

8.05. Admission by Adopted Statement (rev. 12-2019¹)

(1) An out-of-court statement made by a person which is inconsistent with a party's position in the proceeding is admissible against that party, if the party heard and understood the statement and assented to the statement by word or conduct.

(2) Except as provided in subdivision three, an out-of-court statement made by a person that is inconsistent with a party's position in the proceeding is admissible against that party if the party heard and understood the statement and provided an equivocal or evasive response or remained silent when he or she would reasonably have been expected to deny the statement and had an opportunity to do so.

(3) In a criminal proceeding when, before or after a defendant's arrest, the defendant is silent following a statement made to the defendant by a person the defendant knows to be a member of law enforcement, during the performance of his or her duties, the defendant's silence is not admissible as an admission or to impeach the defendant's testimony, except as provided in paragraphs (a) and (b).

(a) The silence of a defendant, who at the time was a law enforcement officer, in the face of an accusation of criminal conduct by a fellow officer is admissible if the defendant was under a duty to inform his or her superiors of his or her activities.

(b) A defendant who, prior to trial, makes a voluntary statement relating to the criminal transaction at issue and then provides testimony at a criminal proceeding with respect to that transaction may be impeached by the defendant's omission of critical details from the

defendant's pretrial statement that would have been natural to include in that statement.

(4) A party's failure to respond to a written statement directed to the party may not be used to establish the party's assent to the statement.

(5) A person who understands and clearly expresses his or her assent to a statement of another that contains a statement against the interest of the assenting person adopts that statement as his or her own, and the statement is admissible in evidence as an adoptive admission.

Note

This rule addresses the adoptive admission hearsay exception. An adoptive admission occurs "when a party acknowledges and assents to something 'already uttered by another person, which thus becomes effectively the party's own admission' " (*People v Campney*, 94 NY2d 307, 311 [1999], citing 4 John Henry Wigmore, Evidence § 1609 at 100 [James H. Chadbourn rev]). The other person's statement is then admissible against the party as a party admission. In effect, it is as if the party himself or herself made the statement. The manifestations of assent are also admissible to establish the "relevant demonstrative response of the affected party" (*People v Lourido*, 70 NY2d 428, 433 [1987]).

Subdivision (1) sets forth the adoptive admission rule in situations where the alleged manifestation of assent involves words or conduct by the party charged with the adoption. It recognizes that the assent may be by a verbalized response (*see e.g. Campney*, 94 NY2d at 312-313; *see also People v Vining*, 28 NY3d 686 [2017] [express assent may be based upon evasive or equivocal answers]), or by conduct (*e.g. People v Ferrara*, 199 NY 414, 430 [1910] [shrugging of shoulders]). Subdivision (2) and subdivision (3) set forth the rule where the alleged manifestation involves the party's evasive or equivocal responses or silence.

The Court of Appeals has cautioned that an adoptive admission is allowed only when the statement was "fully known and fully understood" by the party against whom it is being offered (*People v Koerner*, 154 NY 355, 374 [1897]; *see also People v Allen*, 300 NY 222, 225-226 [1949]). Whether these foundation elements for the admissibility of the statement have been established is to be decided by the trial court in light of "all the facts and circumstances surrounding the incident" (*Ferrara*, 199 NY at 430).

Subdivision (2). Except as set forth in subdivision (3), subdivision (2) sets forth the rule governing an adoption of a statement in circumstances involving a party's silence or evasive or equivocal response. The Court of Appeals has held that "[a]ssent can be manifested by silence, because '[a] party's silence in the face of an accusation, under circumstances that would prompt a reasonable person to protest, is generally considered an admission' " (*Vining*, 28 NY3d at 690). For purposes of this rule, the Court has held that silence may also encompass equivocal or evasive answers (*id.* ["an equivocal or evasive response may similarly be used against (a) party . . . as an adoptive admission by silence"]).

As to adoption by silence, the Court of Appeals has cautioned that while "accusatory statements, not denied, may be admitted against the one accused, as admissions," they are admissible "only when the accusation was 'fully known and fully understood' by defendant and when defendant was 'at full liberty to make answer thereto, and then only under such circumstances as would justify the inference of assent or acquiescence as to the truth of the statement by his remaining silent' " (*People v Allen*, 300 NY at 225 [citations omitted]; *see also Vining*, 28 NY3d at 691 ["To use a defendant's silence or evasive response as evidence against the defendant, the People must demonstrate that the defendant heard and understood the assertion, and reasonably would have been expected to deny it"]; *Koerner*, 154 NY at 374 [the circumstances must be "such as would properly or naturally call for some action or reply from (persons) similarly situated"]). Whether these foundation elements have been established is an issue for the trial court to determine (*Vining*, 28 NY3d at 691).

