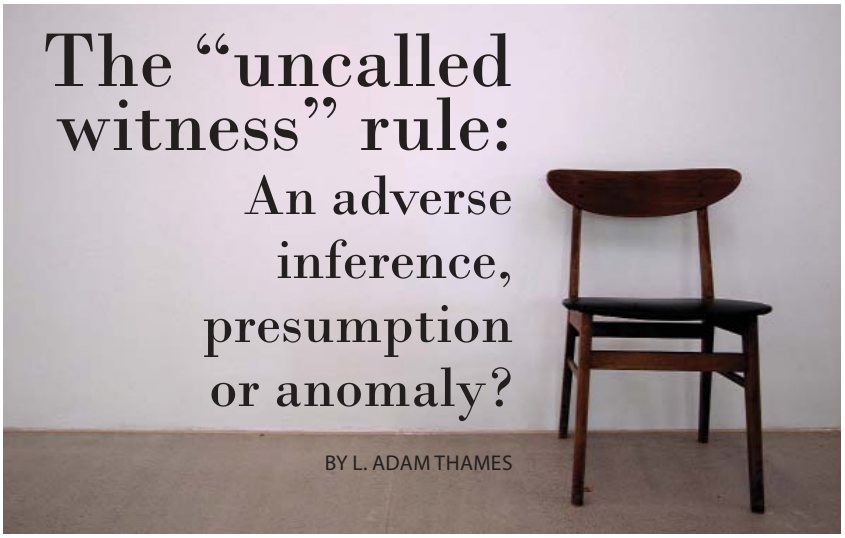

The "uncalled witness" rule:

An adverse inference, presumption or anomaly?

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The law is replete with presumptions and inferences that apply across all civil cases, including the often overlooked "uncalled witness" rule. More than a century ago, Justice Henry Brown of the United States Supreme Court issued one of the most definitive judicial statements on this rule: "The rule … is that, if a party has it peculiarly within his power to produce witnesses whose testimony elucidates the transaction, the fact that he does not do it creates a presumption that the testimony, if produced, would be unfavorable."[1] Likewise, under Louisiana law, the "uncalled witness" rule has been defined as an adverse presumption that arises when "a party has the power to produce witnesses whose testimony would elucidate the transaction or occurrence" and fails to call such witnesses.[2] A party's failure to call these witnesses gives rise to the presumption that "the witnesses' testimony would be unfavorable to him."[3]

In explaining the significance of the rule to defendants, a Louisiana appellate court noted that "'[w]hen a defendant in a civil case can by his own testimony throw light upon matters at issue necessary to his defense and particularly within his own knowledge, and fails to go upon the witness stand, the presumption is raised and will be given effect, that the facts, as he would have them do not exist.'"[4] However, under Louisiana law, "the purpose of the rule is to punish a party for withholding unfavorable testimony, not to penalize a party for its inability to produce witnesses."[5] With that in mind, Louisiana courts have recognized various circumstances in which the "uncalled witness" rule is not applicable: when a witness is equally available to each side, when the missing witness' testimony would be considered cumulative, and/or when the failure to produce the witness is adequately explained.

For example, in *Bienvenu v. Allstate Ins. Co.*, the driver of the lead vehicle in a rear-end collision sued the driver of the following vehicle, who ultimately contended that a third driver was the sole cause of the collision.[6] At trial, the court held that the failure of the defendant to produce the third driver as a witness did not give rise to an adverse presumption as there was no showing that the third driver's testimony was available only to the following driver, or that the plaintiff did not have equal access to that testimony.[7] Similarly, in *Crane v. Diamond Offshore Drilling, Inc.*, the court held that the adverse presumption did not apply to an employer that failed to call its employee to the stand where the employee, though in Scotland at the time of trial, was equally available to each party by telephone deposition.[8]

Additionally, in *State Farm Fire & Cas. Co. v. Torregano*, the court rejected the "uncalled witness" rule where its application would require a party to produce cumulative testimony.[9] In so doing, the court explained that the general rule requiring a party to call all material witnesses under its control must be tempered by the fact that a party need only prove his case.[10] Thus, "if he does so by calling one or more witnesses to testify concerning an issue, he should not be penalized because he fails to call still another witness on the subject."[11]

