Session 305 | Emoji Law: Are you Prepared for Emojis, Emoticons and Hashtags in Litigation?

What happens when you are faced with a string of nonsensical emojis in a document during discovery? You can’t always call a teenager for help. E-mail and text messages have been common forms of evidence for two decades, but emojis, emoticons and hashtags are just starting to make their way into evidence and the day-to-day practice of law for in-house and outside counsel. Emoji use is increasing, and courts—like us—are learning how to interpret them in the context of a trial, in the workplace, and in a plethora of practice areas. Learn how to best represent your clients on these issues, the most recent cases dealing with emojis, the role of the hashtag in the law and points of consideration for in-house counsel. The program will provide an overview of emojis, emoticons and hashtags; learn intent and literal interpretations, related Model Rules of Professional Conduct, and a variety of civil and criminal cases. The panel will address topics that include evidence, contracts, criminal harassment, discrimination, and workplace issues and policies, and how to best protect your company from harmful litigation.

Moderator:
Ireno A. Reus III, The Reus Law Firm

Speakers:
Janice V. Jabido, Pratt & Whitney
Edward T. Kang, Kang Haggerty & Fetbroyt LLC
Kandis L. Kovalsky, Kang Haggerty & Fetbroyt LLC
Elaine Edralin Pascua, TrueBlue, Inc.

Written Materials Provided by Kang Haggerty & Fetbroyt LLC
Panelist Biographies

Janice V. Jabido
Janice is currently Intellectual Property Counsel for United Technologies Corp., Pratt & Whitney division. Pratt & Whitney is a world leader in the design, manufacture, and service of commercial and military aircraft engines. As IP Counsel, Janice is responsible for all aspects of intellectual property, including litigation, post-grant review, and opposition practice, as well as development of strategies to manage patent, trade secret, copyright, and trademark portfolios. Janice also provides counsel on general, transactional, and compliance client matters related to intellectual property.

Prior to joining UTC, Janice was a senior associate in the IP Litigation Department of Ropes & Gray LLP and has practiced in many district courts throughout the country as well as the Federal Circuit, the ITC, and before the Patent Trial and Appeal Board. Janice has been active on the board of the National Filipino American Lawyers Association as Regional Governor, Secretary, Vice President for Membership and At-Large. In addition, Janice served as secretary for the Asian American Bar Association of Greater Chicago. Janice received her J.D. and B.S. from Tulane University in New Orleans, LA. She has also spent visiting semesters studying at the University of Chicago and Cambridge University.
Edward T. Kang

Edward is the Managing Member of Kang Haggerty & Fetbroyt LLC. A minority-owned business litigation firm with offices in Philadelphia, PA and Marlton, NJ.

Edward devotes his practice to business litigation and other litigation involving business entities. As part of his business litigation practice, Edward carries expertise in a variety of areas, including contract disputes, business torts (such as fraud, tortious interference, and unfair competition), civil RICO, and breach of fiduciary duty.

In addition to business litigation practice, Edward is experienced in other types of litigation relating to business entities, including insurance bad faith, trade secret, and construction law. He has represented contractors and owners in various construction litigation matters, such as design defects, faulty construction, delay, and failure to pay promptly. He has represented construction clients in arbitration and trial, both a jury trial and bench trial.

Edward also pursues claims in class actions and whistleblower actions. He is associated with the nationally known The Qui Tam Team, a team of lawyers that specialize in prosecuting whistleblower claims against individuals or organizations that defraud the government.

Edward is admitted to practice in Pennsylvania, New Jersey and New York. You can contact him via email at EKang@KHFlaw.com.
Kandis L. Kovalsky

Kandis is an associate at Kang Haggerty & Fetbroyt LLC. She is an accomplished business and trial lawyer. Her practice focuses on a broad range of high stakes complex commercial and business-related civil litigation in Pennsylvania and New Jersey state and federal courts and arbitral tribunals. Kandis routinely handles expedited litigation matters, including temporary restraining orders and injunctions in federal court.

Kandis represents both individual and institutional clients in litigation over fiduciary duties, securities fraud, trade secrets, business torts, partnership and shareholder disputes, contractual disputes, noncompetes, unfair and deceptive business practices actions. Kandis also handles civil RICO actions. Although Kandis’ practice mostly focuses on cases in active litigation, Kandis also assists clients in general business matters and litigation avoidance and has negotiated many favorable settlements for her clients.

Kandis appreciates that her job allows her to make a difference in people’s lives. She strives to make sure each of her clients achieves the best possible outcome, especially in the context of litigation. Kandis is a problem solver and enjoys developing strategies uniquely tailored to address each of her client’s needs.

Before she attended law school, Kandis was a competitive figure skater for fifteen years. While at University of Delaware, Kandis was an eight-time Intercollegiate National medalist. She was also the vice-president of the University’s figure skating team for three years during which time she helped lead the team to three national medals.

Kandis is admitted to practice in Pennsylvania and New Jersey. You can contact her via email at KKovalsky@KHFlaw.com.
Elaine Edralin Pascua

Elaine Edralin Pascua joined TrueBlue, Inc. in 2016, a leading provider of specialized workforce solutions. TrueBlue, Inc. is engaged in providing staffing, on-site workforce management and recruitment process outsourcing (RPO) services through its subsidiaries: PeopleReady, PeopleManagement and PeopleScout. TrueBlue currently connects more than 840,000 people to work each year and partners with 130,000 companies around the world.

Elaine is on TrueBlue’s Litigation and Labor & Employment legal teams. She is also responsible for responding to all OSHA-related matters on behalf of the Company. Prior to joining TrueBlue, Elaine was a trial attorney for Zurich North America for over 12 years. As an insurance defense attorney, Elaine tried several cases to verdict; a majority of which she successfully obtained defense verdicts. Elaine is currently on the Executive Committee of the Washington State Bar Association’s (WSBA) Corporate Counsel Section, founding/emeritus board member & past President of the Filipino Lawyers of Washington (FLOW), and was recently appointed as the Alternate Northwest Regional Governor for the National Asian Pacific American Bar Association (NAPABA). Her term as Northwest Regional Governor of NAPABA begins in November 2020.
Ireneo A. Reus III
Ireneo is an AV-rated attorney in Long Beach, California. Before establishing his own law firm, Ireneo worked for a civil litigation firm, a public finance law firm, and the General Counsel's Office of the Metropolitan Water District of Southern California. He received his J.D. from UCLA School of Law in 2004, where he was a Member of the UCLA Moot Court Honors Program and Senior Articles Editor of the UCLA Journal of Law & Technology.

Ireneo served as President of UCLA School of Law’s Alumni Association from 2018 to 2019 and has served on the Alumni Association’s Board of Directors since 2015. Ireneo has presented at ABA conferences in Tokyo, Japan and Washington, D.C. and at several NAPABA Conventions.

Prior to joining the Executive Committee of the Labor & Employment Section of the California Lawyers Association, Ireneo served in leadership positions in the State Bar of California, including as the Chair of the California Young Lawyers Association from 2012 to 2013. He also served on the State Bar’s Council on Access & Fairness, and Task Force on Admissions Regulation Reform. In 2016, the Los Angeles Law Library featured Ireneo in an exhibit and documentary film Opening the Door: Personal Stories of Groundbreaking Los Angeles Lawyers and Judges.

You can contact Ireneo via email at ireneo.reus@gmail.com.
Variance in Emojis

These are all the same emoji!
This is what the “grinning face with smiling eyes” emoji looks like on devices for each of these platforms:

![Emojis from various platforms](image)

*Figure 1 Sourced from “Investigating the Potential for Miscommunication Using Emoji” by Hannah Miller (April 5, 2016)*

These are all the same emoji!
This is what the “astonished face” emoji looks like on devices for each of these platforms:

![Emojis from various platforms](image)

*Figure 2 Emojis Sourced from Emojipedia - Prepared by Kang Haggerty & Fetbroyt LLC (July 2018)*

This is what the “Face With Tears of Joy” emoji looks like on various Windows operating systems:

- **Windows 10 April 2018 Update**
- **Windows 10 Fall Creators Update**
- **Windows 10 Anniversary Update**
- **Windows 10**
- **Windows 8.1**
- **Windows 8.0**

*Figure 3 Emojis Sourced from Emojipedia - Prepared by Kang Haggerty & Fetbroyt LLC (July 2018)*
**Proposal for White Wine Emoji ZWJ Sequence for RGI**

In 2018, wine enthusiasts began petitioning Unicode for a White Wine Emoji (there is already a Red Wine Emoji). This proposal was submitted by Kendall-Jackson Winery.

Unicode denied the proposal in August 2019. Unicode states that the White Wine Emoji is a color variation and adding color variation to an emoji is complex because the Unicode standard is not fully defined. Unicode defines “U+1F377” as a wine glass. Each platform chooses what that wine glass looks like. All platforms currently depict as “U+1F377” a wine glass filled with red wine.

A copy of the proposal in its entirety is attached as Exhibit A.
Article: Why Lawyers Should Care About Emojis

In the October 18, 2018 edition of The Legal Intelligencer, Edward Kang, Managing Member of KHF and Kandis Kovalsky, Associate of KHF, co-authored, “Why Lawyers Should Care About Emojis.”

Today, there are close to 3,000 emojis in the Unicode Standard. As such, people can communicate a lot more through emojis, if they choose. And, the data shows this is what people are choosing. Over 10 billion emojis are sent each day throughout the world. Approximately 92 percent of all people who communicate online or through text messages on a smartphone use emojis, with more than one-third of them using emojis daily. Analysts have referred to the uptick in emoji use as “watching the birth of a new language.”

In 2015, emojis were mentioned in 14 federal and state court opinions. This number increased to 25 in 2016 and 33 in 2017. With the rules of the profession (Rules of Civil Procedure, Rules of Professional Conduct, Rules of Evidence) changing—slowly, albeit surely—to address the advent of social media and electronic communications, it is important to understand how emojis fit into the current legal landscape.

The Ethical Duty of Technology Competence

A lawyer’s fundamental duty has always been to provide competent representation. For years, competence included only a lawyer’s knowledge of substantive areas of the law, experience and skill to handle the representation adequately. As the times changed, and technology became more prominent in life and law, the meaning of competence expanded.

In 2012, Model Rule of Professional Conduct 1.1 was modified so that “competence” in representation includes being able to advise clients on the “benefits and risks of technology” in one’s area of the law. Since then, 31 states, including Pennsylvania, have amended their rules of professional conduct to include “technology competence” as a fundamental duty of lawyers.

The specific language used in each state’s rule governing technological competence varies. In 2014, Pennsylvania released a Formal Ethics Opinion (2014-300) titled “Ethical Obligations for Attorneys Using Social Media” in which it mandated that lawyers be aware of how social media websites operate and the issues they raise. The opinion notes that as the use of social media
expands, so does its place in legal disputes, as well as the fact that most clients seeking legal advice have at least one account on a social networking site.

Without technology, emojis would not exist. Given the strength of Pennsylvania’s position on the importance of lawyers being competent in technology, particularly social media, every lawyer should be familiar with emojis and the potential issues they can cause in litigation. For litigators, an understanding of emojis and social media platforms can be critical. Not understanding these platforms can be a disservice to your clients, which can lead to discovery violations, malpractice and ethical violations. To that end, we are starting to see decisional law in this regard. See, e.g., James v. National Finance, 2014 WL 6845560, at *12 (Del. Ch. Dec. 5, 2014) (“Professed technological incompetence is not an excuse for discovery misconduct.”).

The importance of a lawyer’s understanding and depth of knowledge of emojis and social media varies based on their practice area. A lawyer who handles employment lawsuits, for example, is more likely to encounter issues involving emojis than one who handles regulatory litigation. Emojis are communications, however, and they can become an issue in any type of case. Therefore, all lawyers should have a working knowledge of emojis. As the rule of competence has proven to be elastic, it is important that lawyers be too.

**Emojis Present Challenges in Discovery**

Emojis can present difficulties in discovery. One such challenge is that it is very difficult to search for emojis. Given the volume of electronically stored information (ESI), parties in litigation will often agree to certain search terms to be used by the party making the production of documents as it is often not feasible to review all potentially responsive discovery to determine what should be produced. Using keywords replaces the obligation to review each document with only having to review and produce documents containing agreed on search terms. Emojis, however, at least for now, are very difficult to search for under most configurations. To produce more relevant results, many search technologies deconstruct and interpret documents and, attempt to limit junk content (e.g., spaces and punctuation). Emojis are usually part of this “junk content.” Where on survey estimates that 40 percent of data across messaging apps like iChat is emojis, this problem should not be underestimated. While this predicament is beyond that of most attorneys, e-discovery platforms are likely hard at work on a solution, as emojis present yet another business opportunity for them.

Another challenge emojis present in discovery is that their appearance is often device-specific. If the sender and recipient of an emoji are on the same platform and using the same version of the operating system (i.e., both sender and recipient are on iOS 12), then they should see the same versions of the platform’s emoji implementation. Where, however, the sender and the recipient of an emoji are not using the same platform, the sent emoji and the received emoji can be different, sometimes significantly. With this in mind, if an emoji becomes an important piece of evidence in a case, it is important for the lawyer who seeks to use it at trial to establish the
operating systems of both the sender and the recipient. If the operating systems were different, the lawyer seeking to use the emoji must determine what the sender intended to send and if the sent emoji is materially different from the received one. In a world where emoji users now can choose between different races and genders (including gender neutral), the devil is in the detail, and this detail is one that should be considered.

**Emojis as Evidence**

With so many emojis being transmitted nowadays, it is increasingly likely they will be used as evidence in cases. The analysis of using emojis as evidence as trial is largely the same as it would be for any communication. One of the most common—if not the most common—objections to a “statement” is that it is inadmissible hearsay. In this sense, emojis are unique as they often constitute a statement, but not always. For example, depending on the context, a smiley face emoji with hearts as eyes could mean “I love you,” which is a statement. Alternatively, this same emoji could be used as a modifier of another statement it follows, indicating that the statement should be read “in a loving way.” In the latter instance, the emoji itself would not be a statement and therefore, could not be hearsay (although the statement itself could be).

