THE MISSING WITNESS RULE: ITS APPLICATION AT CIVIL TRIALS

by John P. McCahey

For over a century, federal courts have recognized the "missing witness" rule (sometimes referred to as the "uncalled witness" rule or "empty chair" doctrine). This rule permits but does not compel the factfinder at a civil or criminal trial to draw an adverse inference under certain circumstances from a party's failure to produce a particular witness at trial.[1] Its origin in federal law is often traced to the 1893 pronouncement by the United States Supreme Court "that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable".[2]

The rule has survived the enactment of the Federal Rules of Evidence, as well as the opinion of some courts that its use in civil trials is no longer justified.[3] It continues to be raised in both criminal and civil trails, thus requiring the court to decide whether to permit argumentive comment during closing statements or to provide an instruction to the jury that it may draw an adverse inference from one party's failure at trial to call a particular witness. This article will discuss the rule's application in civil trials as developed by federal courts.

THE MISSING WITNESS RULE

The missing witness rule is an exception to the general rule that a party to a civil litigation is under no duty either to call or to account for the absence of any particular witness at trial.[4] If a party fails to call a witness to testify who was under its control and who could have provided material evidence to the case not otherwise available at trial, the missing witness rule permits the factfinder to draw an inference that the uncalled witness' testimony would have been damaging to that party's case.[5] This adverse inference has been described as being "more a product of common sense than of common law",[6] and derives from the notion "that if a party has evidence which will illuminate questions in issue and fails to present it, it may be inferred that such evidence would be harmful to his case".[7]

The rule is a part of the federal common law. In civil actions brought under diversity jurisdiction, federal courts have differed as to whether the rule's application is governed by federal or state law. Some have reasoned that the rule is a procedural matter and therefore controlled by federal common law,[8] while others have found that the state law should be applied in diversity actions.[9] Several other courts have found it unnecessary to decide this issue inasmuch as it found little difference between the available federal and state rule.[10]

The rule is one of discretion that does not create a conclusive presumption against the party failing to call a witness, but instead allows the factfinder to draw an inference that the missing witness' testimony would have been adverse to that party's case.[11] In a jury trial, the decision to give a missing witness instruction or to allow counsel to argue the inference in closing arguments is committed to the sound discretion of the trial court and is subject to appellate review under an abuse of discretion standard.[12] If the issue is put to it, the jury will then decide whether an adverse inference should be drawn.

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The courts have identified the criteria that normally need exist under the facts and circumstances of each case before an adverse inference may be properly considered by the factfinder. While sometimes stated differently, it is generally accepted that an adverse inference is not permissible unless it is first established that the uncalled witness both (1) would have provided relevant and noncumulative testimony and (2) was "peculiarly within the control" of only one party.[13] It is the burden of the party seeking the benefit of the adverse inference to establish that these criteria have been met.

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RELEVANT TESTIMONY

The rule only applies when the uncalled witness "was important and possessed relevant information".[14] It does not apply when the potential testimony would have been cumulative or was equally available from another witness at trial.[15] Thus, the uncalled witness must be shown to have had information "peculiarly within his knowledge"[16] and "superior to that relied upon at trial".[17] Instances where a court has found that an uncalled witness possessed such information include the defendant's elevator mechanics where the plaintiff alleged that she was injured during an elevator malfunction,[18] and the defendant's accountant who advised the defendant as to the preparation of its financial statements that the plaintiff alleged were fraudulent.[19]

It has been suggested that "[d]rawing an adverse inference from the failure of a party to put on a key witness relevant to some issue is most reasonable when it is the party with the burden of proof on that issue who fails to do so".[20] Some courts have drawn an adverse inference against a defendant who declined to testify or appear at trial when the facts at issue were "peculiarly" within its knowledge.[21] If, however, a party is present at trial and declines to testify, courts usually find the rule is inapplicable because the other party could have compelled the non-testifying party's testimony by subpoena.[22] Apart from the missing witness rule, a party's assertion at a civil trial of its Fifth Amendment privilege against self-incrimination permits the factfinder to draw an adverse inference against it.[23]

CONTROL BY ONE PARTY

The second criteria, that the uncalled witness was "peculiarly within the control" of only one party to produce at trial,[24] is often described in terms of the uncalled witness not being "equally available" to both parties.[25] Thus, an uncalled witness is peculiarly within the control of one party (and thus not equally available to both parties) when the witness is (1) physically or (2) practically available only to one party.[26]

Physical availability means that the witness' testimony can be obtained by a subpoena to testify, either at trial or at a deposition that can be read or shown at trial. When either party can compel such testimony, the witness is physically available to both parties.[27] No adverse inference can usually be drawn from one party's failure to call a witness physically available to both parties unless it can be shown that the witness as a practical matter was available only to one party.

