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**You Know What I Meant:
The Science Behind Email and Intent**

Kristen Murray

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“The single biggest problem in communication is the illusion that it has taken place.”¹

It is now a given that electronic communication pervades the modern world. The way we communicate was largely unchanged for a long stretch of time and then changed very quickly. We moved swiftly from hand-written and typewritten letters and telegrams to email and text messages and tweets.² Now we can send a meaningful and easily understood message that contains solely a smiling face made up of punctuation marks or an image of a fruit or vegetable.³

Email, of course, is a (if not the) major form of electronic communication. It is quick and convenient, making it extremely easy to send messages out daily or hourly, instead of the long time it might take to send a letter.⁴ At the turn of the millennium, the number of emails sent

* Professor of Law, Temple University, Beasley School of Law. Many thanks to the law school for its support of my research.

¹ This quote is often attributed to George Bernard Shaw; that there are questions around its origin seems like evidence of the very truth of the statement. Garson O’Toole, QUOTE INVESTIGATOR (Aug. 31, 2014), <http://quoteinvestigator.com/2014/08/31/illusion/>.

² See generally M.H. Hoeflich, *From Scrivener to Typewriters: Document Production in the Nineteenth Century Law Office*, 16 GREEN BAG 2d 395 (2013).

³ See generally Alex Hern, *Don’t Know the Difference between Emoji and Emoticons? Let Me Explain*, THE GUARDIAN (Feb. 6, 2015), <https://www.theguardian.com/technology/2015/feb/06/difference-between-emoji-and-emoticons-explained> (noting that an emoticon is a “typographic display of a facial representation” whereas an emoji is an actual picture “of everything from a set of painted nails to a slightly whimsical ghost”) (emoji in quoted phrases omitted). New to this mix are memes and GIFs (Graphic Interchange Format).

outnumbered the number of letters sent via the United States Postal Service.⁵ Today, almost all American adults use email, and it is the most popular form of business communication.⁶ Nearly half of the world population will be using email by the end of 2020.⁷

But recent social science research suggests that the winking faces and pineapples might have a better chance of being understood than an actual, fully written email message. When it comes to this casual form of communication, how sure can we be that our intentions are properly conveyed? And where there is reason to doubt, what implications exist for the world of legal communication?

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How much do we email? In short, a lot—so much so that it almost makes trying to calibrate it seem like a fruitless endeavor. But let's try. Email is the most commonly used form of “computer-mediated communication” and for many, one of the most common forms of communication overall.⁸ As of 2015, 84% of American adults use the Internet.⁹ According to the Pew Research Center on Internet, Science, & Tech, as of 2011, 92% of all online adults used email, and 61% of all online adults used it on a “typical” day.¹⁰ Given the rapidity with which these innovations take hold in our society, there is reason to believe that these numbers have only increased since this data was gathered.

We see these same patterns repeated in the legal profession, where the ability to communicate electronically provides many advantages.¹¹ Long analytical memoranda have been whittled down to short email updates.¹²

4 Justin Kruger, et al., *Egocentrism over Email: Can We Communicate as Well as We Think?* 89 J. PERSONALITY & SOCIAL PSYCHOLOGY 925, 926 (2005).

5 *Id.* (citing L.L. Thompson, *THE MIND AND HEART OF THE NEGOTIATOR* (2d ed. 2001)).

6 Kristen Purcell, *Search and Email Still Top the List of Most Popular Online Activities*, PEW. RES. CTR. (Aug. 9, 2011), <http://www.pewinternet.org/2011/08/09/search-and-email-still-top-the-list-of-most-popular-online-activities/>; *Email Statistics Reports, 2016–2020*, THE RADICATI GROUP, INC., http://www.radicati.com/wp/wp-content/uploads/2016/01/Email_Statistics_Report_2016-2020_Executive_Summary.pdf (last visited Feb. 22, 2017).

7 THE RADICATI GROUP, INC., *supra* note 6.

8 Joseph B. Walther & Kyle P. D'Addario, *The Impacts of Emoticons on Message Interpretation in Computer-Mediated Communication*, 19 SOCIAL SCI. COMPUTER REV. 324, 324 (2001).

9 Andrew Perrin & Maeve Duggan, *Americans' Internet Access: 2000–2015*, PEW. RES. CTR. (June 26, 2015), <http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/>.