Another consideration unique to emoji evidence, versus other communicative evidence, is how they should be presented at trial and published to the jury. Once a text message or other communication is determined to be admissible, it can be read aloud to a jury. In this situation, there is often no need to use a demonstrative exhibit of a long string of text. Where emojis are present, however, merely reading the text aloud is often insufficient. If a text message is read aloud to a jury and the emoji is omitted, the jurors will miss out on important context and be denied the opportunity to grasp the writer’s intent fully. Likewise, it should not be left to your opponent to explain to a jury the meaning of any emoji appearing in a communication. Each emoji is often subject to many interpretations, and even then, they are often used to mean something other than their true meaning. As such, communications with emojis being used as evidence, must be shown to a jury. If the recipient and sender of an emoji were using different platforms, it is important to show the jury what the message with the emoji looked like to each, so the jury can fairly and accurately weigh the evidence. A further discussion of this issue can be found in the matter of *United States v. Ulbricht*, No. 14-cr-68 (KBF), U.S. District Court for the Southern District of New York.

**Conclusion**

Emojis are here to stay. As is the case with many aspects of the legal profession, lawyers must be willing to adapt to changing times. Technology has brought some of the biggest changes to the practice of law and continues to do so. Lawyers should be diligent in remaining apprised of maintaining their competence in technology, which includes emojis and social media. Before you know, you and your adversary could be arguing over the true meaning of an emoji in your next case—perhaps with the assistance of expert emoji experts.
Edward T. Kang is the managing member of Kang Haggerty & Fetbroyt. He devotes the majority of his practice to business litigation and other litigation involving business entities. He gave a CLE presentation titled “Emojis Speaking Louder than Words” at the 2018 Annual Meeting of National Association of Minority and Women Owned Law Firms (NAMWOLF) in Chicago, Illinois.

Kandis L. Kovalsky, an associate at the firm, focuses her practice on representing both corporate and individual clients in a broad range of complex commercial litigation matters in Pennsylvania and New Jersey state, federal and bankruptcy courts.

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Pennsylvania Formal Ethics Opinion 2014-300
The Pennsylvania Bar Association issued a formal opinion on attorney’s use of social media for business purposes. The opinion addresses 10 issues regarding an attorney’s ethical use of social media.

A copy of the opinion in its entirety is attached as Exhibit B.
Article: Emojis are increasingly coming up in court cases. Judges are struggling with how to interpret them.

On July 8, 2019, an article in CNN Business was published by Samantha Murphy Kelly entitled, “Emojis are increasingly coming up in court cases. Judges are struggling with how to interpret them.”

New York (CNN Business) Can a knife emoji double as a threat to kill someone? Does a heart emoji from a manager constitute sexual harassment?

More emojis are showing up in court cases throughout the United States. Attorneys are having to argue for different interpretations of the small illustrated characters that are used to express emotions, activities or objects. And courts are struggling to handle the nuances of emojis as evidence.

"Many courts haven't had to deal with the emoji much, but the numbers are up and it will likely increase," Vinson & Elkins partner Jason Levine, who has worked on cases with emojis as evidence, told CNN Business. " Judges aren’t prepared for the influx, especially ones who are older and may not be familiar with newer vernacular."

The number of reported cases with emojis as evidence in the United States increased from 33 in 2017 to 53 in 2018, and is at nearly 50 so far in the first half of 2019, according to Eric Goldman, a Santa Clara University law professor who monitors court opinions that are made public.

No court guidelines exist on how to approach the topic. Sometimes a judge might describe the emoji in question to jurors, rather than allow them to see and interpret it for themselves. In some cases, emojis are omitted from evidence altogether, Goldman said.

Emojis are most prevalent in sexual harassment and criminal cases. An emoji with Xs for eyes — also known as the "dizzy face emoji" — was an issue in a 2017 murder case in Massachusetts. Prosecutors argued that the emoji showed that an individual who received it knew "something was happening."

Emojis are increasingly showing up in workplace lawsuits, too. For example, in an employee termination case related to a possible violation of family medical leave, a manager sent a series of smiley face emojis. The plaintiff's lawyers claimed it was evidence the company was happy to let her go.

"Someone may use threatening symbols, a gun, a pointed finger, and then behind it put a symbol for 'just joking,'" said attorney Karen S. Elliott of Eckert Seamans Cherin & Mellott, a firm that has worked on cases with emojis. "There is a lot that could get lost in the translation. Was it a joke? Or was it serious? Or was the person just using the emoji to hedge so that they could later argue it was not serious?"
**Emojis are not a 'universal language'**

There are more than 2,823 emojis set by the Unicode Consortium, ranging from food and drink to hand gestures, activities and facial expressions.

Emojis can be especially misinterpreted when used without text, according to ABI Research analyst Stephanie Tomsett. For example, a face with sunglasses could be used to convey a sunny day, feeling cool or "deal with it." Similarly, the emoji with smoke coming out of the nose could be read as "angry" when it's intended to mean "triumph."

![Emoji examples](image)

*4 The "triumph" emoji renders differently on varying platforms.*

"Emojis cannot be considered a universal language," Tomsett said.

That's especially true when you consider how symbols vary by culture. The thumbs-up gesture has been up for debate as offensive or vulgar in the Middle East, while it's a sign of something good in other parts of the world. A smiley face emoji is taken as sarcasm in China.

But one of the biggest points of contention for emojis in court cases is that they render differently on varying platforms, whether you're using, say, an Apple iPhone or a Samsung Galaxy device. Although the Unicode Consortium sets the standard for emojis, software makers, such as Apple and Google, then design versions for their platforms, opening up a path for inconsistencies and miscommunication. For example, the pistol emoji looks like a real gun on some devices and a water or toy gun on others.

In a 2016 study from the University of Minnesota, participants rated popular emoji characters on Android and iOS as positive or negative. In the case of the emoji called "a grinning face with smiling eyes," some people interpreted the image as "blissfully happy" on Android, while it looked like it was "ready to fight" on iOS.
Another study found about 25% of participants were unaware the emojis they posted on Twitter could appear differently based on their followers' devices. After being shown how one of their tweets rendered across platforms, 20% said they would have edited or not sent the tweet.

"Earlier on, we may have all thought all smiley faces were the same, so it might have seemed OK to the courts for the evidence to come in simply as a smiley face," attorney Elliott said. "Then someone realized that the smiley face from Google might be interpreted differently than the smiley face from Apple -- and that might make a difference in the evidence in the case."

Was that emoji a joke or a threat?

Some experts such as ABI Research's Tomsett argue there should be consistency across platforms to avoid confusion. But she believes standardized emojis are unlikely because platforms want to "stand out and offer unique experiences." However, she believes they could start to look increasingly similar to help alleviate some of these issues.

Attorney Elliott argues courts will need to develop literature that requires lawyers to obtain the exact depiction of what was sent and received on each platform, and show it to the judge and jurors in a case. "Words may not adequately describe the precise emoji meaning," she said.

Of course, emojis are commonly used to bring levity to conversations. Courts generally recognize attempts at humor, and defendants have invoked "I was just joking" defenses for centuries.

According to Elliott, the courts and judges are becoming more skeptical about this defense in criminal cases because the recipient doesn't know whether it's actually a joke.

"As long as the threat is conveyed, it remains a threat," she said. "For example, you can't yell 'fire' in a crowded theater and then say 'just joking.'"

Some judges omit emojis as evidence because they think it's superfluous, according to professor Goldman. He referenced a sex-trafficking case in which an expert witness detailed how a series of sent emojis, including a crown, high heels and bags of money, provided evidence of prostitution, noting a crown often references a pimp.

"We might not think twice about a crown emoji, but in the sex-trafficking world, it added context," he said. "If a judge said 'omitted emoji' and ... wasn't briefed by other parties on its meaning ... that would make it impossible for any of us to audit ... and understand what the court did to independently consider the evidence was irrelevant."

However, Goldman believes the issue will eventually solve itself as more emojis surface in cases.

"With the proliferation of any new technology, there is an adjustment period for everyone, including judges," he said. "As judges become more familiar and comfortable with emojis, they will figure out the best ways to adapt existing legal principles to [them]."

Samantha Murphy Kelly is an editor for CNN business. She helps oversee daily tech coverage and writes news stories and features related to consumer and lifestyle tech.
Article: 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.*

At first, Marek Nowak, a 32-year-old engineer at enterprise cloud software company CircleCI, was skeptical of using emojis when communicating with colleagues. Now, whenever he posts the minutes of his team meetings in Slack, he precedes them with a custom emoji of a teddy bear giving a hug.

This isn’t just for funsies. It’s company policy to use certain emojis to indicate certain communiques, such as a meeting summary. If he forgot the bear, team members could miss important decisions.

“My favorite team value is over-communicating,” says Mr. Nowak, who is now a self-professed emoji fan. “If you hesitate to write a message because you think three-quarters of the team already knows, that’s not a problem, you just preface it with the ‘over-communicating’ emoji.”

This is how formality in business communications dies, not with a whimper, but with a particolored riot of modern-day hieroglyphics, denoting everything from collaboration to dissent. At Slack itself, employees use the “eyes” emoji to indicate they’re reading a just-posted memo. The “unamused face” or even the “nauseated face” are both acceptable in communications channels at Joyride Coffee, a Woodside, N.Y.-based beverage maker.

This trend is much bigger than the latest thing the *youths are foisting on their crusty elders*. It’s happening for deep neurological reasons, according to recent research, and can lead to better cooperation. But that doesn’t mean it’s always appropriate to use them, or that they can fully replace other forms of communication.

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.

What’s happening with visual communication in businesses tracks what’s happening to visual communication in more casual contexts—and especially how it’s *changed among young people*, says Jeremy Burge, Chief Emoji Officer of Emojipedia.
In a just-published paper, researchers from Colombia describe how electrical activity in the brain indicates that we process emojis in the same areas of the brain where we process faces. The key is that emojis often include the most salient features for visually conveying human emotion—eyes, mouths, sometimes eyebrows.

“In computer-mediated communication, I don’t see your face, but when you send to me an emoji, my brain generates a similar response as when I can see you,” says Carlos Gantiva, a professor in the department of psychology at Universidad de los Andes and an author of the paper.

Adam Belanich, chief executive of Joyride Coffee, had his company’s five core values enshrined in the company’s Slack channels as custom-designed emojis.

New employees at the company’s four facilities across the U.S. pick up on them pretty quickly just by seeing them used in context. For example, when someone does something for another team without being asked and posts about it on Slack, coworkers respond with a “fostering community” emoji. “It’s a shorthand for, ‘Yes, you embodied this core value,’” says Mr. Belanich.

Many of these emojis are used in what Slack calls “reacjis”: responses that attach specifically to a message, rather than following in the thread below. (You might’ve never heard that word, but if you’ve ever “liked” something on social media, you get the idea.) They’re a way emojis can make written communication less verbose, says Mr. Nowak, by allowing team members to survey co-workers or get an acknowledgment that others saw a message.

Emojis also make messaging more efficient by conveying the intent and context that’s otherwise missing from a message, says Mr. Burge.

People tend to share positive emotions such as laughter or a smile. This is consistent with how our faces have evolved to convey “prosocial” emotions—“I am not a threat.” Anthropologists believe that things like the evolution of our moveable eyebrows—which we unconsciously raise when we see someone at a distance in order to indicate friendliness—are consistent with many millennia of “self-domestication,” in which our means of non-verbal communication evolved to match our ever-more-cooperative nature.

“Sometimes there’s a person I need to communicate with regarding a project and I have a tight deadline and I’ve never talked to them before, but I’d like to come across as being engaged and helpful in some way,” says Mr. Nowak, who works from Japan with colleagues who are spread across a half dozen time zones from Asia to the Americas.

“I don’t have time to write so many words to express my wish to connect with them on a personal level, but with a couple of well-timed and well-placed emoji, it helps you go around that problem,” he says.

Ying Tang and Khe Foon Hew, researchers at the University of Hong Kong who study business communications, reviewed 50 studies on the use and impacts of emojis in communication and
found that, on balance, proper use of emojis helps people form relationships and understand one another.

Companies and teams often have their own cultures of emoji use, a splintering of communication methods that is only enhanced by the flexibility of this visual medium. Teams are going beyond just using reactjis and emojis to express tone, creating what is essentially a custom pictographic language, as potentially impenetrable to outsiders as Viking runes. Some companies go overboard: Slack’s CTO said at a recent Wall Street Journal event that one corporate customer uses more than 50,000 custom emojis. (Slack wouldn’t tell me which company it is.)

The utility of emojis is not an excuse to use them willy-nilly. If you don’t know the local emoji parlance, attempting to use one can make you seem unserious and damage your subsequent ability to collaborate with others, says Ella Glikson, a researcher at Carnegie Mellon University. With her collaborators, Dr. Glikson found that using emojis in initial communication with unfamiliar people could even make you appear less competent.

For younger employees, knowing when to strategically deploy an emoji to smooth communication or add context can be natural, says Mr. Belanich of Joyride Coffee. “But I’ve also seen it done not especially well, and it can come across like that ‘How do you do, fellow kids?’ meme.”

A good rule of thumb: If you don’t know what Mr. Belanich is talking about when he references actor Steve Buscemi’s internet-famous turn on “30 Rock” as a skateboard-toting undercover detective, you might not be ready to bust out the “folded hands” emoji, much less the “hundred points.”

Christopher Mims is a Technology columnist for The Wall Street Journal. He writes Keywords, a weekly column on technology. Before joining the Journal in 2014, he was the lead technology reporter for Quartz and has written on science and tech for publications ranging from Technology Review, Smithsonian, Wired, the Atlantic, Slate and other publications. Mims, who has degree in neuroscience and behavioral biology from Emory University, lives in Baltimore.

