

“A Lawyer’s Guide to Emoji: What you need to know.”

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PART 1. THE HISTORY OF EMOJI

I. CAVE ART TO EMOJI.

It is believed that humans began using language approximately 100,000 years ago. For information to pass from one generation to another it had to be memorized and told repeatedly through the years.¹

Cave art consists of paintings using either red or black pigment. Hand stencils are among the earliest known cave art and animal figures represent the majority that have been found. Cave art is generally considered to have some religious function, but the exact meaning is unknown. We know that Paleolithic cave art found in Spain, Portugal and France are between 35,000 and 66,000 years old.

Recently hand stencils have been found in Indonesia and they are believed to be the oldest known examples of figurative art anywhere.² In the Americas [Mud-Glyphy caves in Southeastern U.S. and Mayan caves in Mexico], Australia [Koonalda caves in South Australia] and Asia [Kalimantan caves in Borneo, Indonesia], the paintings are found in deep caves, almost completely in the dark, unlike those found in Europe.³ It is believed this cave art was not really used as a form of communication, but had some religious significance.

In Mesopotamia approximately 5500 years ago, there was a need to keep track of goods being traded. The Sumerians began engraving symbols in clay tablets. At the same time, writing may have been invented independently in China and in Mesoamerica. At roughly the same time,

¹ OpenLearn Free Educational Course: A brief history of communication: hieroglyphics to emojis, <https://www.open.edu/languages/brief-history-hieroglyphics-emojis/content-section-4> “The birth of writing.”

² Reconsidering History:40,000-Year-Old Asian Cave Paintings Stun Archaeologists, Jack Phillips, http://www.theepochtimes.com/reconsidering-history-40,000-year-old-asian-cave-paintings-stun-archaeologists_2863474.html.

³ A brief history of communication: hieroglyphics to emojis, “Writing”, Joshua J. Mark, 28 April 2011.

the Egyptians had a similar approach to record commodities.⁴ Of the systems used to track goods, only Mesopotamian cuneiform script can be connected with no breaks to the present. First, there were clay tokens used for accounting. Then, the tokens were transformed into two dimensional pictographic signs used for accounting. Finally, phonetic signs were used to transcribe the name of individuals, at which point the writings began to emulate spoken language and become applicable to all fields of human experience.

The invention of writing paved the way for the accumulation of knowledge with greater ease and accuracy. Writing facilitated the transfer of this knowledge from place to place and from one generation to the next. The earliest writing systems were pictographic. They were drawings representing things. A picture of a tree was a tree. Eventually, the drawings were combined with other drawings to create ideograms. For example, a picture of a bird and an egg represented fertility. Hieroglyphics allowed a person's name to be written by breaking it into component sounds and then use symbols that corresponded to each sound.

Around 2000 BCE, an alphabet was invented somewhere in Egypt or Palestine. English speakers only need to know fifty-two (52) alphabetic signs, along with numbers and punctuation and several other symbols to use the language. Hieroglyphics on the other hand required the users to know over 600 characters.⁵

Writing has a major disadvantage over speech. It does not allow the writer to express emotion and mood in a direct way. All the essentials of speech – tone, facial expression and hand gestures – are all omitted in writing.⁶

⁴ *Id.*

⁵<http://www.open.edu/openlearn/languages/brief-history-communication-hieroglyphics-emojis/content-section-4.3>
pg. 25, 18 Dec2018.

⁶ *Id.* at 26.

The typewriter was invented in the late 19th century and the QWERTY keyboard had virtually no ornamental characters at all. In 1982, a professor at Carnegie Mellon University is credited with coming up with the emoticon [:-)], the direct ancestor of the emoji.⁷ In 1986, a Japanese message board user, Yasushi Wakayashi began using (^ -^) to sign off on message. Others were added over time.⁸

Fast forward to 1999, again in Japan, and an engineer named Shigetaka Kurita designed a group of 176 icons for his company's internet system. This was the beginning of emojis. We first need to understand the distinction between emoticons and emojis.⁹ An emoticon is a typographic display of a facial representation, used to convey emotion in a text only medium. Emoticons are normally created by using a sequence of keyboard symbols.¹⁰

Emojis, on the other hand, are actual pictures, which are treated by computers as letters from a non-western language. What this means is that the software must support them. If not, all that will display is a placeholder icon or simply a blank space. Each company must provide its own interpretation of what the emoji should look like. And unfortunately, they do not always agree.

In 1987, Apple and Xerox developed a single universal set of characters. They named it "Unicode." Unicode Consortium has codified almost all forms of writing known to humanity. In 2007, a draft of a unified emoji character set was created, and by 2010, a set of 722 emojis were added to the other characters already in the standard.¹¹

⁷ Emoji, part 2: what went before, <http://shadycharacters.co.uk/2018/emoji-part-2-emoticons/>

⁸ *Id.*

⁹ Emoji, part 1: in the beginning, <http://shadycharacters.co.uk/2018/08/emoji-part-1-in-the-beginning/>

¹⁰ The History of Emoticons and Emojis, Andrei Stefan, <http://design.tutsplus.com/tutorials/the-history-of-emoticons-and-emojis-cms-31399>.

¹¹ <https://shadycharacters.co.uk/2018/08/emoji-part-1-in-the-beginning/>.

In 2014, Unicode added 250 emoji characters. More recently, Apple introduced a new subset of emoji called animojis, which can mimic the facial expressions of a person by using face tracking technology.

Emojis are a feature of our language. They are used to convey emotional context that words alone cannot do. Research says that there are over 41 billion electronic messages and 6 billion emojis sent each day.¹² They can be used to completely change the meaning of sentence by adding a winking or smiling face. All this mean is that emojis have evidentiary meaning and they cannot be disregarded or omitted when considering communication meaning. The problem with emojis is that there is no standard meaning or definitions. As a result, they have presented some challenges in the courtroom.

PART 2 – EMOJI AND THE LAW

II. INTENT.

Intent is an element in many legal actions, both civil and criminal. In the civil arena, intent is an element in claims of harassment, discrimination and fraud. Emojis are used to give meaning or intent to what is written.¹³ “It’s hard to inject emotion into an email. With email, you can’t see a person’s facial expression and saying something jokingly can be taken the wrong way.”¹⁴

In a recent published paper, researchers from Colombia explain how electrical activity in the brain shows that people process emojis in the same area of the brain where they process faces.

