

Emoji and eDiscovery: How to Mitigate Risky Business



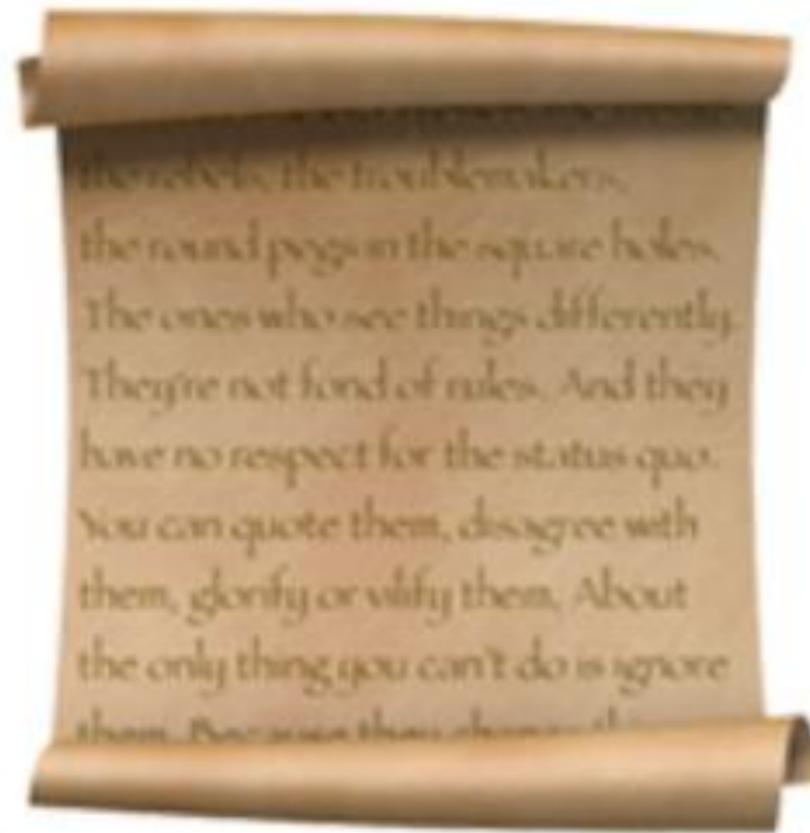
Presented By:
Eric Parish, JD, CIGO, CEDS

Agenda

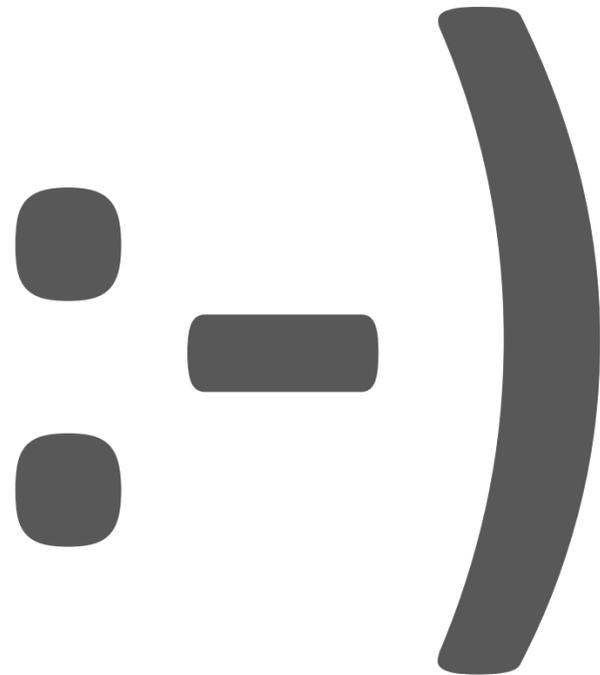


- History of Emoji and Growth of Utilization in the Workplace
- Emoji Case Law and Challenges in the Legal Space
- Emoji and eDiscovery Technology
- Emoji Takeaways: Policy and Proactive Approach

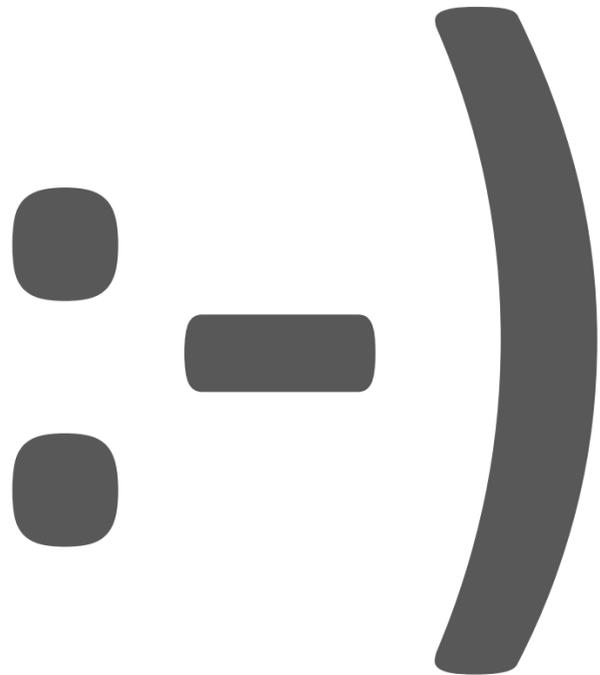
History of Emoji and Growth of Utilization in the Workplace