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Sample FRE 902(13) Certification of Authenticity for Records Generated by an Electronic Process or System

**Rule 902(13): Certified Records Generated by an Electronic Process or System.** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

A copy of the form is attached as Exhibit C.
Sample FRE 902(14) Certification of Authenticity by Process of Digital Identification

Rule 902(14): Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

A copy of the form is attached as Exhibit D.
Article: Self-Authentication of ESI Under Federal Rule of Evidence 902


In a recent annual Federal Bench Bar Conference in Philadelphia, a U.S. District Court judge warned of the perils of allowing clients to perform their own data and document collection. As the judge wisely pointed out, this can be problematic as the lawyers owe a duty to the court to represent truthfully and accurately. If, for example, a client performed the data collection without proper supervision, the lawyer could not accurately represent that all responsive documents have been collected and produced. The 2015 amendments to Federal Rule of Civil Procedure 37 provide dire consequences for failing to preserve electronically stored information (ESI), including monetary sanctions, dismissal of a claim, judgment in favor of the prejudiced party, suppression of evidence and adverse inference instructions. The recent changes to Federal Rule of Evidence 902, which addresses self-authenticating evidence, and is routinely relied on by civil trial lawyers, raises additional concerns with clients performing their own data collection.

Self-authenticating evidence under Rule 902 is evidence that requires no extrinsic evidence to prove that it is what it purports to be. Common examples of self-authenticating evidence include newspapers, periodicals, signed and sealed public documents, and official publications. While the amendments to Rule 902 were created to address the unnecessary expense and inconvenience associated with having live testimony from multiple witnesses solely to authenticate electronic evidence, they also provide guidance on ESI collection and resolving authentication issues relating to ESI before trial.

Amendment to Rule 902

On Dec, 1, 2017, Rule 902 was amended in two important ways that drastically changed the process for both collecting and admitting ESI into evidence. Both amendments now allow for the authentication of electronic evidence by a written affidavit of authentication of a “qualified person.” Subsection (13) covers records “generated by an electronic process or system that produces an accurate result,” such as a system registry (e.g., Windows Registry) report showing that a device was connected to a computer, or showing how smartphone software obtains GPS coordinates. Subsection (14) applies to records “copied from an electronic device, storage medium or file” (e.g., email, hard drive of a computer, cellphone photos, text messages).

Subsections (13) and (14) of Rule 902 are different. The former pertains to computer-generated data, whereas the latter pertains to computer stored data (e.g., user-created data). Subsection
(13) is limited to data automatically generated and recorded by electronic processes and systems. The records contain data created by the electronic system. Since there is no human declarant, the only issue is the reliability of the system generating and recording the data. For example, many smartphones contain software that automatically records a log of its user’s text messages. The log containing the date and time of each text, and the number of the other phone involved could be authenticated under Rule 902(13), but the content of the text messages could not. Under Rule 902(13), a party could establish that a smartphone’s software captures the date, time and GPS coordinates of pictures taken, allowing the court to determine that whoever took the picture did so at a certain time and place. Rule 902(13) will be useful in trade secret cases, as it will allow for the authentication of a systems report showing when a party logged into a network and what actions were taken. If a proponent seeks to introduce user-created ESI, such as text messages or emails, that are stored on an electronic device, such as a phone or a computer, they must proceed under Subsection (14).

The advisory committee noted that evidence now covered by 902(13) and (14) was rarely the subject of a legitimate dispute over authenticity. Rather, parties usually wait until their opponent has incurred the significant expense and time of producing an authentication expert before stipulating to authenticity, or deciding not to oppose it. Since Rules 902(13) and (14) both require that the proponent comply with the notice provisions of Rule 902(11), issues relating to the authentication of ESI can now be addressed well before trial removing the unpleasant element of surprise relating to authentication of ESI. To further limit the surprise at trial, the proponent of the ESI can file a motion in limine well before trial for the court to rule on the sufficiency of the authentication and admissibility of electronic records.

The amendments to Rule 902 do away with the requirement that a foundation witness testify to support authentication of electronic documents. Now, if the procedure in Rule 902(13) and (14) is properly followed, the proponent of the ESI need provide only a certification of authentication of the person performing the collection for there to be a foundation for future questioning about the ESI. Before the amendments to Rule 902 were in effect, the data collector would have to first testify about the merits of the collection process before substantive questions relating to the data could be asked.

While the term “qualified person” is not defined under Rule 902, the notes on the amendment clarify that the qualified person must, at a minimum, check the “hash value” (or use another reliable means of identification and verification) of the proffered item and certify that the hash value was identical to the original. As the notes explain, a hash value “is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file” and that “if the hash values for the original and copy are different, then the copy is not identical to the original” and vice versa. Hash values are often referred to as “the fingerprint of a file.”
In the absence of a definition of “qualified person,” a safe approach is to look to the standard for qualifying an expert witness, as provided by Federal Rule of Evidence 702. Accordingly, the affidavit should provide information relating to the affiant’s identity and qualification. The affiant should describe their familiarity with the design of the type of phone or computer at issue. The affiant should also provide information about the methodology used to retrieve and copy the data. If the affiant used the hash value method of identification, the proponent attorney could ask the court to take judicial notice of the general reliability of the method under Federal Rule of Evidence 201(b)(2). To satisfy Rule 702(d), the affiant should state that the software they employed is industry standard and that they encountered no problems when they used it to compare the data and that they followed proper procedure in printing out the contents of the copy.

Rules 902(13) and (14) require a certification that complies with Rule 902(11), which has three requirements. First, the record was made at or near the time by, or from information transmitted by, someone with knowledge. Second, the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling. Third, making the record was a regular practice of that activity. The affiant must also establish the chain of custody to satisfy Federal Rules of Evidence 401 and 901. To do so, the affiant should include information such as the ESI source (make, model, serial number), identity of who delivered the source, collection dates and the means of transfer for the copy of the data.

Generally, clients, and lawyers alike, are not capable of checking and understanding a hash value or other methodology. Further, most clients will not meet the standard of a “qualified person” as required under Rule 902(13) and (14). As described above, the information required to be included in a certification under Rule 902(13) or (14) is complicated. These amendments to Rule 902 raise the question of whether a client should be self-collecting the data in their case, or whether a third party, such as a forensic collection specialist or service, should be performing the collection.

In general, a practitioner should not allow her client to self-collect data, for it is difficult for a client to qualify as a “qualified person” under Rule 902(13) or (14) or to perform a forensically sound data collection. If inadvertent spoliation occurs, your client will face potential sanctions under Federal Rule of Civil Procedure 37. Collecting data without spoliation involves technical expertise. Certain kinds of data, such as file access related and log file data, easily spoliate, even if collected in good faith. Forensic collection agencies have tools that can help generate logs and other materials that can serve as invaluable support for the affidavit required under Rule 902(13) and (14).

If, despite all the above, you still determine your client is competent to self-collect their own data, at a minimum, they must document the steps they take during the collection process, and information relating to the chain of custody, including the ESI source (make, model, serial
number), custodian, collection dates and the means of transfer for the copy of the data. This information will be critical come time for authentication of this data. For larger firms with an in-house IT department, it is critical to use these departments in cases of self-collection.

**Conclusion**

The December 2017 amendments brought Rule 902 current with the Digital Age. Where there is no legitimate dispute about the authenticity of ESI, even if a party will not stipulate to authenticity in advance, the amendments to Rule 902 should promote greater certainty, save litigants and attorneys time and money, and preserve valuable judicial resources by leading to fewer witnesses, less trial preparation relating to ESI. The amendments to Rule 902 take nothing away, are there to help, and will only hurt those who fail to use a valid process of data collection by a qualified individual. Rule 902 is a welcome and much-needed straight path in a windy world of electronic discovery, which is now a multimillion-dollar industry that dominates litigation and the lives of lawyers alike.

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Exhibit A
Proposal for White Wine Emoji ZWJ Sequence for RGI
PROPOSAL FOR WHITE WINE EMOJI ZWJ SEQUENCE FOR RGI

Submitter: Maggie Curry for Kendall-Jackson Winery
Date: May 11, 2018 / Revised June 22, 2018 / Revised March 27, 2019

1. IDENTIFICATION
   CLDR short name: White Wine Glass
   CLDR keywords: white wine | wine | white wine glass | wine glass | cheers | wine time | Chardonnay | Sauvignon Blanc | Pinot Grigio | Pinot Gris | Riesling

2. IMAGES
   Zip file: (attached)
   License: Designed by Kendall-Jackson Winery, to be licensed for public use (CC0)

3. SORT LOCATION:
   a. Category: Drink
   b. Category Location: After WINE GLASS (RED WINE), or activated on LONG PRESS

4. REFERENCE EMOJI: Necktie

ABSTRACT

This is the proposal for inclusion of a White Wine Glass Emoji ZWJ Sequence (U+1F377 + ZWJ + U+25FB) for RGI in Unicode Emoji Version 13 for the following reasons:

- The existing wine glass emoji, depicted as a glass of red wine, does not properly represent one of the most popular and widely consumed adult beverages - white wine
- All three code points in the sequence already exist.

Kendall-Jackson Winery is submitting this proposal on behalf of all white wine lovers, fellow wine producers, and viticulturists from around the world.

INTRODUCTION

Since 6000 BC, wine has played a critical role for humanity. The beverage has a complex and venerable history that spans cultures, socioeconomic classes, rituals, and religions. White wine
Viticulture has reached every continent, excluding Antarctica, and has been consumed around the world for thousands of years.

Jess Jackson, founder of Kendall-Jackson Winery, believed “…wine is a beverage poured to forge bonds with other people, other cultures. Wine is the elixir. We bring it for luck, and for love, and on special occasions. From weddings to housewarmings to ship launchings. We make peace with it, toast the living and the dead with it. Give it and share it with those closest to us. Wine has a deep spiritual significance that no other food or drink possesses. As he saw it, it is embracing life.”

Today, wine is ubiquitous worldwide and evokes strong personal and emotional connections and opinions. In its simplest form, it boils down to “are you a red or a white wine drinker?” We live in an era where the rise of post-truth has left people demanding clear communication and the desire to represent their identity. White wine is not just a popular category comprised of white wine grape varietals; it is a large part of people’s daily lives. This all-important beverage with ancient beginnings should be properly illustrated in our modern, international language of emoji.

5. SELECTION FACTORS — INCLUSION
   a. Compatibility: N/A
   b. Expected usage level
      i. Frequency

The expected usage of the white wine glass emoji is extremely high. According to Google Trends for “white wine,” there is a growing interest in all white wine varietals worldwide. Further, “white wine” as a general term used to represent all white varietals, outranks any wine search, including category leaders (e.g., Chardonnay, Sauvignon Blanc, and Pinot Grigio). The addition of a white wine glass emoji will allow users to showcase their passion for all white wine varieties with the use of a single emoji.

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Five wine varietals comprise approximately 75% of the total wine category, dollar share, and case volume. The top-ranking varietals include:

1. Chardonnay
2. Cabernet Sauvignon
3. Pinot Noir
4. Red Blends
5. Pinot Grigio / Pinot Gris

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Out of the top six varietals, three are red wines and three are white wines. Combined, the top three white wines account for approximately 55% of the wine category dollar share, followed by the top three red wines at 45%.

This is significant for two reasons:

1. It showcases the popularity of white wine
2. The popularity of “red wine” as a search term could be due to the fact red wine blends are the third most popular varietal.

Globally, trends in popular adult beverage consumption vary by country, with white wine, red wine, and beer continually ranking in the top three. For example, white wine reigns in the United States, Australia, and the United Kingdom, while red wine outpaces white wine (second) and beer (third) in both Germany and Canada. Moreover, by 2021, wine is expected to grow at a greater rate than both beer and spirits on a global scale.

According to Gallup, beer remains the number one alcoholic beverage of choice for Americans, with a consumption rate of 42%. However, wine is close behind, with a consumption rate of 34%. The wine consumption rate has continuously increased over the past twenty years, while beer’s rate has steadily decreased. Both beverages are followed by spirits at a steady consumption rate of 19%.

When looking at total wine drinkers, red wine is the overall most consumed wine; however, white wine is not far behind, comprising one-third of total wine drinkers. Despite sparkling wine making up only 8% of wine drinkers, this category currently has an emoji. The large group of white wine drinkers fails to have any emoji representation.

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4 International Wine & Spirits Record (2018), Regular wine drinkers which is defined as drinking wine at least once a month. https://www.theiwsr.com/Category%20Spotlights.html
Moreover, the U.S. Wine Market Landscape Report by Wine Intelligence\(^5\) reports that 78% of regular wine drinkers in the U.S. drink white wine, whereas 77% of regular wine drinkers in the U.S. drink red wine. While there is clearly overlap in red and white wine consumption, this further demonstrates the lack of emoji representation for white wine drinkers.

White wine’s popularity also continues to grow in terms of production volume. Though red wine composes the largest global share, its category continues to decline as white wine is forecasted to grow in absolute volume terms.\(^9\) Additionally, white wine and red wine are produced from two different grapes, white grapes and red grapes respectively. Red grapes are the only grapes represented as an emoji, thus furthering the need for a white wine emoji.\(^10\)

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When examining the larger scope of alcoholic beverage search trends, wine is consistently the number one search term in comparison to beer and liquor.  When taking a deeper dive into wine search trends and comparing the terms “red wine” to “white wine”, “white wine” redwine still shows higher results on search platform Google, though white wine has an impressive number at 1,570,000,000 results.

Google Search Results for “white wine”: 1,570,000,000

Google Search Results for “white wine”: 1,850,000,000

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Though both terms have been steadily increasing in Google searches since 2004, “red wine” has been decreasing in YouTube searches while “white wine” has slightly increased, which is an indication that there is a growing interest in white wine varietals.

Of the users who are searching the term “red wine” in Google, the most popular term that they also searched for is “white wine.”

While “red wine” searches have been historically higher, it does not paint a true picture of search trends by varietal because one of the top selling red wines is called “red wine blend.” When comparing Google search trends of the number one varietal in the US, “Chardonnay” (13.5 MM case sales) to the second largest varietal, “Cabernet Sauvignon” (10.8 MM case sales), “Chardonnay” is consistently and steadily higher, while searches for “Cabernet

Sauvignon” have cyclical peaks of interest, showing a dependable and steady interest in the Chardonnay varietal.  

The blurred interest between varietals is also apparent when comparing “Cabernet Sauvignon”, “Chardonnay”, “Pinot Noir”, and “Sauvignon Blanc.” YouTube search trends show that these red and white wines are comparable to one another, except for Chardonnay, which far outnumbers the remaining varietals.  

