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IN PRACTICE

EVIDENCE—WITNESSES

Adverse Inference for Failing To Call a Witness

What rules apply when a person with material knowledge of a case does not testify?

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An issue that often arises at trial is what, if any, are the applicable rules where a party fails to call a witness with material knowledge of the case. In such a scenario, two issues arise: (1) whether counsel can obtain a jury charge regarding the failure to call a witness; and (2) whether counsel can comment in summation regarding the nonproduction.

The missing-witness inference, as recently addressed by the Appellate Division in *Washington v. Perez*, 430 N.J. Super. 121, 128 (App. Div. 2013), provides a mechanism by which an adverse party may obtain a jury instruction or adverse inference where a party fails to call a witness who would "elucidate relevant and critical facts in issue[.]"

The New Jersey Supreme Court first addressed the inference that may arise under such circumstances in *State v. Clawans*, 38 N.J. 162, 170 (1962). In *Clawans*, the defendant requested that the court instruct the jury that it could infer from the state's failure to call two allegedly corroborating witnesses that the witnesses' testimony would have been against the state's interest. The trial court denied the defendant's request, and the Supreme Court considered whether any inference might be drawn from the nonproduction. The *Clawans* court concluded that the failure to call a witness may give rise to a "natural inference that the party so failing fears exposure of those facts [that] would be unfavorable[.]" In order for such inference to be drawn, however, "it must appear that the person was within the power of the party to produce and that [the witness's] testimony would have been superior to that already utilized in respect to the fact to be proved."

Applicable Factors

The New Jersey Supreme Court has, since *Clawans*, further delineated the requisite standard. Specifically, courts *must* adjudge the propriety of the missing-witness inference through consideration of the following factors on the record: (1) whether the "uncalled witness" was "peculiarly within" one party's control; (2) whether the witness was available "both practically and physically"; (3) whether the uncalled witness's testimony "will elucidate relevant and critical facts in issue"; and (4) whether "such testimony appears to be superior to that already utilized in respect to the fact to be proved." *State v. Hill*, 199 N.J. 545, 561 (2009).

Depending upon the strength of the proofs, the trial court may determine that the failure to call the witness raises no inference, or an unfavorable one, and hence whether any reference in the summation or a jury charge is warranted. *See Clawans*, 38 N.J. at 172. However, the New Jersey Supreme Court recently noted that "[c]are must be exercised because the inference is not invariably available whenever a party does not call a witness who had knowledge of relevant facts." *Hill*, 199 N.J. at 561. Consistent with *Hill*'s cautionary mandate, a "judge may not give a charge relating to the nonproduction of a witness unless [the judge] is satisfied that a sufficient foundation for drawing such an inference has been laid in accordance" with *Clawans* and its progeny. *Wild v. Roman*, 91 N.J. Super. 410, 415 (App. Div. 1966).

Thus, where an analysis of *each* factor supports application of the doctrine, the missing-witness inference may be drawn. However, where *any* factor militates against the use of the inference, or where the factors are indeterminate, trial courts are well within their discretion to deny the request for a jury instruction or permission to comment. See *Washington*, 430 N.J. Super. at 131 (affirming a trial court's denial of plaintiff's request for a missing-witness inference because an analysis of the four factors "was, at best, a close call[.]").

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Procedure To Obtain an Adverse Jury Charge

Generally, in accordance with *Clawans*' "better practices," the party seeking to obtain an absent-witness charge must *specifically* advise the trial judge and counsel of the intended request, out of the jury's presence and "at the close of [the] opponent's case." *Clawans*, 38 N.J. at 171-72; *see also* Comment to *Model Jury Charge (Civil)*, § 1.18 (1970) (underscoring the need for proper notice). The party so seeking must further "demonstrate the names or classes of available persons not called" and delineate with particularity the basis "for the conclusion that [the uncalled witnesses] have superior knowledge of the facts." *Id*.

Once the moving party has alerted the court to the potential inference issue, "[t]he adversary should then be given the opportunity to either call the designated witness or demonstrate to the court by argument or proof the reasons for the failure to call." Comment to *Model Jury Charge (Civil)*, § 1.18 (1970) (internal quotations omitted); see also *Nisivoccia v. Ademhill Assocs*., 286 N.J. Super. 419, 429 (App. Div. 1996) (same).

