burglary and felonious assault charges.²⁵ The witness testified that the "winky face" emoji sent by the individual that the defendant allegedly assaulted meant that the individual wanted "to sleep with her again."²⁶ On appeal of his conviction, the defendant argued this testimony was evidence of provocation. Taking the evidence most favorably for the defendant, the appellate court found that it was "insufficient to convey words of infidelity and to find otherwise would require [the court] to make an unsupported assumption of the emoji's meaning."²⁷

Before discussing interpretation issues related to specific emojis, it must be noted that emoji senders and recipients could view different emoji images from the on-set of a digital communication because different devices, softwares, and operating systems convey different emoji images. That is, senders and recipients may not see the same image. There are two types of emojis—Unicode emojis and proprietary emojis.²⁸ The Unicode emoji system does not determine emojis' characteristics, such as color, shape or size.²⁹ Therefore, the final depiction of an emoji is left up to the particular device, operating system or software and as a result, emojis can be conveyed differently between a sender and a recipient.³⁰ Furthermore, proprietary emojis are only recognized on the platform they are offered, and as a result, a recipient of a proprietary emoji may not be able to view the emoji at all if he is not using the requisite platform.³¹

While it is positive that various courts are recognizing and beginning to address emojis as evidence in various lawsuits, courts need to address emojis and their application uniformly and consistently. For example, as recognized by *State v. Shepherd*, interpretation of emojis is an issue.³² Courts, lawyers, witnesses, jurors, and even recipients of emojis can analyze the same

emoji and reach different, but rational, conclusions as to the meaning of the same emoji. This is no different than other interpretative challenges, such as words and other symbols that generate multiple meanings. Because emoji interpretation is an issue, several online dictionaries related to emojis have already been created.³³

Due to the interpretation issues related to emojis, courts should consider incorporating actual emoji images, rather than textually describing emojis, into their opinions and other written orders in order to establish uniform precedent for the meanings of specific emojis. Of course, in order to do this, actual emoji images at issue must be adequately preserved by practitioners, which must be done during the discovery phase of any lawsuit. Therefore, it comes with no surprise that practitioners must be mindful of evidentiary issues surrounding emojis. Just like the evidentiary hurdles currently associated with social media evidence, emojis must be properly authenticated and, likely, will need to survive hearsay objections. Perhaps, under certain circumstances, emojis could be admissible under certain hearsay exceptions outlined in Rule 803. In order to be prepared for these issues prior to trial, practitioners must evaluate and analyze all evidentiary issues that could arise with emojis at the on-set of a case and continue to evaluate the same as the case develops.

Following the logic of the interpretation issues above, courts and practitioners must evaluate and determine the best way to present emojis, if admissible, to juries in order to prevent jury confusion. Written communications such as emails and text messages can be read to the jury once deemed admissible. What happens if an emoji is contained in such communication and is read, or described, by a lawyer to the jury? Conversely, what happens if a lawyer omits the emoji from the written communication? The opposing party could certainly object either way due to mischaracterization and/or any likelihood to confuse the jury. Must an actual image of the emoji be presented to the jury to avoid these obstacles? Moreover, generational gaps between jurors are also likely to create issues. Certain jurors may not be familiar with emojis and different generations could associate a different meanings with the same emoji. While the use of emojis as evidence creates the above complications, courts and practitioners must evaluate and consider emojis' evidentiary value as they are a novel form of non-verbal communication that can substantially aid (or hinder) a practitioner's case.

¹"Emoji" is a Japanese term for picture character and is a "small digital image or icon used to express and idea, emotion, etc., in electronic communications." Goldman, Eric, *Surveying the Law of Emojis* Santa Clara Univ. Legal Studies Research Paper (May 1, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2961060 (quoting *In re L.F.*, 2015 WL 3500616, *1 n.2 (Cal. Ct. App. June 3, 2015)).

²"Emoticon" is a hybrid of the words "emotion" and "icon" and "are letters, numbers and other standard keyboard characters sequenced to create a pictograph." Goldman, *supra* note 1.