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When comparing expected usage versus necktie (reference emoji), white wine clearly has a higher expected usage.

Google Search Results for Necktie: 43,100,000

Google Search Results for White Wine: 1,570,000,000

When comparing expected usage versus necktie (reference emoji) using Google Trends\(^{20}\), white wine clearly has a higher expected usage, and the trends continue to rise for white wine (2004 to present).

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When comparing expected usage versus necktie (reference emoji) using Google Trends\(^{21}\) and YouTube Search white wine has a clearly higher expected usage, and trends continue to rise for white wine.

When comparing YouTube search results, white wine\(^{22}\) receives 7,780,000 results, where necktie\(^{23}\) receives 57,300.


\(^{22}\) Google. Google YouTube Search “White Wine” – website: https://www.google.com/search?q=white%20wine%20site%3Ayoutube.com&rlz=1C1GGRV_enUS783US783&oq=youtube&aqs=chrome.0.0j69i60l4j0.751j0j9&sourceid=chrome&ie=UTF-8&ved=2ahUKEwiC0dm4qPhAhUTFjOiHTUKCmsO2wF6BAgDEAg&ei=5vKbXILGAZOs0PEPtZSo2AY. Data pulled 3/27/19

\(^{23}\) Google. Google YouTube Search “White Wine” – website: https://www.google.com/search?q=necktie%20site%3Ayoutube.com&rlz=1C1GGRV_enUS783US783&oq=youtube&aqs=chrome.0.0j69i60l4j0.751j0j9&sourceid=chrome&ie=UTF-8&ved=2ahUKEwiC0dm4qPhAhUTFjOiHTUKCmsO2wF6BAgDEAg&ei=5vKbXILGAZOs0PEPtZSo2AY. Data pulled 3/27/19
When searching popular social platforms, results show a high usage of the hashtag #whitewine — over 2,440,146 posts on Instagram alone, where necktie\(^2\) (reference emoji) has 376,674 posts.

Instagram Search: White Wine = 2,440,146 Posts

\(^2\) Instagram. Instagram Search "#Whitewine". Retrieved from Instagram: https://www.instagram.com/explore/tags/whitewine/

\(^2\) Instagram. Instagram Search "#Necktie". Retrieved from Instagram: https://www.instagram.com/explore/tags/necktie/?hl=en
i. **Multiple Use:**

In addition to representing all white wine varietals that the red wine emoji cannot, the white wine glass emoji has innumerable uses. For example, it can be used with other emojis to represent food pairings (e.g., white wine + sushi, soup, salad, fish, etc.). It can also be used to communicate occasion based activities, such as a weekend brunch, girl’s night, or beach day, or other celebrations during warmer months when white wine is more frequently consumed.

ii. **Use in Sequences**

The addition of the white wine glass emoji will create a new and valid “wine glass emoji sequence,” allowing a glass color modification to the character. The wine glass sequence will include both white and red wine, and creates the opportunity to add more colors in the future (e.g., pink wine glass to represent rosé wine).

iii. **Breaking new ground**

The current wine glass emoji, representing a generic red, is an oversimplification. Different varietals and styles of wine are more popular during various occasions, meals, and even climates. For example, if a person enjoys a meal of grilled steak and Cabernet Sauvignon, they may communicate it using the “cut of meat” emoji (U+1F969) and the current red wine glass
emoji. However, if a person enjoys a meal of lobster and chardonnay (a delicious pairing!), they may use the lobster emoji (U+1F99E), but are required to use the current red wine emoji was well.

Additionally, white wines have a higher rate of consumption during warmer weather and seasons. Conversely, in general, red wine varietals are consumed at higher rates during cooler seasons.

The lack of a white wine glass emoji inhibits self-expression, from a suggested meal pairing to the preferred libation one may enjoy during warm weather.

c. Image Distinctiveness

The white wine glass emoji will be visually distinct from the current wine glass emoji. The creation of the wine glass sequence will add greater diversity among all emojis, especially in the food and beverage emoji category, where no sequences currently exist.

Furthermore, different wine types are traditionally consumed out of different wine glasses. It not only changes the way the wine may taste on the palate, but also the experience on the nose. Making slight modifications to the wine glass (or vessel) for white wine will drive additional distinctiveness and real likeness.

d. Completeness

The creation of a wine glass emoji sequence incorporating a white wine glass will complete the representation of this beverage category. Quantitative research show that the number one varietal is Chardonnay (a white wine), followed by Cabernet Sauvignon (a red wine). The white wine option brings an authenticity and diversity to the already popular wine glass emoji.

Nielsen Dollar Sales Data 201726: Chardonnay (white wine) represents the largest dollar sales by varietal.

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IRI Sales Data: Case sales data at 52 weeks shows that Chardonnay (white wine) is the number one selling by volume (17.6MM cases):

Currently, Instagram allows users to hashtag emojis which enables them to appear in search results. The red “wine glass” emoji has incredibly high usage, second only to beer. These trends infer a white wine glass emoji would yield comparable or higher results, especially considering white wine is consumed at a higher frequency than red wine.

There are over 2,427 posts on Instagram using the hashtag #whitewineemoji. These posts include examples of users questioning the absence of a white wine emoji and demonstrating

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their enthusiasm for one to be added. The asks for the white wine emoji are represented on a global scale with post from Germany, Brasil, Italy, Spain, USA, etc.

Upon further investigation of emoji usage statistics, the current wine glass emoji ranks 220 out of 2,666 total emojis (filtered by “daily average,” March 25, 2019). Expanding the sequence to include a white wine glass will increase overall usage of this already popular emoji.

Comparative to alternate adult beverage emojis, the red wine glass emoji does not trail far behind the top emojis in this category in terms of daily average usage (DAU). To put this in perspective, the most used adult beverage emoji is the bottle popping cork emoji (844 DAU) while the lowest is the martini glass (243 DAU). The red wine glass emoji is near the top of this category with a daily average usage of 529. In fact, the only other adult beverage emojis that outrank the red wine glass emoji are the clinking glasses (772 DAU) and the clinking beer mugs (672 DAU). The popularity of these two emojis could be attributed to their celebratory nature. Since they are both clinking, users can use these emojis for alternative reasons such as celebrating a promotion, wedding, birthday, etc.

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The resolution is undeniable. There is a clear need and demand for the white wine glass emoji, and fans of white wine feel they are not being represented. Below are just a few examples:

**Pop Star Lady Gaga** recently released a popular song called “Grigio Girls” that is all about having fun with your girlfriends while enjoying some Pinot Grigio.\(^{34}\)

**The Today Show** tweeted about the fact that there is no white wine emoji.\(^{35}\)

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\(^{35}\) The TODAY Show (2016, 06 02). TODAY show. Retrieved from Twitter: https://twitter.com/TODAYshow/status/738352121075105792
Entrepreneur and Author Gary Vaynerchuk posted on Twitter stating his need for a white wine emoji. 

Food & Wine Magazine’s online article, “13 New Food Emojis are Coming Out This Year” specifically identifies that even there are new additions to the emoji keyboard, we are still missing “…a glass of white wine emoji.”

The emojis will come to Apple iOS later this year, but there’s no word on what exact part of the year the update will happen.

Food emojis are still seriously lacking though: We still don’t have iced coffee, cupcake, kale, avocado toast, or even a glass of white wine emoji!

6. SELECTION FACTORS — EXCLUSION
   f. Overly Specific

White wine is a broad and currently unrepresented adult beverage category. Red and white wine are extremely different from one another in many areas ranging from production process to flavor profile to usage occasion and consumer preference. Further, the white wine glass emoji is not overly specific, as it represents all white varietals (e.g., Chardonnay, Sauvignon Blanc, etc.).

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g. Open-Ended

This is not an open-ended pursuit; there are only three major shades of wine – white, red, and pink. While some day demand may justify adding a pink wine emoji too, the popularity of white wine will bring greater user benefit overall.

h. Already Representable

One cannot represent or recreate white wine using existing emojis or emoji sequences. The only way to communicate wine (red, white, or pink) is with the red wine glass emoji.

i. Logos, Brands, UI Icons, Signage, Specific People, Deities

N/A. White wine brings people together!

There are no logos or brands associated with the white wine glass emoji. Kendall-Jackson Winery is submitting this proposal on behalf of all white wine lovers and fellow wine producers.

There are no copyright risks associated with a white wine emoji.

j. Transient

It is safe to say that wine isn’t going anywhere, and neither is the popularity of white wine. Scientists believe white wine has been around since before the time of Tutankhamen\(^*\) and it has only grown in popularity over time. It now represents 47% of all wine purchases (red wine represents 46%).\(^{39}\)

k. Faulty Comparison

N/A. This proposal is not leveraging comparisons to existing emojis or sets of emojis to make its case.

l. Exact Images

N/A. This proposal does not request an exact image, but Kendall-Jackson Winery has developed a design to be licensed for public use (CC0).


Exhibit B
Pennsylvania Formal Ethics Opinion 2014-300
I. Introduction and Summary

“Social media” or “social networking” websites permit users to join online communities where they can share information, ideas, messages, and other content using words, photographs, videos and other methods of communication. There are thousands of these websites, which vary in form and content. Most of these sites, such as Facebook, LinkedIn, and Twitter, are designed to permit users to share information about their personal and professional activities and interests. As of January 2014, an estimated 74 percent of adults age 18 and over use these sites.\(^1\)

Attorneys and clients use these websites for both business and personal reasons, and their use raises ethical concerns, both in how attorneys use the sites and in the advice attorneys provide to clients who use them. The Rules of Professional Conduct apply to all of these uses.

The issues raised by the use of social networking websites are highly fact-specific, although certain general principles apply. This Opinion reiterates the guidance provided in several previous ethics opinions in this developing area and provides a broad overview of the ethical concerns raised by social media, including the following:

1. Whether attorneys may advise clients about the content of the clients’ social networking websites, including removing or adding information.
2. Whether attorneys may connect with a client or former client on a social networking website.
3. Whether attorneys may contact a represented person through a social networking website.
4. Whether attorneys may contact an unrepresented person through a social networking website, or use a pretextual basis for viewing information on a social networking site that would otherwise be private/unavailable to the public.
5. Whether attorneys may use information on a social networking website in client-related matters.
6. Whether a client who asks to write a review of an attorney, or who writes a review of an attorney, has caused the attorney to violate any Rule of Professional Conduct.
7. Whether attorneys may comment on or respond to reviews or endorsements.
8. Whether attorneys may endorse other attorneys on a social networking website.
9. Whether attorneys may review a juror’s Internet presence.

\(^{1}\) http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/
10. Whether attorneys may connect with judges on social networking websites.

This Committee concludes that:

1. Attorneys may advise clients about the content of their social networking websites, including the removal or addition of information.
2. Attorneys may connect with clients and former clients.
3. Attorneys may not contact a represented person through social networking websites.
4. Although attorneys may contact an unrepresented person through social networking websites, they may not use a pretextual basis for viewing otherwise private information on social networking websites.
5. Attorneys may use information on social networking websites in a dispute.
6. Attorneys may accept client reviews but must monitor those reviews for accuracy.
7. Attorneys may generally comment or respond to reviews or endorsements, and may solicit such endorsements.
8. Attorneys may generally endorse other attorneys on social networking websites.
9. Attorneys may review a juror’s Internet presence.
10. Attorneys may connect with judges on social networking websites provided the purpose is not to influence the judge in carrying out his or her official duties.

This Opinion addresses social media profiles and websites used by lawyers for business purposes, but does not address the issues relating to attorney advertising and marketing on social networking websites. While a social media profile that is used exclusively for personal purposes (i.e., to maintain relationships with friends and family) may not be subject to the Rules of Professional Conduct relating to advertising and soliciting, the Committee emphasizes that attorneys should be conscious that clients and others may discover those websites, and that information contained on those websites is likely to be subject to the Rules of Professional Conduct. Any social media activities or websites that promote, mention or otherwise bring attention to any law firm or to an attorney in his or her role as an attorney are subject to and must comply with the Rules.

II. Background

A social networking website provides a virtual community for people to share their daily activities with family, friends and the public, to share their interest in a particular topic, or to increase their circle of acquaintances. There are dating sites, friendship sites, sites with business purposes, and hybrids that offer numerous combinations of these characteristics. Facebook is currently the leading personal site, and LinkedIn is currently the leading business site. Other social networking sites include, but are not limited to, Twitter, Myspace, Google+, Instagram, AVVO, Vine, YouTube, Pinterest, BlogSpot, and Foursquare. On these sites, members create their own online “profiles,” which may include biographical data, pictures and any other information they choose to post.

Members of social networking websites often communicate with each other by making their latest thoughts public in a blog-like format or via e-mail, instant messaging, photographs, videos, voice or videoconferencing to selected members or to the public at large. These services permit members to locate and invite other members into their personal networks (to “friend” them) as well as to invite friends of friends or others.
Social networking websites have varying levels of privacy settings. Some sites allow users to restrict who may see what types of content, or to limit different information to certain defined groups, such as the “public,” “friends,” and “others.” For example, on Facebook, a user may make all posts available only to friends who have requested access. A less restrictive privacy setting allows “friends of friends” to see content posted by a specific user. A still more publicly-accessible setting allows anyone with an account to view all of a person’s posts and other items.

These are just a few of the main features of social networking websites. This Opinion does not address every feature of every social networking website, which change frequently. Instead, this Opinion gives a broad overview of the main ethical issues that lawyers may face when using social media and when advising clients who use social media.