10 Purcell, *supra* note 6.

11 See, e.g., Kendra Huard Fershee, *The New Legal Writing: The Importance of Teaching Law Students How to Use Email Professionally*, 71 MD. L. REV. ENDNOTES 1 (2011).

12 See Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-Mail: The Traditional Legal Memorandum in the Twenty-First Century*, 58 J. LEGAL EDUC. 32 (2008) (stating that 75 percent of survey respondents “write no more than three traditional memoranda per year” and are far more likely to communicate with clients about their research results by e-mail, telephone, face-to-face discussion, informal memorandum, or a letter, and in that order of preference).

The legal profession was an early adopter of electronic communication, but today this necessarily means that lawyers are communicating substantively via email. According to a 2008 survey by Professor Kristen Tiscione, 92% of attorneys surveyed sent substantive emails to clients; it was the respondents' most highly preferred medium for client communications.¹³

Email, of course, can be accessed through both desktop and mobile devices, and most lawyers at this point use mobile devices of some kind. According to the 2015 ABA Tech Survey, 90% of survey respondents used smartphones and 49% used tablets outside of the office.¹⁴ The most popular mobile activity was, of course, email, with 93% of users.¹⁵

Others have written about the expectations and norms that come with such writing.¹⁶ But a lot of email communication does not involve communication of legal analysis or conclusions. Lawyers might use email to participate in negotiations with opposing counsel, to request information from a client or witness, to assign a crucial, last-minute task to a junior attorney. Social scientists have taken on a difficult question: As email becomes more and more of a daily presence in our lives, how can we be sure that we can effectively communicate our intended messages to our recipients using this medium?

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Despite its popularity, email communication is not without its critics. Social science research has referred to it as an “inherently more impoverished communication medium than voice or face-to-face communication” because of its inability to convey nonverbal cues that are so important to the interpretation of meaning.¹⁷ There has been a great deal of social science research into the potential limitations of email as a communication medium, particularly with respect to the question of the effect of the lack of nonverbal signaling.

Generally speaking, people tend to use themselves as a reference point when trying to imagine someone else's perspective, thoughts, or

¹³ *Id.* at 42.

¹⁴ Tom Mighell, *Mobile Technology*, ABA TECHREPORT 2015, <http://www.americanbar.org/publications/techreport/2015/Mobile.html> (last visited Feb. 22, 2017).

¹⁵ *Id.*

¹⁶ See, e.g., Katrina June Lee, *Process over Product: A Pedagogical Focus on Email as a Means of Refining Legal Analysis*, 44 CAP. U. L. REV. 655 (2016); Robbins-Tiscione, *supra* note 12; Kirsten K. Davis, “*The Reports of My Death Are Greatly Exaggerated*”: Reading and Writing Objective Legal Memoranda in a Mobile Computing Age, 92 OR. L. REV. 471 (2013); Ellie Margolis, *Incorporating Electronic Communication in the LRW Classroom*, 19 PERSPS.: TEACHING LEGAL RES. & WRITING 121 (2011); Kristen K. Tiscione, *The Rhetoric of Email in Law Practice*, 92 OR. L. REV. 525 (2014).

¹⁷ Kruger, et al., *supra* note 4, at 926 (noting that nonverbal information such as inflection and gesture are important cues to a speaker's meaning, particularly when the literal content of the message is ambiguous).

feelings.¹⁸ This often leads to an overestimation in our belief that our message will be effectively received. For example, one 1990 study asked participants “to tap the rhythm of a well-known song to a listener and then assess the likelihood that the listener would correctly identify the song.”¹⁹ The participants “estimated that approximately 50% of listeners would correctly identify the song”; the actual rate of accuracy was 3%.²⁰

This same disconnect exists when it comes to electronic communication. People routinely overestimate how well they are communicating their intended messages, particularly when a message is ambiguous—and people might not even be able to discern ambiguities in their own communication. This disconnect has manifested over and over in the social science research. Of note are two studies that attempted (in different ways) to answer the question of how well we are able to communicate using email messages.

