

**1.18 WITNESS — FAILURE OF A PARTY TO PRODUCE;
ADVERSE INFERENCE** (Approved 05/1970; Revised 10/2016)

NOTE TO JUDGE

Before charging the jury as to adverse inference, the party seeking the charge must, before the parties rest, notify the trial judge and the opposing party outside the presence of the jury, state the name of the witness(es) not called, and indicate why this witness(es) have superior knowledge of the relevant facts. *State v. Hill*, 199 N.J. 545, 560-61 (2009). The trial court must rule on this issue before a jury instruction is allowed. *Id.* at 561. In making its decision, the trial court must consider various factors and place on the record findings as to each of these factors. *Id.* To guide that assessment, the Court in *Hill* prescribed a four-pronged test: (1) that the uncalled witness is peculiarly within the control or power of only the one party, or that there is a special relationship between the party and the witness or the party has superior knowledge of the identity of the witness or of the testimony the witness might be expected to give; (2) that the witness is available to that party both practically and physically; (3) that the testimony of the uncalled witness will elucidate relevant and critical facts issue; and (4) that such testimony appears to be superior to that already utilized in respect to the fact to be proven. *Id.* at 561-62. (See also *Torres v. Pabon*, 225 N.J. 167 (2016). In a personal injury trial context, this charge should rarely be given to address the absence of an expert witness. *Washington v. Perez*, 219 N.J. 338 (2014).

A. When Judge Has Determined that the Adverse Inference May Be Drawn

Reference has been made to _____ (as a person who has information relevant to the matter before you) and that the plaintiff/defendant has failed to call him/her to testify.

The rule is that where a party (plaintiff/defendant) fails to produce as a witness a person whom that party would naturally be expected to call to testify, you have a

right to infer that had the witness been produced he/she would have testified adversely to the interests of that party (plaintiff/defendant).

The reason for this rule is that where you would normally expect a party to call a person as a witness and that party, without reasonable explanation, fails to do so, it leaves a natural inference that the non-producing party fears exposure of facts which would be unfavorable to him/her.

Cases:

See Torres v. Pabon, 225 N.J. 167 (2016); *State v. Wilson*, 128 N.J. 233 (1992); *State v. Irving*, 114 N.J. 427 (1989); *State v. Clawans*, 38 N.J. 162 (1962); *Michaels v. Brookchester, Inc.*, 26 N.J. 379 (1958); *O'Neil v. Bilotta*, 18 N.J. Super. 82 (App. Div. 1952), *aff'd*, 10 N.J. 308 (1952); *Hickman v. Pace*, 82 N.J. Super. 483, 490 (App. Div. 1964).

B. Where Judge Has Determined that No Adverse Inference Can Be Drawn

During the course of this trial reference has been made to _____. I have determined that the non-production of _____ as a witness is excusable as a matter of law. Therefore, you should not speculate as to what his testimony would be had he/she been called to testify. Nor may you draw any inferences against or in favor of either party from his/her failure to testify.

Comments:

In *Wild v. Roman*, 91 N.J. Super. 410, 416 (App. Div. 1966) it was said that it is "nearly always for the judge alone to decide" whether the circumstances warrant an adverse inference or an inference of no material aid to a party's case. The court said that it is rare that a factual dispute as to the factors involved should be left for the jury. Obviously, the court must first determine whether or not to give an adverse inference charge as to a designated absent witness and whether the charge of "no material aid" (*see Parentini, supra*) should be given.

C. Where Testimony is Not of Material Aid

From the testimony it would appear that _____ is a person who has information relative to the issues involved, and that the plaintiff/defendant has failed to call him/her as a witness. The failure of a party to produce as a witness a person whom that party would naturally be expected to call does not necessarily permit the inference that the testimony of that witness would have been unfavorable to that party.

In the circumstances of this case, however, you may infer that this witness would not have specifically contradicted the testimony of witnesses called by the plaintiff/defendant and that the testimony of the absent witness would not have materially aided plaintiff/defendant's case.

Comments:

In *Parentini v. S. Klein Dept. Stores*, 94 N.J. Super. 452 (App. Div. 1967), a false imprisonment case, plaintiff produced two doctors who testified as to the causal relation between the episode and the psychiatric condition of plaintiff and as to permanency. Defendant's neurologist examined plaintiff but was not called. Defendant offered

no medical testimony. The court held that the adverse inference charge given against defendant was given in error because there was no basis for an assumption that the non-testifying doctor would have favored or materially aided either side.