¹² Erin Janssen, *Hearsay in the Smiley Face: Analyzing the Use of Emojis as Evidence*, 49 St. Mary’s L.J. 699, 705 (2018).

¹³ John G. Browning and Gwendolyn Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. 34 (October 2015).

¹⁴ Francesca Fontana, A Quick Guide to Emojis in the Office, <http://www.wsj.com/articles/a-quick-guide-to-emojis-in-the-office-11563595270>

“The key is that emojis often include the most salient features for visually conveying human emotion – eyes, mouths, sometimes eyebrows.”¹⁵

“Emojis also make messaging more efficient by conveying the intent and context that’s otherwise missing from a message...”¹⁶ Like other words and symbols, emojis have multiple meanings. For example, the 100 emoji [👉] “is commonly used as a shorthand for 100%, with the usage meaning keep it real or similar sentiment.”¹⁷ The 100 emoji [👉] can also “be used to express pride or general acceptance of an idea and, when used on Snapchat, the 100 emoji [👉] appearing next to the fire emoji [🔥] indicates a 100 day Snapstreak.”¹⁸

Unicode has a short description of all the emojis it defines, but those definitions are not definitive or all inclusive. New emojis are coming into existence all the time and their meaning will take time to reach a consensus recognition. Face emojis are a unique problem, as their use allows the sender to send mixed messages, such as sarcasm or humor. Face emojis, just like actual facial expressions, are not easily decoded and, as such, are prone to misinterpretation or misunderstanding.

In addition to the problems identified above, each platform has depiction diversity. This problem alone can cause misunderstanding. Another difficulty is an emoji can mean something completely different to people from different countries. Generally, the reason for a message will provide insight into both the intention and meaning behind the use of a particular emoji.

The most misconstrued emoji is Microsoft’s smiley face with open mouth and tightly shut eyes [😬]. Apple’s unamused face was thought to mean disappointment, depression, unimpressed

¹⁵ <https://www.wsj.com/articles/yes-you-actually-should-be-using-emojis-at-work-11563595262>.

¹⁶ *Id.*

¹⁷ Diana C. Manning and Kathryn B. Rockwood, *Emoticons and Emojis, Hazards to Be Aware of in Discovery*, 317-APR N.J. Law. 68, 71-72, citing *Hundred Points*, Emojipedia, <http://emojipedia.org/hundred-points-symbol/>.

¹⁸ *Id.*

and suspicious [🙄]. One suggestion – to solve the problem of depiction diversity – is to have more standardization of images on the various platforms.

As discussed more fully below, when cases have evidentiary issues involving emojis, it cannot be assumed that one’s personal interpretation of the emoji “equates to the most commonly accepted interpretation.”¹⁹ In many cases, the jury will need to be made aware of the “multiple definitions or slang implications attributable to the same emoji, as this could impact the interpretation analysis.”²⁰

III. EMOJI AS EVIDENCE.

With more than 3,000 emojis²¹ available and approximately ninety-two percent (92%) of the online population using emojis, one-third (1/3rd) of whom use them daily, it is no wonder that emojis have begun appearing in court rooms across the country.²² In fact, “emoji” is becoming the world’s fastest growing form of communication.²³ The emoji and its predecessor, the emoticon, can provide context, clarify meaning and even change what appears to be a serious or threatening statement into a joke simply by adding a “winking, “laughing” or “smiley” face; and thus, they have evidentiary value.²⁴ Therefore, attorneys who dismiss emojis as mere cartoonish symbols, do so at their own peril.²⁵

Indeed, attorneys who want factfinders to fully grasp online, email and text conversations “cannot afford to leave [emojis] out or not address them as a vital part of a larger piece of

¹⁹ *Id.* at 71-72.

²⁰ *Id.*

²¹ For purposes of this portion of the paper, the term “emoji” is sometimes used to describe not only a single character face or object, but also its “predecessor,” the emoticon, which consists of several keyboard characters.

²² ABA Webinar, Kang, Haggerty & Fetbroyt, LLC, “Emojis Speaking Louder than Words? The Import of Emojis, Emoticons and Hashtags as Evidence at Trial and Beyond # 😊” March 2019).

²³ *Id.*

²⁴ Browning and Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. at p. 1.

²⁵ Tanya M. Kiatkulpiboone and Andrea W. Paris, *Emoji and Deciphering Intent in the Digital Age*, 59-JUN Orange County Law 42, 43 (June 2017).

evidence.”²⁶ It is also dangerous to allow jurors to presume the meaning of, or intent behind, a party’s use of certain emojis, particularly since they can be subject to multiple reasonable interpretations; and thus, attorneys must do their best to persuade judges to allow evidence of their intent/meaning to be presented to the jury.²⁷ The cases addressed below show that, at least some, courts have begun to recognize the evidentiary significance of emojis in both the criminal and civil context, as well as the need to address “emoji evidence” in court proceedings, including how emojis should be interpreted.²⁸

A. Emojis in Criminal Cases.

1. *United States v. Ulbricht*.

To date, perhaps no case demonstrates the evidentiary significance of emojis in the criminal context more than the high-profile trial of Ross W. Ulbricht (known online as Dread Pirate Roberts), who was charged with running the eBay-like online black market site, “Silk Road,” where drugs and other illicit goods could be purchased with the electronic currency, Bitcoin.²⁹ *United States v. Ulbricht*, 79 F.Supp.3d 466 (S.D.N.Y. Jan. 7, 2015). Federal prosecutors sought to connect Ulbricht to these illegal activities through the use of internet chat logs, forum posts, emails and other online communications. Shortly after the trial began, Ulbricht’s legal team lodged an unusual objection – that federal prosecutors had omitted a crucial piece of evidence while reading the text of an Internet post: a smiley face emoji [😊].³⁰ The defense argued these

²⁶ Browning and Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. at p. 1.