In the first set of studies, one group of researchers conducted five studies to evaluate participants’ abilities to convey emotion and tone in emails.²¹ Each of the studies built upon the previous one to determine both whether and why this communication gap existed.²²

The first study asked participants to write serious and sarcastic statements on topics chosen from a list of ten options.²³ A second set of participants then analyzed the statements. The recipients were less able to discern the intended meaning than the senders anticipated—97% expected their topics to be correctly interpreted, whereas only 84% were.²⁴ The second study attempted to determine whether email in particular caused the gap, as opposed to just a general inclination toward overconfidence that one would be understood.²⁵ It determined that voice communication was, in fact, more effective: participants accurately communicated 75% of messages by voice recording but only 50% by email.²⁶ Also of note was that the senders had no less confidence based on the medium.²⁷ The third study injected both familiarity (communication between friends) and face-to-face communication into the analysis.²⁸ It concluded that predicted understanding was higher among both strangers and friends and found consistent results with respect to overconfidence and the medium but no significant difference among friends and with face-to-face communication.²⁹

18 *Id.* at 925.

19 *Id.* (citing Elizabeth Newton, *Overconfidence in the Communication of Intent: Heard and Unheard Melodies* (1990) (unpublished Ph.D. dissertation, Stanford University).

20 *Id.* (citing Newton, *Overconfidence in the Communication of Intent: Heard and Unheard Melodies*).

21 *See id.*

22 *See id.*

23 *Id.* at 927.

24 *Id.*

25 *Id.*

26 *Id.* at 928.

27 *Id.*

28 *Id.* at 929–30.

29 *Id.*

The final two studies attempted to determine the reason for the gap between confidence and understanding. Both suggested that egocentrism played a major role in email (mis)communication. In the fourth study, participants were asked to vocalize a message inconsistent with their intended meaning before being asked how confident they were that their message would be properly interpreted.³⁰ The researchers found that this reduced the level of overconfidence, which confirmed the hypothesis about egocentrism.³¹ In contrast, the last study attempted to *increase* the participants' overconfidence in how their message would be interpreted³² by using an experiment involving attempts at humor, which are "often less successful over email than one would think."³³ Here, participants acknowledged that the recipients might not find the jokes as funny as they did, but underestimated the degree to which that might be true.³⁴

Ultimately, the researchers concluded that participants overall overestimated their ability to communicate over email, whether they were trying to communicate sarcasm, humor, or some other emotion, or whether they were free to craft their own communication or were constrained by the researcher.³⁵ They noted that egocentrism in communication is not always undesirable, but that "[t]o the extent that successful communication depends on an accurate assessment of one's clarity, overconfidence of that clarity reduces the quality of communication."³⁶

More recently, a second group of researchers set out to build upon the first set of studies, specifically in the context of familiar relationships. Their goal was to test hypotheses regarding communication between friends (versus strangers) and communication where context is offered (versus not).³⁷

These researchers conducted three experiments. In the first set of experiments, participants were asked to write two emails describing their reactions to different hypothetical scenarios. First, they were instructed to draft an email in a text box as follows: "In the box below, write an e-mail to

30 This was based on the hypothesis that "[i]f people are overconfident in their ability to communicate over e-mail partly because of the difficulty of moving beyond their own perspective, then forcing people to adopt a perspective different from their own ought to reduce this overconfidence." *Id.* at 930.

31 *Id.* at 931.

32 This study used *Saturday Night Live's* "Deep Thoughts by Jack Handey" as the basis for this humor. *Id.* at 932; see also <http://www.deepthoughtsbyjackhandey.com/> (last visited Feb. 22, 2017).

33 Kruger, et al., *supra* note 4, at 931–32.

34 *Id.* at 932–33.

35 *Id.* at 933.

36 *Id.* at 934.

37 See Monica A. Riordan & Lauren A. Trichtinger, *Overconfidence at the Keyboard: Confidence and Accuracy in Interpreting Affect in E-Mail Exchanges*, 43 HUMAN COMM. RES. 1 (2016).

a friend. This e-mail is to convey an emotion; for example, that you are disappointed after trying a new restaurant, happy that someone asked you out on a date, or angry with a family member.”³⁸ For the second email, they were asked to choose among five different scenarios and “[p]retend that one of the following situations happened to you. In the box below, indicate which situation you chose. Then write an email to a friend telling them how you feel about the situation.”³⁹

