# eDiscovery best and worst practices with gifs, emojis and more

**By Katherine A. Helm, Esq., and Daniel Roberts, Esq., of Dechert LLP, and Averie K. Hason, Esq., Eli Lilly and Company**

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Consider this situation: You are an attorney reviewing document number 189,938 of 200,000 in the latest production and come across an email with the subject line "RE: Auditors arriving today." The body of the email simply states:

> We have nothing to worry about. The financials are in perfect order. [OBJ]

*Employees and employers alike need to understand that in complex litigation (i.e., patent, antitrust, white collar, securities, products liability, etc.), all devices and lines of communication may be fair game.*

Aren't you curious what's behind the [OBJ] tag? Do you know what the [OBJ] tag represents in the first place? When an image is not properly rendered in the underlying program, [OBJ] is a default replacement character, usually for an image file such as an emoji, GIF, or other picture.

This article addresses emerging issues in eDiscovery — particularly with respect to embedded images and issues arising from new methods of communication. Employees and employers alike need to understand that in complex litigation (i.e., patent, antitrust, white collar, securities, products liability, etc.), all devices and lines of communication may be fair game.

With two-thirds of email communication taking place on mobile devices, embedded images like emojis and GIFs have become prevalent in the 21st century lexicon. As every writer can attest, it is a true skill to convey complex emotions or sarcasm, as tone and context are critical to nuanced communication. The widespread use of GIFs and emojis in emails, texts and other messaging is a quick hack to help bridge the gap between the written and spoken word.

With this change, best practices and communication training must also evolve. Employee training is critical to highlight the potential ramifications of this "fun" type of speech, as well as the potential of future legal holds. Consider the New York Times Rule: Don't email anything you wouldn't want to be published, or its modern-day equivalent, to go viral. But what happens when a custodian's words are perfectly acceptable, but the embedded images are unclear, questionable or, in the worst case, damning?

Reconsider the above hypothetical, now with images disclosed:

> We have nothing to worry about. The financials are in perfect order.
>
> 

Does this denote confidence or strength in the employee's statement, and an overall sense that the company's financials are solid? What if the employee instead wrote:

> We have nothing to worry about. The financials are in perfect order.
>
> 

Is this an indication of anxiety and a sense of danger, and are they even connected to the previous statement? The employee may have no faith in his or her words and is instead conveying the opposite of the written message. Perhaps in this employee's opinion, there is a problem. Or maybe the employee is on vacation and so overwhelmed with work that he feels like he's dying.

And of course, if the [OBJ] were a GIF — like the ever-popular "dumpster fire" — such an image would convey a greater lack of confidence or elevated concern:

> During discovery, communications with this type of embedded image will inevitably come up in a custodian search. But this raises interesting and novel questions about discoverability and what requires production as relevant and proportional


under Federal Rule of Civil Procedure 26(b). Further, Federal Rules 26(b)(2)(B) and 34(a)(1) require production of "reasonably accessible" electronically stored information within the producing party's possession, custody, or control. The case law, however, is only starting to grapple with inline graphics.

Craig Ball answered some interesting questions in a great piece (https://bit.ly/3lGOw55) on eDiscovery issues related to embedded graphics in emails. Where the question is one of possession, custody, or control, how do you know who has double-clicked or stored inline images? What if someone puts an image in their email signature block, alongside their preferred pronouns?

Possession, custody, and control become even more muddled in the context of certain videoconferencing platforms, which permit meeting "channels" to livestream messaging with related emojis and GIFs to all meeting invitees. If a witness was invited but did not attend the meeting, or does not remember (potentially years later), a passive channel stream may nonetheless be within his or her control and subject to the expense of collection and review.

Discovery disputes invariably also raise issues of proportionality: Can it really be proportional for a company embroiled in litigation to collect and image employees' entire smartphones to determine if they downloaded and viewed a particular GIF? The answer in many cases, perhaps surprisingly, is yes. As above, the context of an emoji or GIF can entirely change the meaning of a key piece of evidence.

The cost and burden of collecting and imaging mobile devices is higher than one might imagine. Not only is there cost associated with imaging — which can run into the double-digit thousands for a mere handful of custodians — there is also the reality that the employee will be without a device for the duration of the collection and imaging process. This can be especially disruptive during pandemic telecommuting, and if an employee's personal and work device are one in the same. And if they are not, don't think you can avoid a litigation hold on your personal device. Many company litigation holds require employees to preserve any work-related communications on their own devices and to bear the cost of cloud or other storage personally.

