ILLINOIS STATE BAR ASSOCIATION

TRIAL BRIEFS The newsletter of the ISBA's Section on Civil Practice & Procedure

November 2011, vol. 57, no. 4

Forfeiture by wrongdoing and the Illinois Rules of Evidence

By Patrick M. Kinnally

With the codification of the Illinois Rules of Evidence ("Rules")(MR 24138, Illinois Supreme Court (9/27/2010)) for the most part, with the notable exception of expert witness testimony (see Rule 702 [comment] citing *Donaldson v. Central Illinois Public Service Co.*, 199 Ill.2d 63 (2002)), the Illinois Supreme Court Committee on Illinois Evidence ("Committee") adopted the Federal Rules of Evidence. This is so even though the Committee indicated that "the Illinois Rules of Evidence are not intended to abrogate any current statutory rules of evidence." MR 24138, Illinois Supreme Court (9/27/2010), at 1 (Committee Commentary).

How this codification will be interpreted when it comes to the Dead Man's Act (735 ILCS 5/8-201), sexual abuse (735 5/8-2601), elder abuse (735 5/8-2701), or domestic violence cases (725 ILCS 5/115-10.1a, 760 ILCS 60/21(a), see, *Rolandis G.*, 232 Ill.2d 13 (2009) ("Rolandis"), or other provisions of the Evidence Act (735 ILCS 5/8-101, *et seq.*) or Supreme Court Rules, should prove interesting, if not nettlesome. Illinois, for example, is without any statutory privilege relating to client-attorney communications other than what exists in the Rules of Professional Conduct (RPC Rule 1.6).

But what about common law rules of evidence? The Rules make no mention of common law evidentiary principles. One of the interesting precepts now adopted in Illinois as an exception to the hearsay rule, where the declarant is unavailable, is Rule 804(b)(5), which states: ". . .The following are not excluded by the hearsay rule even though the declarant is unavailable as a witness. . . ."

Forfeiture by Wrongdoing

A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. . . . (Ill. R. 804(b)(5).

This is the same rule found in the Federal Rules of Evidence (F.R. Evid. R. 804(b)(6). Although little known outside the criminal court (See 720 ILCS 5/115-10.6(g) and *People v. Stechly*, 225 Ill.2d 246 (2007), the genesis for the rule abides in the common law. (See *People v. Hanson*, 238 Ill.2d 74 (2010), citing *Reynolds vs. United States*, 98 U.S. 145 (1878).

The basis for it is an equitable concept; namely,if a witness is not present because the defendant wrongfully secured his/her absence, then a defendant cannot complain if competent evidence is admitted in place of what the defendant has sought to withhold. *Reynolds* (See also, *Crawford v. Washington*, 541 U.S. 36 (2005); *Davis v. Washington*, 547 US 813 (2006)). The rule is an exception to the hearsay rule. It is a true forfeiture of rights (see, Rutan, Procuring the Right to an Unfair Trial. (56 *American Law Review* 177, 183 (2006))

Historically, in the criminal court, the way the rule has worked is by a motion in limine to admit certain hearsay statements (see *People v Peterson,* 2011 Ill. App.3d 100513 (2011)) The prosecution files a motion to determine whether certain hearsay statements may be utilized at trial and asks the trial court to do so before a jury is empaneled. Under the statute (725 ILCS 5/115-10.6(e)), the admissibility of the hearsay declarations is based on three determinations: (1) the adverse party murdered the declarant; (2) the content and circumstances of the statements are sufficiently reliable; and (3) the interests of justice will be promoted by the admission of the evidence. The standard of proof to which the proponent of the statement must adhere is a preponderance of the evidence. The Illinois Supreme Court has not ruled on the constitutionality of this statute which was enacted in 2008. (Compare, *People v. Melchor*, 226 Ill.2d 24 (2007)).

The forfeiture by wrongdoing doctrine and Illinois Rule 804(b)(5), however, do not address just murder and criminal cases. It applies to civil cases as well. (See, *Handbook of Illinois Evidence*, Graham (2010), Sec. 804.5, pp. 986-987 ("Graham") The rule, quite plainly, says that where a declarant's out-of-court statement is offered for the truth of an assertion against a party who engages or acquiesces in wrongdoing that intends to and actually accomplishes the unavailability of that witness at trial, then the declarant's statements are admissible. See, *Rule 804(b)(6), the Illegitimate Child of the Failed Liaison Between the Hearsay Rule and Confrontation Clause*, Bocchino and Sonenshein, 73 *Missouri Law Review* 41, 50 (2008) ("Bocchino")

Indeed, several provisions of the Illinois Probate Code where a person causes the death of another (755 ILCS 5/2-6) or is convicted of financial exploitation of an elder person (755 ILCS 5/2-6.2) codify disqualification from receipt of any benefits the perpetrator might have enjoyed but for his or her misconduct. As an evidentiary proposition, the forfeiture by wrongdoing statute in civil cases arguably should cut a broader swath.