Of note, the Court of Appeals has stated that in criminal proceedings this rule "is to be applied with careful discrimination" as " '[r]eally it is most dangerous evidence' " (*Koerner*, 154 NY at 374) and that this evidence "should always be received with caution, and ought not to be admitted unless the evidence is of direct declarations of a kind which naturally call for contradiction, or some assertion made to a party with respect to [the party's] rights, in which, by silence, [the party] acquiesces" (*id.* at 374-375).

Subdivision (3). Subdivision (3) sets forth the rule governing the admissibility in a criminal proceeding of a defendant's silence during police questioning. Specifically, evidence of a criminal defendant's pre-arrest and post-arrest silence during police questioning may not be used in the People's direct case or for impeachment purposes, a rule derived from the State Constitution (*see e.g. People v De George*, 73 NY2d 614, 618 [1989] [pre-arrest silence]; *People v Von Werne*, 41 NY2d 584, 588 [1977] [post-arrest silence]; *People v Conyers*, 52 NY2d 454, 457 [1981] [post-arrest silence]).

In summing up New York law, the Court of Appeals has stated: "We hold, as a matter of state evidentiary law, that evidence of a defendant's selective silence generally may not be used by the People as part of their case-in-chief, either to allow the jury to infer the defendant's admission of guilt or to impeach

the credibility of the defendant's version of events when the defendant has not testified" (*People v Williams*, 25 NY3d 185, 188 [2015]).

Subdivision (3) (a). Subdivision (3) (a) is derived from *People v Rothschild* (35 NY2d 355, 360-361 [1974] ["The natural consequences of his status as a law enforcement officer would require him to promptly report any bribe or attempted bribe to his superiors, and certainly protest and reveal such an alleged scheme after his arrest to them, and to his fellow officers as well"]); and *People v De George* (73 NY2d 614, 619 [1989] ["we affirmed the (*Rothschild*) conviction because under the circumstances, the evidence of silence had an unusually high probative value. The officer was under a duty to inform his superiors of his undercover activities and thus his continued silence in the face of direct accusations by his fellow officers was probative of guilt"]).

Subdivision (3) (b). Subdivision (3) (b) is derived from *People v Savage* (50 NY2d 673, 676 [1980] ["a defendant who, having been given the warnings required by *Miranda v Arizona* (384 US 436 [1966]) and having elected to waive his right to silence, proceeds to narrate the essential facts of his involvement in the crime, may be cross-examined about his failure to inform the police at that time of exculpatory circumstances to which he later testifies at trial"]); and *People v Chery* (28 NY3d 139, 142, 145 [2016] [it was permissible for "the People to use defendant's selective silence, while making a spontaneous postdetention statement to the police, to impeach his trial testimony," given that the "defendant elected to provide some explanation of what happened at the scene, and it was unnatural to have omitted the significantly more favorable version of events to which he testified at trial"]).

Subdivision (4). This subdivision is derived from substantial Court of Appeals precedent (*see e.g. Talcott v Harris*, 93 NY 567, 571 [1883] ["While a party may be called upon in many cases to speak where a charge is made against him, and in failing to do so may be considered as acquiescing in its correctness, his omission to answer a written allegation, whether by affidavits or otherwise, cannot be regarded as an admission of the correctness thereof and that it is true in all respects"]; *Gray v Kaufman Dairy & Ice Cream Co.*, 162 NY 388, 397-398 [1900] [collecting cases]; *Viele v McLean*, 200 NY 260, 262 [1910]).

Subdivision (5) is derived from decisions holding that "[g]enerally, an adoptive admission is allowed when a party acknowledges and assents to something 'already uttered by another person, which thus becomes effectively the party's own admission' " (*People v Campney*, 94 NY2d 307, 311 [1999] [citation omitted]).

The foundation for holding that a statement was adopted includes finding, by direct or circumstantial evidence, that the "defendant had read or been informed of the contents of the statement, understood its implications, and affirmatively adopted the statement as his own" (*id.* at 313).

In *People v Woodward* (50 NY2d 922, 923 [1980]), for example, the police read to the defendant his codefendant’s written confession, whereupon the defendant said: “Yes, that is what happened.” In addition to holding that the statement was admissible at the joint trial of the defendants, the Court noted that “[e]ven at a separate trial . . . , the [codefendant’s] statement would have been admissible since the jury could find that he had adopted it as his own” (*id.*).

¹ The December 2019 revision was for the purpose of adding subdivision (5).