Effect on Summation

Despite the "better practice" prescribed by *Clawans*, commenting in summation without prior notice does not automatically warrant a new trial. Indeed, New Jersey courts consider the procedure prescribed by *Clawans* as "a matter of professional conduct" rather than a "requirement." *State v. Irving*, 114 N.J. 427, 443-44 (1989). Accordingly, "attorneys may generally make appropriate comments in civil case summation without prior notification [to] the adversary." *Nisivoccia*, 286 N.J. Super. at 430. As explained by the Appellate Division in *Nisivoccia*:

> All attorneys in civil cases are charged with knowledge that an adversary may focus on the failure to call a witness. Indeed, to countenance such an approach would in effect require attorneys at the beginning of a trial to serve notice on their adversaries that if a person listed as a witness is not called, or perhaps some evidence is not produced that was referred to in the opening statements, an adverse inference charge would be requested or the attorney would seek to comment upon that fact in summation, or both.

New Jersey courts are particularly lenient to remarks by defense counsel because, in civil proceedings, plaintiffs have "the last word and thus [] the opportunity to address the defense attorney's comment" about the failure to produce a corroborative witness. *Id*. at 430-31.

The body of law in New Jersey affords counsel "broad latitude in summation." *Bender v. Adelson*, 187 N.J. 411, 431 (2006). Counsel may ask the jury to make inferences that are "improbable, perhaps illogical, erroneous or even absurd[,]" but "may not misstate the evidence[,]" "distort the factual picture[,]" nor draw an inference without evidentiary support. Id.; see also *Biruk v. Wilson*, 50 N.J. 253, 260-61 (1967) (disapproving false suggestions to the jury in closing argument). Remarks that transgress the bounds of propriety and "clearly and convincingly" effect "a miscarriage of justice under the law" necessitate a new trial. Id.; see also R. 4:49-1(a).

If a court declines to provide a jury charge or to allow counsel to comment, any argument in summation that the party's failure suggests the party fears exposure of unfavorable facts likely is an improper argument. *Bender*, 187 N.J. at 433-36 (finding comments regarding defendants' failure to call a witness improper because the witness' testimony was excluded by court order). By contrast, if the court provides a jury instruction or expressly permits counsel to comment, any summation statement likely falls within the ambit of the "broad latitude" afforded summation. Where, however, the court does not consider the applicability of the doctrine prior to summation, one can fairly infer from *Nisivoccia* that a comment may be permissible, but only if the evidence squarely supports such an inference. See *Nisivoccia*, 286 N.J. Super. at 430 (permitting "appropriate comment" without prior notification).

Fact and Expert Witnesses

At present, no real dispute exists regarding the doctrine's application to fact witnesses. Indeed, *Clawans* set forth the conditions under which an adverse inference may be drawn through explicit consideration of a fact witness. The doctrine's application to expert witnesses, however, remains subject to greater dispute. Caution is appropriate because of the multitude of reasons — unrelated to fear of the content of the testimony — that may plausibly explain a litigant's decision to refrain from producing an expert witness. Such reasons may include, among other things, limited testimonial value or the inability to compensate the expert for his or her testimony. In either case, the inference is something quite different than unfavorable or adverse.

Various panels of the Appellate Division have reached opposite conclusions on this issue. In *McQuaid v. Burlington County Memorial Hospital*, the Appellate Division stated that "the failure of a party to call an expert witness *does not* normally justify an adverse inference charge[.]" 212 N.J. Super. 472, 476 (App. Div. 1986) (emphasis added); *Bradford v. Kupper Assocs*., 283 N.J. Super. 556, 580 (App. Div. 1995), cert. denied, 144 N.J. 586 (1996) (same). On the other hand, in *Genovese v. N.J. Transit Rail Operations*, the Appellate Division concluded, in dicta, that "an adverse party *would* ordinarily *be* entitled to the benefit of an adverse inference" where counsel fails to produce an expert witness at trial. 234 N.J. Super. 375, 382 (App. Div. 1989), cert. denied, 118 N.J. 196 (1989) (emphases added).

Given the significant impact the adverse inference may have on a jury's assessment of the evidence, a robust knowledge of the foregoing principles is important for effective trial advocacy.■