ABSENT WITNESS

The judge may not give such an instruction, nor permit counsel to comment on the potential inference, unless the judge has first ruled, as a matter of law, that there is a sufficient foundation for such an inference in the record. See notes 1 and 2, below.

In this case, you have heard some reference to a potential witness who did not testify.

I. WHERE DEFENSE DOES NOT CALL WITNESS

If the defendant in this case did not call a potential witness to testify, and four conditions are met, you may infer that the witness's testimony would not be favorable to the defendant. The four conditions are:

First: **that the Commonwealth's case against the defendant is strong;**

Second: **that the absent witness would be expected to offer important testimony that would support the defendant's innocence;**

Third: **that the absent witness is available to testify for the defendant; and**

Fourth: **that the witness's absence is not explained by any of the other circumstances in the case.**

If any of these four conditions has not been met, then you may not draw any inference from the witness's absence. If all four conditions have

been met, you may infer that the testimony would not be favorable to the defendant if such an inference is reasonable in this case, and you are persuaded beyond a reasonable doubt that the inference is true.

This rule is based on common sense. First, you may not draw such an inference unless the Commonwealth presented a case strongly supporting guilt because under those circumstances it would be natural for an accused person to call an available witness to testify in his (her) favor. However, keep in mind that a defendant never has any burden to prove himself (herself) innocent and the Commonwealth bears the entire burden of proving his (her) guilt.

Second, you may not draw such an inference unless the absent witness's testimony would be relevant to the defendant's guilt or innocence in some significant way. Normally an accused person would have no reason to bring in a witness who would only testify about minor details, or who would only repeat what has already been said by other witnesses.

Third, you may not draw such an inference unless there is evidence that the accused was able to bring the absent witness into court.

And fourth, you may not draw such an inference if the evidence suggests another reasonable explanation for the witness's absence.

A version of this instruction was affirmed in *Commonwealth v. Rollins*, 441 Mass. 114, 120, 803 N.E.2d 1256, 1261 (2004), and in *Commonwealth v. Graves,* 35 Mass. App. Ct. 76, 80 n.6, 616 N.E.2d 817, 820 n.6 (1993). In the case of a defense failure to call a witness, the jury should be instructed that they "should not draw an adverse inference from the defendant's failure to call a certain witness unless they were persuaded of the truth of the inference beyond a reasonable doubt." *Commonwealth v. Olszewski,* 416 Mass. 707, 724 n.18, 625 N.E.2d 529, 540 n.18 (1993), cert. denied, 513 U.S. 835 (1994).

II. WHERE COMMONWEALTH DOES NOT CALL WITNESS

If the Commonwealth did not call a potential witness to testify, and four conditions are met, you may infer that the witness's testimony would not be favorable to the Commonwealth. The four conditions are:

First: **that the Commonwealth's case against the defendant is sufficiently weak that it would normally be expected to call that witness to testify;**

Second: **that the absent witness would be expected to offer important testimony that would support the Commonwealth's case;**

Third: **that the absent witness is available to testify for the Commonwealth; and**

Fourth: **that the witness's absence is not explained by any of the other circumstances in the case.**

If any of these four conditions has not been met, then you may not draw any inference from the witness's absence. If all four conditions have

been met, you may infer that the witness's testimony would not be favorable to the Commonwealth if that is a reasonable conclusion in the circumstances of this case.

This rule is based on common sense. First, you may not draw such an inference unless the Commonwealth's case was sufficiently weak that it would be expected to bring in the absent witness.

Second, you may not draw such an inference unless the absent witness's testimony would be relevant to the defendant's guilt or innocence in some significant way. Normally the Commonwealth would have no reason to bring in a witness who would only testify about minor details, or who would only repeat what has already been said by other witnesses.

Third, you may not draw such an inference unless there is evidence that the Commonwealth was able to bring the absent witness into court.

And fourth, you may not draw such an inference if the evidence suggests another reasonable explanation for the witness's absence.

SUPPLEMENTAL INSTRUCTION

Neutralizing instruction where negative inference not allowed. **There has been mention in this case about a witness named** *[absent witness]* **. As a result of a hearing that I held when you were not in the courtroom, I have determined that** *[absent witness]* **is not available to be called as a witness by either side in this case. You may not draw any inference from the fact that** *[absent witness]* **did not appear as a witness.**

This supplemental instruction may be used when the judge does not instruct on, or permit argument about, an absent witness, and the judge wishes to neutralize the effect of a prior reference to that witness before the jury. It is drawn from *Commonwealth v. Gagnon,* 408 Mass. 185, 198 n.9, 557 N.E.2d 728, 737 n.9 (1990).