Emoticon and Emoji – History



Emoticon and Emoji – History



1982

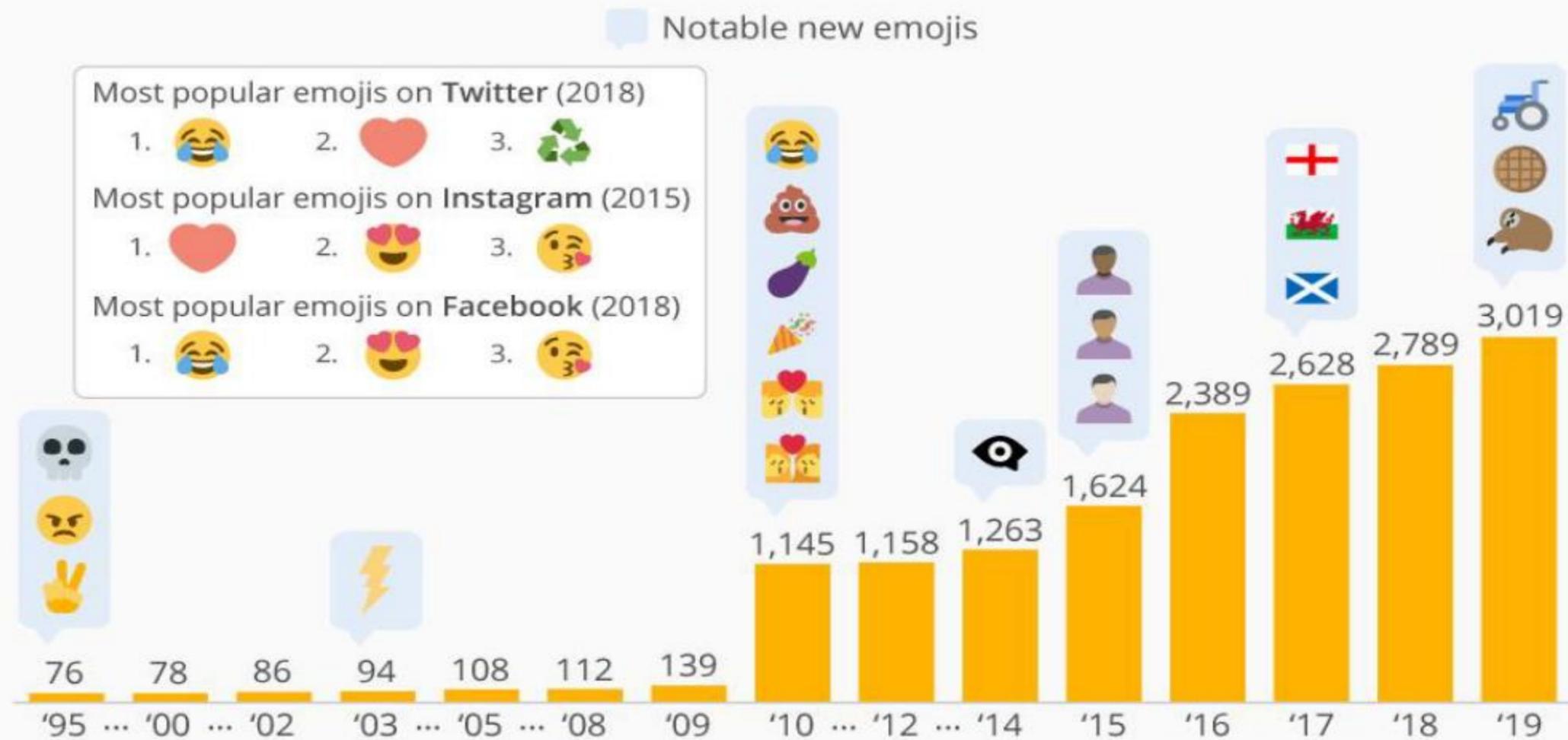


1999

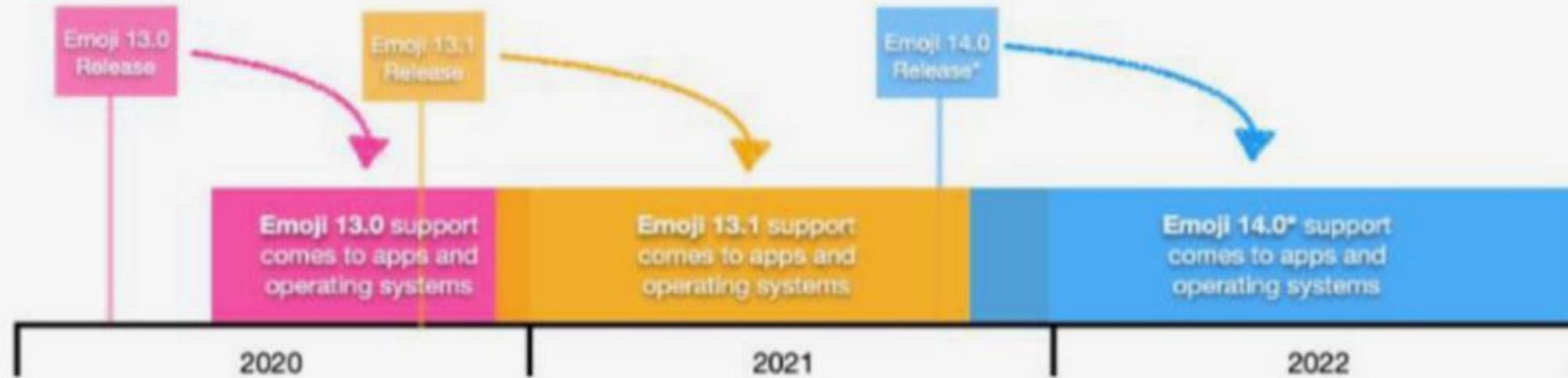
Emoticon and Emoji – History

A Short History of the Emoji

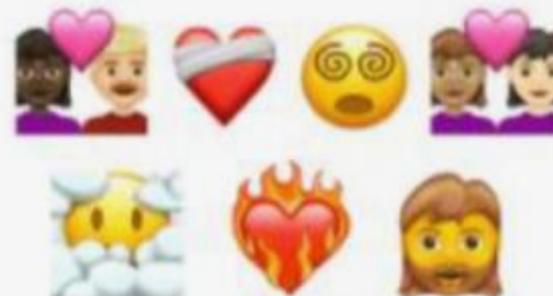
Number of emojis by year and release of notable emojis



New Emoji



Emojipedia Sample Images



Emojipedia Sample Images



Unicode Provisional Chart Images

** candidates only, final set TBD*

Source: <https://emojipedia.org/new/>

Favorite Emojis

Favorite Emojis – By Gender
(Shown: Top 3; open-end response)



Favorite Emojis – By Region
(Shown: Top 3; open-end response)



Emoji Popularity Growing

2015 Oxford Dictionary Word of the Year

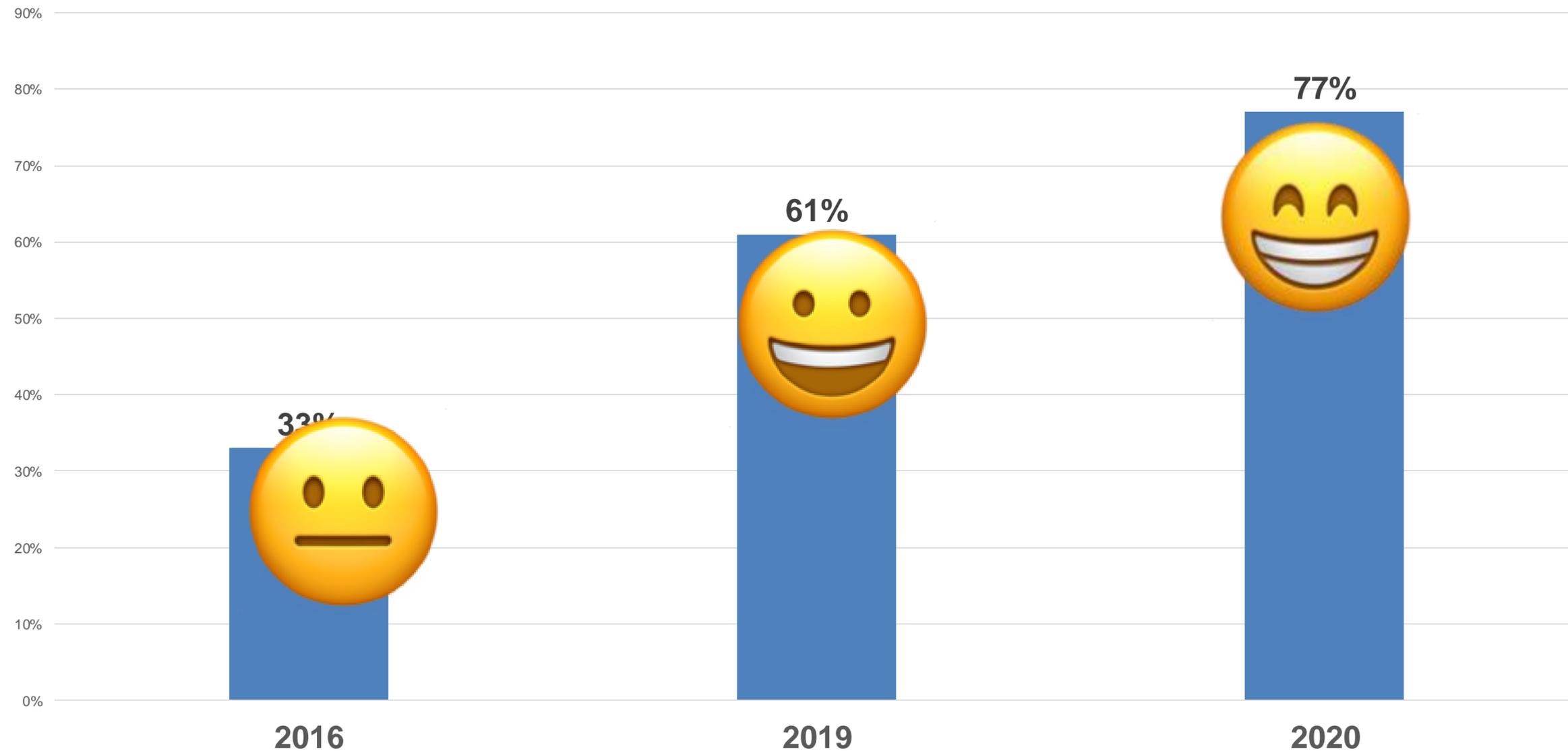


The official name of the chosen emoji is “face with tears of joy” according to the Unicode Consortium, the organization in charge of emoji standards. The tears of joy face was the most frequently used emoji in 2015, making up 17% of all emojis in the U.S. and 20% in the UK.