Courts have accepted varying degrees of explanation for a party's failure to produce a missing witness. In *Thomas v. Albertsons, Inc.*, the court refused to apply an adverse presumption where the missing witness was shown to be legally unavailable for trial.[12] Similarly, in *Florists' Mut. Ins. Co. v. Homecraft Corp.*, no adverse presumption was inflicted upon the plaintiff insurer who demonstrated to the court that it tried to find its missing insured to testify.[13] And in *Moran v. Harris*, the court held that the plaintiff was not entitled to a jury instruction on the adverse presumption on the defendant's failure to call an expert whose unavailability was due to a serious injury that required hospitalization and surgery.[14]

Notwithstanding the various exceptions to the rule, one could fashion an argument that the modern rules of evidence and procedure—and particularly the ability to take trial depositions, to subpoena witnesses, and to impeach one's own witness—have rendered the "uncalled witness" rule unnecessary. However, in *Driscoll v. Stucker*, the Louisiana Supreme Court rejected such an argument and expressly upheld the application of the rule where the defendant failed to call its in-house counsel to prove that he sought and acted upon legal advice before taking actions that were adverse to the plaintiff.[15] In invoking the uncalled witness rule, the Court explained that, "[d]espite the advent of modern, liberal discovery rules, [the "uncalled witness" rule] remains vital, especially in cases … in which a witness with peculiar knowledge of the

material facts is not called to testify at trial."[16]

In *Stucker*, the Supreme Court had an opening to judicially eliminate the uncalled witness rule and clearly chose against doing so. Since *Stucker,* however, the appellate courts have further complicated its application. Some courts have held that the application of the rule is at the sole discretion of the trial judge;[17] while, conversely, other courts have indicated that the rule should apply only when the party against whom it is invoked bears both the burden of proof and has control over the missing witness.[18] Thus, while the uncalled witness rule is still alive under Louisiana law, its applicability at trial arguably remains unclear.

The use and application of the uncalled witness-rule is equally perplexing under federal law. Federal R. Evidence 302 provides that "in civil cases, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision." However, in *Herbert v. Wal-Mart Stores, Inc.*, the Fifth Circuit upheld the trial court's refusal to invoke an adverse inference against a defendant for failing to call an expert, finding that such an inference, which stems from the "uncalled witness" rule, is not available under the Federal Rules of Evidence, but rather only under state law.[19] Use of the Federal Rules of Evidence was proper, the Fifth Circuit held, because Rule 302 applies only to presumptions and the uncalled witness rule creates merely an inference, not a true presumption.[20] Thus, the Fifth Circuit held that federal courts sitting in diversity look to federal—not state—law in determining the application of the rule.

In examining the uncalled witness rule, the *Herbert* court further noted, in dicta, that the rule historically served two purposes: to discourage parties from concealing evidence and to incentivize parties to submit at trial all relevant testimony.[21] As such, federal courts tended to apply the rule "reflexively" with little to no judicial consideration as to the adoption of the Federal Rules of Procedure or Evidence.[22] The *Herbert* court, however, found that a close review of the federal evidentiary and procedural scheme renders the rule an "anachronism" for which there is no justification to continue its use in civil cases conducted under the federal rules—particularly where the missing witness could have been called by either party.[23] Despite highlighting the impractical nature of the rule, the *Herbert* court was forced to concede the extensive precedent on this issue, and consequently refused to overrule the long line of Fifth Circuit cases that applied the uncalled witness rule.[24]

Thereafter, in *Bayou Fleet, Inc. v. Alexander*, the Eastern District of Louisiana recognized Herbert's harsh tone with respect to the utility of the "uncalled witness" rule but nevertheless found that its application in civil cases remained discretionary on the part of the trial judge.[25] In that case, the district court ultimately found the adverse inference to be inapplicable because the missing witness' testimony would have been cumulative and the witness was equally available to both parties.[26]