²⁷ Joyce R. Rosenberg, *Substance and Style*, 87-APR J. Kan. B.A. 37 (April 2018); *See also*, Eric Goldman, *Emojis and the Law*, 93 Wash. L. Rev. 1227, 1263-1264 (October 2018).

²⁸ *Id.*; *See also*, Browning and Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. at p. 2.

²⁹ Browning and Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. at p. 3.

³⁰ Benjamin Weiser, *At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji*, The New York Times (January 28, 2015), www.nytimes.com/2015/01/29/nyregion/trial-silk-road-online-black-market-debating-emojis.html. The emoji was not included in the opinion; and thus, it is this author’s assumption of what was used.

online communications, “were created and intended to be read, not spoken or heard”; and thus, they should be presented to the jury the same way.³¹ The defense further argued “not only could reading these communications aloud add an inflection and create an impression the creator never intended...there were aspects of the written form that [could not] be reliably or adequately conveyed orally.”³² The U.S. district court judge, Katherine B. Forrest, agreed the internet posts and other online conversations were “meant to be read”; and thus, while she permitted the communications to be orally read in court, she also instructed the jurors to read the posts, themselves, so they could note the punctuations and emojis.

This case is a good example of a court being faced with having to decide whether to allow emojis in as evidence and how to handle the “emoji evidence” at trial, once admitted.³³ The court’s decision to permit the jurors to see the emojis with their own eyes and consider them along with the text of the online communications, as “part of the evidence,” likely provided the most accurate interpretation.³⁴

Not all judges are as attuned to the significance of “emoji evidence” in criminal cases as was Judge Forrest in *United States v. Ulbricht*.³⁵ Indeed, the evidentiary value, if any, courts place on emojis/emoticons in the criminal arena is not always apparent from their opinions. For instance, in *Kinsey v. State*, which involved a sexual assault conviction, the court appeared to be dismissive of the defendant’s claim the victim consented to sex through a text exchange, which ended with her sending him a “winkie face emoticon” [;-)] before the act, pointing to her torn clothing and

³¹ Browning and Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. at 3.

³² *Id.* at p. 3.

³³ Janssen, *Hearsay in the Smiley Face: Analyzing the Use of Emojis as Evidence*, 49 St. Mary’s L.J. at 717.

³⁴ Goldman, *Emojis and the Law*, 93 Wash. L. Rev. at 1264.

³⁵ Elizabeth Kirley and Marilyn McMahon, *The Emoji Factor: Humanizing the Emerging Law of Digital Speech*, 85 Tenn. L. Rev. 517, 551 (Winter 2018).

blooded, bruised appearance afterward. No. 11-12-00102-CR, 2014 WL 2459690, at *4 (Tex.Ct.App. May 22, 2014).³⁶ Nevertheless, as evidenced by the following examples, emojis and emoticons are increasingly being featured in criminal cases; and thus, judges and attorneys, alike, must become attuned to their evidentiary import, including in determining intent.³⁷

2. More Examples of Emojis in Criminal Cases.

In *People v. Cramer*, the defendant was charged with willfully making threats after he sent the victim – his girlfriend – a text message one hour after he attacked her, which said “You have 12 hours to find me, before I find you,” and contained several emojis of bombs [🧨🧨🧨🧨], guns [🔫], knives [🔪🔪], needles [🪡🪡🪡] and a fork and knife [🍴].³⁸ No. C080611, 2016 WL 4087259, * 1 (Cal. Ct. App. Unpub. Aug. 8, 2016). The appellate court affirmed the lower court’s decision to impose a higher sentence on the defendant, finding that the circumstances of aggravation – meaning the crime involved “great violence, threat of bodily harm and other acts disclosing a high degree of cruelty, viciousness or callousness – outweighed any circumstances of mitigation. *Id.* In other words, the text of the defendant’s message, combined with the “use of emoji weaponry, supported an aggravated criminal threats charge.”³⁹

Similarly, in *In re LF*, a minor (L.F.), was charged with violating a California criminal statute requiring specific intent to make threats, in connection with a series of statements she made on Twitter about purchasing guns and shooting classmates and teachers. No. A142296, 2015 WL 3500616, at **1-2 (Cal. Ct. App. Unpub. June 3, 2015). Several of the online statements or Tweets at issue contained emojis, including the following:

³⁶ *Id.*; See also, Browning and Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. at p. 5.

³⁷ Kiatkulpi Boone and Paris, *Emoji and Deciphering Intent in the Digital Age*, 59-JUN Orange County Law at 43.

³⁸ The emojis were not contained in the court’s opinion; and thus, those included hereinabove may not be the actual images or number of emojis used by the defendant .

³⁹ Jonathan Geneus, *Emoji: The Caricatured Lawsuit*, 16 Colo. Tech. L.J. 431 (2018).

- “I’m dead ass [three laughing emojis][🤣🤣🤣] not scared to go to jail for shooting up FHS warning everybody duck.”
- “Ain’t nobody safe [‘100’ emoji] [¹⁰⁰].”
- “I feel sorry for whoever got c wing 1st period [four laughing emojis][🤣🤣🤣🤣].”
- “I’m leaving school early and going to get my cousin gun now [three laughing emojis and two clapping hands emojis][🤣🤣🤣 🙌🙌].”⁴⁰

The defendant argued she did not intend her Tweets to be taken as threats, but rather as jokes, as evidenced by her frequent use of the “laughing” emojis, which are typically used to signify humor and “clapping hands” emojis, which are usually used for “extra emphasis when making a point, declaration or statement” on Twitter.⁴¹ What about her use of “100 emoji” [¹⁰⁰]? What does that emoji usually symbolize? While not addressed by the court, the placement of the “100 emoji” [¹⁰⁰] in the defendant’s Tweet supports she intended her statements to be taken as threats because that image is “commonly used as a shorthand for 100% with the usage meaning ‘keep it real’ or a similar sentiment.”⁴² Ultimately, the court rejected L.F.’s position that her statements were meant as jokes, and she was convicted of a felony. *Id.* at *8.

