

Experts: Lawyers can't dismiss emojis as frivolous clutter

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Don't be surprised if the relevance and meaning of a smiley face emoji becomes the subject of debate in a courtroom near you.

Emojis have become the true punctuation marks of today's electronic communications. And since emojis bear directly on the intent of the sender as well as what could reasonably be understood by the recipient, litigators who ignore those silly images do so at their own peril.

The emerging "law of emojis" is the subject of a recent paper by Eric Goldman, director of the High Tech Law Institute at Santa Clara University School of Law in California.

Goldman points out that there are actually two types of images that people commonly refer to as emojis. An "emoticon," he explains in his paper, is a collection of standard keyboard characters — such as ☺ — grouped to create an image that conveys emotion. An emoji, meanwhile, is an actual digital image or icon 🍌.

According to stats unearthed by Goldman, 92 percent of those who go online use emojis, and emojis (or emoticons) appear in 2.3 trillion mobile messages every year. So if it hasn't already, it's only a question of time before an emoji becomes relevant in determining the meaning of an electronic communication in a client's case.

Goldman says his research found that emojis and emoticons are becoming an issue in sexual predation cases far more than in any other type of matter. The law professor cites an example of a suspect chatting online with an undercover officer posing as an underage girl, and the suspect adds a winking emoji to the message, "I know you're under 18."

"What do we do with that?" Goldman asks. "Does that say the sexual predator admitted that he's engaging in conversation with someone he thinks is underage, or does the winky [face] say, 'I know you're an undercover cop, and I'm not taking this conversation seriously?'"

Goldman's research also showed emojis coming up in employment discrimination cases on the issue of whether online conversations made the employee feel uncomfortable about the work environment. As for what's next, he says he expects the relevance of emojis eventually will cut across every practice area.



"The unique technology of emojis might create 'gotchas,' and if lawyers aren't aware of the gotchas, then they're capable of making mistakes," Goldman says.

The most important legal issue for lawyers to be aware of is that different online platforms can translate emojis differently. That means the emoji may not appear the same to sender and recipient, Goldman says. For example, an emoji representing a toy squirt gun might be received as an image of a real handgun, dramatically altering the meaning of a message.

"The possibilities for miscommunication and misunderstanding are ripe," he warns.

Also important for lawyers to consider is that emojis are a class of content that may essentially be "invisible" to certain e-discovery programs, Goldman says. So lawyers need to ensure their e-discovery is configured to "pick up" emojis to ensure they get the full context of a communication.

According to Stephen M. Prignano, who practices at McIntyre Tate in Providence, emojis are becoming a more important form of evidence in the domestic relations area.

"In many Family Court disputes, text-messaging evidence on child custody and visitation issues and whether threats have been made has become front and center," Prignano says. "In that type of casual form of communication, we see these characters used to convey additional meaning."

Prignano hasn't had a case in which an emoji was a key issue, but he sees emojis becoming more relevant as they become a more prevalent form of communication.

"These symbols can add ambiguity to an otherwise clear expression of intent," he says. "And the reverse could be true. They could clear up what would otherwise be an ambiguous communication."

Boston business litigator Julie Barry says emojis could also have relevance in contract cases.

"Attorneys should absolutely be aware of all the types of communications their clients may be having," she says, noting that Superior and Land Court judges have made clear that text messages and emails under the right circumstances may contain the necessary elements for a binding contract. For that reason, lawyers can't view emojis as easily ignored surplus.

"An emoji could end up confusing the issue where otherwise it might be pretty clear," says Barry, a residential and commercial real estate practitioner at Prince, Lobel, Tye.

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