Indeed, the application of the "uncalled witness" rule varies across Louisiana and federal law. Whether it is adjudged to be an adverse inference, presumption, or anomaly may simply depend on the jurisdiction in which the case is tried. Nevertheless, Louisiana and Fifth Circuit courts both appear to hold that the "uncalled witness" rule is inapplicable if a party against whom the presumption is invoked can prove that the missing witness' testimony was cumulative and/or that the witness was an equally available "will call" witness that the other party could have, but did not, call at trial. Because the limited exceptions to the rule may not always be clear, one should heed the advice of Professor Maraist and avoid an adverse presumption or inference by calling the witness live at trial and tendering him immediately for cross-examination.[27]

[1] *Graves v. United States*, 150 U.S. 118, 121 (1893).
[2] 19 Frank L. Maraist, *Louisiana Civil Law Treatise: Evidence and Proof*, § 4.3 (1999).
[3] *Id.*
[4] *Taylor v. Entergy Corp.*, 01-0805 (La. App. 4 Cir. 4/17/02), 816 So.2d 933, 941 (quoting *Davis v. Myers,* 427 So.2d 648, 649 (La. App. 5 Cir. 1983)).
[5] *Roth v. New Hotel Monteleone, L.L.C.*, 07–0549 (La. App. 4 Cir. 1/30/08); 978 So.2d 1008, 1012.
[6] 01-2248 (La. App. 4 Cir. 5/8/02); 819 So. 2d 1077.
[7] *Id.* at 1083.
[8] 99-166 (La. App. 5 Cir. 1999); 743 So. 2d 780.
[9] 00-141 (La. App. 5 Cir. 9/26/00), 769 So. 2d 754.
[10] *Id.* at 759 (citing *Wilson v. U.S. Fire & Cas. Co.*, 593 So.2d 695 (La. App. 4 Cir. 1991)).
[11] *Id.* at 700.
[12] 28950-CA (La. App 2 Cir. 12/11/96); 685 So.2d 1134, 1138 ; *see also Laborde v. St. James Place Apartments* 05-0007 (La. App. 1 Cir. 2/15/06); 928 So.2d 643, 648-49 (holding that a former employee who failed to testify at trial was not under the control of the employer so as to invoke the "uncalled witness" rule).
[13] 506 So. 2d 746, 748 (La. App. 1 Cir. 1987).
[14] 93-2226 (La. App. 1 Cir. 11/10/94); 645 So. 2d 1244, 1247–48.
[15] 04-0589 (La. 1/19/05); 893 So.2d 32, 47.
[16] *Id.*
[17] See *Roth*; 978 So.2d 1008; *Horacek v. Watson*, 2011-1345 (La. App. 3 Cir. 3/7/12); 86 So.3d 766, 771 (citing *Roth*).
[18] *Francis v. Francis*, 07-1622 (La. App. 3 Cir. 4/30/08); 981 So.2d 920, 922 (citing *Randolph v. Alexandria Civil Service Comm'n*, 04-1620 (La. App. 3 Cir. 4/6/05); 899 So.2d 857)).
[19] 911 F.2d 1044, 1047-48 (5th Cir. 1990).
[20] *Id.* at 1047 (citing *Burgess v. U.S.*, 440 F.2d 226, 233 n. 10 (D.C.Cir. 1970); E. Cleary, *McCormick on Evidence* § 272 at 806–07 (1984 ed.); Stier, *Revisiting the Missing Witness Inference*, 44 Md.L.Rev. 137, at 148 & n. 50 (1985).; 21 C. Wright & K. Graham, *Federal Practice & Procedure* § 5124 at 587.
[21] *Id.* at 1046-47.
[22] *Id.*
[23] *Id.* at 1048-49.
[24] *Id.*
[25] 68 F.Supp.2d 734, 742-43 (E.D. La. 1999).
[26] *Id.*
[27] 19 Frank L. Maraist, *Louisiana Civil Law Treatise: Evidence and Proof*, § 4.3 (1999) (citing *Barrois v. Serv. Drayage Co.*, 250 So.2d 135 (La. App. 4 Cir. 1971)).