Indeed, it is each employee's responsibility to ensure that they follow the corporate retention policy for all devices. A mobile device containing corporate communications is the modern equivalent of the lab notebook in the inventor's garage. Failure to retain communications can have dire consequences; consider the 2021 Northern District of Illinois decision in *DR Distributors v. 21 Century Smoking*, where the court instructed the jury that it could draw an adverse inference from spoliated Yahoo! Chats and GoDaddy emails under Federal Rule of Civil Procedure 37(e)(1).

With the increasing use of ephemeral (i.e., disappearing) messaging like Snapchat, retention becomes even more problematic — it is not a far leap for a court to decide that using ephemeral messaging to discuss sensitive business matters implies that the contents were troublesome for the company, thereby resulting in an adverse inference.

Next, consider the source of potentially discoverable communications. Employees are increasingly moving away from email and are instead communicating via text messages and chat

 

platforms like Microsoft Teams, Slack, and Google Chat. These platforms are designed for quick, frequent, and informal group communications, with emojis and GIFs built in as an integral part of the service. With their increased prevalence in the workplace, it is becoming increasingly necessary to collect these informal communications in discovery despite the increased expense to the client: email discovery is often simply insufficient. And graphics like emojis and GIFs are typically automatically downloaded in these chat programs, so if the written messages are discoverable, then the images within them are discoverable almost as a matter of course.

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Further, once those graphics have been discovered, how do you prepare the custodian for depositions and trial testimony related to those graphics? Consider key scientists or doctors conversing by email about a drug safety issue, using GIFs or emojis to lighten the mood. Such context will be heavily litigated in high-stakes cases. While emojis and GIFs are modern replacements for ages-old social cues, they "often lack standard meaning and can be difficult to interpret," as the Supreme Court of Colorado pointed out in *People in Interest of R.D* in 2020. This uncertainty provides fodder for lawyers in depositions. Continuing the above hypothetical, how does the custodian witness answer the following question?

"By using the image of a flaming dumpster floating down a flooded road, you were implying that your company's financial statements were comparable to a dumpster fire, right?"

Such a question could be devastating to defending a client in front of a jury against, for example, a charge of securities fraud. Hopefully, that employee can point to the financials, say that he or she was making an off-the-cuff comment or a feeble attempt at humor, and the financials are actually in terrific shape. But as they say, a picture is worth a thousand words.

This is not to say that emojis and GIFs should be banned from the workplace. They have become part of the zeitgeist and can be cleverly and usefully employed to enrich dialogue and to convey context and tone when words are lacking. And their use can be both striking and profitable when done well: Dell saw its revenue increase by over 100% when it started using GIFs in its laptop advertisements.

Finally, parody and satire have their respective places, just not in corporate communications. A tongue-in-cheek video may seem like a great way to boost morale, but remember: That video could end up being played in a courtroom, out of the context in which it was originally intended.

Always think of your potential audience. Assume your texts will be broadcast far beyond your intended recipient. Litigation opponents have no sense of humor. Take the recent flurry in an ongoing opioid trial as a warning: Defendants are trying desperately to exclude internal marketing videos as prejudicial, where one of the videos allegedly shows an employee standing against off-label marketing being fed to the sharks, Austin-Powers style. While these videos were purportedly "made in jest" nearly 15 years ago, they are causing massive problems for a defense centered in part around responsible marketing.

It's also worth noting that even if the discovery of emojis and GIFs is not case dispositive, it can be the source of employee (and company) embarrassment. It only takes one voice to say "this might not be a great look if it got out to the public." Let it be yours.

And please, use emojis sparingly.

## About the authors

**Katherine A. Helm** (L) is a partner in **Dechert LLP**'s New York office. **Daniel Roberts** (C) is an associate in the firm's Philadelphia office. They can be reached at khelm@dechert.com and daniel.roberts@dechert.com. **Averie K. Hason** (R) is an assistant general patent counsel at **Eli Lilly and Company** and can be reached at averie.hason@lilly.com. They each work extensively on discovery aspects of U.S. and global pharmaceutical patent litigation. The views and opinions expressed in this article are those of the authors and do not represent the positions of Eli Lilly and Company or Dechert LLP.

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