Practical availability turns on all the facts and circumstances bearing on the witness' relationship to the parties.[28] If that relationship is one that would presumptively give rise to a favorable disposition towards one party and a bias or hostility towards the other, the witness in a practical sense is not equally available to both parties.[29] While the relationship between an uncalled witness and the parties need be assessed on a case by case basis, courts often find that an employer of one party is unavailable to the other as a practical matter because of the financial ties between an employer and employee.[30] A majority of courts have concluded that a party's relationship with its former employer usually will not support a conclusion that the former employer was under the control of that one party.[31]

There ordinarily is no basis for a missing witness instruction when the uncalled witness could have been called to testify by both parties and there is no showing that the witness was favorably disposed to one party. Some courts, however, have indicated that when an important witness is equally available to both parties but not called at trial by either party, both parties may be open to an inference that the witness' testimony would have been adverse to it.[32] Thus, where "the missing witness is as likely to favor one party as the other", the trial judge may have the discretion to allow the jury to consider drawing an adverse inference against either party.[33]

This missing witness rule is sometimes said not to be applicable where the party alleged to be in control of the witness satisfactorily explains the witness' absence at trial.[34] The courts, however, have offered little insight as to what would constitute such an acceptable explanation. In addition, some courts have stated that the rule will not apply if the uncalled witness was physically "unavailable" to both parties.[35] It is unclear, however, whether such a witness could nonetheless be shown to have been available to only one party as a practical matter.

CRITICISM OF THE RULE

Both the Fifth and Eighth Circuits have questioned the continued use of the rule in civil cases in light of the Federal Rules of Evidence and Federal Rules of Civil Procedure.[36] These courts have pointed out that the rule was developed when a party could not call a potentially hostile witness without "vouching" for his or her credibility and therefore not permitted to impeach its witnesses. In addition, the rule was the product of an era when the party more closely associated with a witness was in a better position to determine the witness' potential testimony. Today, a party is both free to impeach a witness it calls and able to learn of a witness' potential testimony through discovery. Thus, it has been argued

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that the missing witness rule serves no purpose other than to "creat[e] evidence from non-evidence by artificially inflat[ing] one side of the case by giving undue significance to the missing witness".[37] Despite this criticism, neither the Fifth nor Eighth Circuit have abandoned the rule.

CONCLUSION

Federal courts frequently address the missing witness rule in civil actions. More often than not the trial court concludes that the rule should not be applied to the case before it. In cases both applying or declining to apply the rule, it is rare that the appellate court finds an abuse of discretion, and even rarer an abuse sufficient to warrant a new trial. While a few courts have urged that the rule be curtailed or eliminated in civil actions, most courts seem not to share such a view. After all, the rule is one of common sense.