NOTES:

1. **When an absent witness inference is permissible**. The general rule is that where a party, without explanation, does not call a witness who is known to and can be located and brought forward by that party, who is friendly to, or at least not hostile toward, that party, and who can be expected to give material testimony of distinct importance to that party, then the jury may, if they think it reasonable in the circumstances, infer that the witness would have given testimony unfavorable to that party. *Commonwealth v. Schatvet*, 23 Mass. App. Ct. 130, 134, 499 N.E.2d 1208, 1210-1211 (1986). If the other party's case is strong enough that the noncalling party "would be naturally expected" to call the witness, such an inference may be permitted even if the witness is available to both parties, *Commonwealth v. Bryer*, 398 Mass. 9, 13, 494 N.E.2d 1335, 1338 (1986); *Commonwealth v. Niziolek*, 380 Mass. 513, 519, 404 N.E.2d 643, 646 (1980), habeas corpus denied sub nom. *Niziolek v. Ashe*, 694 F.2d 282 (1st Cir. 1982); *Commonwealth v. Franklin*, 366 Mass. 284, 293, 318 N.E.2d 469, 475 (1974); *Commonwealth v. Fulgham*, 23 Mass. App. Ct. 422, 425, 502 N.E.2d 960, 962 (1987), or can provide only partial corroboration of that party's story, *Bryer*, *supra*. Because of the potentially serious adverse effect on the noncalling party, the inference should be permitted "only in clear cases, and with caution." *Schatvet*, *supra*. The inference is not permissible if "so far as appears the witness would be as likely to be favorable to one party as the other." *Id.*, 23 Mass. App. Ct. at 134 n.8, 499 N.E.2d at 1211 n.8.

The judge may not instruct the jury, nor permit counsel to comment, on the potential inference unless the judge has first ruled, as a matter of law, that there is a sufficient foundation for such an inference in the record. *Commonwealth v. Zagranski,* 408 Mass. 278, 288, 558 N.E.2d 933, 939 (1990); *Commonwealth v. Sena,* 29 Mass. App. Ct. 463, 467, 561 N.E.2d 528, 530-531 (1990). "[T]he judge is to consider four factors: (1) whether the case against the defendant is strong and whether, faced with the evidence, the defendant would be likely to call the missing

witness if innocent; (2) whether the evidence to be given by the missing witness is important, central to the case, or just collateral or cumulative; (3) whether the party who fails to call the witness has superior knowledge of the whereabouts of the witness; and (4) whether the party has a 'plausible reason' for not producing the witness." *Commonwealth v. Rollins*, 441 Mass. 114, 118, 803 N.E.2d 1256, 1260 (2004), quoting from *Commonwealth v. Alves*, 50 Mass. App. Ct. 796, 802, 741 N.E.2d 473, 480 (2001). The strength of the Commonwealth's case "appears to have application" whether the Commonwealth or the defense is requesting the instruction. *Alves,* 50 Mass. App. Ct. at 803 n.1, 741 N.E.2d at 480 n.1. "We emphasize again that judges should be circumspect in allowing requests to give the instruction and should do so only when all foundation requirements are clearly met." *Rollins,* 441 Mass. at 120, 803 N.E.2d at 1261. See also *Commonwealth v. Fredette*, 396 Mass. 455, 465-467, 486 N.E.2d 1112, 1119-1120 (1985); *Commonwealth v. Luna*, 46 Mass. App. Ct. 90, 95 n.3, 703 N.E.2d 740, 743 n.3 (1998); *Commonwealth v. Happnie*, 3 Mass. App. Ct. 193, 197, 326 N.E.2d 25, 28 (1975); *Fulgham*, 23 Mass. App. Ct. at 426, 502 N.E.2d at 963.

In deciding the issue of the witness's availability, the judge may consider only the evidence that has been put before the jury, *Niziolek*, 380 Mass. at 520, 404 N.E.2d at 647, though the evidence need not be conclusive, see *Commonwealth v. Melandez*, 12 Mass. App. Ct. 980, 428 N.E.2d 824 (1981); *Commonwealth v. Andres*, 12 Mass. App. Ct. 901, 902-903, 422 N.E.2d 484, 486-487 (1981). Apart from non-availability, plausible explanations for non-production would include: (1) that the witness's testimony would be immaterial or cumulative, *Happnie, supra*; *Commonwealth v. Groce*, 25 Mass. App. Ct. 327, 329-331, 517 N.E.2d 1297, 1298-1299 (1988) (error to so instruct where missing witness's alibi evidence would have been weak at best); *Schatvet*, 23 Mass. App. Ct. at 134, 499 N.E.2d at 1211; (2) that the case against the party is not strong and therefore there is no occasion to reply, *Id.*, 23 Mass. App. Ct. at 134 n.9, 499 N.E.2d at 1211 n.9; (3) that the witness is reluctant to testify for fear of reprisal, *Commonwealth v. Gagliardi,* 29 Mass. App. Ct. 225, 244, 559 N.E.2d 1234, 1246 (1990); (4) that a family member is nevertheless unfriendly to the defendant, *Commonwealth v. Resendes,* 30 Mass. App. Ct. 430, 433, 569 N.E.2d 413, 415 (1991); (5) that a prior conviction renders a witness antagonistic to the Commonwealth, *Commonwealth v. Anderson,* 411 Mass. 279, 283, 581 N.E.2d 1296, 1298-1299 (1991); or (6) that the witness has a prior criminal record that may be used for impeachment, or is susceptible to cross-examination on collateral issues, or there are other tactical reasons for not calling the witness, *Franklin*, 366 Mass. at 294, 318 N.E.2d at 476.