This rule and its penalty of forfeiture seem to require three elements necessary to obviate an hearsay objection. First, the declarant must be unavailable to testify. Next, the party against whom the rule would operate must have *engaged in or acquiesced in wrongdoing that intends* to make the declarant absent. And, finally, the wrongdoer must effectuate the witness' unavailability.

What is wrongdoing? Wrongdoing, a word derivative of 14th century etymology, is: evil or improper behavior or action; or, in an instance of doing wrong (Merriam Webster Dictionary, 2011). This would not denote that any type of crime must be committed in order for the rule to apply. Merely the commission of an act that is wrongful or undertaken with an improper motive should suffice. One court, in applying the exception in the federal context (which is now the Illinois version), found that wrongdoing need not consist of a criminal act. *United States v. Scott*, 284 F.3d 758, 763 (7th Cir. 2002). If this is correct, then a witness' trial unavailability procured wrongfully by the party to whom the testimony would be adverse should not have a valid hearsay objection.

Let's assume the following facts. Dennis Wixom ("Wixom") went to Ballyvaughan Tap on Thursday night and consumed four shots of Red Breast Irish Whiskey and four pints of Guinness. He then drove his Ford F150 home and on the way struck a vehicle operated by Vicenzo. There were no eyewitnesses to the auto accident. Vicenzo was severely injured and taken to the hospital, where he remained for seven days before he died. Prior to his death, Vicenzo made the following statements. On the night he was hospitalized, he told the emergency room physician, Dr. Tad, that the car that he collided with was a blue Ford F150 that crossed the center line into his lane of traffic. He repeated that statement to Jim Clancy, the Aurora Police Officer investigating the accident, four days after the car wreck when Wixom was heavily sedated.

Wixom was charged with driving under the influence of alcohol. Wixom refused a breathalyser test, and Clancy never requested a blood draw. Wixom's criminal trial resulted in an acquittal. Dr. Tad had relocated to Molokai, Hawaii, and Officer Clancy did not appear since he resigned as a police officer and moved to Savannah, Georgia. There is no evidence that Wixom had anything to do with the unavailability of these witnesses.

You are now preparing for the trial on the wrongful death suit you have brought on behalf of Vicenzo's wife, Maude. You have filed a motion in limine to admit the testimony of Officer Clancy and Dr. Tad. You assert that both Clancy and Tad's statements are not hearsay because Vicenzo is unavailable due to the wrongdoing of Wixom. Vicenzo's insurance defense lawyer claims the statements are rank hearsay and inadmissible since they are out-of-court statements offered for their truth.

This issue in Illinois and elsewhere in our civil courts is one of first impression. See, *Bocchino*, 73 Missouri Law Review 41, 60, fn. 111). It is likely that whether the motion in limine should be granted or denied will turn not just the unavailability of the witness, but whether there was some intent on the part of Wixom to procure that witness' absence. Was a conscious choice made by Wixom to drive a vehicle that might result in an injury to another? Professor Graham concludes the conduct of making the witness unavailable must show actions taken after the event of wrongdoing. In this scenario, the plaintiff, Maude, as Vicenzo's representative, would have to show Wixom performed some act wrongfully to procure Vicenzo's absence as a witness with some intention to prevent the witness from testifying. (*Graham*, at p. 986) Is this necessary? Our Illinois Supreme Court seems to agree with this in a situation where Sixth Amendment confrontation clause concerns are not implicated. (*Rolandis*, 232 Ill.2d at 43-44)

In the civil arena, however, confrontation clause concerns are not present. No liberty issues are involved. The issue is compensation for tortious or wrongful conduct. Where it is apparent that Vicenzo's unavailability is the result of Wixom's conduct, why must the proponent of admitting Officer Clancy's and Dr. Tad's testimony be prevented from doing so? It can hardly be argued with any persuasion that Wixom's conduct did not result in Vicenzo's unavailability. The timing of his absence from being able to testify is the direct result of the occurrence. Hence, any temporal proximity as to when the event occurred is irrelevant.

The witness is Vicenzo, not Dr. Tad or Officer Clancy. Can it be concluded by a preponderance of the evidence that Wixom intended to cause Vicenzo's unavailability when he got in his pickup truck and, apparently inebriated, drove home from the Ballyvaughan Tap? Are the statements Vicenzo uttered to Dr. Tad and Officer Clancy reliable or trustworthy? Do they need to be if they are a true exception to the hearsay rule?

Forfeiture by wrongdoing should no longer be a doctrine which is only applicable in our state criminal trial courts. New rules, thankfully, can create imaginative ways of thinking and litigating for civil practitioners who use them. ■