In addition, in *State v. Jacques*, the defendant communicated in internet chat rooms with an undercover police officer posing as a thirteen (13) year old girl as part of a sting operation, which ultimately led to the arrest and conviction of the defendant. 332 Wis.2d 804, 798 N.W.2d 319 (WI. App. 2011). At trial, the jury was given a transcript of the online chat sessions between

⁴⁰ Again, the emojis were not included in the court’s opinion; and thus, may not be the ones actually used by the defendant.

⁴¹ Feinn, Lily “What Does The Clapping Hands Emoji Mean On Twitter? It Goes Back Much Further Than Its Internet Usage” (March 10, 2017) <https://www.bustle.com/p/what-does-the-clapping-hands-emoji-mean-on-twitter-it-goes-back-much-further-than-its-internet-usage-43594>.

⁴² Manning and Rockwood, *Emoticons and Emojis, Hazards to Be Aware of in Discovery*, 317-APR N.J. Law. 68, 71-72, citing *Hundred Points*, Emojipedia, <http://emojipedia.org/hundred-points-symbol/>.

the undercover officer and the defendant, which contained various emoticons in “static” form, instead of the animated versions that appeared on the defendant’s computer. He argued that if the jurors had been shown the animated emoticons of a “blushing smiley face” and other smiley faces, they would have supported his defense of “entrapment.”⁴³ The court rejected the defendant’s argument because he failed to support his position with any legal authority and, more importantly, failed to show how the non-disclosed animated emoticons “would have led the jury to conclude he was a victim of ‘excessive incitement, urging, persuasion, or temptation’” by the undercover officer. *Id.* at **1-2.

In *State v. Wilson*, a federal district court grappled with the issue of emojis in the context of discovery and disclosure. No. 15-cr-00521, 2016 WL 3647327, *7 (D.N.J. July 6, 2016).⁴⁴ Specifically, a defendant charged with the possession of a “firearm as a convicted felon” filed several motions requesting production of various discovery materials, as well as an order requiring the State to disclose the identity of the confidential informant who had identified him to the police. *Id.* at **1-2. The basis for the defendant’s motion for disclosure was that the information provided by the confidential informant was the only evidence establishing the defendant possessed a firearm. *Id.* at *6. In response, the State pointed to other evidence it would submit to support the charge, including a Tweet by the defendant stating: “[a]nd I got a 40 [emoji of a handgun] [🔫] my 40 ah [expletive deleted] ya [emoji of a handgun and explosion][🔫💣].” *Id.* at *7. The court denied the defendant’s motion, finding the Tweet constituted additional material evidence to support the charge of illegal possession of a fireman beyond the identifying information provided by the confidential informant. *Id.*

⁴³ Browning and Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. at p. 5.

⁴⁴ Manning and Rockwood, *Emoticons and Emojis, Hazards to Be Aware of in Discovery*, 317-APR N.J. Law. at 70-71.

This case highlights the issue of how emoji interpretation can be influenced by the platform used and the emoji design available at the time. Had the defendant tweeted the same Tweet in 2018 instead of 2016, the court’s analysis may have differed because of the drastically different appearance of the gun or pistol emoji on Twitter. At the time of the defendant’s tweet, Twitter’s pistol emoji looked like a typical handgun; however, it was changed in 2018 to look like a squirt gun [🔫].⁴⁵ Would the court have weighed the significance of the defendant’s tweet differently had he used two squirt gun emojis [🔫🔫], instead of two handgun emojis [🔫🔫]?

Finally, in *Elonis v. United States*, one of the only Supreme Court cases involving emoticons, the defendant, Elonis, a “self-styled rapper, posted graphic and violent lyrics and messages about this soon-to-be ex-wife on his Facebook account.”⁴⁶ 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015). One such post suggested their “son’s Halloween costume should include her head impaled on a stick.”⁴⁷ At trial, Elonis’ attorneys argued that his use of the “tongue-out emoticon [:-p] signaled he was joking or engaging in hyperbole just meant to shock.”⁴⁸ However, the defense’s arguments were unsuccessful and Elonis was convicted of threatening his estranged wife. On review, the Supreme Court “briefly noted the rise of social media use has made domestic violence tactics more commonplace,” but declined to address “Elonis’ First Amendment issue regarding the emoticon” or his intent when he made the postings.⁴⁹ *Id.* at 2012, 2017. Rather, the Supreme Court reversed Elonis conviction based on “an erroneous jury instruction on the requisite

⁴⁵ *Id.* at 71.

⁴⁶Geneus, *Emoji: The Caricatured Lawsuit*, 16 Colo. Tech. L.J. at 445; *See also*, Kirley and McMahon, *The Emoji Factor: Humanizing the Emerging Law of Digital Speech*, 85 Tenn. L. Rev. at 552-553.

⁴⁷ Kirley and McMahon, *The Emoji Factor: Humanizing the Emerging Law of Digital Speech*, 85 Tenn. L. Rev. at 552.

⁴⁸ Geneus, *Emoji: The Caricatured Lawsuit*, 16 Colo. Tech. L.J. at 445.

⁴⁹ Kirley and McMahon, *The Emoji Factor: Humanizing the Emerging Law of Digital Speech*, 85 Tenn. L. Rev. at 553.

mens reas.”⁵⁰ The Supreme Court, therefore, refused to take this opportunity to weigh in on the evidentiary value of emojis.

Should the Supreme Court have done so? Would it have been helpful for the highest court to have ruled on “emoji interpretation” or the importance of “emoji evidence”? Perhaps it is simply too soon for the Supreme Court to address these issues in light of the newness of emojis/emoticons in court proceedings.⁵¹

B. Employment Law.

Another area where emojis and emoticons have had an impact is employment law. Emojis/emoticons are typically used by employers to defeat discrimination and harassment claims, but they can also be used to support claims of discrimination and harassment.

