N.Y. Pattern Jury Instr.--Civil 1:75 (3d ed. 2013)

PJI 1:75 General Instruction—Evidence—Failure to Produce Witness—In General

A party is not required to call any particular person as a witness. However, the failure to call a certain person as a witness may be the basis for an inference against the party not calling the witness. For example, in this case the (plaintiff, defendant) did not call AB [*identify witness, e.g. treating physician, examining physician*] to testify on the question of [*identify issue, e.g., permanent extent of injury, causation*]. (The plaintiff, defendant) (has offered the following explanation for not calling AB [*summarize explanation*], as a witness or has offered no explanation for not calling AB).

[*If explanation is offered*] If you find that this explanation is reasonable, then you should not consider the failure to call AB in evaluating the evidence. If, however, you find (the explanation is not a reasonable one, no explanation has been offered) you may, although you are not required to, conclude that the testimony of AB would not support (the plaintiff's, defendant's) position on the question of [*identify issue*] [*add if opposing party has offered evidence on the issue*]: and would not contradict the evidence offered by (the plaintiff, defendant) on this question and you may, although you are not required to, draw the strongest inference against the (the plaintiff, defendant) on that question, that opposing evidence permits.

Comment