III. Discussion

A. Pennsylvania Rules of Professional Conduct: Mandatory and Prohibited Conduct

Each of the issues raised in this Opinion implicates various Rules of Professional Conduct that affect an attorney’s responsibilities towards clients, potential clients, and other parties. Although no Pennsylvania Rule of Professional Conduct specifically addresses social networking websites, this Committee’s conclusions are based upon the existing rules. The Rules implicated by these issues include:

- Rule 1.1 (“Competence”)
- Rule 1.6 (“Confidentiality of Information”)
- Rule 3.3 (“Candor Toward the Tribunal”)
- Rule 3.4 (“Fairness to Opposing Party and Counsel”)
- Rule 3.5 (“Impartiality and Decorum of the Tribunal”)
- Rule 3.6 (“Trial Publicity”)
- Rule 4.1 (“Truthfulness in Statements to Others”)
- Rule 4.2 (“Communication with Person Represented by Counsel”)
- Rule 4.3 (“Dealing with Unrepresented Person”)
- Rule 8.2 (“Statements Concerning Judges and Other Adjudicatory Officers”)
- Rule 8.4 (“Misconduct”)

The Rules define the requirements and limitations on an attorney’s conduct that may subject the attorney to disciplinary sanctions. While the Comments may assist an attorney in understanding or arguing the intention of the Rules, they are not enforceable in disciplinary proceedings.

B. General Rules for Attorneys Using Social Media and Advising Clients About Social Media

Lawyers must be aware of how these websites operate and the issues they raise in order to represent clients whose matters may be impacted by content posted on social media websites. Lawyers should also understand the manner in which postings are either public or private. A few Rules of
Professional Conduct are particularly important in this context and can be generally applied throughout this Opinion.

Rule 1.1 provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

As a general rule, in order to provide competent representation under Rule 1.1, a lawyer should advise clients about the content of their social media accounts, including privacy issues, as well as their clients’ obligation to preserve information that may be relevant to their legal disputes.

Comment [8] to Rule 1.1 further explains that, “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology....” Thus, in order to provide competent representation in accordance with Rule 1.1, a lawyer should (1) have a basic knowledge of how social media websites work, and (2) advise clients about the issues that may arise as a result of their use of these websites.

Another Rule applicable in almost every context, and particularly relevant when social media is involved, is Rule 8.4 (“Misconduct”), which states in relevant part:

It is professional misconduct for a lawyer to:

... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

This Rule prohibits “dishonesty, fraud, deceit or misrepresentation.” Social networking easily lends itself to dishonesty and misrepresentation because of how simple it is to create a false profile or to post information that is either inaccurate or exaggerated. This Opinion frequently refers to Rule 8.4, because its basic premise permeates much of the discussion surrounding a lawyer’s ethical use of social media.

C. Advising Clients on the Content of their Social Media Accounts

As the use of social media expands, so does its place in legal disputes. This is based on the fact that many clients seeking legal advice have at least one account on a social networking site. While an attorney is not responsible for the information posted by a client on the client’s social media profile, an attorney may and often should advise a client about the content on the client’s profile.

Against this background, this Opinion now addresses the series of questions raised above.

1. Attorneys May, Subject to Certain Limitations, Advise Clients About The Content Of Their Social Networking Websites

Tracking a client’s activity on social media may be appropriate for an attorney to remain informed about developments bearing on the client’s legal dispute. An attorney can reasonably expect that opposing counsel will monitor a client’s social media account.
For example, in a Miami, Florida case, a man received an $80,000.00 confidential settlement payment for his age discrimination claim against his former employer. However, he forfeited that settlement after his daughter posted on her Facebook page “Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.” The Facebook post violated the confidentiality agreement in the settlement and, therefore, cost the Plaintiff $80,000.00.

The Virginia State Bar Disciplinary Board suspended an attorney for five years for (1) instructing his client to delete certain damaging photographs from his Facebook account, (2) withholding the photographs from opposing counsel, and (3) withholding from the trial court the emails discussing the plan to delete the information from the client’s Facebook page. The Virginia State Bar Disciplinary Board based the suspension upon the attorney’s violations of Virginia’s rules on candor toward the tribunal, fairness to opposing counsel, and misconduct. In addition, the trial court imposed $722,000 in sanctions ($542,000 upon the lawyer and $180,000 upon his client) to compensate opposing counsel for their legal fees.

While these may appear to be extreme cases, they are indicative of the activity that occur involving social media. As a result, lawyers should be certain that their clients are aware of the ramifications of their social media actions. Lawyers should also be aware of the consequences of their own actions and instructions when dealing with a client’s social media account.

Three Rules of Professional Conduct are particularly important when addressing a lawyer’s duties relating to a client’s use of social media.

Rule 3.3 states:

(a) A lawyer shall not knowingly:
(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; …
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal’s adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal

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2 “Girl costs father $80,000 with ‘SUCK IT’ Facebook Post, March 4, 2014: http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/
3 In the Matter of Matthew B. Murray, VSB Nos. 11-070-088405 and 11-070-088422 (June 9, 2013)
4 Lester v. Allied Concrete Co., Nos. CL08-150 and CL09-223 (Charlotte, VA Circuit Court, October 21, 2011)
or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Rule 3.4 states:

A lawyer shall not:

(a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act;

Rule 4.1 states:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The Rules do not prohibit an attorney from advising clients about their social networking websites. In fact, and to the contrary, a competent lawyer should advise clients about the content that they post publicly online and how it can affect a case or other legal dispute.

The Philadelphia Bar Association Professional Guidance Committee issued Opinion 2014-5, concluding that a lawyer may advise a client to change the privacy settings on the client’s social media page but may not instruct a client to destroy any relevant content on the page. Additionally, a lawyer must respond to a discovery request with any relevant social media content posted by the client. The Committee found that changing a client’s profile to “private” simply restricts access to the content of the page but does not completely prevent the opposing party from accessing the information. This Committee agrees with and adopts the guidance provided in the Philadelphia Bar Association Opinion.

The Philadelphia Committee also cited the Commercial and Federal Litigation Section of the New York State Bar Association and its “Social Media Guidelines,” which concluded that a lawyer may advise a client about the content of the client’s social media page, to wit:

- A lawyer may advise a client as to what content may be maintained or made private on her social media account, as well as to what content may be “taken down” or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information.
- Unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject
to a duty to preserve. This duty arises when the potential for litigation or other conflicts arises.

In 2014 Formal Ethics Opinion 5, the North Carolina State Bar concluded that a lawyer may advise a client to remove information on social media if not spoliation or otherwise illegal.

This Committee agrees with and adopts these recommendations, which are consistent with Rule 3.4(a)’s prohibition against “unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value.” Thus, a lawyer may not instruct a client to alter, destroy, or conceal any relevant information, regardless whether that information is in paper or digital form. A lawyer may, however, instruct a client to delete information that may be damaging from the client’s page, provided the conduct does not constitute spoliation or is otherwise illegal, but must take appropriate action to preserve the information in the event it is discoverable or becomes relevant to the client’s matter.

Similarly, an attorney may not advise a client to post false or misleading information on a social networking website; nor may an attorney offer evidence from a social networking website that the attorney knows is false. Rule 4.1(a) prohibits an attorney from making “a false statement of material fact or law.” If an attorney knows that information on a social networking site is false, the attorney may not present that as truthful information. It has become common practice for lawyers to advise clients to refrain from posting any information relevant to a case on any website, and to refrain from using these websites until the case concludes.

2. Attorneys May Ethically Connect with Clients or Former Clients on Social Media

Social media provides many opportunities for attorneys to contact and connect with clients and other relevant persons. While the mode of communication has changed, the Rules that generally address an attorney’s communications with others still apply.

There is no per se prohibition on an attorney connecting with a client or former client on social media. However, an attorney must continue to adhere to the Rules and maintain a professional relationship with clients. If an attorney connects with clients or former clients on social networking sites, the attorney should be aware that his posts may be viewed by clients and former clients.

Although this Committee does not recommend doing so, if an attorney uses social media to communicate with a client relating to representation of the client, the attorney should retain records of those communications containing legal advice. As outlined below, an attorney must not reveal confidential client information on social media. While the Rules do not prohibit connecting with clients on social media, social media may not be the best platform to connect with clients, particularly in light of the difficulties that often occur when individuals attempt to adjust their privacy settings.

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6 http://www.ncbar.com/ethics/printopinion.asp?id=894
3. Attorneys May Not Ethically Contact a Represented Person Through a Social Networking Website

Attorneys may also use social media to contact relevant persons in a conflict, but within limitations. As a general rule, if contacting a party using other forms of communication would be prohibited, it would also be prohibited while using social networking websites.

Rule 4.2 states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Regardless of the method of communication, Rule 4.2 clearly states that an attorney may not communicate with a represented party without the permission of that party’s lawyer. Social networking websites increase the number of ways to connect with another person but the essence of that connection is still a communication. Contacting a represented party on social media, even without any pretext, is limited by the Rules.

The Philadelphia Bar Association Professional Guidance Committee concluded in Opinion 2009-02, that an attorney may not use an intermediary to access a witness’ social media profiles. The inquirer sought access to a witness’ social media account for impeachment purposes. The inquirer wanted to ask a third person, i.e., “someone whose name the witness will not recognize,” to go to Facebook and Myspace and attempt to “friend” the witness to gain access to the information on the pages. The Committee found that this type of pretextual “friending” violates Rule 8.4(c), which prohibits the use of deception. The action also would violate Rule 4.1 (discussed below) because such conduct amounts to a false statement of material fact to the witness.

The San Diego County Bar Legal Ethics Committee issued similar guidance in Ethics Opinion 2011-2, concluding that an attorney is prohibited from making an ex parte “friend” request of a represented party to view the non-public portions of a social networking website. Even if the attorney clearly states his name and purpose for the request, the conduct violates the Rule against communication with a represented party. Consistent with this Opinion, this Committee also finds that “friending” a represented party violates Rule 4.2.

While it would be forbidden for a lawyer to “friend” a represented party, it would be permissible for the lawyer to access the public portions of the represented person’s social networking site, just as it would be permissible to review any other public statements the person makes. The New York State

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7 See, e.g., Formal Opinion 90-142 (updated by 2005-200), in which this Committee concluded that, unless a lawyer has the consent of opposing counsel or is authorized by law to do so, in representing a client, a lawyer shall not conduct ex parte communications about the matter of the representation with present managerial employees of an opposing party, and with any other employee whose acts or omissions may be imputed to the corporation for purposes of civil or criminal liability.
Bar Association Committee on Professional Ethics issued Opinion 843,\textsuperscript{10} concluded that lawyers may access the public portions of other parties’ social media accounts for use in litigation, particularly impeachment. The Committee found that there is no deception in accessing a public website; it also cautioned, however, that a lawyer should not request additional access to the social networking website nor have someone else do so.

This Committee agrees that accessing the public portion of a represented party’s social media site does not involve an improper contact with the represented party because the page is publicly accessible under Rule 4.2. However, a request to access the represented party’s private page is a prohibited communication under Rule 4.2.

4. **Attorneys May Generally Contact an Unrepresented Person Through a Social Networking Website But May Not Use a Pretexual Basis For Viewing Otherwise Private Information\textsuperscript{11}**

Communication with an unrepresented party through a social networking website is governed by the same general rule that, if the contact is prohibited using other forms of communication, then it is also prohibited using social media.

Rule 4.3 states in relevant part:

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. …

(c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

Connecting with an unrepresented person through a social networking website may be ethical if the attorney clearly identifies his or her identity and purpose. Particularly when using social networking websites, an attorney may not use a pretextual basis when attempting to contact the unrepresented person. Rule 4.3(a) instructs that “a lawyer shall not state or imply that the lawyer is disinterested.” Additionally, Rule 8.4(c) (discussed above) prohibits a lawyer from using deception. For example, an attorney may not use another person’s name or online identity to contact an unrepresented person; rather, the attorney must use his or her own name and state the purpose for contacting the individual.

In Ohio, a former prosecutor was fired after he posed as a woman on a fake Facebook account in order to influence an accused killer’s alibi witnesses to change their testimony\textsuperscript{12}. He was fired for “unethical behavior,” which is also consistent with the Pennsylvania Rules. Contacting witnesses under false pretenses constitutes deception.

\textsuperscript{10} New York State Bar Assn., Comm. on Prof’l Ethics, Op. 843 (2010).

\textsuperscript{11} Attorneys may be prohibited from contacting certain persons, despite their lack of representation. This portion of this Opinion only addresses communication and contact with persons with whom such contact is not otherwise prohibited by the Rules, statute or some other basis.

Many Ethics Committees have addressed whether an attorney may contact an unrepresented person on social media. The Kentucky Bar Association Ethics Committee concluded that a lawyer may access the social networking site of a third person to benefit a client within the limits of the Rules. The Committee noted that even though social networking sites are a new medium of communication, “[t]he underlying principles of fairness and honesty are the same, regardless of context.” The Committee found that the Rules would not permit a lawyer to communicate through social media with a represented party. But, the Rules do not prohibit social media communication with an unrepresented party provided the lawyer is not deceitful or dishonest in the communication.

As noted above, in Opinion 2009-02, the Philadelphia Bar Association Professional Guidance Committee concluded that an attorney may not access a witness’ social media profiles by deceptively using a third party intermediary. Use of an alias or other deceptive conduct violates the Rules as well, regardless whether it is permissible to contact a particular person.

The New Hampshire Bar Association Ethics Committee agreed with the Philadelphia Opinion in Advisory Opinion 2012-13/05, concluding that a lawyer may not use deception to access the private portions of an unrepresented person’s social networking account. The Committee noted, “A lawyer has a duty to investigate but also a duty to do so openly and honestly, rather than through subterfuge.”

The Oregon State Bar Legal Ethics Committee concurred with these opinions as well in Opinion 2013-189, concluding that a lawyer may request access to an unrepresented party’s social networking website if the lawyer is truthful and does not employ deception.

These Committees consistently conclude that a lawyer may not use deception to gain access to an unrepresented party’s page, but a lawyer may request access using his or her real name. There is, however, a split of authority among these Committees. The Philadelphia and New Hampshire Committees would further require the lawyer to state the purpose for the request, a conclusion with which this Committee agrees. These Committees found that omitting the purpose of the contact implies that the lawyer is disinterested, in violation of Rule 4.3(a).

This Committee agrees with the Philadelphia Opinion (2009-02) and concludes that a lawyer may not use deception to gain access to an unrepresented person’s social networking site. A lawyer may ethically request access to the site, however, by using the lawyer’s real name and by stating the lawyer’s purpose for the request. Omitting the purpose would imply that the lawyer is disinterested, contrary to Rule 4.3(a).

