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EMOJI & EDISCOVERY PART III:

THE JUDGES PANEL

November 30, 2022

Sponsored by: **eDiscovery**  **Assistant**



The Speakers



HON. WILLIAM MATTHEWMAN

United States Magistrate Judge
Southern District of Florida

HON. XAVIER RODRIGUEZ

United States District Judge
Western District of Texas

KELLY TWIGGER

Principal at ESI Attorneys
Founder & CEO at eDiscovery Assistant



WHY EMOJIS CREATE LEGAL ISSUES

CREATION OF UNICODE EMOJIS



New Emojis In 2022-2023

 Keith Broni
Jul 13, 2022 · 6 min read



New emojis created following submission for proposal to Unicode Consortium each year

<https://www.androidpolice.com/31-emoji-unicode-15/>



WHAT IS BEHIND THE EMOJI A USER SEES?

- An Emoji is defined by at least one code point in Unicode, an international computing industry standard that maps from each letter, character or symbol to a numeric value that allows sharing of documents across different platforms and environments.
- Emoji can be an individual code point or a sequence of code points; sequences make it possible to modify neutral Emoji (usually displayed with yellow skin color) and make them fit your personal preference.



PROPRIETARY EMOJIS



- Proprietary emojis
 - A proprietary emoji or sticker is an emoji that works only on the platform of its owner because it does not have a Unicode assigned numerical value. When sent outside of the platform, a proprietary emoji will most often be received as a blank square.
 - <https://www.forbes.com/sites/oliverherzfeld/2019/10/24/the-legal-implications-of-emoji/?sh=6956cf266bbd>
- Use of Emojis reaches new heights
 - <https://blog.emojipedia.org/global-emoji-use-reaches-new-heights/>
- Google publishes animated emojis
 - <https://googlefonts.github.io/noto-emoji-animation/>



CREATE YOUR OWN EMOJIS



Tools available to create your own emojis:

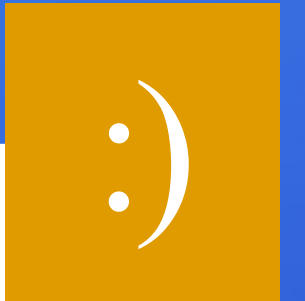
- Bitmoji
- Gboard Emoji Kiche
- Angel Emoji Maker
- PiZap
- Flat Icon Emoji Maker
- Elite Emoji
- Emojily
- Labeley
- Emotiyou
- Boomoji
- Zmoji



EMOJI V. EMOTICON



- “pictogram, logogram, ideogram or smiley embedded in text and used in electronic messages and web pages. The primary function of emoji is to fill in emotional cues otherwise missing from typed conversation.” (Wikipedia)
- OR any of various small images, symbols, or icons used in text fields in electronic communication (as in text messages, email, and social media) to express the emotional attitude of the writer, convey information succinctly, communicate a message playfully without using words, etc. (Merriam-Webster)



- “a pictorial representation of a facial expression using characters—usually punctuation marks, numbers, and letters—to express a person's feelings, mood or reaction, or as a time-saving method.” (Wikipedia)

MEMES



When you're reading a complex 200 page judgment and you come across these lifesaving words....

Put simply, the a removal is completed.

In short, the outside Australia w





LEGAL ISSUES CREATED BY EMOJIS



IMPORTANCE AND INTERPRETATION



INTERPRETATION



"In the distant future it may be necessary that some form of "Rosetta Stone" is needed to translate those various meanings into a common tongue – just as Egyptian hieroglyphic and Demotic script were translated to Ancient Greek by the physical Rosetta Stone." (Peter Suci, Forbes, August 24, 2021)

SEC v. Fassari, 2021 WL 2290576 (C.D. Cal. May 5, 2021): Use of emojis, exclamation points and other flip language does not change the substance of what defendant posted when he tweeted



CONSIDERATIONS



- No dictionary that everyone is settled upon
- Sender what they intended to say; recipient what they thought they were receiving
- Be prepared to provide testimony from both parties
- Generational differences

GENERATIONAL DIFFERENCES IN USE OF EMOJIS



Did you know the smiley face emoji can denote awkwardness among Gen-Z?

GENERATIONAL DIFFERENCES



09 July 2020, Berlin: Different emojis are shown on a tablet. From meanwhile more than 3000 different Emojis you can find the right Emoji for almost every occasion.



COLLECTION



State v. Lesser



- Criminal Case on solicitation of child
- Differing standards for evidence in criminal v. civil
- Forensic collection redone to authenticate evidence at trial



CONSIDERATIONS



- What is the context of the emojis to be collected?
- Is the cost proportional to the needs of the case?
- Will the tools you use to collect preserve the data/Unicode in its original form?
- QC data following collection and moving between platforms



ESI PROTOCOL



Weisenberger v. Ameritas Mut. Holding Co.

Embedded Objects—Microsoft Excel (.xls) spreadsheets embedded in documents will be extracted as separate documents and treated like attachments to the document. The parties agree that other embedded objects, including, but not limited to, logos, icons, emoticons, and footers, may be culled from a document set and need not be produced as separate documents by a producing Party (e.g., such embedded objects will be produced within the document itself, rather than as separate attachments).



CONSIDERATIONS



- Is the Protocol where parties should agree on how to treat emojis in discovery?
- Laying foundation for admissibility
- Authentication
- How to handle in small cases
- Proportionality



PROPORTIONALITY



CONSIDERATIONS

- Consider proportionality as part of each issue
- Undue Burden
- Will the emojis make a difference in the case?
- What is cost associated with collection and production



WHEN DO I NEED
AN EXPERT ?



Rossbach v. Montefiore Med Ctr.

- Plaintiff produced text message containing emojis
- Expert review of text message revealed that it was fabricated; emojis included in text were not available on iOS operating system of phone allegedly used to create them
- Routine nature of emojis in employment and family litigation that are not high stakes litigation



OBLIGATIONS OF COUNSEL





OBLIGATIONS OF COUNSEL



- Know how emojis appear in discovery or ask the question at meet and confer
- Plan, plan, plan – authentication, foundation etc.
- Know how to handle collection; trust but verify
- Produce accurately
- Know when to find expert testimony
- Alert Judge to issues that may arise



Takeaways



Emojis are a source of ESI that need to be considered carefully and planned for; likely to occur in most data sets now



Parties have an obligation to preserve, collect and produce emojis/emoticons under FRCP so that receiving party has the same evidence as the producing party



Be prepared to educate the court on technical issues that underlie what is happening in your case – don't presume knowledge!



Questions



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