³ See, e.g., *Jackson v. McCurry*, 303 F. Supp. 3d 1367, 1377 (M.D. Ga. 2017) (explaining that student in § 1983 action had to identify recipients that were identified by emojis instead of names).

⁴ <http://emojitracker.com> (last visited July 16, 2018); Michael J. Coren, *The Land Rush For Emoji Domains Is Coming*, QUARTZ, Nov. 5, 2016, <https://qz.com/828436/the-land-rush-for-emoji-domains-is-coming>.

⁵ See, e.g., *Murdoch v. Medjet Assistance*, 294 F. Supp. 3d 1242, 1253-54 (N.D. Ala. 2018) (recognizing "smiley face" emojis in digital messages when evaluating employment discrimination case); *NEXUS Servs., Inc. v. Moran*, No. 5:16-cv-00035, 2018 WL 1461750, at *4 (W.D. Va. Mar. 23, 2018) (interpreting the use of a "Hitler emoji" in email communications and reasoning "the emoji was contained in an internal email between two work colleagues in which, taken in context, one was jokingly calling the other a 'meanie' and a taskmaster"), *appeal filed*; *Ukwuachu v. State*, NO. PD-0366-17, 2018 WL 2711167, at *6 n.12 (Tex. Crim. App. June 6, 2018) (recognizing and publishing "winky face" emoji in opinion).

⁶ *Mims v. Chilton Med. Ctr.*, No. 2:11cv41–MHT, 2012 WL 685280, at *6 (M.D. Ala. Mar. 2, 2012).

⁷ *Kara v. Ohio Dept. of Taxation*, No. 2012-03794, 2014 WL 713335, at *7 (Ohio Ct. Cl. Feb. 21, 2014).

⁸ *Kara*, 2014 WL 713335, at *7.

⁹ *Id.*

¹⁰ *Ghanam v. Does*, 845 N.W.2d 128, 145-46 (Mich. App. Ct. 2014).

¹¹ *Ghanam*, 845 N.W.2d at 145.

¹² *Id.* at 146 (emphasis added).

¹³ *Id.* at 145.

¹⁴ See *In re Shawe and Elting*, No. 9661-CB, 2015 WL 4874733, at *23 (Del. Ch. Aug. 13, 2015) (reasoning that ";)" at the end of defendant's text message sent to non-parties displayed intent that defendant looked forward to another opportunity to harass the plaintiff).

¹⁵ Ephrat Livni, *Emojis prove intent, a judge in Israel ruled*, QUARTZ (May 19, 2017), <https://qz.com/987032/emojis-prove-intent-a-judge-in-israel-ruled>.

¹⁶ Livno, *supra* note 15.

¹⁷ Livno, *supra* note 15; Ido Kenan, <http://room404.net/eng/%F0%9F%92%83%F0%9F%8F%BB%F0%9F%91%AF%E2%80%8D%E2%9C%8C%EF%B8%8F%E2%98%84%EF%B8%8F%F0%9F%90%BF%EF%B8%8F%F0%9F%8D%BE-show-intention-to-rent-apartment-says-judge> (last visited July 16, 2018) (shows messages with emojis in Hebrew).

¹⁸ Livno, *supra* note 15.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See *Emojis Taken as Threat Against Officer Lead to Probation for Peoria Man*, CHI. TRIB. (Sept. 17, 2016, 6:24 AM), <http://www.chicagotribune.com/news/local/breaking/ct-emojis-threat-peoria-20160917-story.html> (“A Peoria man pleaded guilty to threatening a police officer based on the emojis he included in a Facebook post has been sentenced to more than two years of probation.”).

²⁵ *State v. Shepherd*, 81 N.E.3d 1011, 1020 (Ohio Ct. App. 2017).

²⁶ *Shepherd*, 81 N.E.3d at 1020.

²⁷ *Id.*

²⁸ Goldman, *supra* note 1.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Shepherd*, *supra* note 25.

³³ See Emojipedia, <http://emojipedia.org> (last visited July 16, 2018); The Emoji Dictionary, <https://emojictionary.emoji.foundation.com> (last visited July 16, 2018); Dictionary.com, <http://www.dictionary.com/e/emoji> (last visited July 16, 2018).