5. Attorneys May Use Information Discovered on a Social Networking Website in a Dispute

If a lawyer obtains information from a social networking website, that information may be used in a legal dispute provided the information was obtained ethically and consistent with other portions of

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14 Id. at 2.
As mentioned previously, a competent lawyer has the duty to understand how social media works and how it may be used in a dispute. Because social networking websites allow users to instantaneously post information about anything the user desires in many different formats, a client’s postings on social media may potentially be used against the client’s interests. Moreover, because of the ease with which individuals can post information on social media websites, there may be an abundance of information about the user that may be discoverable if the user is ever involved in a legal dispute.

For example, in 2011, a New York court\(^\text{18}\) ruled against a wife’s claim for support in a matrimonial matter based upon evidence from her blog that contradicted her testimony that she was totally disabled, unable to work in any capacity, and rarely left home because she was in too much pain. The posts confirmed that the wife had started belly dancing in 2007, and the Court learned of this activity in 2009 when the husband attached the posts to his motion papers. The Court concluded that the wife’s postings were relevant and could be deemed as admissions by the wife that contradicted her claims.

Courts have, with increasing frequency, permitted information from social media sites to be used in litigation, and have granted motions to compel discovery of information on private social networking websites when the public profile shows relevant evidence may be found.

For example, in McMillen v. Hummingbird Speedway, Inc.,\(^\text{19}\) the Court of Common Pleas of Jefferson County, Pennsylvania granted a motion to compel discovery of the private portions of a litigant’s Facebook profile after the opposing party produced evidence that the litigant may have misrepresented the extent of his injuries. In a New York case, Romano v. Steelcase Inc.,\(^\text{20}\) the Court similarly granted a defendant’s request for access to a plaintiff’s social media accounts because the Court believed, based on the public portions of plaintiff’s account, that the information may be inconsistent with plaintiff’s claims of loss of enjoyment of life and physical injuries, thus making the social media accounts relevant.

In Largent v. Reed,\(^\text{21}\) a Pennsylvania Court of Common Pleas granted a discovery request for access to a personal injury plaintiff’s social media accounts. The Court engaged in a lengthy discussion of Facebook’s privacy policy and Facebook’s ability to produce subpoenaed information. The Court also ordered that plaintiff produce her login information for opposing counsel and required that she make no changes to her Facebook for thirty-five days while the defendant had access to the account.

Conversely, in McCann v. Harleysville Insurance Co.,\(^\text{22}\) a New York court denied a defendant access to a plaintiff’s social media account because there was no evidence on the public portion of the profile to suggest that there was relevant evidence on the private portion. The court characterized this request as a “fishing expedition” that was too broad to be granted. Similarly, in Trail v. Lesko,\(^\text{23}\) Judge R. Stanton Wettkick, Jr. of the Court of Common Pleas of Allegheny County denied a party access to a


plaintiff’s social media accounts, concluding that, under Pa. R.Civ.P. 4011(b), the defendant did not produce any relevant evidence to support its request; therefore, granting access to the plaintiff’s Facebook account would have been needlessly intrusive.

6. Attorneys May Generally Comment or Respond to Reviews or Endorsements, and May Solicit Such Endorsements Provided the Reviews Are Monitored for Accuracy

Some social networking websites permit a member or other person, including clients and former clients, to recommend or endorse a fellow member’s skills or accomplishments. For example, LinkedIn allows a user to “endorse” the skills another user has listed (or for skills created by the user). A user may also request that others endorse him or her for specified skills. LinkedIn also allows a user to remove or limit endorsements. Other sites allow clients to submit reviews of an attorney’s performance during representation. Some legal-specific social networking sites focus exclusively on endorsements or recommendations, while other sites with broader purposes can incorporate recommendations and endorsements into their more relaxed format. Thus, the range of sites and the manner in which information is posted varies greatly.

Although an attorney is not responsible for the content that other persons, who are not agents of the attorney, post on the attorney’s social networking websites, an attorney (1) should monitor his or her social networking websites, (2) has a duty to verify the accuracy of any information posted, and (3) has a duty to remove or correct any inaccurate endorsements. For example, if a lawyer limits his or her practice to criminal law, and is “endorsed” for his or her expertise on appellate litigation on the attorney’s LinkedIn page, the attorney has a duty to remove or correct the inaccurate endorsement on the LinkedIn page. This obligation exists regardless of whether the information was posted by the attorney, by a client, or by a third party. In addition, an attorney may be obligated to remove endorsements or other postings posted on sites that the attorney controls that refer to skills or expertise that the attorney does not possess.

Similarly, the Rules do not prohibit an attorney from soliciting reviews from clients about the attorney’s services on an attorney’s social networking site, nor do they prohibit an attorney from posting comments by others.24 Although requests such as these are permissible, the attorney should monitor the information so as to verify its accuracy.

Rule 7.2 states, in relevant part:

(d) No advertisement or public communication shall contain an endorsement by a celebrity or public figure.

(e) An advertisement or public communication that contains a paid endorsement shall disclose that the endorser is being paid or otherwise compensated for his or her appearance or endorsement.

Rule 7.2(d) prohibits any endorsement by a celebrity or public figure. A lawyer may not solicit an endorsement nor accept an unsolicited endorsement from a celebrity or public figure on social

24 In Dwyer v. Cappell, 2014 U.S. App. LEXIS 15361 (3d Cir. N.J. Aug. 11, 2014), the Third Circuit ruled that an attorney may include accurate quotes from judicial opinions on his website, and was not required to reprint the opinion in full.
media. Additionally, Rule 7.2(e) mandates disclosure if an endorsement is made by a paid endorser. Therefore, if a lawyer provides any type of compensation for an endorsement made on social media, the endorsement must contain a disclosure of that compensation.

Even if the endorsement is not made by a celebrity or a paid endorser, the post must still be accurate. Rule 8.4(c) is again relevant in this context. This Rule prohibits lawyers from dishonest conduct and making misrepresentations. If a client or former client writes a review of a lawyer that the lawyer knows is false or misleading, then the lawyer has an obligation to correct or remove the dishonest information within a reasonable amount of time. If the lawyer is unable to correct or remove the listing, he or she should contact the person posting the information and request that the person remove or correct the item.

The North Carolina State Bar Ethics Committee issued Formal Ethics Opinion 8, concluding that a lawyer may accept recommendations from current or former clients if the lawyer monitors the recommendations to ensure that there are no ethical rule violations. The Committee discussed recommendations in the context of LinkedIn where an attorney must accept the recommendation before it is posted. Because the lawyer must review the recommendation before it can be posted, there is a smaller risk of false or misleading communication about the lawyer’s services. The Committee also concluded that a lawyer may request a recommendation from a current or former client but limited that recommendation to the client’s level of satisfaction with the lawyer-client relationship.

This Committee agrees with the North Carolina Committee’s findings. Attorneys may request or permit clients to post positive reviews, subject to the limitations of Rule 7.2, but must monitor those reviews to ensure they are truthful and accurate.

7. Attorneys May Comment or Respond to Online Reviews or Endorsements But May Not Reveal Confidential Client Information

Attorneys may not disclose confidential client information without the client’s consent. This obligation of confidentiality applies regardless of the context. While the issue of disclosure of confidential client information extends beyond this Opinion, the Committee emphasizes that attorneys may not reveal such information absent client approval under Rule 1.6. Thus, an attorney may not reveal confidential information while posting celebratory statements about a successful matter, nor may the attorney respond to client or other comments by revealing information subject to the attorney-client privilege. Consequently, a lawyer's comments on social media must maintain attorney/client confidentiality, regardless of the context, absent the client’s informed consent.

This Committee has opined, in Formal Opinion 2014-200, that lawyers may not reveal client confidential information in response to a negative online review. Confidential client information is defined as “information relating to representation,” which is generally very broad. While there are

26 Persons with profiles on LinkedIn no longer are required to approve recommendations, but are generally notified of them by the site. This change in procedure highlights the fact that sites and their policies and procedures change rapidly, and that attorneys must be aware of their listings on such sites.
certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception.

As Rule 1.6 states:

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Thus, any information that an attorney posts on social media may not violate attorney/client confidentiality.

An attorney’s communications to a client are also confidential. In Gillard v. AIG Insurance Company, the Pennsylvania Supreme Court ruled that the attorney-client privilege extends to communications from attorney to client. The Court held that “the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.” The court noted that communications from attorney to client come with a certain expectation of privacy. These communications only originate because of a confidential communication from the client. Therefore, even revealing information that the attorney has said to a client may be considered a confidential communication, and may not be revealed on social media or elsewhere.

Responding to a negative review can be tempting but lawyers must be careful about what they write. The Hearing Board of the Illinois Attorney Registration and Disciplinary Commission reprimanded an attorney for responding to a negative client review on the lawyer referral website AVVO. In her response, the attorney mentioned confidential client information, revealing that the client had been in a physical altercation with a co-worker. While the Commission did not prohibit an attorney from

[29] Id. at 59.
responding, in general, to a negative review on a site such as AVVO, it did prohibit revealing confidential client information in that type of reply.

The Illinois disciplinary action is consistent with this Committee’s recent Opinion and with the Pennsylvania Rules. A lawyer is not permitted to reveal confidential information about a client even if the client posts a negative review about the lawyer. Rule 1.6(d) instructs a lawyer to make “reasonable efforts to prevent the inadvertent or unauthorized disclosure of . . . information relating to the representation of a client.” This means that a lawyer must be mindful of any information that the lawyer posts pertaining to a client. While a response may not contain confidential client information, an attorney is permitted to respond to reviews or endorsements on social media. These responses must be accurate and truthful representations of the lawyer’s services.

Also relevant is Rule 3.6, which states:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

This Rule prohibits lawyers from making extrajudicial statements through public communication during an ongoing adjudication. This encompasses a lawyer updating a social media page with information relevant to the proceeding. If a lawyer’s social media account is generally accessible publicly then any posts about an ongoing proceeding would be a public communication. Therefore, lawyers should not be posting about ongoing matters on social media when such matters would reveal confidential client information.

For example, the Supreme Court of Illinois suspended an attorney for 60 days for writing about confidential client information and client proceedings on her personal blog. The attorney revealed information that made her clients easily identifiable, sometimes even using their names. The Illinois Attorney Registration and Disciplinary Commission had argued in the matter that the attorney knew or should have known that her blog was accessible to others using the internet and that she had not made any attempts to make her blog private.

Social media creates a wider platform of communication but that wider platform does not make it appropriate for an attorney to reveal confidential client information or to make otherwise prohibited extrajudicial statements on social media.

8. Attorneys May Generally Endorse Other Attorneys on Social Networking Websites

Some social networking sites allow members to endorse other members’ skills. An attorney may endorse another attorney on a social networking website provided the endorsement is accurate and not misleading. However, celebrity endorsements are not permitted nor are endorsements by judges. As previously noted, Rule 8.4(c) prohibits an attorney from being dishonest or making

31 In Re Peshek, No. M.R. 23794 (Il. 2010); Compl., In Re Peshek, Comm. No. 09 CH 89 (Il. 2009).
misrepresentations. Therefore, when a lawyer endorses another lawyer on social media, the endorsing lawyer must only make endorsements about skills that he knows to be true.

9. Attorneys May Review a Juror’s Internet Presence

The use of social networking websites can also come into play when dealing with judges and juries. A lawyer may review a juror’s social media presence but may not attempt to access the private portions of a juror’s page.

Rule 3.5 states:

A lawyer shall not:
(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
(c) communicate with a juror or prospective juror after discharge of the jury if:
(1) the communication is prohibited by law or court order;
(2) the juror has made known to the lawyer a desire not to communicate; or
(3) the communication involves misrepresentation, coercion, duress of harassment; or
(d) engage in conduct intended to disrupt a tribunal.

During jury selection and trial, an attorney may access the public portion of a juror’s social networking website but may not attempt or request to access the private portions of the website. Requesting access to the private portions of a juror’s social networking website would constitute an ex parte communication, which is expressly prohibited by Rule 3.5(b).

Rule 3.5(a) prohibits a lawyer from attempting to influence a juror or potential juror. Additionally, Rule 3.5(b) prohibits ex parte communications with those persons. Accessing the public portions of a juror’s social media profile is ethical under the Rules as discussed in other portions of this Opinion. However, any attempts to gain additional access to private portions of a juror’s social networking site would constitute an ex parte communication. Therefore, a lawyer, or a lawyer’s agent, may not request access to the private portions of a juror’s social networking site.

American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 466 concluded that a lawyer may view the public portion of the social networking profile of a juror or potential juror but may not communicate directly with the juror or jury panel member. The Committee determined that a lawyer, or his agent, is not permitted to request access to the private portion of a juror’s or potential juror’s social networking website because that type of ex parte communication would violate Model Rule 3.5(b). There is no ex parte communication if the social networking website independently notifies users when the page has been viewed. Additionally, a lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.
This Committee agrees with the guidance provided in ABA Formal Opinion 466, which is consistent with Rule 3.5’s prohibition regarding attempts to influence jurors, and *ex parte* communications with jurors.

**10. Attorneys May Ethically Connect with Judges on Social Networking Websites Provided the Purpose is not to Influence the Judge**

A lawyer may not ethically connect with a judge on social media if the lawyer intends to influence the judge in the performance of his or her official duties. In addition, although the Rules do not prohibit such conduct, the Committee cautions attorneys that connecting with judges may create an appearance of bias or partiality.32

Various Rules address this concern. For example, Rule 8.2 states:

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

In addition, Comment [4] to Canon 2.9 of the Code of Judicial Conduct, effective July 1, 2014, states that “A judge shall avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending matters or matters that may appear before the court, including a judge who participates in electronic social media.” Thus, the Supreme Court has implicitly agreed that judges may participate in social media, but must do so with care.

Based upon this statement, this Committee believes that attorneys may connect with judges on social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to assure that there is no *ex parte* or other prohibited communication. This conclusion is consistent with Rule 3.5(a), which forbids a lawyer to “seek to influence a judge” in an unlawful way.

**IV. Conclusion**

Social media is a constantly changing area of technology that lawyers keep abreast of in order to remain competent. As a general rule, any conduct that would not be permissible using other forms of communication would also not be permissible using social media. Any use of a social networking website to further a lawyer’s business purpose will be subject to the Rules of Professional Conduct.