1. *Employers Rely on Emojis to Support Claims against Employees.*

In *Arnold v. Reliant Bank*, an ex-bank employee brought an action against her former employer, asserting she was terminated based on her gender and was subjected to a hostile work environment. 92 F.Supp.2d 840, 844, 852-853 (M.D. Tenn. 2013). Among the evidence the court considered, in finding the alleged harassment was not sufficiently severe or pervasive to create a hostile work environment, was the plaintiff’s use of a “smiley face” emoticon [:-)] in an employee self-assessment form to describe her job satisfaction. *Id.* at 854.⁵²

Similarly, in *Murdoch v. Medjet Assistance, LLC*, the plaintiff brought an action against her former employer and its CEO for sexual harassment and retaliation under Title VII, among other claims. 294 F.Supp.3d 1242 (N.D. Ala. Mar. 1, 2018). The court held the employer was not liable for creating a hostile work environment. The evidence relied upon by the court included the

⁵⁰*Id.*

⁵¹ Geneus, *Emoji: The Caricatured Lawsuit*, 16 Colo. Tech. L.J. at 445.

⁵² See also, Browning and Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. at p. 7.

plaintiff's own flirtatious and unsolicited text messages and emails, many of which ended with the "smiley face" emoji [😊]. *Id.* at 1252-1254, 1262-1264.

Finally, in *Mooneyhan v. Telecommunications Mgmt, LLC*, the plaintiff filed a gender discrimination lawsuit against her former employer, alleging she was subjected to a hostile work environment, which forced her to resign. No. 16-cv-118, 2017 WL 5478474, *1 (E.D. Mo. Nov. 15, 2017). The court noted that in the months leading up to her resignation, the plaintiff sent several emails to her supervisors indicating she liked her job, never mentioned the harassment and were concluded with "smiley-face" emoticons [:-) :-) :-)]. *Id.* at **11-12. The court found this evidence undermined the plaintiff's claim she subjectively perceived her work conditions were abusive. *Id.*

2. Employees Rely on Emojis to Support Claims Against Employers.

In *Apatoff v. Munich Re Am. Servs.*, the plaintiff was terminated by her employer while she was out on medical leave for an asthma condition.⁵³ Civ. No. 11-7570, 2014 US Dist. LEXIS 106665 (D.N.J. August 1, 2014). Based on a report from someone (the employer could not remember who) that the plaintiff was seen shopping while on medical leave, the employer hired a private investigator who filmed her engaged in similar activities as was reported, as well as moving from her old home into a new home, which involved carrying boxes. As a result, the employer concluded the plaintiff was abusing her medical leave and terminated her.

After suit was filed, the defendant employer filed a motion for summary judgment, claiming that even if it was incorrect, it held an honest belief the plaintiff was abusing her medical leave; and thus, was entitled to summary judgment. In denying the motion for summary judgment, the court pointed to emails exchanged between management of the company containing "smiley

⁵³ <https://www.schorrlaw.com/week-ending-8114-apatoff-v-munich-re-4/>

face” emoticons and exclamation marks [:-) :-) !!!], which “could be found as evidence the decision-makers were happy to have any reason to terminate [the plaintiff].”⁵⁴

C. Contract Disputes.

Can a text or email thread between negotiating parties exchanging emojis convey an intent to agree to proposed contract terms, such as a thumbs-up [👍], handshake [🤝], high-five [👏], or fist bump [👊]? This could be possible in California outside of a settlement agreement or real estate transaction, as long as it can be established that a party intended to sign an electronic record.⁵⁵

In addition, a 2017 case from Israel, *Dahan v. Shacaroff*, provides some insight into how emojis may impact contract law.⁵⁶ In response to an apartment listing, a couple sent the following series of emojis to the landlord/lessor:



In reliance on the couple’s text messages expressing interest, combined with the use of these emojis, the landlord believed they would rent the apartment and removed the listing. Although the parties engaged in lease negotiations, a lease was never signed, and the couple eventually stopped communicating with the landlord. The landlord subsequently filed suit, claiming he had relied on the couple’s messages to indicate consent.⁵⁷ The Israeli small claims court held that this sequence of emojis “conveyed great optimism” and “naturally led to the

⁵⁴ *Id.*

⁵⁵ Kiatkulpi Boone and Paris, *Emoji and Deciphering Intent in the Digital Age*, 59-JUN Orange County Law at 46.

⁵⁶ Goldman, *Emojis and the Law*, 93 Wash. L. Rev. at 1268; *See also*, Kirley and McMahon, *The Emoji Factor: Humanizing the Emerging Law of Digital Speech*, 85 Tenn. L. Rev. at 556 and fn. 201.

⁵⁷ Kirley and McMahon, *The Emoji Factor: Humanizing the Emerging Law of Digital Speech*, 85 Tenn. L. Rev. at 557.

Plaintiff's great reliance on the defendants' desire to rent his apartment."⁵⁸ The court further held that even though the emojis did not constitute a binding contract, they were evidence of reliance, a general principal of contract law, and supported the conclusion the defendants acted in bad faith. The court awarded the landlord \$2,200 (one month's rent) in damages based on the statutory obligation in Israel that parties negotiate contracts in good faith.⁵⁹

Did the court correctly interpret the sequence of emojis? While some of the above emojis typically are used to denote celebration or optimism/joy, such as the Salsa Dancer, the Bottle with Popping Cork and the Smiley Face, others are not. The Women with Bunny Ears emoji *could* express fun, festive and friendly sentiments (or adult entertainment).⁶⁰ The Peace Sign emoji *might* symbolize victory and the Comet *may* mean "a new beginning."⁶¹ But what about the Chipmunk? When viewed in context, the Chipmunk emoji does not appear to have a single obvious meaning.⁶²

Emojis also played a role in *Parcel Management Auditing and Consulting Inc. v. Dooney & Bourke, Inc.*, which was described by the federal court as "a 'whodunit' of a contract case."⁶³ No. 13-cv-00665, 2015 WL 796851, *1 (D. Conn. Feb. 25, 2015). The plaintiff, Parcel Management Auditing and Consulting, Inc. ("PMAC"), alleged it had entered into a written contract with the defendant, Dooney & Bourke, Inc. ("Dooney"), a company selling high-end handbags and other fashion accessories, to advise Dooney on how to reduce its shipping costs. *Id.* However, the "contract" at issue had been signed by a part-time Dooney employee – a computer

⁵⁸ Goldman, *Emojis and the Law*, 93 Wash. L. Rev. at 1267.

⁵⁹ *Id.* at 1268.