It is error to charge that "where a witness is equally available to either party, and the defendant fails to call the witness, an inference may be drawn that the testimony would have been unfavorable to the defendant where the evidence against him is so strong that, if innocent, he would be expected to call the missing witness." Where a witness is equally available to both sides, the judge may permit the jury to draw an inference against the defendant only if the prosecution has offered sufficient incriminating evidence and the defendant could produce witnesses who are more likely known to him or her than to the prosecution to offer explanations consistent with the defendant's innocence. *Commonwealth v. Cobb,* 397 Mass. 105, 107-109, 489 N.E.2d 1246, 1247-1248 (1986).

2. **Allowing inference is optional with judge.** The fact that a sufficient foundation is established in the record does not *require* the judge to allow comment by counsel and to give an appropriate instruction to the jury, particularly if the inference would run against the defendant. *Commonwealth v. Smith,* 49 Mass. App. Ct. 827, 832, 733 N.E.2d 159, 162 (2000); *Sena,* 29 Mass. App. Ct. at 467 n.6, 561 N.E.2d at 531 n.6. "[W]hether to give a missing witness instruction is a decision that must be made on a case-by-case basis, in the discretion of the trial judge . . . . That decision will be overturned on appeal only if it was manifestly unreasonable. *Commonwealth v. Thomas,* 429 Mass. 146, 151, 706 N.E.2d 669 (1999). However, once a judge permits counsel to make a 'missing witness' comment to the jury, "the judge also must give a 'missing witness' instruction to the jury [or] the effect is to undercut counsel's closing argument." *Smith, supra; Sena, supra.*

The degree of such discretion may be less when it is the defendant who asks for an absent witness instruction or to make an absent witness argument. *Commonwealth v. Tripolone*, 57 Mass. App. Ct. 901, 901, 780 N.E.2d 966, 968 (2003).

"[W]here incriminating evidence has been introduced by the Commonwealth and explanations consistent with his innocence could be produced by the defendant through witnesses other than himself, his failure in this respect may be deemed by the judge to be a fair matter for comment" (citations omitted). *Bryer*, 398 Mass. at 12, 494 N.E.2d at 1337. On the other hand, "[e]ven though comment may be warranted, it does not necessarily follow that it should, in the judge's discretion, be permitted . . . . [T]he judge's discretion in allowing the inference should be applied cautiously and with a strict regard for the rights of persons accused," *Franklin, supra,* since care must be taken to avoid shifting the burden of proof or denigrating the defendant's failure to testify, *Bryer, supra*; *Commonwealth v. Perkins*, 6 Mass. App. Ct. 964, 965, 384 N.E.2d 215, 217 (1979); *Schatvet*, 23 Mass. App. Ct. at 135 n.10, 499 N.E.2d at 1211 n.10.

The judge should consider the strength of the case against the defendant and permit the inference only if "'the evidence against him is so strong that, if innocent, he would be expected to call [the witness]'" (citations omitted). *Bryer, supra.* Although not determinative, the judge may also consider whether the defendant has superior knowledge of the absent witness's identity and whereabouts. *Niziolek*, 380 Mass. at 519, 404 N.E.2d at 646-647; *Franklin*, 366 Mass. at 293, 318 N.E.2d at 475. "In the last analysis, the trial judge has discretion to refuse to give the instruction, . . . and, conversely, a party who wishes the instruction cannot require it of right." *Anderson, supra.*

3. **Argument by counsel impermissible when foundation for instruction absent.** If the judge determines that the foundational requirements for an absent witness instruction are not met, then the judge should not permit counsel to make an absent witness argument either. Since an absent witness instruction is "a specific, limited exception to the more general instruction that the jury are not to draw any conclusion about the content of evidence that was not produced," counsel may not encourage the jury to draw an inference that the judge has determined is not appropriate in the case. This does not stop defense counsel from making the "standard argument that can be made in any case . . . that the evidence that has been produced is inadequate; the defendant may even legitimately point out that a specific witness or specific evidence has not been produced," but may not "point[] an accusatory finger at the Commonwealth for not producing the missing witness and urg[e] the jury to conclude affirmatively that the missing evidence would have been unfavorable to the Commonwealth," which is "the essence of the adverse inference." *Commonwealth v. Saletino*, 449 Mass. 657, 671-672 & n.22, 871 N.E.2d 455, 467-468 & n.22 (2007). Where a prosecutor makes an absent witness argument without having requested advance permission from the judge to do so, an appellate court will take the judge's failure to interrupt or give a curative instruction sua sponte as an implied ruling that the prosecution has laid a proper foundation. *Commonwealth v. Broomhead,* 67 Mass. App. Ct. 547, 855 N.E.2d 413 (2006).