The Rise of Emoji Usage in the Workplace

% of Connected Population Using Emoji in the Workplace



Source: 2016 Adobe Survey; <https://www.statista.com/chart/18717/emoji-use-at-work/>;

<https://clutch.co/translation/resources/translation-interpretation-work-emoticons-change-business-communication>

Adobe 2021 Global Emoji Trend Report Says...

71%



of global emoji users feel that using emoji
at work positively impacts likeability
and credibility ✓ (62%)

Adobe 2021 Global Emoji Trend Report Says...

Global emoji users' **TOP FIVE** favorite emoji are:

#1



#2



#3



#4



#5



67%

of global emoji users think that people who use emoji are friendlier, funnier and cooler than those who don't



MORE THAN

1/2

of global emoji users agree that using emoji in communications has positively impacted their mental health



88%

of global emoji users are more likely to feel empathetic toward someone if they use an emoji

Adobe 2021 Global Emoji Trend Report Says...



51%

of global emoji users are more comfortable expressing emotions through emoji than in-person conversations



55%

of global emoji users are more comfortable expressing emotions through emoji than phone conversations

Adobe 2021 Global Emoji Trend Report Says...

 **Emoji users want brands to communicate** 
 **with them using emoji**  

Adobe 2021 Global Emoji Trend Report Says...



MORE THAN HALF



of Gen Z'ers would be more satisfied at their job if their team or boss used more emoji in workplace communications



Emoji Use and Remote-Work Burnout

Can emoji use be the key in detecting remote-work burnout?



- *[University of Michigan researchers at the School of Information] found that workers who regularly use emoji to express emotion – positive or negative – in their work may be with better emotional health and are naturally less likely to drop off the platform one year later.*
- *Those who don't use emojis are three times more likely to drop out of remote work.*
- *The team found that using their machine learning model, they could predict dropouts with 75% accuracy.*



Adobe 2021 Global Emoji Trend Report Says...

The **MOST EFFECTIVE** emoji at motivating users at work are:

#1



#2

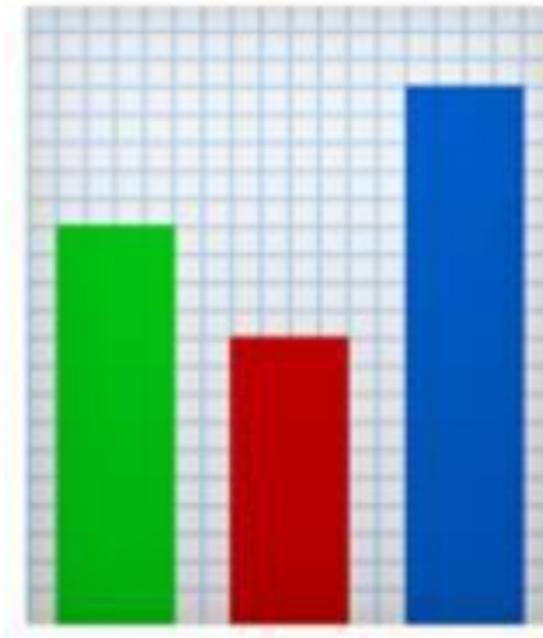


#3



Emoji at Work – Cultivate Report

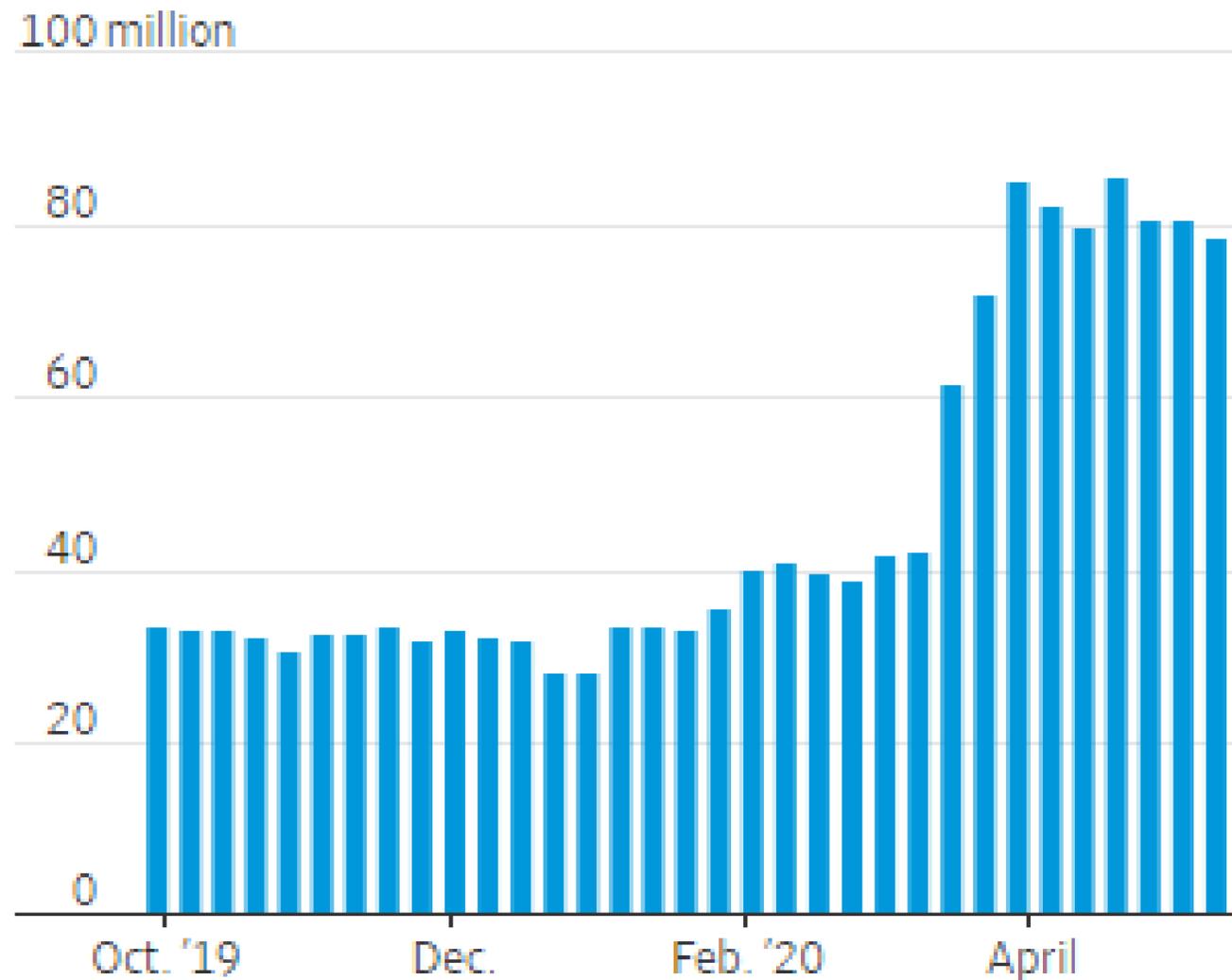
71.2% of users used fewer than **10** emoji in the last 180 days



50.7% of users used fewer than **5** emoji in the last 180 days

Adoption of Collaboration Applications

Global weekly downloads of business apps



*In April [2020], Microsoft reported that Teams had grown to 75 million daily users, more than double its early March figure. On one day, it logged **4.1 billion** meeting minutes.*

Teams Expands Emoji Set

Teams Gets Expanded Emoji Set. Enterprise Users are So Pleased

Posted on  April 26, 2021 by  Tony Redmond

How to Use the 800-Plus Emojis Now Available to Teams

Those of us who work in the enterprise often forget that other needs and desires drive feature requests in different segments. Which is no doubt why Microsoft published message center notification MC246220 on March 24 ([roadmap item 81403](#)) to announce that the emoji set available in the Teams picker expands “*from 85 to over 800 emojis, with a category selector, skin tone selector and short code picker.*” I’m not sure I consider this a high-priority enhancement, but the logic is that the new set is a necessity for the “*diverse and widespread*” Teams user base. So that’s the announcement explained.

