8.22. Impeachment of Hearsay Declarant

(1) Except as provided in subdivision two, when hearsay evidence has been admitted, the credibility of the declarant may be impeached by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The admission of that impeachment evidence is accordingly not conditioned on affording the declarant an opportunity to deny or explain.

(2) When hearsay evidence is admitted pursuant to rule 8.19, the trial court may in its discretion preclude evidence of impeachment. The court may consider, on the one hand, the possibility that, if impeachment is not allowed, the jury will be misled into giving too much weight to the hearsay evidence and, on the other hand, that the party against whom the hearsay evidence is offered may unfairly benefit from the party's own wrongful conduct because the opposing party will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent testimony proffered as impeaching evidence.

Note

Subdivision (1), first sentence, is derived from Court of Appeals case law, which uniformly recognizes the rule stated therein. (*See People v Fratello*, 92 NY2d 565, 572 [1998], *cert den* 526 US 1068 [1999]; *Matter of Hesdra,* 119 NY 615 [1890].) The second sentence restates recent authority addressing this point. (*See Lawton v Palmer,* 126 AD3d 945 (2d Dept [2015]; *People v Conde,* 16 AD2d 327, 331-332 [3d Dept 1962]*, affd* 13 NY2d 939 [1963].)

Subdivision (2) applies when the hearsay statements are admitted because of the defendant's forfeiture of the right to exclude them (*see* Guide to NY Evid rule 8.19) and is derived from *People v Bosier* (6 NY3d 523, 528 [2006] ["(W)e do not hold that such a defendant (who tampered with a witness) should never be able to introduce the unavailable witness's out-of-court statements for impeachment purposes. The trial judge has discretion to permit such impeachment where there is a possibility that, if it is not allowed, the jury will be misled into giving too much weight to the statement offered by the prosecution. But such impeachment need not always be allowed. Where impeachment is permitted, the defendant, in direct

contravention of the most basic legal principles and the policy objectives of *Geraci* (85 NY2d 359 [1995]), 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 (as impeaching evidence). Here, where 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"]).