⁶⁰ <https://www.dictionary.com/e/emoji/people-with-bunny-ears-emoji/> ("the people with bunny ears (partying) emoji is variously used across digital contexts to express a fun, party-loving spirit, communicate festive and friendly sentiments, and mark content dealing with adult entertainment.")

⁶¹ Goldman, *Emojis and the Law*, 93 Wash. L. Rev. at 1267; *See also*, <https://emojis.wiki/comet/> ("this emoji is used in surprisingly diverse meanings – it may be used in its direct meaning, it may stand for gorgeous and other words of fascination. At last, it may mean a new beginning.")

⁶² *Id.*

⁶³ Browning and Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. at p. 5.

programmer – who worked primarily out of his home. After Dooney failed to pay invoices submitted by PMAC, it filed suit for breach of contract. In ruling the part-time Dooney employee “lacked authority to bind the company, the court noted the casual nature of the communications between the parties, even including a [large] visual depiction in its opinion of the ‘smiley face’ emoji [😊] contained in the initial communication from PMAC’s president.”⁶⁴

To date, emojis and emoticons have only had a “peripheral role” in online and text communications relevant to contract negotiations and formation.⁶⁵ Nevertheless, as the above cases illustrate, the inclusion of emojis/emoticons in pre-contractual communications may be significant in assisting the factfinder to interpret the intent of the parties.⁶⁶

D. Other Civil Cases, including Torts.

Emojis and emoticons have started to increasingly appear in a variety of other types of civil cases, including actions involving defamation, emotional distress, and even consumer protection, and *may or may not* play an influential role in the outcome of the case as evidenced by the following cases.⁶⁷

1. *Emojis Mattered.*

For instance, in *Ghanam v. Does*, a Detroit city official filed a defamation lawsuit against several unknown defendants who allegedly made defamatory statements about him on an Internet message board dedicated to local politics. 845 N.W.2d 128, 132, 303 Mich. App. 522, 525 (Mich. Ct. App. 2014).⁶⁸ In holding the city official failed to state a claim for defamation, the Michigan

⁶⁴ *Id.*

⁶⁵ Kirley and McMahon, *The Emoji Factor: Humanizing the Emerging Law of Digital Speech*, 85 Tenn. L. Rev. at 557.

⁶⁶ *Id.*

⁶⁷ *Id.* at 558; *See also*, Browning and Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. at p. 6; Manning and Rockwood, *Emoticons and Emojis, Hazards to Be Aware of in Discovery*, 317-APR N.J. Law. at 68-69.

⁶⁸ Geneus, *Emoji: The Caricatured Lawsuit*, 16 Colo. Tech. L.J. at 443.

Court of Appeals found that one of the statements complained of, on its face, could not be taken as fact because of the use of a “:-P” emoticon, which the court interpreted “a face with a tongue sticking out” that denotes “a joke or sarcasm.” As a result, the court concluded its use at the end of the statement made it “patently clear that the commenter was making a joke.” *Id.* at 145, 549.⁶⁹ Therefore, based on its interpretation of the stuck-out tongue emoticon [:-P], the court held its inclusion, from the perspective of a reasonable reader, transformed a potentially defamatory statement into a joking or sarcastic comment.⁷⁰

In addition, in *Piping Rock Partners, Inc. v. David Lerrier Associates, Inc.*, the court’s interpretation of emoticons influenced its ultimate decision concerning jurisdictional issues. In *Piping Rock Partners, Inc.*, a California court had to determine whether it could exercise personal jurisdiction over two New York citizens – a company and its controlling owner – which allegedly ratified the libelous actions of the company’s former employee. No. 12-04634, 2012 WL 5471143, *3 (N.D. Cal. Nov. 9, 2012).⁷¹ The court found there was evidence to support the controlling owner approved the employee’s “smear posts” with “a ‘smear cheer’ series of six laughing face emoticons [:-D :-D :-D :-D :-D :-D].” Thus, the court held that this “ratification” of the employee’s “intentional act was sufficient to warrant exercising personal jurisdiction over the defendants.”⁷² *Id.* at **9-10.

In *Shawe v. Etling*, which involved a dysfunctional and deteriorating relationship between two business partners, a “winking” emoticon [;-)] played a role in the court’s decision. 157 A.3d

⁶⁹ *Id.* at 443; *See also*, Kirley and McMahon, *The Emoji Factor: Humanizing the Emerging Law of Digital Speech*, 85 Tenn. L. Rev. at 558; Browning and Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. at p. 6.

⁷⁰ Kirley and McMahon, *The Emoji Factor: Humanizing the Emerging Law of Digital Speech*, 85 Tenn. L. Rev. at 558.

⁷¹ Browning and Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. at p. 6.

⁷² *Id.*





152, 154 (Del. Feb. 13, 2017); *See also, In re Shawe & Elting, LLC*, No. 9661-CB, 2015 WL 4874733 (Del. Ch. Aug. 13, 2015).⁷³ Specifically, one of the incidents addressed by the lower court was whether the secret purchase of a plane ticket to Paris by one partner, Philip Shawe, for a seat across the aisle from the other partner, Elizabeth Elting, was intended as harassment or, as Shawe contended, an olive branch.⁷⁴ *In re Shawe & Elting, LLC*, 2015 WL 4874733 at *23. In ruling the incident was meant to harass, the court pointed to a text message from Shawe to his friends that said: “[w]as next to [Elting] on the plane to Paris and she switched seats ;).” *Id.* The court concluded the smiley face or “winking” emoticon [;)] at the end of the message “suggest[ed] he was amused by yet another opportunity to harass Elting, who Shawe knew full well would not welcome his presence on the flight.” *Id.* In affirming the lower court’s decision to award the unusual remedy of appointing a custodian to sell the partners’ company, the Delaware Supreme Court appeared to agree with its interpretation of the “winking” emoticon [;-)], stating the “Court of Chancery best captured the lengths that Shawe would go to harass Elting in its recounting of [the] plane trip to Paris in 2014.” *Shawe*, 157 A.3d at 157.