Even if you doubt the need for more emojis and wonder why Microsoft dedicates engineering, testing, and program management effort to bring the new set to clients, Teams desktop (Windows and Mac – no mention for Linux), Teams mobile, and the Teams browser app will soon enjoy extra graphics. The expanded emoji set is now available in [the preview version of Teams](#) and general deployment is expected in May. A client-side update is necessary to see the expanded emoji set.

Collaboration Platforms & Instant Messaging

ABOVE THE LAW

Is Slack The New Email?

Don't forget about instant messaging and collaboration platforms in your ediscovery planning.

By KELLY TWIGGER

<https://abovethelaw.com/2017/05/is-slack-the-new-email/>



Emoji Workflows in Slack

Productivity

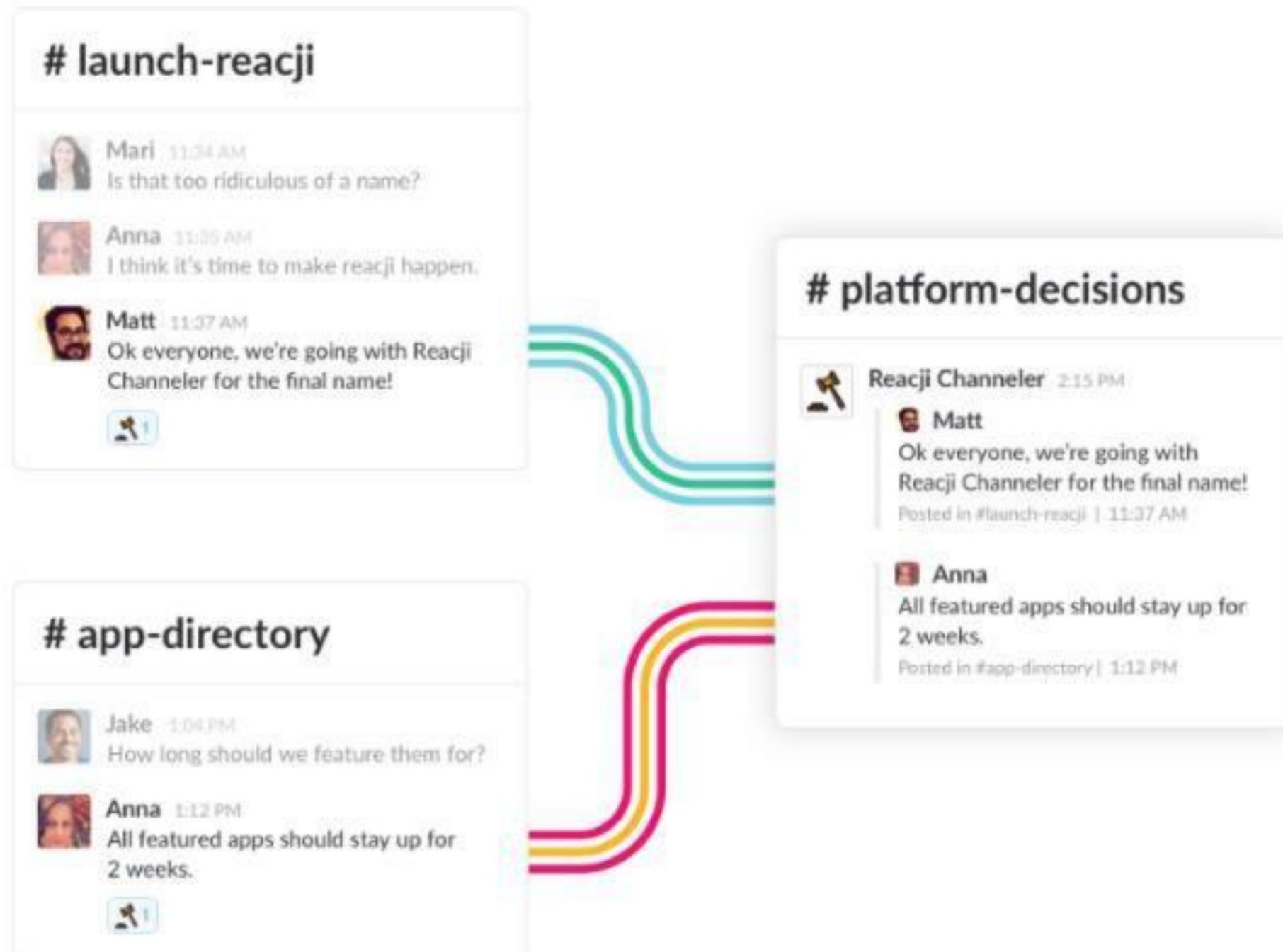
A new way to share messages across channels – using emoji

The Reacji Channeler lets you route messages to other channels with a quick click

By the team at Slack
January 23rd, 2017



Emoji Workflows in Slack



Does Your Organization Have a Yat?

THE WALL STREET JOURNAL.

LIFE & WORK | LIFE & STYLE

When You Marry NFTs and Emojis, You Get a Yat

Combinations of the basic symbols of the internet are now for sale, following the run on digital art and sports highlights

By [Rachel Wolfe](#)

Feb. 8, 2022 7:00 am ET

TechCrunch defines a Yat as “a platform that lets you buy a URL with emojis in it.”

<https://y.at/>     

Emoji Challenges and Case Law



HR Nightmare #1

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?

HR Nightmare #1

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Subject: Re: Need coverage for James

Why does that surprise you?   

HR Nightmare #2

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. 🍷

HR Nightmare #3

Hey

What's up?

Did you see the new intern?

HR Nightmare #3



Risky Skin Tones?



How Diverse Emoji Encourage More Social Inclusion

When skin tone emojis were first launched, some feared social media users would abuse them. But a new study shows that's not the case.

<https://news.nationalgeographic.com/2018/04/emoji-skin-tone-inclusion-culture-spd/>

Emoji in Highly Regulated Industries

These 4 Emojis Are a No-No on Wall Street

Investment and social media compliance firms warn about the pitfalls of using emojis in client communications.

<https://www.thinkadvisor.com/2017/04/11/these-4-emojis-are-a-no-no-on-wall-street/?slreturn=20180903170819>

Emojis to avoid



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

ADA Considerations

Emojis and Accessibility: The Dos and Don'ts of Including Emojis in Texts and Emails

▪ **Do's**

- *Use one or two emoji if you like, most blind people get a kick out of the descriptions*
- *Put any important information before the emojis so we'll be more likely to hear*
- *Limit yourself to no more than three emojis per message*

▪ **Don'ts**

- *Repeat an emoji over and over*
- *Place emojis throughout a message*
- *Put a call to action after the emoji*

Emoji are an Evolving Language



Source = <https://www.wsj.com/articles/sending-a-smiley-face-make-sure-you-know-what-youre-saying-11628522840>

Adobe 2021 Global Emoji Trend Report Says...



Emoji are an Evolving Language

VICE News

Subscribe



The world's first emoji translator



Source = https://news.vice.com/en_us/article/434pdm/meet-the-worlds-first-emoji-translator

Emoji are an Evolving Language

Sorry, millennials. The 😂 emoji isn't cool anymore



By [Kaya Yurieff](#), [CNN Business](#)

Updated 9:36 AM ET, Mon February 15, 2021

For many Gen Z-ers, the 💀 emoji has become a popular replacement for conveying laughter. It's the visual version of the slang phrase "I'm dead" or "I'm dying," which signifies something is very funny. Other acceptable alternatives: the 😭 emoji (officially called "Loudly Crying Face"), or just writing "lol" (laughing out loud) or "lmao" (laughing my, well, you probably know the rest).