Accordingly, this Committee concludes that any information an attorney or law firm places on a social networking website must not reveal confidential client information absent the client’s consent. Competent attorneys should also be aware that their clients use social media and that what clients reveal on social media can be used in the course of a dispute. Finally, attorneys are permitted to use social media to research jurors and may connect with judges so long as they do not attempt to

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32 American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 462 concluded that a judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with the relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge’s independence, integrity, or impartiality, or create an appearance of impropriety.
influence the outcome of a case or otherwise cause the judge to violate the governing Code of Judicial Conduct.

Social media presents a myriad of ethical issues for attorneys, and attorneys should continually update their knowledge of how social media impacts their practice in order to demonstrate competence and to be able to represent their clients effectively.

**CAVEAT:** THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.
Exhibit C
Sample FRE 902(13) Certification of Authenticity
UNITED STATES DISTRICT COURT FOR THE
[__________] DISTRICT OF [__________]

[NAME(S)],
Plaintiff(s),
v.

FRE 902(13)
AUTHENTICITY
CERTIFICATION OF
[NAME] IN SUPPORT OF
[EVIDENTIARY ITEM]

[NAME(S)],
Defendant(s).

[STATE OF [STATE]
) ss.:]
COUNTY OF [COUNTY]
)

OR

[LANGUAGE NECESSARY TO COMPLY WITH LAWS OF THE COUNTRY IN WHICH
THE CERTIFIER SIGNS THE CERTIFICATION]]

[NAME], pursuant to 28 U.S.C. § 1746, hereby certifies as follows:

OR

[NAME], being duly sworn, deposes and says:

OR

[LANGUAGE NECESSARY TO COMPLY WITH LAWS OF THE COUNTRY IN
WHICH THE CERTIFIER SIGNS THE CERTIFICATION]:

1. I am [over 18 years of age, of sound mind, and otherwise competent to make this
Certification/[OTHER WITNESS COMPETENCY STANDARD]]. The evidence set out in this
Certification is based on my personal knowledge.

2. I am [CERTIFIER'S JOB TITLE/POSITION/DESCRIPTION OF CERTIFIER].

3. [CERTIFIER'S RELEVANT EDUCATION, TRAINING, AND EXPERIENCE].

4. I submit this Certification in support of [IDENTIFICATION AND DETAILED
DESCRIPTION OF EVIDENCE THAT CERTIFICATION SUPPORTS].

5. The ESI described above was generated by [NAME OR DESCRIPTION OF PROCESS OR
SYSTEM].
6. [DESCRIPTION OF HOW PROCESS OR SYSTEM WORKS].

7. [DESCRIPTION OF CERTIFIER'S FAMILIARITY OR EXPERIENCE WITH THE PROCESS OR SYSTEM].

8. [DESCRIPTION OF WHY THE PROCESS IS TRUSTED TO PRODUCE AN ACCURATE RESULT].

9. [DESCRIPTION OF HOW THE PROCESS OR SYSTEM WAS USED TO GENERATE THE SPECIFIC ESI].

10. [ADDITIONAL TESTIMONIAL STATEMENT(S)].

[I certify under penalty of perjury that the foregoing is true and correct. Executed on [DATE].

__________________________
[CERTIFIER'S NAME]]

OR

[__________________________
[CERTIFIER'S NAME]]

Sworn to before me this ___ day of [MONTH], [YEAR]

_____________________________
[NAME]
[Notary Public/[OTHER PERSON AUTHORIZED TO TAKE OATHS]]

OR

[CONTENT NECESSARY TO COMPLY WITH LAWS OF THE COUNTRY IN WHICH THE CERTIFIER SIGNS THE CERTIFICATION]
Exhibit D
Sample FRE 902(14) Certification of Authenticity
UNITED STATES DISTRICT COURT FOR THE [_____________] DISTRICT OF [_____________]

– X

[NAME(S)], : [__ Civ. ____ (___)(___)]
     Plaintiff(s), :

v. :

FRE 902(14)
AUTHENTICITY
CERTIFICATION OF
[NAME] IN SUPPORT OF
[EVIDENTIAL ITEM]

[NAME(S)], :
     Defendant(s). :

– X

[[STATE OF [STATE] )
    ) ss.:]

COUNTY OF [COUNTY] )]

OR

[LANGUAGE NECESSARY TO COMPLY WITH LAWS OF THE COUNTRY IN WHICH
THE CERTIFIER SIGNS THE CERTIFICATION]]

[NAME], pursuant to 28 U.S.C. § 1746, hereby certifies as follows:

OR

[NAME], being duly sworn, deposes and says:

OR

[LANGUAGE NECESSARY TO COMPLY WITH LAWS OF THE COUNTRY IN WHICH
THE CERTIFIER SIGNS THE CERTIFICATION]:

1. I am [over 18 years of age, of sound mind, and otherwise competent to make this
Certification/[OTHER WITNESS COMPETENCY STANDARD]]. The evidence set out in this
Certification is based on my personal knowledge.

2. I am [CERTIFIER'S JOB TITLE/POSITION/DESCRIPTION OF CERTIFIER].

3. [CERTIFIER'S RELEVANT EDUCATION, TRAINING, AND EXPERIENCE].

4. I submit this Certification in support of [IDENTIFICATION AND DETAILED
DESCRIPTION OF ESI THAT CERTIFICATION SUPPORTS].
5. The ESI described above ("Copied ESI") was copied from [NAME OR DESCRIPTION OF ELECTRONIC DEVICE, STORAGE MEDIUM, OR FILE].

6. I accessed and compared the [hash value/OTHER DIGITAL IDENTIFIER] for the Copied ESI and the corresponding original file[s] by [DESCRIPTION OF HOW THE CERTIFIER ACCESSED AND COMPARED THE DIGITAL IDENTIFIERS OF THE COPIED AND ORIGINAL ESI].

7. The Copied ESI's digital identifier[s] [is/are] identical to the original [file's/files'] digital identifier[s].

8. [ADDITIONAL TESTIMONIAL STATEMENT(S).]

[I certify under penalty of perjury that the foregoing is true and correct. Executed on [DATE].

[CERTIFIER'S NAME]]

OR

[CERTIFIER'S NAME]

Sworn to before me this ___ day of [MONTH], [YEAR]

[NAME]
[Notary Public/[OTHER PERSON AUTHORIZED TO TAKE OATHS]]

OR

[CONTENT NECESSARY TO COMPLY WITH LAWS OF THE COUNTRY IN WHICH THE CERTIFIER SIGNS THE CERTIFICATION]
Emoji Law: Are you Prepared for Emojis, Emoticons and Hashtags in Litigation?

Session 305 Friday, November 8th, 2019 from 1:30 PM–2:45 PM
PANELISTS

Janice Jabido
Pratt & Whitney
Intellectual Property Counsel

Edward T. Kang
Kang Haggerty & Fetbroyt LLC
Managing Member

Kandis Kovalsky
Kang Haggerty & Fetbroyt LLC
Associate

Elaine Pascua
TrueBlue Inc.
Senior Corporate Counsel

Ireno Reus III
The Reus Law Firm
Attorney
What are we talking about?
Audience Poll

What emoji is this?
Definition of Emoji

The Oxford English Dictionary & Unicode® Technical Standard

1. Originates from Japanese: “e” means picture and “moji” means letter or character.
2. A small digital image or icon used to express an idea or emotion. Emoji are pictographs (pictorial symbols) that are typically presented in a colorful cartoon form and used inline in text. They represent things such as faces, weather, vehicles and buildings, food and drink, animals and plants, or icons that represent emotions, feelings, or activities.
3. The Oxford English Dictionary definition has been frequently adopted by the courts but is not universally accepted.
Emojis’ Evolution

• The word for personalized animated images has its roots in 14th-century Japan: women of the Japanese imperial court developed a kind of euphemistic language called “nyobo kotoba.” For many terms, especially those for food or clothing, the women would add “-moji” to a word’s opening syllable – for instance, referring to sushi as “su-moji,” roughly equivalent to calling it “the ‘su’ word.”

• In the U.S., the “-moji” trend took off in March 2015, when a comic creation app called Bitstrips released customizable digital stickers called “bitmoji.”

• At the end 2015, Kim Kardashian jumped on the “moji” trend by launching her own set of personalized emoji known as “Kimoji.”
Definition of Emoticon

 Unicode® Glossary

A symbol (vs. an image) added to text to express emotional affect or reaction—for example, sadness, happiness, joking intent, sarcasm, and so forth. Emoticons are often expressed by a conventional kind of "ASCII art," using sequences of punctuation and other symbols to portray likenesses of facial expressions. In Western contexts these are often turned sideways, as :-) to express a happy face; in East Asian contexts other conventions often portray a facial expression without turning, such as ^^-^ . Rendering systems often recognize conventional emoticon sequences and display them as colorful or even animated glyphs in text. There is also a set of dedicated pictographic symbols—mostly representing different facial expressions—encoded as characters in the Unicode Standard.

: P
Definition of Hashtag

The Oxford English Dictionary

Born: August 23, 2007 (Twitter)

A word or phrase preceded by a hash sign (#), used on social media websites and applications, especially Twitter, and now Instagram, to identify messages on a specific topic. This metadata tag allows users to apply dynamic, user-generated tagging, which allows users to easily find messages on a specific topic.

#KHFOnEmojisandtheLaw
Why is this important?
The Oxford English Dictionary & Emoji

The word emoji has been in Oxford Dictionaries since 2013.

Oxford’s 2015 Word of the Year was the “Face With Tears of Joy” emoji, also known as LOL Emoji or Laughing Emoji.

This emoji comprised nearly 20% of all emoji use in the U.S. and U.K.

The runner-up in the U.S., comprising 9% of all emoji use, was the kissy face emoji.
A Picture is Worth a Thousand Words…

Casper Grathwohl, president of Global Business Development and Dictionaries Division at Oxford University Press, explained that their choice reflects the walls-down world that we live in. “Emoji are becoming an increasingly rich form of communication, one that transcends linguistic borders,” he said in a statement. Oxford Dictionaries’ choice for the word of the year, he added, embodies the “playfulness and intimacy” that characterizes emoji-using culture.

Oxford Dictionaries Word of the Year 2015 is...

That’s right – for the first time ever, the Oxford Dictionaries Word of the Year is a pictograph: 😂, officially called the ‘Face with Tears of Joy’ emoji, though you may know it by other names. There were other strong contenders from a range of fields, outlined below, but 😂 was chosen as the ‘word’ that best reflected the ethos, mood, and preoccupations of 2015.
Over 5 billion emojis are sent each day on Facebook Messenger.

95% of Internet users have sent an emoji at some point.

About 4 billion people can communicate via emojis, quadruple the number who share the next most common language, Mandarin.
The Heart Emoji

The Global Language Monitor ("GLM") dubbed the heart emoji the most commonly used word of 2014. GLM analyzed social media, blogs, and 275,000 print and electronic publications.

The heart emoji was used billions of times a day around the globe.
Use of Emojis on Instagram

As of June 2018, Instagram had 1 billion active monthly users worldwide.

Just one month following the introduction of the iOS emoji keyboard (October 2011), 10% of text on Instagram contained emoji. As of March 2015, nearly half of text contained emoji. As of Fall 2018, more than half the posts on Instagram contain emoji.

In September 2018, Instagram added personalized emoji shortcuts to its app. Above the keyboard are a user's most frequently used emojis to allow for quicker commenting.
Other Statistics

• 92% of the online population uses emojis.

• 2.3 trillion mobile messages incorporated emojis in 2016.

• According to a 2015 study conducted by Adweek, the Silent Generation, Baby Boomers and Generation X frequently employ emojis in their online conversations, as well, with Millennials and Generation Z leading by only 4-10 percent.

Almost 60% of women report using emojis frequently, while only 41% of men reporting the same.

Frequent users believe emojis express their feelings more accurately than words (%)

<table>
<thead>
<tr>
<th></th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>30-35 Years Old</td>
<td>84</td>
<td>75</td>
</tr>
<tr>
<td>35+ Years Old</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

With that idea in mind, 500 emoji users were shown digital advertisements and asked to judge the ad using an emoji.
World Emoji Day

Est. July 17, 2014

An unofficial holiday celebrated on July 17, the date Apple shows on its calendar emoji, has increased in popularity since its conception in 2014. On the 2019 #WorldEmojiDay, various emojis were released by Apple and the hashtag trended on Twitter.

Example of hashtag being used by The Weather Channel.

New emoji released by Apple focused greater human representation.
Controversies with Emojis
Emojis Are Easily Misunderstood
Clorox Controversy

New emojis are alright but where’s the bleach.

Wish we could bleach away our last tweet. Didn't mean to offend - it was meant to be about all the 🌞🌧️🍷 emojis that could use a clean up.