After they wrote each email, the participants were asked to rate on a scale of 1 to 7 how many of the eight basic human emotions were present in the messages.⁴⁰ They then rated how confident they were about a friend’s and a stranger’s ability to interpret their intended emotions.⁴¹ A second set of participants then read the emails (the first set of emails without context and the second with the hypothetical, in random order) and rated the emails based on the eight emotions and their confidence in their interpretation.⁴²

In the second set of experiments, pairs of friends completed a substantially similar set of tasks.⁴³ One participant wrote the same two emails, addressed to a friend.⁴⁴ Then, the friend read and rated the two emails (as in the first part of the experiment) from the friend as well as another set of two emails from another study participant (thus, a stranger).⁴⁵ These participants also wrote a reply to both their friend and the stranger.⁴⁶

The study came to several conclusions. First, writers have more confidence in friends than strangers, but not much. Second, friends were more confident than strangers in their interpretations. Third, there was not much of a difference between the interpretations of friends and strangers, except in the cases of very long friendships, where the interpretations were more likely accurate. There was no relationship between

38 *Id.* at 5.

39 *Id.* at 5–6. The five hypothetical scenarios were (1) attendance at a tense basketball game the night before, where your team won at the buzzer after losing a large lead at halftime; (2) a language exam that took place two hours before, where you didn’t know half the answers after you had stayed up late studying and fell asleep while reading the last chapter, which you had inadvertently forgotten to read earlier; (3) an encounter with a dog outside your workplace, where you had tried unsuccessfully to find or call the owner, and after which you left the dog; (4) icing your knee after, four hours earlier, you had a great treadmill workout but then fell off the treadmill while shutting it down, in front of many others at the gym; and (5) you won a restaurant gift card in a raffle after entering a contest at the mall the week before. *Id.* at 21–22.

40 *Id.* at 5. The eight emotions are joy, trust, fear, surprise, sadness, disgust, anger, and anticipation. *Id.*

41 *Id.*

42 *Id.* at 6.

43 *Id.* at 13.

44 *Id.*

45 *Id.*

46 *Id.*

confidence and accuracy. People were overconfident that they would be accurately heard, even by friends, and both friends and strangers made inaccurate interpretations of the email writer's emotional state.⁴⁷

The researchers in both studies presented their conclusions with some caveats and ideas for future research, but taken together they illustrate a few key concepts. First, we are overconfident that our intended messages will be received when we communicate those messages via email. Second, our effectiveness is not necessarily better when we are writing to someone with whom we have an existing relationship. Thus, despite its ubiquity and convenience, communicating by email has a lot of potential for misunderstanding.

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So, what implications does this research have for legal communication? To some extent, this research is consistent with existing professional norms regarding email communication—much advice about writing professional emails calls for an awareness of tone. But a deeper look at some of the social science behind email communication suggests we might still be overestimating the idea that our intent has been communicated effectively, and that has important implications for many different types of legal communication.

Law is and always has been a social profession. A successful legal career requires development of both external and internal social networks—business development, networking, community outreach, maintenance of existing relationships, building rapport and teamwork among colleagues, establishing a strong social-media presence⁴⁸—all of these are important in the law. Increasingly, legal communication includes some amount of “substantive” socializing as well—communicating with judges or opposing or co-counsel, updating a client, assigning work to our associates.

As these social interactions move to electronic communication, the ability to effectively communicate becomes more and more important. Social science research tells us that electronic communication is less reliable than verbal communication in this regard. The conservative professional norms of legal communication also present an obstacle to contextualizing some of our electronic communication, in that social

⁴⁷ *Id.* at 18.

⁴⁸ See, e.g., *Social Media for Lawyers*, ABA LAW PRACTICE DIVISION, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/social_media.html (“Used carefully, social media can give your firm a voice, amplify your professional reputation, and help drive new business.”) (last visited Feb. 22, 2017).

science suggests that one way to mitigate the effect of this disconnect is by introducing non-text into the messaging. For example one study concluded that the use of emoticons⁴⁹ significantly changed the reader's perception of the writer's intent.⁵⁰ However, current legal professional norms counsel against the use of emoticons in emails.⁵¹ Advice to both lawyers and law students about professional email etiquette has suggested that they are overly casual and unprofessional.⁵² Thus, legal communicators cannot take advantage of one of the tools known to help bridge the gap between verbal and electronic communication.