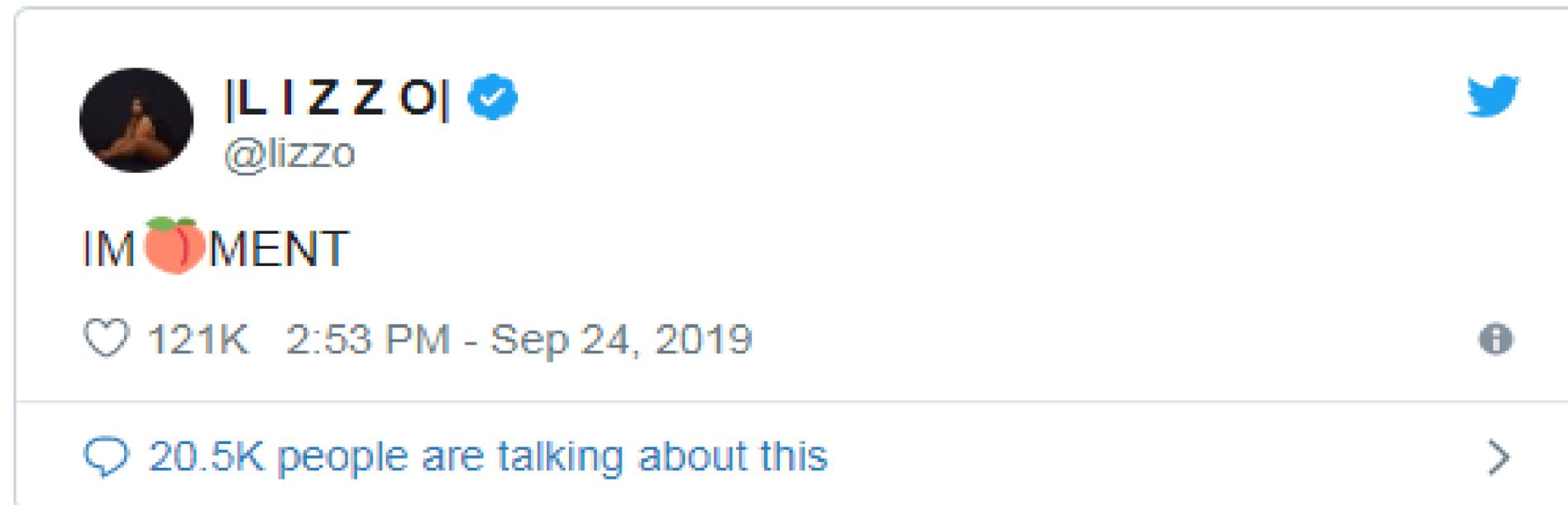
Secondary Meanings Can Emerge Quickly

Sections 

The Washington Post
Democracy Dies in Darkness

Style

How the sexy peach emoji joined the resistance



A screenshot of a tweet from the user @lizzo. The tweet text is "IM 🍑 MENT". The tweet has 121K likes and was posted at 2:53 PM on Sep 24, 2019. Below the tweet, it says "20.5K people are talking about this". The user's profile picture shows a person with their hands in a prayer position. The tweet includes a Twitter icon, a verified account checkmark, and a share icon.



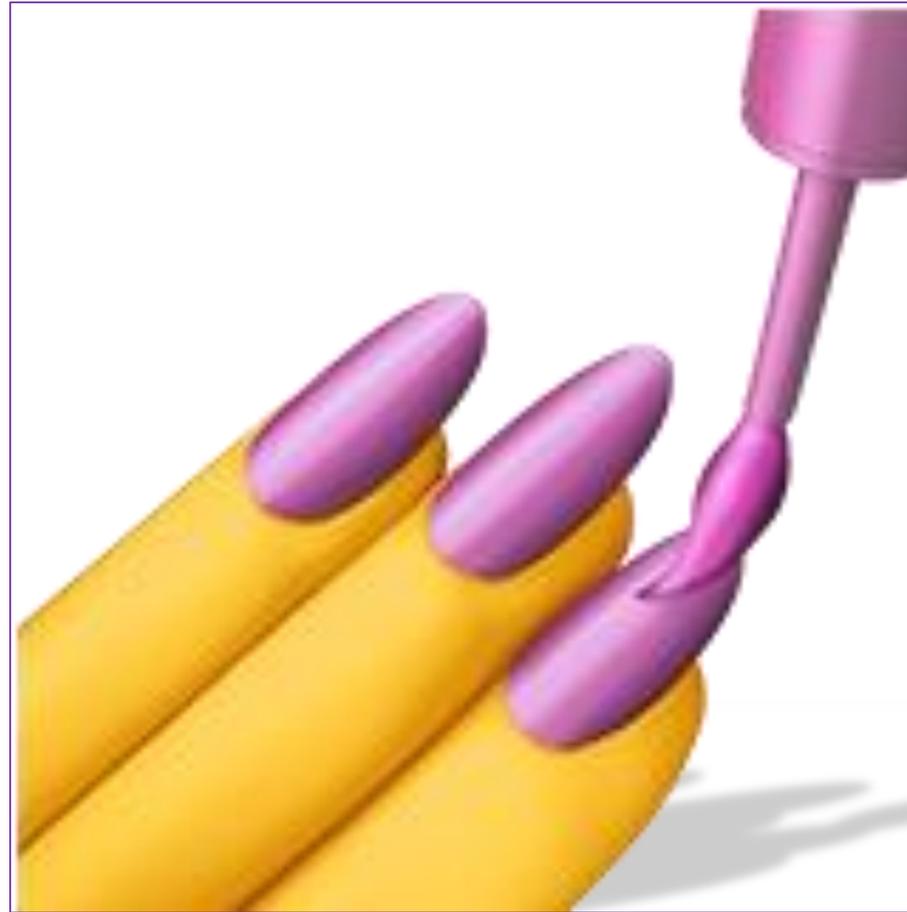
Secondary Meanings Can Emerge Quickly

Trending Topics: 'OK' hand gesture emoji added to list of hate symbols

POSTED 1:24 PM, SEPTEMBER 30, 2019, BY THE BEAT ON 33



Secondary Meanings Can Emerge Quickly



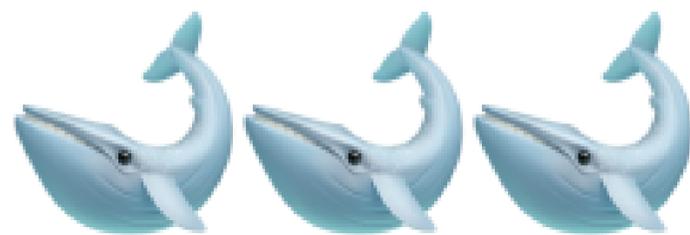
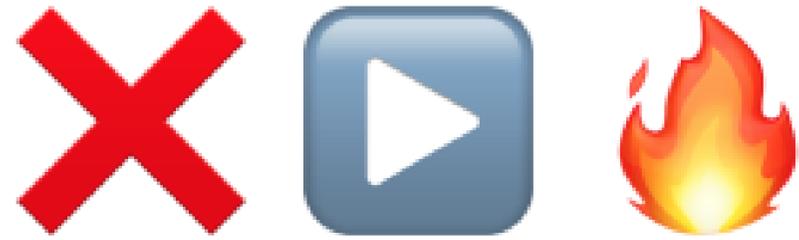
Translations

Coffee



?

Translations



Marketing Mishaps

Fail: Samsung dishonors Cookie Monster by using a cracker as the cookie emoji

<https://www.androidpolice.com/2017/07/10/fail-samsung-dishonors-cookie-monster-using-cracker-cookie-emoji/>



Apple		LG	
Google		Samsung	
Microsoft		HTC	

Clarity or Confusion?

Apple



Microsoft



Google



LG



Samsung



HTC



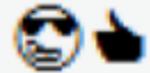
Clarity or Confusion?



Re: Lit support [EXTERNAL]

to: Matthew Mahon 08/10/2017 08:53 PM

[Show Details](#)



Sent from my iPhone

Lotus Notes

To: [Matt Mahon](#) >

iPad

Re: Lit support [EXTERNAL]

August 10, 2017 at 8:53 PM



Clarity or Confusion?