In *Scoggins v. Credit Bureau of Jonesboro, Inc.* a Fair Debt Collection Practices Act case, the court concluded the debtor had brought his action “in bad faith and for the purpose of harassment.” 973 F.Supp.2d 961 (E.D. Ark. Sept. 20, 2013). One of the many instances of the debtor’s dishonest conduct and harassing behavior, considered by the court, included his online post that read, in part “so walk into that federal courtroom with me and get ready for the biggest [train wreck emoticon] ever.” *Id.* at 976-977.⁷⁵

⁷³ *See also, Kiatkulpi Boone and Paris, Emoji and Deciphering Intent in the Digital Age*, 59-JUN Orange County Law at 44.

⁷⁴ *Id.*

⁷⁵ Browning and Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. at p. 7.

Finally, in *Stewart v. Durham*, the plaintiff asserted claims of intentional and negligent infliction of emotional distress resulting from sexual advances made by the defendant during a job interview and throughout the entire application process. No. 16-cv-744 (S.D. Miss. June 9, 2017). According to the court, the defendant’s “most egregious act was texting [the plaintiff] a picture of an engorged penis...” *Id.* Nevertheless the court held the evidence did not show the defendant’s actions had actually caused the plaintiff any emotional distress, including that the plaintiff exchanged flirtatious texts with the defendant, after he texted her a picture of the “tumescant penis,” which contained “an emoji blowing him a kiss [] and three winking emojis [  ].

This case illustrates the critical importance of a plaintiff’s response to potentially harassing text, email or online communications. If the plaintiff responds to semi-naked photographs or “penis pictures” sent by the defendant with flirtatious emojis such as in *Stewart*, she is likely to “find an unsympathetic court.”⁷⁶

2. *Emojis Did Not Matter.*

By contrast, in *Enjaian v. Schlissel*, the court disagreed with a law student’s contention that his inclusion of a “wide-open mouth smile” or “laughing” emoticon [:-D] “materially alter[ed] the meaning” of a text message, wherein he expressed he wanted another student to “feel crappy” and experience “deep dark pits of depression.” No. 14-cv-13297, 2015 WL 3408805, at *6, n. 10 (E.D. Mich. May 27, 2015).⁷⁷ *Enjaian* involved a civil suit instituted by the law student seeking redress for an alleged improper search of his online accounts and data located on his computer and cellphone.

⁷⁶ Kirley and McMahon, *The Emoji Factor: Humanizing the Emerging Law of Digital Speech*, 85 Tenn. L. Rev. at 558.

⁷⁷ Kiatkulpiboone and Paris, *Emoji and Deciphering Intent in the Digital Age*, 59-JUN Orange County Law at 44 .

Similarly, in *Career Agents Network, Inc. v. Careeragents network.biz*, an Anticybersquatting Consumer Protection Act case, “emoticons were viewed as...[fairly] benign.”⁷⁸ 722 F.Supp.2d 814 (E.D. Mich. June 29, 2010). Although the court ultimately determined the plaintiff’s case was unfounded, it was less persuaded by some of the claims of “vexatious behavior” lodged against the company’s chief operating officer (“COO”) centered on certain text messages containing emoticons.⁷⁹ *Id. Id.* at 821. While the court noted the COO had sent numerous text messages to the defendant that consisted of little more than a “smiley” [:-)] or “winky” [;-)] face to the defendant, it observed there was no apparent purpose for their inclusion and they did not appear to convey anything threatening or “support a claim of vexatious behavior.” *Id.*⁸⁰

In *Lenz v. Universal Music Corp.*, a copyright infringement case arising out of a mother’s uploading of a YouTube video of her son, the court had to consider a claim of irreparable harm by the plaintiff, which allegedly resulted from a takedown notice. No. C07-3783 JF, 2010 WL 702466, **4-5 (N.D. Cal. Feb. 25, 2010). The defendant argued an email exchange between the plaintiff and her friend was evidence the plaintiff did not believe she had been injured substantially and irreparably by the takedown notice. *Id.* at *4. In the email exchange at issue, the plaintiff responded to her friend’s comment “that the friend ‘love[s] how [the plaintiff has] been injured ‘substantially and irreparably’;-)’ by writing ‘I have ;-).’” *Id.* While the court noted the “winky” emoticon signifies “something along the lines of ‘just kidding,’” it accepted the plaintiff’s explanation that she and her friend were discussing the “stilted language...lawyers sometimes

⁷⁸ Browning and Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. at p. 7.

⁷⁹ *Id.*

⁸⁰ *Id.*

use,” and her use of the “winking” emoticon was a reply to the “wink” her friend had used. *Id.* at *5.⁸¹

IV. EVIDENTIARY ISSUES AND STANDARDS.

With the rise of emoji popularity and the accelerated rate at which emojis are appearing in court opinions, lawyers must anticipate the evidentiary issues that may arise from their use and the standards courts will likely apply in admitting “emoji evidence.” Will new rules need to be created to address emojis? Or can traditional authentication and admissibility rules be applied to emojis? While the normal evidentiary rules should adequately address the authentication and admissibility of emojis, courts may also need to “study...the norms of modern culture and the market in which they exist” when analyzing “emoji evidence.”⁸²

A. Authentication.

As with other types of social media evidence, some courts are worried about authentication problems and “seem to put a higher standard on these areas of evidence, and sometimes tend to exclude relevant evidence for fear of making an error.”⁸³ Nevertheless, authentication of emoji evidence should only require sufficient proof that a reasonable juror could find the evidence is what it the proponent claims it to be. Rule 901.⁸⁴

For instance, in *State v. M.F.*, the appellate court was faced with tackling the novel issue of authenticating and admitting proffered screenshots of emojis as evidence. No. A-3602-15T2, 2018 WL 333493, *1 (N.J.App.Div. Jan. 9, 2018).⁸⁵ The defendant was convicted of violating a final restraining order obtained by his ex-girlfriend (A.T.) following a bench trial. At trial, the State





⁸¹ See also, Browning and Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. at p. 6.

⁸² Geneus, *Emoji: The Caricatured Lawsuit*, 16 Colo. Tech. L.J. at 449-450.






⁸³ Janssen, *Hearsay in the Smiley Face: Analyzing the Use of Emojis as Evidence*, 49 St. Mary’s L.J. at 716.