FOOTNOTES

[1] See *Bogosian v. Woloohojian Realty Corp.*, 323 F.3d 55, 67 (1st Cir. 2003)
[2] See *Graves v. United States*, 150 U.S. 118, 121 (1893)
[3] See *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1048 (5th Cir.), reh'g en banc denied, 917 F.2d 559 (1990); *Jones v. Otis Elevator Co.*, 861 F.2d 655, 659 n.4 (11th Cir. 1988)
[4] See *LaMarca v. United States*, 31 F. Supp. 2d 110, 128 (S.D.N.Y. 1998)
[5] See *Revson v. Cinque & Cinque P.C.*, 221 F.3d 71, 81 (2d Cir. 2000); *Bufco Corp. v. National Labor Relations Board*, 147 F.3d 964, 971 (D.C. 1998); In re *Evangeline Refining Co.*, 890 F.2d 1312, 1321 (5th Cir. 1989); Jones, 861 F.2d at 658-59
[6] See *International Union v. National Labor Relations Board*, 459 F.2d 1329, 1335 (D.C. 1972)
[7] See *Steinhilber v. McCarthy*, 26 F. Supp. 2d 265, 280 (D. Mass. 1998); see also *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) ("[t]he production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse")
[8] See *Herbert*, 911 F.2d at 1047; *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 719 F.2d 1335, 1353(7th Cir. 1983)
[9] See *Campbell v. Coleman Co., Inc.*, 786 F.2d 892, 897-98 (8th Cir. 1986); *Queenie, Ltd. v. Nygard Interntional*, 204 F. Supp.2d 601, 604 n.2 (S.D.N.Y. 2002), aff'd in part, 321 F.3d 282 (2nd Cir. 2003)
[10] See *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 432 (2nd Cir. 1999); *Wilson v. Merrel Dow Pharmaceuticals Inc.*, 893 F.2d 1149, 1151 n.3 (10th Cir. 1990); *Jones*, 861 F.2d at 659 n.4
[11] See *Underwriters Laboratories Inc. v. National Labor Relations Board*, 147 F.3d 1048, 1054 (9th Cir. 1998); *Herbert*, 911 F.2d at 1047
[12] See *Cameo Convalescent Center v. Senn*, 738 F.2d 836, 844 (7th Cir. 1984), cert. denied, 469 U.S. 1106 (1985)
[13] See *Martinelli*, 196 F.3d at 432 n.10; *Jones*, 861 F.2d at 655; *Chicago College*, 719 F.2d at 1353; *Williams v. Citibank*, N.A., 190 B.R. 728, 733 (D.R.I. 1996), on remand, 209 B.R. 584 (Bankr. D.R.I. 1997)
[14] See *Boardman v. National Medical Enterprises*, 106 F.3d 840, 844 (8th Cir. 1997)
[15] See *Streber v. Commission of Internal Revenue*, 138 F.3d 216, 222 (5th Cir. 1998); *Cowens v. Siemans-Elema AB*, 837 F.2d 817, 825 (8th Cir. 1988)
[16] See *Streber*, 138 F.3d at 222
[17] See *Jones*, 861 F.2d at 660
[18] See *Jones*, 861 F.2d at 660
[19] See *In re Albanese*, 96 B.R. 376, 379 (Bankr. M.D. Fla. 1989); but see *Streber*, 138 F.3d at 222 (plaintiff's failure to call the accountant who advised them as to deductions challenged in the case was held not to invoke the missing witness rule since other credible witnesses testified as to the accountant's advice)
[20] See *Boardman*, 106 F.3d at 844; see also *Oxygenated Fuels Assoc. Inc. v. Pataki*, 293 F. Supp. 2d 170, 176 n.2 (N.D.N.Y. 2003)
[21] See *McKay v. Commissioner of Internal Revenue Service*, 886 F.2d 1237, 1238 (9th Cir. 1989); *Gray v. Great American Recreation Association Inc.*, 970 F.2d 1081, 1082 (2d Cir. 1992); but see *In re David Proskanzer*, 143 B. R. 991, 998 (Bankr. D.N.J. 1992) (refusing to draw adverse inference where defendant failed to appear or testify at trial)
[22] See *Bogosian*, 323 F.3d at 67; *Brice v. Nkaru*, 220 F.3d 233, 240 (4th Cir. 2000)
[23] See *ePlus Techology, Inc. v. Aboud*, 313 F.3d 166, 179 (4th Cir. 2002)
[24] See *Martinelli*, 196 F.3d at 432 n.10; *Bufco*, 147 F.3d at 971; *Streber*, 138 F.2d at 222; *Oxman v. WLS-TV*, 12 F.3d 652, 661 (7th Cir. 1993)
[25] See *Tyler v. White*, 811 F.2d 1204, 1207 (4th Cir. 1987); *Wilson*, 893 F.2d at 1151; *Fleet National Bank v. Anchor Media Television, Inc.*, 831 F. Supp. 16, 32 (D.R.I. 1993), aff'd, 45 F.3d 546 (1st Cir. 1995)
[26] See *Oxman*, 12 F.3d at 661; *Jones*, 861 F.2d at 659; *Chicago College*, 719 F.2d at 1353
[27] See *Oxman*, 12 F.3d at 661; *Herbert*, 911 F.2d at 1049
[28] See *Sagendorf-Teal v. County of Rensselaer*, 100 F.3d 270, 275 (2nd Cir. 1996); *Chicago College*, 719 F.2d at 1353
[29] See *Jones*, 861 F.2d at 659; *Steinhilber*, 26 F. Supp. 2d at 280
[30] See *Jones*, 861 F.2d at 660; *Chicago College*, 719 F.2d at 1353
[31] See *Steinhilber*, 26 F. Supp. 2d at 281 (discussing majority and minority view as to former employees)
[32] See *Wilson*, 893 F.2d at 1152
[33] See *Segandorf-Teal*, 100 F.3d at 275
[34] See *Cowens*, 837 F.2d at 825; In re *Albanese*, 96 B. R. at 379
[35] See *Louis Vutton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 973 (2nd Cir. 1985); *Chicago College*, 719 F.2d at 1353
[36] See *Herbert*, 911 F.2d at 1046-47; *Jones*, 861 F.2d at 659 n.4
[37] See *Jones*, 861 F.2d at 659 n.4