Re: Lit support [EXTERNAL]



Aug 10

😎👍 Sent from my iPhone On
Aug 10, 2017, at 8:41 PM, Matthew ...

**Samsung
Galaxy Preview**

Samsung Galaxy

Re: Lit support [EXTERNAL]



To: me

Thu, Aug 10, 2017 8:53 PM [Show Details](#)

Sent from my iPhone

Marketing Mishaps

The Houston Rockets fired a social media manager for sending a dumb, but harmless emoji tweet

<https://www.businessinsider.com/houston-rockets-social-media-manager-horse-emoji-tweet-2015-4>



Houston Rockets 
@HoustonRockets



Shhhhh. Just close your eyes. It will all be over soon.

4/28/15, 10:44 PM

Marketing Mishaps

NAD Finds Emojis Communicate Clear Messages in Advertising

Thursday, January 27, 2022

THE
NATIONAL LAW REVIEW

- *In a case of first impression, the NAD examined a social media video from BA Sports Nutrition, which produces the sports drink BodyArmor. It was shared by BA Sports Nutrition and by Baker Mayfield, Cleveland Browns quarterback and BodyArmor endorser. In a "blind taste test" video, Mayfield tastes and recognizes three BodyArmor flavors before he is handed an orange drink that the NAD said was "clearly" Gatorade's Orange Thirst Quencher. When Mayfield tastes the Gatorade, the "Nauseated Face" and "Face with Tears of Joy" emojis appear on the video while he says the drink is "awful."*



Marketing Mishaps

NAD Finds Emojis Communicate Clear Messages in Advertising

THE
NATIONAL LAW REVIEW

Thursday, January 27, 2022

- *[T]he NAD said that emojis are not merely subjective; they can communicate "clear messages" in some contexts. In the Baker Mayfield video, given that the Gatorade is identifiable, the pair of emojis contributed to a "harshly negative statement" which called Gatorade (among other things) nauseating - which is an express claim and moves beyond puffery. Without substantiation, it is a false claim.*



Ethics – Professional Responsibility

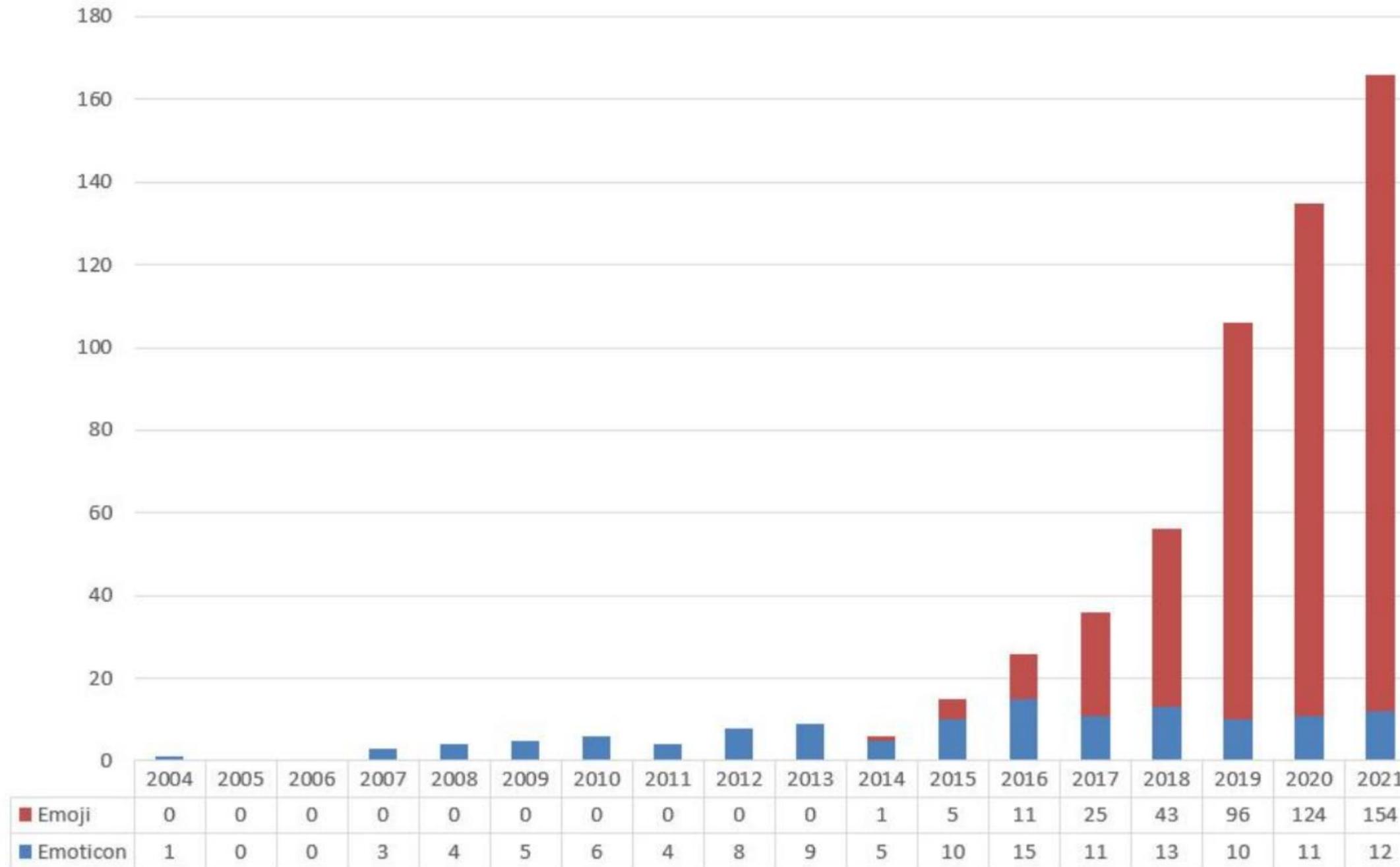
Nevada attorney arrested for trying to intimidate witness with rat emoji

Mar 6, 2019  4

https://elkodaily.com/news/state-and-regional/crime-and-courts/nevada-attorney-arrested-for-trying-to-intimidate-witness-with-rat/article_d802bb12-edff-56e9-b33c-86e290204912.html



Cases Referencing Emoji/Emoticons



Source = <https://blog.ericgoldman.org/archives/2022/01/2021-emoji-law-year-in-review.htm>

Case Law from Israel

Israeli court says emojis can signal your intent

A 😊 isn't just a smile for everyone.

<https://www.engadget.com/2017/05/21/israeli-court-emojis/>



Case Law from Israel



The [emoji laden] text message sent by Defendant 2 on June 5, 2016, was accompanied by quite a few symbols, as mentioned. These included a “smiley”, a bottle of champagne, dancing figures and more. These icons convey great optimism. 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.

-Judge Amir Weizebluth

More Case Law

- ***Apatoff v Munich Re Am. Servs.*, 2014 US Dist. LEXIS 106665 (D.N.J., August 1, 2014)**
 - Employee leaving for asthma condition
 - Anonymous Tip
 - Employee following doctor's recommendation
 - Honest Mistake Defense
 - Employer internal email with smiley face emoticons and exclamation points
 - ***:-)) did Ray chat with you about Elena?***
 - ***Yes he did. Thank you for your help. That deserves a big :-))!!!***



More Case Law

- ***United States v. Ulbricht, (Silk Road)***

- Emoji and Emoticons were omitted from transcripts of online chats
- 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.*



