

## 8.19. Forfeiture By Wrongdoing

**Where a witness in a proceeding is unwilling to testify or testify to the full extent of the witness’s knowledge, a party forfeits the right to preclude that witness’s prior out of court statement(s) as hearsay or on the ground that the party will be denied the right to confront the witness, if the party offering the statement proves by clear and convincing evidence that: (a) the opposing party, personally or with the aid of others, engaged or acquiesced in misconduct aimed at least in part at preventing the witness from testifying, and (b) such misdeeds were a significant cause of the witness’s decision not to testify or testify fully.**

### Note

This rule is derived from the Court of Appeals recent decisions in *People v Dubarry* (25 NY3d 161, 174-175 [2015]) and *People v Smart* (23 NY3d 213, 219-220 [2014]), which in turn were derived from several prior decisions of the court.

In *People v Geraci* (85 NY2d 359 [1995]), the court held that forfeiture requires a showing that the witness’s unavailability was procured by misconduct and noted such a showing had traditionally required that the defendant procured the witness’s unavailability through “violence, threats or chicanery.” (*Id.* at 365-366.) In *Dubarry* and *Smart*, the court stated the rule as requiring that the defendant engaged in “misconduct” or “misdeeds” aimed at least in part at preventing the witness from testifying and that defendant’s misconduct was a significant cause of the witness’s decision not to testify. (*People v Dubarry*, 25 NY3d at 176, quoting *People v Smart*, 23 NY3d at 220.) These recent holdings introduced more precise evidentiary standards to the procured by misconduct rule. This language, read literally, also includes misdeeds other than “violence, threats or chicanery.” The Court of Appeals, however, has never indicated that misconduct beyond these three kinds of behaviors would qualify for forfeiture. (*See also People v Cotto*, 92 NY2d 68 [1998]; *People v Johnson*, 93 NY2d 254 [1999]; *People v Maher*, 89 NY2d 456, 461-463 [1997].)

The forfeiture of confrontation rights “ ‘constitutes a substantial

deprivation' ” (*People v Johnson*, 93 NY2d at 258, quoting *People v Geraci*, 85 NY2d at 367), and the clear and convincing evidence requirement places a “heavy burden” on the statement’s proponent (*People v Cotto*, 92 NY2d at 76). Forfeiture is a “narrow departure from the hearsay rule.” (*People v Maher*, 89 NY2d at 461.) Where the statement’s proponent alleges “specific facts which demonstrate a ‘distinct possibility’ that a criminal defendant has engaged in witness tampering,” the court must conduct an evidentiary hearing, known as a *Sirois* hearing (*see Matter of Holtzman v Hellenbrand*, 92 AD2d 405 [2d Dept 1983]), to determine if forfeiture should be invoked. (*People v Johnson*, 93 NY2d at 258, quoting *People v Cotto*, 92 NY2d at 72.) Because of the inherently surreptitious nature of witness tampering, circumstantial evidence may be used to establish, in whole or in part, that a witness’s unavailability was procured by the defendant. (*People v Geraci*, 85 NY2d at 369.)

The Court of Appeals has expressly stated that this forfeiture rule is not limited to admitting prior grand jury testimony of an intimidated witness and may encompass other out-of-court statements made by an intimidated witness. (*People v Cotto*, 92 NY2d at 77.) However, the court has cautioned that any statement sought to be admitted pursuant to it “cannot be so devoid of reliability as to offend due process.” (*Id.* at 78.)

The Court of Appeals has noted that when an out-of-court statement is admitted pursuant to this rule, the trial court has the discretion to admit additional out-of-court statements of the unavailable witness for impeachment where there is a possibility that, if such impeachment is not allowed, the factfinder will be misled into giving too much weight to the initially offered statement. (*People v Bosier*, 6 NY3d 523, 528 [2006].) However, the court has cautioned that impeachment need not always be allowed. In this connection, the court emphasized that the trial court in exercising that discretion shall consider that the party offering the impeaching statement may benefit from his own wrongful conduct because the party proffering the initial out-of-court statement will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent impeachment evidence. (*Id.* [“Where impeachment is permitted, the defendant, in direct contravention of the most basic legal principles and the policy objectives of *Geraci*, may benefit from his or her own wrongful conduct because the prosecution will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent testimony proffered by the defendant”].) In *Bosier*, the court rejected the defendant’s impeachment attempt, commenting that since “the inconsistency defendant relied on did not go to the heart of the prosecution’s case and might well have been credibly explained if the witness had been present, it was not an abuse of discretion to exclude the impeaching evidence.” (*Id.*)

While the forfeiture rule has arisen in criminal cases, there is no indication

in the case law that the rule is not applicable in civil actions when a party seeks to introduce a statement of an intimidated witness over a hearsay objection.