What else can we do? By now, most practicing lawyers and law students know to be mindful when using email—to make sure email is the appropriate method of communication, to make sure the message is properly addressed, and so on. Further engagement with the communication research can bring even more awareness to the way we approach electronic communication. I suggest we proceed by asking a few key questions when communicating by email.

First, what is the nature of the relationship between the sender and the recipient? How well do the sender and recipient know each other? Know that this can have a mitigating effect, but in only a small number of situations. We should not be too confident that a friend or colleague will be able to interpret our intended tone.

Second, what is the email attempting to convey? Professional legal communication will probably involve even more than just the eight basic human emotions discussed by the researchers. One can imagine the need to convey urgency with regard to a deadline, or appreciation for a compromise, for example. We should ensure that the ease of sending a

49 An emoticon is a “graphic representation[] of facial expressions that many email users embed in their messages.” Walther & D’Addario, *supra* note 8, at 326 (Abstract).

50 *Id.* at 324. In the study, participants reviewed a verbal message that was accompanied by either an emoticon of a smile, a frown, a wink, or no emoticon. Each message contained a brief discussion about a movie and one of two variations of a statement about an economics course. The statement about the course was followed by one of the three emoticons or no emoticon. Participants then answered questions about their impressions of the message writer’s attitude toward the economics course, the writer’s affect, and other characteristics of the messages such as how serious or ambiguous the message was or how (un)happy or sincere the writer was. The study concluded that the effect of the emoticons varied by the emoticon and whether the message was inherently positive or negative. *Id.* at 332–34.

51 See, e.g., Wayne Schiess, *E-Mail Like a Lawyer*, MICH. B. J., Sept. 2010, at 48 (stating that emoticons are inappropriate for professional office emails); *Three Words That Should Never Be Used in an E-Mail*, PROBATE & PROPERTY, January/February 2013, at 64 (“An emoticon is also likely to make the sender appear foolish to a judge or jury (or an international e-mail chain.)”); Janice MacAvoy, Ivan Espinoza-Madrigal & Sherita Walton, *Think Twice Before You Hit the Send Button! Practical Considerations in the Use of Email*, 46 THE PRACTICAL LAWYER 45, 51 (“Do not use emoticons, and avoid using slang, jargon and abbreviations unless clearly appropriate, based on your recipient and the content and context of your message. Such informality may not only be misunderstood by the recipient, it also lulls the sender into a false sense that email is a conversation. It is not. It is a permanent (in most cases) written record”)

52 See e.g., George W. Kuney, *Legal Form, Style, and Etiquette for Email*, 15 TRANSACTIONS: TENN. J. BUS. L. 59, 67 (2013); David J. Goldstone & Robert Frederickson III, *E-Mail Etiquette, Version 2.0*, BOSTON B.J., March/April 2008, at 10; Schiess, *supra* note 51, at 48.

quick email did not undercut the thoughtfulness that the intended message requires.

Finally, replicate the step taken in the second study and evaluate the confidence you have that your intended message will be received. Might an edit make you more confident? Might eliminating some of the emotion (sarcasm, anger, anticipation) make your email more accurate? Perhaps take an even broader step and consider whether you often find yourself misunderstood in emails and text messages or whether you rely on external markers like emojis and emoticons to make sure your intended message is properly received. Ultimately, legal communicators are well-advised to err on the side of less emotion and familiarity in electronic communication.

Legal communicators could also benefit from future social science research in this area. As the researchers have noticed, it is also possible that other factors such as gender, education level, and relative status could also form the basis of assumptions that affect our interpretations of emails.⁵³ It is also important to develop best practices now, before less-formal channels of communication like text messaging and real-time communications like Slack start to displace email as the primary mode of electronic legal communication.⁵⁴

For the moment, perhaps the best we can do is proceed with caution, knowing that one should not rely on friendship and situational knowledge when interpreting emotion in emails, and lacking the ability to provide other communicative cues.

⁵³ Kruger et al., *supra* note 4, at 21.

⁵⁴ Adrienne LaFrance, *The Triumph of Email: Why Does One of the World's Most Reviled Technologies Keep Winning?*, THE ATLANTIC (Jan. 6, 2016), <https://www.theatlantic.com/technology/archive/2016/01/what-comes-after-email/422625/>.