***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

**MEMORANDUM**

To: CAFL Appellate Panel Support Unit

From: [Legal Intern]

Date: July 2016

Re: Forfeiture of Right to Counsel

QUESTIONS PRESENTED

What actions or behaviors by a parent may lead to the forfeiture of his right to the

assistance of counsel? What actions or behaviors by a defendant may lead to a waiver of counsel by conduct?

BRIEF ANSWERS

 A defendant’s threats or acts of violence against his counsel, or others, may result in a forfeiture of his right to the assistance of counsel. A defendant may waive his right to counsel by conduct when a defendant seeks to remove counsel without good cause, the judge warns the defendant that he will lose his right to counsel if he further commits misconduct, and the defendant then further engages in the misconduct.

DISCUSSION

I. Doctrine of Forfeiture of Counsel

A party’s conduct may be so egregious as to justify an inference that he has forfeited his right to assistance of counsel under the doctrine of “forfeiture by wrongdoing.” *Commonwealth v. Edwards*, 444 Mass. 526, 534 (2005). Forfeiture results in the defendant having to represent himself even though he may wish to be represented by counsel, and occurs even though he has not been warned of the dangers of being pro se. *See Commonwealth v. Means*, 454 Mass. 81, 92 (2009) (citing *United States v. Goldberg*, 67 F.3d 1092, 1100 (3rd Cir. 1995)); *see also Adoption of Ulon,* 09-P-1112 (September 10, 2009) (applying *Means* to child welfare case).

There are four considerations to assess whether forfeiture is appropriate. *Means*, 454 Mass. at 93-95. The four considerations are: (1) the defendant has had more than one appointed counsel; (2) the forfeiture was imposed at a stage of the proceedings other than trial; (3) the defendant had made threats of violence or acts of violence against his counsel or others; and (4) the “forfeiture should be a last resort in response to the most grave and deliberate misconduct.” *Id*.

Defendants have forfeited their right to the assistance of counsel when they physically assault or threaten to harm their attorneys or others. *Id*. at 95. *E.g.*, *Gilchrist v. O’Keefe*, 260 F.3d 87, 90-91 (2d Cir. 2001) (forfeiture upheld at sentencing phase where defendant punched his counsel in the head). Courts have also applied the doctrine to other inexcusable conduct by defendants. *See, e.g.*, *United States v. Lamplugh*, 334 F.3d 294, 300-01 (3rd Cir. 2003) (forfeiture upheld when defendant knowingly fabricated documents in attempt to deceive the court); *Edwards*, 444 Mass. at 537 (explaining doctrine applies where defendant murders, threatens or intimidates a witness).

Not all bad conduct by a defendant is sufficient to forfeit counsel. In *Commonwealth v. Gibson,* 474 Mass. 726 (2016), the SJC reversed the trial judge’s order of forfeiture of the defendant’s right to counsel at a probation revocation hearing, because (1) the forfeiture hearing did not meet the procedural due process requirements of *Means*, and (2) the defendant’s conduct, although egregious in many respects, did not warrant forfeiture under the guidelines established in *Means*.

In *Gibson*, the defendant was convicted on two counts of indecent assault and battery on a child under fourteen. Over the course of the trial and post-trial proceedings, the defendant was represented by a succession of nine different court-appointed attorneys (six during the trial proceedings and three during the probation revocation proceedings). Most of those attorneys withdrew from representation of the defendant because of his “pattern of quarrelsome, confrontational, hostile, and threatening conduct toward” them, including accusations of unprofessional conduct and threats to report them to the Board of Bar Overseers. (In one instance, the defendant threatened violence against counsel.) Prior to a probation revocation hearing, the judge issued an order to the defendant to show cause why his right to counsel should not be forfeited. At the show cause hearing, the defendant suggested that his medical and mental health problems caused his conduct. Without conducting an evidentiary hearing, the judge found that mental health was not a factor and ordered the defendant’s right to counsel forfeited. The defendant appeared pro se at the revocation hearing, was found in violation of probation, and was incarcerated.

In its decision, the SJC noted that in Means, it had opined that the sanction of forfeiture should not be imposed until the defendant has had a “full and fair opportunity at a hearing to offer evidence as to the totality of circumstances,” including his mental competency and psychological condition. The Court further noted that it had explained in Means that forfeiture is an “extreme sanction in response to extreme conduct that imperils the integrity or safety of court proceedings.” The judge must apply a two-part test: “whether the defendant’s conduct was so egregious as to warrant the sanction of forfeiture, and, if so, in view of the totality of circumstances, whether the sanction of forfeiture is in the interests of justice.”

The SJC concluded that the forfeiture determination here was deficient in several respects. In regard to procedural requirements, “[t]he hearing … was not sufficiently protective of the defendant’s due process right to a ‘full and fair’ hearing where the timing of the hearing, one day after the issuance of the show cause order, imposed unacceptable limitations on the defendant’s right to present evidence [e.g., medical records or expert testimony] on the totality of circumstances, including mental disability, bearing on the issue of forfeiture.” Substantively, the forfeiture order was erroneous because the defendant’s conduct, consisting mainly of threats to report counsel to the BBO over many years, caused “no peril to the ‘integrity or safety of [the] court proceeding[],’” and, therefore, was not sufficiently egregious to warrant forfeiture.  Moreover, even if the defendant’s conduct met the threshold for forfeiture, the judge failed to consider whether forfeiture was in the interests of justice.

II. Doctrine of Waiver of Counsel by Conduct

Forfeiture of a defendant’s right to the assistance of counsel is distinguishable from “waiver by conduct.” *Means*, 454 Mass. at 90-92. A waiver of counsel by conduct occurs when “a defendant competent to waive counsel moves to remove his attorney without good cause, the motion is denied, and the judge warns the defendant that he will lose his right to an attorney if he engages in dilatory or abusive conduct towards his attorney,” and then defendant proceeds to commit the misconduct that he was warned not to commit. *Id*. (referencing *Goldberg*, 67 F.3d at 1100). This is deemed as a waiver by conduct “because the defendant had been warned of the consequences of such misconduct.” *Id*. The primary example of waiver by conduct is a defendant’s attempt to delay proceedings by a last-minute request for new counsel. *Id*. at 91-92. *See also* *United States v. Moore*, 706 F.2d 538, 540 (5thCir. 1983) (holding that defendant had waived his right to assistance of counsel by “persistent, unreasonable demand[s] for dismissal of [multiple] counsel and appointment of new counsel”); *Commonwealth v. Babb*, 416 Mass. 732, 734-35 (1994) (affirming waiver of defendant’s right to counsel because of defendant’s conduct of “attempting to forestall his trial . . . by forcing a last-minute change of his court-appointed attorney”).

CONCLUSION

Forfeiture of counsel may result where the defendant has made threats or committed acts of violence against his counsel or other persons, including witnesses and counsel’s family members. A defendant can forfeit his right to the assistance of counsel without being first informed of the difficulties of representing himself, after the judge considers four factors: (1) the defendant has had more than one appointed counsel; (2) the forfeiture was imposed at a stage of the proceedings other than trial; (3) the defendant had made threats of violence or acts of violence against his counsel or others; and (4) the “forfeiture should be a last resort in response to the most grave and deliberate misconduct.” *Means*, 454 Mass. at 95.

 Waiver of counsel by conduct may occur when a defendant moves to remove his attorney without good cause, and the judge warns the defendant to cease his misconduct. When the defendant engages in the misconduct again, by making another motion to remove his attorney without cause or to appoint a new attorney, the judge may deem this is waiver by conduct and force the defendant to represent himself pro se.