More Case Law

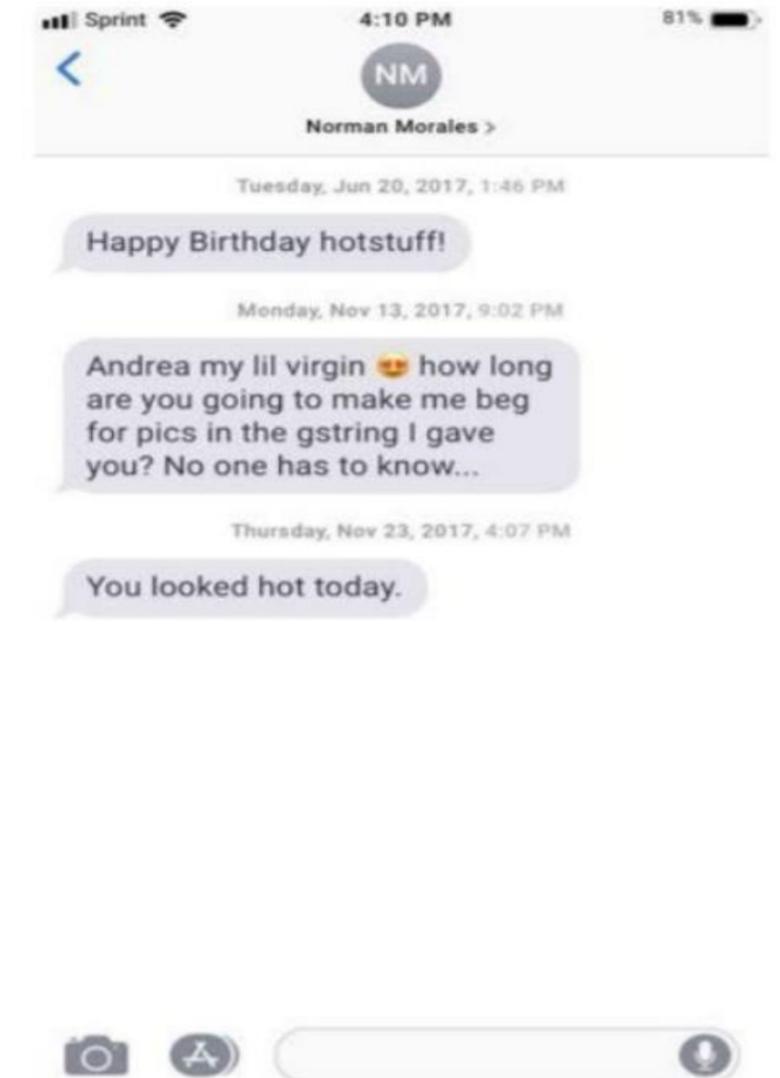
- ***United States v. Westley*, No. 3:17-CR-171, 2018 WL 3448161 (D. Conn. July 17, 2018)**
 - Court addressed probable cause for warrant to search Facebook accounts
 - ATF Agent provided affidavit stating that public facing posts that included a cloud emoji referenced drugs and a gas emoji was a symbol for gangs
 - Court denied the motion to suppress the evidence from the Facebook accounts



More Case Law

- ***Rossbach v. Montefiore Med. Ctr.*, 2021 U.S. Dist. LEXIS 147031 (SDNY Aug. 5, 2021)**

- Plaintiff claimed that her supervisor sexually harassed and retaliated against her
- Plaintiff claimed that she received text messages on iPhone 5 and that screenshots could not be provided from the phone due to the screen being cracked and having ink bleed.
- Took photo of text with new phone



This image is a fabrication

More Case Law

- ***Rossbach v. Montefiore Med. Ctr., 2021***
U.S. Dist. LEXIS 147031 (SDNY Aug. 5, 2021)

- Court states that the version of the heart eyes emoji in the picture produced by the plaintiff is from iOS13 or later
- iPhone 5 is only able to support up to iOS10
- Court concludes that the evidence has been fabricated

iOS 14.6	
iOS 13.1	
iOS 10.2	
iOS 10.0	
iOS 8.3	
iOS 6.0	

More Case Law

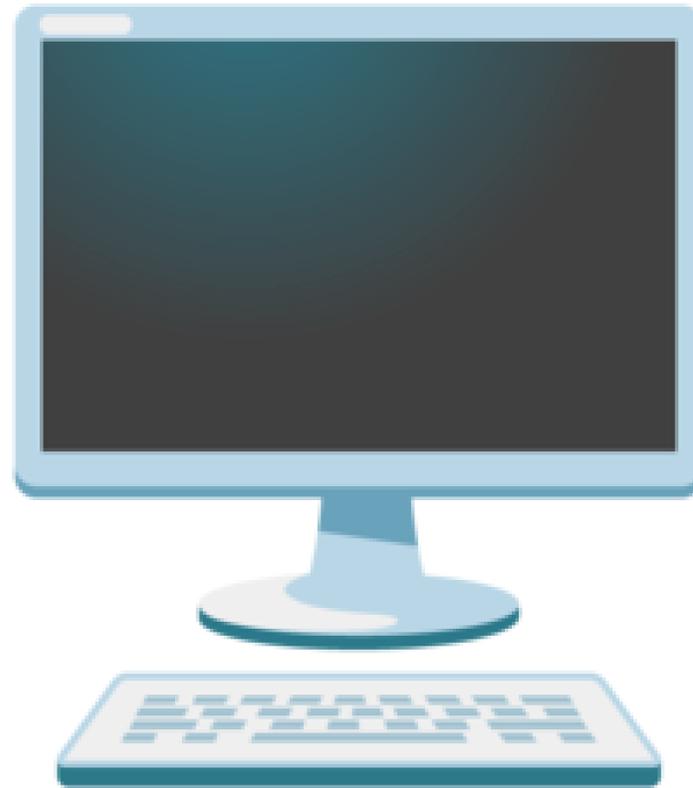
- ***Rossbach v. Montefiore Med. Ctr.*, 2021 U.S. Dist. LEXIS 147031 (SDNY Aug. 5, 2021) – Lessons Learned**
 - *Lesson #1: Emoji depictions in litigation should always come in pairs—what the sender actually saw, and what the recipient actually saw.*
 - *Lesson #2: You need to see the emojis as the sender and recipient saw them in, not as they appear on current devices. Thus, in document production, watch out for processing the evidence using current technology because often discovery takes place years after the evidence was initially generated and things could have changed in the interim.*

More Case Law

- ***Lightfoot v. Forterra Concrete Industries, Inc., No. 2021-CA-0560-MR (Commonwealth of Kentucky Court of Appeals, April 15, 2022)***
 - Plaintiff claimed workplace discrimination and unlawful retaliation.
 - *[Plaintiff] learned from a fellow employee that his (Plaintiff's) contact information in [Plant Manager's] personal cellphone was designated by the "poop emoji" ...*
 - Defendant granted summary judgement and the ruling was affirmed upon appeal.



Emoji and eDiscovery Technology



eDiscovery Technology Continues to Evolve



SMS

Facebook



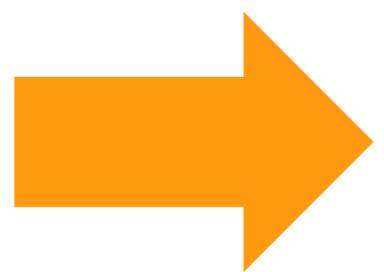
Slack

WhatsApp



Teams

WeChat



The screenshot shows a web-based eDiscovery interface. At the top, there's a navigation bar with a back arrow and the text "Return to document list". Below that, the document ID "SMS-000000015" is displayed with a download icon. The interface includes a viewer control with "Viewer" selected and "Extracted Text" as the view type. A toolbar shows zoom controls (100%), navigation arrows, and other document management icons. A participant list at the top right identifies the users: Karl Knoernschild [1], Vince Raso [1], Mike Saucedo [5], and Jim Witte [4]. The message history is titled "11 messages between Jan 31, 2019—Feb 2, 2019".

The message thread is dated "Thursday, January 31, 2019" and shows a group message from "Mike, Jim, Vince, Karl" at 4:21 PM. This is followed by a message from "Mike Saucedo" at 4:21 PM: "Hey everyone is really excited about the Relativity Short Message feature". Then, "Jim Witte" responds at 10:25 PM: "I received a ton of positive feedback at Legal Week. Customers love this new Relativity feature ❤️❤️❤️".

The thread continues on "Friday, February 1, 2019". "Vince Raso" leaves the conversation at 10:02 AM with the message "The team has been working great together to get this into Blazingstar" and a trophy icon with the number 2. "Karl Knoernschild" joins the conversation at 12:47 PM, stating "The new dedicated reviewer for short message files is awesome. I love the participant pane, short message viewer, and timeline navigator". Finally, "Mike Saucedo" edits a message at 6:53 PM: "It has come a long way from the Fest demo.".