When counsel wishes to make an absent witness argument to the jury, the proper practice is first to obtain the judge's permission to do so. *Smith,* 49 Mass. App. Ct. at 830, 733 N.E.2d at 161. Counsel who fails to do so "risk[s] interruption of his closing argument by the judge . . . . Whether a judge should prevent an improper argument by stopping counsel during the argument or instead should wait until the conclusion of the argument, or correct the argument in his charge to the jury rests largely in his discretion." *Commonwealth v. Vasquez,* 27 Mass. App. Ct. 655, 658 & n.4, 542 N.E.2d 296, 298 & n.4 (1989). A judge may be required to provide curative instructions immediately if a prosecutor's improper argument about an absent witness is sufficiently prejudicial. See *Commonwealth v. Rodriguez,* 49 Mass. App. Ct. 370, 729 N.E.2d 669 (2000) (judge's "tardy and tepid" boilerplate remarks in final instructions insufficient to dispel improper argument; to be effective, corrective instruction should have been given immediately).

4. **Witness present in court.** Since normally an absent witness instruction should not be given when the witness is "equally available to parties on both sides of a dispute," such an instruction is generally inappropriate where the witness is present in the courtroom. However, this is not a hard and fast rule, and need not be applied where one party is more closely acquainted with the witness and would naturally be expected to call the witness. *Saletino*, 449 Mass. at 669 n.17, 871 N.E.2d at 465 n.17.

5. **Non-defendant witness's pretrial silence**. The Commonwealth may impeach a defense witness other than the defendant with his or her pretrial silence only upon establishing the following foundation: (1) the witness knew of the pending charges in sufficient detail to realize that he or she possessed exculpatory information; (2) the witness had reason to make such information available; (3) the witness was familiar with the way to report it to the proper authorities; and (4) neither the defendant nor defense counsel asked the witness to refrain from doing so. *Commonwealth v. Gregory*, 401 Mass. 437, 445, 517 N.E.2d 454, 459 (1988); *Commonwealth v. Edgerton*, 396 Mass. 499, 506-507, 487 N.E.2d 481, 486-487 (1986); *Commonwealth v. Berth*, 385 Mass. 784, 790, 434 N.E.2d 192, 196 (1982); *Commonwealth v. Liberty*, 27 Mass. App. Ct. 1, 4-6, 533 N.E.2d 1383, 1385-1387 (1989); *Commonwealth v. Enos*, 26 Mass. App. Ct. 1006, 1007, 530 N.E.2d 805, 807 (1988); *Commonwealth v. Bassett*, 21 Mass. App. Ct. 713, 716-717, 490 N.E.2d 459, 461-462 (1986); *Commonwealth v. Brown*, 11 Mass. App. Ct. 288, 296-297, 416 N.E.2d 218, 224 (1981). See also *Commonwealth v. Nickerson*, 386 Mass. 54, 58 n.4, 434 N.E.2d 992, 995 n.4 (1982) (inference impermissible if witness had other reasons for not wanting to deal with police); *Commonwealth v. Baros*, 24 Mass. App. Ct. 964, 964, 511 N.E.2d 362, 363-364 (1987) (inferable from witness's explanation that fourth foundation requirement satisfied). The Commonwealth is entitled to pose such foundation questions in the presence

of the jury, *Enos, supra,* but it is error to permit such impeachment unless the proper foundation has been laid, *Commonwealth v. Rivers*, 21 Mass. App. Ct. 645, 648, 489 N.E.2d 206, 208 (1986).

6. **Absence of investigation or testing**. Defense counsel is entitled to argue to the jury that they should draw an adverse inference against the Commonwealth from the failure of the police to preserve and introduce material evidence or to perform probative tests. The judge is not required to instruct the jury that they may draw such an inference, although the Appeals Court has suggested that it is preferable to do so. See Instruction 3.740 (Omissions in Police Investigations.)

7. **Lost or destroyed evidence.** When the defense demonstrates a reasonable possibility that lost or destroyed evidence was in fact exculpatory, the judge must then balance the culpability of the Commonwealth, the materiality of the evidence and the potential prejudice to the defendant in determining an appropriate remedy, which may include instructing the jury that it is permissible for them to draw a negative inference against the Commonwealth. See Instruction 3.740 (Omissions in Police Investigations).