⁸⁴ *Id.*

⁸⁵ Manning and Rockwood, *Emoticons and Emojis, Hazards to Be Aware of in Discovery*, 317-APR N.J. Law. at 69.

had offered screenshots of multiple messages sent by the defendant to his ex-girlfriend, A.T., from two different phone numbers using the application “WhatsApp.” The messages consisted of “question marks followed by exclamation marks[!!!], emojis of lips and broken hearts [
], and text including ‘Aww,’ ‘Sexy,’ and ‘Wow.’” *Id.*

The trial court treated the screenshots, including the emojis, as social media evidence and applied the existing standard for authentication and admissibility of such evidence enunciated in *State v. Hannah*, 448 N.J. Super. 78, 151 A.3d 99 (2016). *Id.* at *5.⁸⁶ Specifically, the trial court noted that, in *Hannah*, the appellate court determined the traditional rules of authentication under 901 should apply to social media evidence, rejecting the notion a new authenticity standard for such evidence – wherein courts would subject social media messages to greater scrutiny because they were created on the Internet and “could be ‘easily forged’” – was required.

On appeal, the defendant argued the screenshots had been improperly authenticated. In rejecting this argument, the appellate court found there was “evidence showing sufficient context and content such that one would expect the messages were sent by the defendant only.” First, the ex-girlfriend, A.T., testified she recognized the phone numbers as belonging to the defendant. Second, the court concluded “the content of the messages supported a reasonable inference” the defendant was the sender because, in part, “[t]here [were] messages from both phones using the identical broken heart emoji” []. *Id.* at *6. Finally, the fact that the messages contained broken heart emojis [] was “consistent with the defendant and A.T.’s recently ended long-term romantic relationship.” *Id.* at *5.

⁸⁶ See also, Manning and Rockwood, *Emoticons and Emojis, Hazards to Be Aware of in Discovery*, 317-APR N.J. Law. at 69.

The recent amendments to Federal Rule of Evidence 902, which were effective 2017, will address authentication of emojis.⁸⁷ Specifically, FRE 902(13) provides a record generated by an electronic process 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). In addition, FRE 902(14) provides that 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 identification is accomplished by a “hash value.” The 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. If the hash values are the same, it is unlikely the original and copy are not identical.

These new sections both require that the proponent give the opponent reasonable written notice of his intent to use the record at a hearing or trial and make the record and certification available for inspection *before* the hearing or trial. In other words, the opponent must be given a “fair opportunity” to challenge both the certificate and the record. However, a certification under these rules only satisfies authenticity. It does not satisfy admissibility; and thus, the opponent remains free to object to admissibly on other grounds, such as hearsay and relevance.

1. Hearsay.

Is an emoji a statement? It is a symbol and, as evidenced by the above cases, can be an important part of the sender’s message. One federal district court has ruled an emoji is a statement, which is protected by the First Amendment. *Bland v. Roberts*, 2013 WL 5228033 (4th Cir. Sept.

⁸⁷ ABA Webinar, Kang, Haggerty & Fetbroyt, LLC, “Emojis Speaking Louder Than Words? The Import of Emojis, Emoticons and Hashtags as Evidence at Trial and Beyond #😊” (March 2019).

18, 2013).⁸⁸ As a result, attorneys and judges will be required to contend with hearsay issues and objections related to emojis used in emails, text messages and online communications.

Emojis may be admissible if they fall within a hearsay exception such as when offered against the opposing party. When a party to a case “declares anything on social media, or performs an act, the statement [emoji] is admissible” as an admission under Rule 801(D)(2).⁸⁹ Other hearsay exceptions may also be available to admit emoji evidence.

2. Relevance.

In *Enjaian v. Schlissell*, referenced above, the defendant claimed the omission of the “wide-open mouth smile” or “laughing” emoticon [:-D] from his allegedly harassing text messages, “would have led the reader to understand that he was merely ‘deeply unhappy...rather than sadistically bloodthirsty for revenge.’” 2015 WL 3408805 at *6. However, the court disagreed, finding the omission of the emoji/emoticon was not relevant because it did not materially alter the meaning of the text messages. *Id.* at *7, n. 10.

By contrast, in *United States v. Ulbricht*, Judge Katherine B. Forrest ruled the smiley face emoji [😊] used by the defendant in his social media message was significant to determining the meaning of his message; and thus, relevant. 79 F.Supp.3d 466 (S.D.N.Y. Jan. 7, 2015).⁹⁰ Consequently, Judge Forrest instructed the jury to consider the smiley face emoji [😊], along with the written text of the defendant’s message, to observe the statement in the same way the defendant had written it.⁹¹

⁸⁸ Browning and Seale, *More than Words The Evidentiary Value of Emoji*, 57 No. 10 DRI For Def. at p. 2.

⁸⁹ Janssen, *Hearsay in the Smiley Face: Analyzing the Use of Emojis as Evidence*, 49 St. Mary’s L.J. at 716-717.

⁹⁰ *Id.* at 717.

⁹¹ *Id.*

V. CONCLUSION.

The history of nonverbal communication by humans is documented back approximately 60,000 years. The cave art that has been discovered is believed to have religious functions, but the exact meaning is unknown.

Symbols engraved in clay tablets were used by the Mesopotamians to keep track of goods being traded. This led to pictographic writings where the drawings represented things, which, in turn, led to drawings combined with other drawings to create ideograms. Finally, around 2000 years ago, the alphabet was invented. Thereafter, pictures and drawings were left out of communication, and the writer was unable to express emotion or mood in a direct way.

Approximately thirty (30) years ago, the emoticon was born, followed ten (10) years later by the emoji. And so, we have come full circle. Now, with the addition of emojis to written communication, we are able to, once again, express emotion and mood.

As in all speech, the intent of the author is always important in understanding the message. Most of the cases that have dealt with emoji evidence have done a good job of connecting the meaning of the written word with the emoji to find the writer's true intent.

The traditional evidentiary rules on authentication and admissibility apply to emojis just as they do to other social media messages. With the increased use of emojis, it is likely they will appear in more and more cases, requiring courts to reach a consensus on their meaning. The challenge is that new emojis are created at a lightening rate and courts will struggle to keep up with the meanings of each one. Stay tuned. 😊