8:17 PM - Apr 8, 2015

635 people are talking about this
Unicode Consortium Rejects White Wine Emoji

• In 2018, wine enthusiasts began petitioning Unicode for a White Wine Emoji (there is already a Red Wine Emoji)

• On May 11, 2018, Kendall-Jackson Winery submitted a 19-page proposal for support of the addition of the White Wine Emoji

• August 20, 2019 – Unicode did not adapt to include a White Wine Emoji

• Maggie Curry, director of marketing at Kendall-Jackson does not plan to stop trying, noting that white wine is a necessary addition based on “global use, economy, culture and history.” [Link to Blog Update](https://www.kj.com/blog/

#WhiteWineEmoji
The Gun Emoji

From iOS 9.3 to iOS 10

2010

August 2016 (Current)

#DisarmTheiiPhone

#NotOneMore
The Gun Emoji

Appearance Across Operating Systems

<table>
<thead>
<tr>
<th>Year</th>
<th>Apple</th>
<th>Google</th>
<th>Microsoft</th>
<th>Samsung</th>
<th>Facebook</th>
<th>Twitter</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td><img src="image1.png" alt="Image" /></td>
<td><img src="image2.png" alt="Image" /></td>
<td><img src="image3.png" alt="Image" /></td>
<td><img src="image4.png" alt="Image" /></td>
<td><img src="image5.png" alt="Image" /></td>
<td><img src="image6.png" alt="Image" /></td>
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<tr>
<td>2014</td>
<td><img src="image7.png" alt="Image" /></td>
<td><img src="image8.png" alt="Image" /></td>
<td><img src="image9.png" alt="Image" /></td>
<td><img src="image10.png" alt="Image" /></td>
<td><img src="image11.png" alt="Image" /></td>
<td><img src="image12.png" alt="Image" /></td>
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<td>2015</td>
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<td><img src="image14.png" alt="Image" /></td>
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<td><img src="image17.png" alt="Image" /></td>
<td><img src="image18.png" alt="Image" /></td>
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<tr>
<td>2016</td>
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<td><img src="image20.png" alt="Image" /></td>
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<tr>
<td>2017</td>
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<tr>
<td>2018</td>
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<td><img src="image36.png" alt="Image" /></td>
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<td>2019</td>
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<td><img src="image41.png" alt="Image" /></td>
<td><img src="image42.png" alt="Image" /></td>
</tr>
</tbody>
</table>

Emojipedia Tweets

- "Pistol changed to a toy gun emoji in iOS 10 beta 4 [emojipedia.org/pistol/]
  9:20 PM - Aug 1, 2016
  885 621 people are talking about this"

- "New! Google is updating the pistol emoji (🔫) on Android, starting today [blog.emojipedia.org/google-updates/]
  5:42 PM - Apr 24, 2018
  169 82 people are talking about this"
The Role of Hashtags and Emojis in Diversity
“People connect with emoji on a personal level—they use them to show their smiles and their hearts...It can be a pretty intimate connection, which is why people want to look at emoji and see the things that are meaningful in their lives.”

- Tyler Schnoebelen

Tyler Schnoebelen, pictured above, is the founder of Idibon, a text analytics company, who also wrote his Stanford Doctoral thesis on emoticons.
Race

• April 2015, iOS 8.3 – Redesigned Emoji Keyboard

• 300 New Characters

• Previous Emoji keyboard version was lacking because there was just an Asian man wearing a gua pi mao cap and an Indian man wearing a turban, but there were no black people represented

• 2019 – Unicode approved 71 interracial couple emojis in response to Tinder campaign

# RepresentLove   #BlackLivesMatter   #TakeAKnee   #Ferguson
Gender

- September 2016, iOS 10
  - Sport emojis that were previously only one gender (typically male) are now offered in both male and female forms
- December 2016, iOS 10.2
  - Brought more professions for both male and female emojis
- 2017 brought the addition of a breastfeeding woman and a gender neutral emoji

#MeToo  #HeForShe  #WomensMarch  #EverydaySexism
LGBTQ+

• As of March 2016, USA had embraced LGBT emojis with open arms and the figures showed that people in the USA used them 30% more, on average, than users from other countries (followed in second place by Canada and thirdly Malaysia)

• iOS 8.3 included same-sex parents

#LoveWins
Disabilities

Apple wants emojis to better represent people with disabilities. In a 2018 proposal sent to the Unicode Consortium - the nonprofit organization that sets the global standard for emojis - the company advocated for 13 new additions.

The pictures emojis were approved by Unicode and will be available Fall 2019.

#IceBucketChallenge
Religion & Culture

#IStandWithAhmed  #StopFundingHate  #RefugeesWelcome
Why should lawyers care about emojis?
Why Lawyers Should Care About Emojis

Today, there are close to 3,000 emojis in the Unicode Standard. As such, people can communicate a lot more through emojis, if they choose. And, the data shows this is what people are choosing.
Emojis in Lawsuits

• Courts are increasingly having to interpret how people have used emojis
• Most prevalent in sexual harassment, wrongful termination and criminal cases
• Mentions of emojis in federal discrimination lawsuits doubled from 2016 to 2017
• Number of reported cases dealing with emojis increased every year since 2015
• 57 reported cases in 2018
• More than 50 reported cases so far in 2019
Emojis and Ethics

ABA Model Rule of Professional Conduct 1.1

Standard of Competence was modified in 2012 to include developments in technology

Comment 8: To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis Added)

ADOPTED BY THE FOLLOWING STATES (36)

- Alaska
- Arizona
- Arkansas
- Colorado
- Connecticut
- Delaware
- Florida
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas
- Kentucky
- Louisiana
- Massachusetts
- Minnesota
- Missouri
- Montana
- Nebraska
- New Hampshire
- New Mexico
- New York
- North Carolina
- North Dakota
- Ohio
- Oklahoma
- Pennsylvania
- Tennessee
- Texas
- Utah
- Vermont
- Virginia
- Washington
- West Virginia
- Wisconsin
- Wyoming

*May 2019 – Michigan considering
Technological Competency

Some states are requiring CLE credits in approved technology programs.

“Lawyers must be aware of how these websites operate and the issues they raise in order to represent clients whose matters may be impacted by content posted on social media websites. Lawyers should also understand the manner in which postings are either public or private. As the use of social media expands, so does its place in legal disputes. This is based on the fact that many clients seeking legal advice have at least one account on a social networking site. While an attorney is not responsible for the information posted by a client on the client’s social media profile, an attorney may and often should advise a client about the content on the client’s profile.”

- Pennsylvania Formal Ethics Opinion 2014-300, “Ethical Obligations for Attorneys Using Social Media” (Emphasis added)
Hashtags Influencing the Legal Industry

#Legal   #LawTwitter   #PracticeTuesday
#AppellateWriter   #AppellateTwitter
#InHouseTwitter   #LRWProfs
#LitigationTwitter   #TrialTwitter
#LadyLawyerDiaries
A Twitter movement that began in March 2017, seeking to remove the clutter in citations and establish a new parenthetical (cleaned up) for citing legal authorities to indicate the removal of extraneous brackets, ellipses or nested quotations.Used by judges in opinions in 8 U.S. Circuit Courts of Appeals – D.C., 2nd, 4th, 5th, 6th, 7th, 8th, 9th. Used in filings in SCOTUS, every federal appellate court, and many federal district courts and state courts across the country, as well as many law reviews, including NYU, Penn and Georgetown.

Will Justice Gorsuch be the first SCOTUS justice to implement cleaned up?

Legal writing is “a lot of banging your head on the computer monitor.” – Justice Kagan

(some emphasis added; citations, internal quotation marks, and brackets omitted)
#CleanedUp

(cleaned up) March 20, 2017 - July 30, 2019

Credit to Twitter User @scotusplaces – Read Article on Data here https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2935374
Discussion of Recent Cases
SCOTUS—First Use of Hashtag in Opinion


“Would a ‘Support Our Troops’ shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a ‘#MeToo’ shirt, referencing the movement to increase awareness of sexual harassment and assault?”

— Chief Justice Roberts

Hashtag activism clothing is permitted while voting.
Liability for Defamation by Hashtag


#Red #RedDragon #MadeInChina #SinkingRedShip #Desperation

VS.

#USA #MadeInTheUSA

First case in the U.S. where a court imposed liability for defamation based on a hashtag.
Employment Cases

Employers Rely on Employees’ Use of Emojis to Defeat Discrimination and Harassment Claims


Employment Cases

Employees Rely on Emojis to Support Claims Against Employers


Email: :-) did Ray chat with you about Elaina?

Response: Yes he did. Thank you for your help. That deserved a big :))!!!
Emoji Interpretation

EMOJIS MATTER


EMOJIS DON’T MATTER

Emoji-Cide

• Three emojis may be evidence in double-homicide trial.

• Prosecutors believe three emojis, found by Pittsburgh police in a text message before gunfire broke out in the neighborhood of Sheraden, can help prove the person who sent it was more than a shooting victim.
The comments contained emojis of rodents. The later comments, following T.R.'s other name, “[T.W.]” included gunshot emojis, gun emojis, and the statement, “share my post.” The four gunshot emojis and three gun emojis were evidence Smith was seeking to encourage other viewers of his Facebook page to shoot T.R. His comments included three emojis, each representing a hand with the thumb and forefinger touching and the other fingers pointed up, representing the letter “b,” a symbol of the Bacc Street Crips. The jury could have reasonably concluded from the photograph and comments that Smith intended to communicate that T.R. was a despised female who had told on Washington, and she was therefore a “rat” or snitch whom members of the gang should kill to assure she did not testify against Washington at his trial.
Criminal Law – Emojis and Criminal Intent


- If I get a gun, it’s fact I’m spraying [five laughing emojis] everybody better duck or get wet
- I’m dead ass [three laughing emojis] not scared to go to jail for shooting up FHS warning everybody duck
- [Expletive] we ain’t fighting I’m bringing a gun [six laughing emojis]
- I feel sorry for whoever got with 1st period [four laughing emojis]
- And wtf lol tf you getting popped first fr try me [laughing emoji]
- Y’all gonna make me go to jail before I step foot on campus [laughing emoji]
- I really wanna a challenge shooting at running kids not fun [laughing emoji]
- Lmao I’m really jk tho [three laughing emojis]
Criminal Law – Emojis and Criminal Intent


JS v. Grand Island Public Schools, 899 N.W.2d 893, 297 Neb. 347 (2017)

“Tomorrow gonna be hella fire [fire emoji] be there [school emoji]”

“Don’t show up to school tomorrow [gun emoji]”
Emojis and Intent in Corporate Disputes

*Shawev. Elting*, 157 A.3d 152 (Del. 2017)

“Was next to Liz on the plane to Paris and she switched seats :)”
Emojis as Evidence of Acceptance Offer

A series of emojis sent by a couple to a landlord in response to an apartment listing were evidence of reliance, a general principle of contract law.
Emojis in Judicial Opinions

Judges often omit emojis and emoticons in their opinions


Problematic

Takeaway: Judges should include emojis in their opinions, if possible.
Emojis in the Workplace
Houston Rockets Tweet

A Tweet Sent Out During Game Against the Mavericks Resulting in Firing

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

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Our Tweet earlier was in very poor taste & not indicative of the respect we have for the @dallasmavs & their fans. We sincerely apologize.

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Replying to @HoustonRockets
@HoustonRockets Not very classy but we still wish you guys the best of luck in the next round.

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Employee Emoji Policy

Is this something that companies need?

• Emoji usage can be used as evidence in numerous workplace claims – from hostile work environment to discrimination.

• Employers can be held liable for sexual harassment claims conducted through social media outlets.
Employee Emoji Policy

Is this something that companies need?

• Employers should maintain strong electronic communication policies with reference to anti-harassment and anti-discrimination policies.

• Ensure anti-harassment and anti-discrimination policies cover text messages and symbols like emojis.

• Employers should train employees about how the use of emojis can potentially alter the intent of the communication such that the communication may deemed offensive or harassing to the recipient.
Should employees be discouraged from using emojis with each other?

On July 20, 2019, The Wall Street Journal published an article titled "Yes, You Actually Should Be Using Emojis at Work."

Emojis and Emoticons at Work
A majority of executives say they do not belong in a professional setting

How appropriate do you think it is to use emojis and emoticons when communicating with the following individuals?

- Clients and customers
- Boss
- Colleagues

<table>
<thead>
<tr>
<th></th>
<th>Not at all appropriate</th>
<th>Somewhat appropriate</th>
<th>Very appropriate</th>
<th>Don't know</th>
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<tbody>
<tr>
<td></td>
<td>59%</td>
<td>33%</td>
<td>5%</td>
<td>1%</td>
</tr>
<tr>
<td>Not too appropriate</td>
<td>19%</td>
<td>20%</td>
<td>3%</td>
<td>1%</td>
</tr>
<tr>
<td></td>
<td>40%</td>
<td>33%</td>
<td>5%</td>
<td>1%</td>
</tr>
</tbody>
</table>

Source: The Creative Group survey of more than 400 U.S. marketing and advertising executives. Some responses do not total 100 percent due to rounding.
Inter-Office Communication

Example: A text message exchange between an HR Manager and an employee’s supervisor. The employee, Todd, is terminated two days after the exchange and files a suit alleging violations of the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). A key piece of evidence in this lawsuit is the supervisor’s response, why?
Inter-Office Communication

Should employees be discouraged from using emojis to communicate?

“Todd argues that this crude response proves that his supervisor harbors an unlawful animus towards those who take family and medical leave and those who are disabled. After all, instead of just responding “we should terminate Todd,” the supervisor went out of his way to creatively combine some images to make the termination decision seem humorous. “Game over” is clearly unprofessional and not very sympathetic. It is a piece of “evidence” the company’s lawyers will now have to try to explain away.”
Top Chef Mika Isabella’s Inappropriate Use of Corn

Emojis in the World of #MeToo
How can in-house counsel protect their companies?
Evidentiary Issues
Discovery of Emojis
Emojis as Evidence

- Authentication/Foundation
  FRE 901
- Admissible/Relevance
  FRE 401, 403
- Hearsay
  FRE 801, 802
- Non-Hearsay
  FRE 801
- Hearsay Exclusions and Exceptions
  FRE 803, 804
How should emojis be presented in court?
The Silk Road Trial


Emoticons admissible!

“I’m so excited and anxious for our future, I could burst 😊”
Emojis and the Best Evidence Rule
Do emojis require expert witnesses?
Emojis and Juries: Considerations for Jury Trials
Federal Rules of Evidence: 902(13) and 902(14)

Amendments Effective December 1, 2017

Rule 902(13): Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

Rule 902(14): Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).
Types of Evidence

• GPS Data
• Cell Phone Photos
• Text Messages
• Email

• Computer Hard Drive
• Other Electronic Evidence
Purpose of New Rules

Allowing easier authentication of electronic evidence
• Eliminates need for a separate authentication witness
• Shifts burden to other party to raise authenticity issues

Rule only addresses authentication of the evidence
• Does not establish accuracy
• Does not establish relevance
• Does not establish ownership or control
• Does not overcome any hearsay objections
Self-Authentication of ESI Under Federal Rule of Evidence 902

In a recent annual Federal Bench Bar Conference in Philadelphia, a U.S. District Court judge warned of the perils of allowing clients to perform their own data and document collection.

By Edward T. Kang and Kandis Kovolsky | June 21, 2018 at 12:02 PM