Retweets As Evidence: The Developing Case Law

By **James Mahon and Samantha Lesser** (December 22, 2022)

James Mahon

Samantha Lesser

Social media encourages seamless communication among a variety of different platforms, such as Facebook, Instagram, Twitter and TikTok. Commentators no longer need to gain notoriety before having their opinions published, broadcast, or heard by millions.

Today, social media platforms provide us with the ability to share ideas and opinions with the simple touch of a button; and while this may seem like a blessing, it is also a curse. Random thoughts, published impulsively, without editorial input or that second set of eyes, can and sometimes do lead to scrutiny, not only in the court of public opinion, but in a court of law.

For example, most recently, Lieutenant Colonel Alexander Vindman filed a complaint in the U.S. District Court for the District of Columbia, alleging that Julia Hahn, Rudolph Giuliani, Daniel Scavino Jr. and Donald Trump Jr. conspired to intimidate and retaliate against him after he testified before the U.S. House of Representatives Intelligence Committee regarding a phone call between President Donald Trump and Ukraine's President Volodymyr Zelenskyy, which ultimately led to Trump's impeachment.

The court analyzed, as evidence of the claims, a series of tweets and retweets from the defendants, and held that they were not made with the "specific goal of intimidating Vindman" and were not defamatory.[1]

In order for evidence to be admissible in a court of law, it must first be relevant to the issue at hand. Evidence is considered relevant if it has any tendency to make a fact more or less probable.[2] Once it has been deemed relevant, the evidence must be evaluated to determine its authenticity — which can be broken down into two specific issues: (1) Does the social media communication accurately reflect the content as it appears, and (2) is the communication, whether a tweet or a retweet, actually authored by the person the proponent claims it was?

Generally, in order to authenticate evidence, a witness needs to have firsthand knowledge, or the evidence must have distinctive characteristics.[3]

States take various approaches to authenticating evidence. For example, Florida does not even allow printouts from government websites to be "self-authenticating."[4] However, in Maryland, the burden is on the admitting party to show that the social media evidence was not falsified or created by another user through (1) testimony by the creator of the website page or post, (2) a search of the internet history or hard drive of the purported creator's computer, or (3) information obtained directly from the social media site that links the establishment of a profile to a person who allegedly created it.[5]

Once relevance and authenticity are shown, the proponent must show that the statement is not hearsay. Under the Federal Rules of Evidence, hearsay is "an out-of-court statement offered to prove the truth of the matter asserted" and is not admissible in a court of law.[6]

Interestingly, one must consider whether certain records or evidence are actually

"statements"; if not, they do not fall within the hearsay rule and are admissible as evidence. For example, cellphone records indicating that a defendant made phone calls from certain cell towers were not considered hearsay because they were not out-of-court statements and were created by a machine.[7] One must also consider whether or not a certain statement is actually being offered for the "truth of the matter asserted."[8]

Notably, the court in Vindman stated that "mere 'loose, figurative, or hyperbolic language' does not imply facts … [and] that political charges … constitute mere 'loosely definable, variously interpretable statement[s] of opinion … made inextricably in the contest of political, social, or philosophical debate.'" In fact, the court stated that "such statements are subjective opinion rather than objectively verifiable fact."[9]

If, however, a statement is hearsay evidence, one must determine whether a certain exception to the rule applies.[10] The exceptions to the hearsay rule exist because, while they may be out-of-court statements offered for the truth of the matter asserted, the declarant's declarations at the time they were made are more trustworthy in that they are being made close to the event, while they are observing or perceiving something, or under the influence of self-interest.

In regard to retweets, an August decision issued by U.S. District Judge Gregory Woods of the U.S. District Court for the Southern District of New York examines whether and to what extent a party to a litigation should be held responsible for the content contained in a tweet, authored by someone else, but retweeted by that party.[11]

In that case, Flynn v. Cable News Network Inc., CNN claimed that Flynn family members were QAnon followers because they retweeted a QAnon followers' tweet. Judge Woods refused to conclude as a matter of law that the retweet of CNN's statement was defamatory, since the retweet was not authored by the Flynns and since the Flynns did not adopt the original author's statement without comment.

Again, in the Vindman case, the court analyzed Trump Jr.'s "retweet of an article accusing Vindham of 'Inappropriate and Partisan Behavior in Military.'"[12] Vindman alleged that the article's source was questionable because it had "the hashtag #Q" and the source "reportedly wrote more than hundreds of tweets recirculating QAnon-related theories."

The court found that that Trump Jr. did not retweet "the article source's tweets" but "retweeted only an article from Gateway Pundit based on those tweets." The court reasoned that "[s]peakers are not presumed to have scrolled through the Twitter history of the source for every article that they re-tweet."[13]

A similar result was reached in another Southern District of New York case, Maron v. The Legal Aid Society, where the reposting of a microblog was held not to constitute sufficient evidence of a hostile work environment, where a white employee, running for City Council was accused by coworkers of not recognizing that the criminal justice system in New York is inherently racist. Once again, the reposting or retweeting was not deemed equivalent to a direct statement by the author.[14]

Retweeting, however, is not without evidentiary risks. For example, in the Washington case of Watness v. City of Seattle, a trial court found that an attorney's "tweets and retweets of various articles stand as extrajudicial statements of a party's credibility, character, and reputation" in violation of the Rules of Professional Responsibility regarding trial publicity and were the basis of the Washington Court of Appeals imposing Rule 11 sanctions against the attorney in 2019.[15]

These decisions show that courts are reluctant to conclude that a mere retweet should be deemed a statement that can be used against the retweeting party. However, where the retweet can be shown to be a wholesale endorsement of the original tweet, a different result can and should be expected.

Courts are going to have to consider these cases of first impression.

James J. Mahon is a shareholder and Samantha A. Lesser is an attorney at Becker & Poliakoff PA.

[1] Vindman v. Trump, 2022 U.S. Dist. LEXIS 203547 (Nov. 8, 2022).

[2] FRE 401.

[3] FRE 901(b)(1) and FRE 901(b)(4).

[4] Nationwide Mutual Fire Insurance Co. v. Darragh, 95 So. 3d 897 (Fla. 5th DCA 2012).

[5] Griffin v. State, 19 A.3d 415, 432 (Md 2011).

[6] FRE 801.

[7] Wade v. State, 156 So. 3d 1004, 1024-25 (Fla. 2014); See also, Gayle v. State, 216 So.3d 656 (Fla 4th DCA 2017).

[8] U.S. v. Encarnacion-Lafontaine, 639 Fed.Appx. 710 (2016).

[9] Vindman v. Trump, 2022 U.S. Dist. LEXIS 169727 (Nov. 8, 2022).

[10] FRE 803.

[11] Flynn v. Cable News Network, Inc., 2022 WL 3334716 (SDNY August 12, 2022).

[12] Vindman v. Trump, 2022 U.S. Dist. LEXIS 169727 (Nov. 8, 2022).

[13] Id.

[14] Maron v. Legal Aid Society, 2022 WL 190247 (SDNY Jun 2, 2022).

[15] Watness v. City of Seattle, 11 Wash App 2d. 1058 (Ct of App. 2019).