



1 on the failure to call a witness or the judge may instruct on the presumption.” *Food Machinery &*  
2 *Chem. Corp. v. Meader*, 294 F.2d 377, 384 (9th Cir. 1961). Furthermore, both parties have been  
3 subject to the same time limit and other legal and procedural constraints of which Samsung  
4 complains, and both parties are equally free to point out the alleged deficiencies in the opposing  
5 party’s case, to the extent permitted by law. In fact, during cross-examination of Apple’s experts,  
6 Samsung asked why Apple’s experts had not communicated directly with certain Apple’s  
7 inventors, who are still employed by Apple and available. Thus, the jury could have drawn  
8 inferences about these inventors’ ability to testify and their absence at trial.

9 While the Court declines to impose a blanket prohibition on testimony or attorney comment  
10 regarding the absence of witness testimony, the parties should be mindful that abuse of the so-  
11 called “missing witness” or “uncalled witness” rule could be grounds for a curative instruction. As  
12 a general matter, the “missing witness” or “uncalled witness” rule allows a party to “properly argue  
13 to the jury the possibility of drawing [an adverse] inference from the absence of a witness,”  
14 provided that the party first “establish[es] that the missing witness was peculiarly within the  
15 adversary’s power to produce.” *Chicago College of Osteopathic Med. v. George A. Fuller Co.*,  
16 719 F.2d 1335, 1353 (7th Cir. 1983). That a missing witness was “peculiarly within the  
17 adversary’s power to produce” can be established “by showing either that the witness is physically  
18 available only to the opponent or that the witness has the type of relationship with the opposing  
19 party that pragmatically renders his testimony unavailable to the opposing party.” *Id.* However,  
20 “[i]f the uncalled witnesses are equally available to both parties, no inference should be drawn.”  
21 *Bellmore v. U.S. Steel Corp.*, 983 F.2d 1065, at \*1 (6th Cir. 1992) (unpublished) (citing *Harkins v.*  
22 *Perini*, 419 F.2d 468, 471 (6th Cir. 1969); *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1048  
23 (5th Cir. 1990)).

24 The parties have not cited, and the Court has not found, any Ninth Circuit authority  
25 governing the applicability of the uncalled-witness rule in civil trials. However, in the criminal  
26 context, Ninth Circuit case law provides that “[w]hen the government can call a key percipient  
27 witness, but relies instead on out-of-court statements and on testimony by an agent who didn’t  
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1 understand half the critical conversation, a jury could conclude that the witness’s ‘testimony, if  
2 produced, would [have been] unfavorable’ to the prosecution.” *United States v. Kojayan*, 8 F.3d  
3 1315, 1317 (9th Cir. 1993) (quoting *Graves v. United States*, 150 U.S. 118, 121 (1893)). In the  
4 face of such circumstances, the district court has the discretion either to give a “missing witness”  
5 instruction, instructing jurors that they may, if they choose, draw an inference adverse to the  
6 prosecution, or simply “to leave the point to be argued by counsel.” *Id.* at 1317 n.2 (citing *United*  
7 *States v. Bautista*, 509 F.2d 675, 678 (9th Cir. 1975), and Manual of Model Criminal Jury  
8 Instructions for the Ninth Circuit, No. 4.15 (1992), respectively).

9 Accordingly, any specific objections about improper attorney argument will be evaluated  
10 on a case-by-case basis. *See Littlefield v. McGuffey*, 954 F.2d 1337, 1346 (7th Cir. 1992)  
11 (“Whether to allow argument on a party’s ‘failure to produce a witness rest[s] largely in the  
12 discretion of the trial court, but the court should not preclude such argument when the case presents  
13 a significant question on this point.’”) (quoting *Chicago College*, 719 F.2d at 1352-53).

14 **IT IS SO ORDERED.**

15 Dated: August 13, 2012

16   
17 LUCY H. KOH  
18 United States District Judge