

The Legal Impacts and Effects of Using Emojis and Emoticons
By Peter J. Glantz

Our old-school keyboards are now improved by thousands of digital symbols. There are currently no clear legal dictionary definitions or rules for interpreting these symbols in the various contexts in which they appear that I am aware of - certainly none with legal binding authority. However, on occasion, the legal and literal meaning of these symbols really does matter.

A few years ago, a judge presiding over the Silk Road (a now famous Bitcoin-related trial) ruled that all online communications entered as evidence in the case must include the original emoticons as they appeared throughout the text. Thereafter, even the U.S. Supreme Court found itself being forced to interpret digital symbols by overturning the conviction of a Pennsylvania man who had been found guilty of threatening his ex-wife by way of virulent public Facebook posting. The defense team, in part, relied on a “stuck-out tongue” emoticon he had keyed in at the end of one of his posts as evidence that he did not seriously want to harm his ex-wife.

Yet, the most absurd emoticon-related argument I have read about to date, might be one proffered by a Texas man prosecuted for violently sexually assaulting an acquaintance in 2011. The defendant argued that his victim had preemptively consented to sex through several text messages they had exchanged prior to the incident, which he had interpreted as sexually suggestive. This text exchange had culminated in the victim texting the man a “winkie face” emoticon. At trial, the defendant argued that his victim gave her prior consent to have sex with him three times one of course, was the “winkie face” emoticon. Thankfully, the court struck the “winkie face” as evidence of an indication of prior consent by text, and sentenced the man to prison.

Aside from litigation, emojis and emoticons can also be used to interpret and bind general contracts. In fact, the use of emojis and emoticons has and will increasingly impact parties’ legal rights and obligations in the areas of promissory estoppel and unjust enrichment. There are several dilemmas for attorneys, judges and arbitrators in this regard. For one, the true meaning attributed to any particular emoji or emoticon could be vague. Additionally, the form and appearance of the emoji or and emoticons you send may not be the same as the form and appearance seen by the recipient. Finally, different cultures, generations, and geographic regions interpret emojis and emoticons differently.

So far, efforts to build a unified legal emotional context for thousands of emojis and emoticons used by millions of people around the world have failed. But, even if we had such a legal emoji and emoticon dictionary of sorts, parties could spar over whether the emoji face had been presented as a “sincere” communication of emotion or an “ironic” prank.

In sum, the legal impacts and effects of using emojis and emoticons in business and workplace communications and dealings are growing. For attorneys, contract

professionals, business executives and teams discussing, negotiating, and communicating about technology, business, deals, and transactions, the use of emojis and emoticons should be a concern. Depending on the circumstances, using an emoji or emoticon to respond to another party's email or message may have the same effect as if precisely crafted words had been used. Unless the author of the email or message is careful, casually sending a "smiley face" emoji in response to an email putting forth a proposal or offer to do business could be the same as stating, "I consent to the terms." At a minimum, replying to a message with an emoji may convey contractual intent. The bottom line is that before using emojis or emoticons in emails and other communications, it is best practice to consider how they may be received or interpreted.