At the bottom of the interface, a timeline visualization shows vertical bars representing messages at various times: 4 PM on Jan 31, 11 PM on Jan 31, 5 AM on Feb 1, 11 AM on Feb 1, 5 PM on Feb 1, 11 PM on Feb 1, 5 AM on Feb 1, 11 AM on Feb 1, and 4 PM on Feb 1. A "Hide Timeline" link is visible in the bottom right corner.

eDiscovery Technology Continues to Evolve

Supported emoji

Relativity supports displaying emoji, but not emoticons, within reactions. Emoji are also displayed within the message bodies. Emoji compatibility is dependent on your internet browser.

When emojis are rendered in HTML5, Relativity uses the native browser to render. When the emojis are imaged, the Google set is used. To learn more about the Google set, visit [Emojipedia](#).

If an emoji is not supported, the text string for the emoji will be displayed instead. For example, if you create a custom emoji, like :test_emoji:, the text string will be displayed in the Short Message Viewer.

Only the following emoji are supported within reactions (this is not browser dependent):



Source: https://help.relativity.com/10.3/Content/System_Guides/Relativity_Short_Message_Format/RSMF-supported_Emoji_Emoticons_and_Attachments.htm/

eDiscovery Technology Continues to Evolve

Return to document list

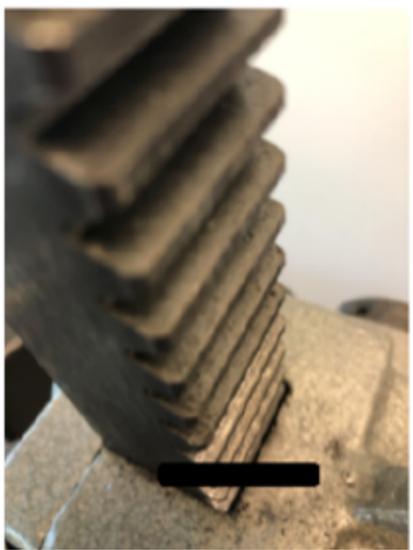
REL000000001

Viewer Extracted Text Native Default

100%

38 messages on Nov 4, 2020

10:12 AM



62619913920__FFB2F249-89E7-4CD6-8406- EFF6F5B7B7F8.JPG 2.3 MB

Dave 10:12 AM

Do you have it on auto delete?

10:12 AM

10:12 AM

Nope

Document: 1 of 7

Edit Document Metadata

Email CC:

Email BCC:

Email Subject:

Date Received:

Date Sent: 11/4/2020

Number of Attachments: 6

AttachName: IMG_1316.jpeg;74a5e12984d9adc3bc51e4268becbdfesticker.png;92B1542-AC47-4731-AC08-FC22CEF7CCEE.JPG;62619913920__FFB2F249-89E7-4CD6-8406-EFF6F5B7B7F8.JPG;82619910618__C2B0B398-B8D5-449C-BCC9-FF36DCB3E8B3.JPG;62619909753__4EC85AC3-CBF4-4D85-A2B4-586A939EE3D5.JPG

Email Importance:

Email Sensitivity:

Email Delivery Receipt:

Email Read Receipt:

Email Categories:

Conversation:

Conversation Index: 01D8B2EF3CF20F794E13664F42438EFDCCDD08FD24FDB

Message ID:

Document Metadata

E-Author:

Date Last Modified: 11/4/2020

Date Created: 11/4/2020

Date Last Printed:

E-Comments:

E-Subject:

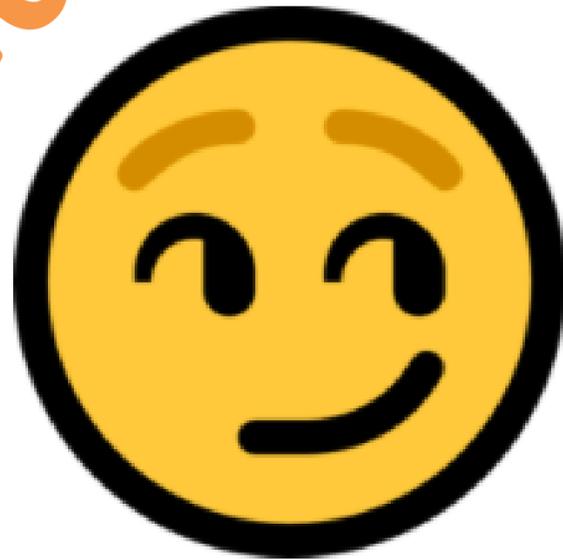
Sent vs Received vs Reviewed vs Produced

Sent



Received

Reviewed



Produced

Should We Use Emoji in the Workplace?

THE WALL STREET JOURNAL.

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Yes, You Actually Should Be Using Emojis at Work

Once viewed as a frivolity, emojis are now key to clear and concise communication, esprit de corps and cultivating a shared corporate culture



TEXT



79



By [Christopher Mims](#)

July 20, 2019 12:01 am ET

In Slack, 26 million custom emojis have been created since the feature was introduced, says a spokesman for the company. For the 13 million daily active users of Microsoft Corp.'s Slack competitor, Teams, emoji use is basically universal, says a spokeswoman for Microsoft.

Slack's CTO said ... that one corporate customer uses more than 50,000 custom emojis.

Adobe 2021 Global Emoji Trend Report Says...



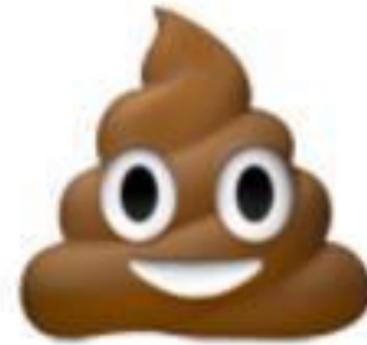
66%

of global emoji users like when
people use emoji at work

Emoji Takeaways: Policy and a Proactive Approach



Takeaway - Awareness



Takeaway – Draft an Emoji Policy

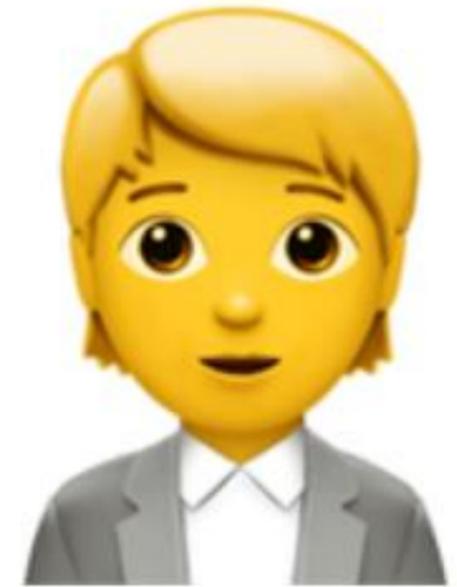
- **Consider The Following:**
 - *Which emojis are we going to use in business communication and which are off-limit?*
 - *What forms of communication are good for emojis and which ones should be emoji-free? Contracts, for example, might be an emoji-free zone, while marketing materials remain emoji-friendly.*
 - *Who is responsible for using emojis on social media, which emojis 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.*
 - *When should customer service integrate emojis and through what channels? Here especially you need clear guidelines to ease potential concerns for customers and to empower your frontline agents.*



Takeaway – Custodial Interviews

- **Consider The Following:**

- *Add questions regarding the use of emojis in the workplace to your custodial interviews.*
- *Are emojis going to be relevant in this matter? If yes, what sources of information contain relevant emoji (ex. Slack, Teams, Skype, Text, WhatsApp, SnapChat, Twitter, etc...)?*
- *What emoji are utilized? Is there a well-defined or assumed meaning?*
- *Work with your Digital Forensic and eDiscovery Expert to create a collection and review strategy for ESI containing emoji.*



Questions?



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