5.00

FAILURE TO TESTIFY OR PRODUCE EVIDENCE

INTRODUCTION

This section covers the failure of a party to produce evidence under his control, the failure of a competent party to testify, and the situations which may arise under the "Dead Man's Act" (735 ILCS 5/8-201 (1994)).

Under the circumstances enumerated in IPI 5.01, a presumption arises that the evidence a party fails to produce would be unfavorable to him. The instructions explaining the application of the "Dead Man's Act" state the general rule that a party cannot testify on his own motion when the adverse party is suing or defending in one of the enumerated capacities, and the exceptions to the rule.

5.01 Failure To Produce Evidence or A Witness

If a party to this case has failed [to offer evidence] [to produce a witness] within his power to produce, you may infer that the [evidence] [testimony of the witness] would be adverse to that party if you believe each of the following elements:

1. The [evidence] [witness] was under the control of the party and could have been produced by the exercise of reasonable diligence.

2. The [evidence] [witness] was not equally available to an adverse party.

3. A reasonably prudent person under the same or similar circumstances would have [offered the evidence] [produced the witness] if he believed [it to be] [the testimony would be] favorable to him.

4. No reasonable excuse for the failure has been shown.

Notes on Use

Before giving this instruction, the trial court must first determine that in all likelihood a party would have produced the witness/document under the existing facts and circumstances except for the fact that the testimony/contents would be unfavorable. *Tuttle v. Fruehauf Corp.*, 122 Ill.App.3d 835, 843; 462 N.E.2d 645, 652; 78 Ill.Dec. 526, 533 (1st Dist.1984). Whether to give IPI 5.01 is a matter within the sound discretion of the trial court. *Roeseke v. Pryor*, 152 Ill.App.3d 771, 504 N.E.2d 927, 105 Ill.Dec. 642 (1st Dist.1987); *Anderson v. Chesapeake & Ohio Ry. Co.*, 147 Ill.App.3d 960, 498 N.E.2d 586, 594-595; 101 Ill.Dec. 262, 270-271 (1st Dist.1986). The instruction is not warranted when the unproduced witness's testimony would be merely cumulative. *Chuhak v. Chicago Transit Auth.*, 152

Ill.App.3d 480, 504 N.E.2d 875, 881; 105 Ill.Dec. 590, 596 (1st Dist.1987).

Comment

The failure of a party to produce testimony or physical evidence within his control creates a presumption that the evidence if produced would have been adverse to him. *Beery v. Bre*ed, 311 Ill.App. 469, 474-478; 36 N.E.2d 591, 593-595 (2d Dist.1941) (failure to produce grandson of defendant who drove defendant's automobile at time of occurrence justified presumption that testimony of grandson would have been unfavorable). *See also Zegarski v. Ashland Sav. & Loan Ass'n*, 4 Ill.App.2d 118, 123; 123 N.E.2d 855, 857 (1st Dist.1954). The presumption does not apply if the evidence is "equally available" to either party. *Flynn v. Cusentino*, 59 Ill.App.3d 262, 375 N.E.2d 433, 16 Ill.Dec. 560 (3d Dist.1978); *Chapman v. Foggy*, 59 Ill.App.3d 552, 375 N.E.2d 865, 16 Ill.Dec. 758 (5th Dist.1978); *Wood v. Mobil Chem. Co.*, 50 Ill.App.3d 465, 365 N.E.2d 1087, 8 Ill.Dec. 701 (5th Dist.1977). A witness is not "equally available" to a party if there is a likelihood that the witness would be biased against him, as for example a relative or an employee of the other party. *United States v. Beekman*, 155 F.2d 580, 584 (2d Cir.1946); *Biehler v. White Metal Rolling & Stamping Corp.*, 65 Ill.App.3d 1001, 382 N.E.2d 1389, 22 Ill.Dec. 634 (3d Dist.1978); *Kerns v. Lenox Mach. Co.*, 74 Ill.App.3d 194, 392 N.E.2d 688, 30 Ill.Dec. 33 (3d Dist.1979). This is an evidentiary instruction dealing with failure to produce evidence. This instruction is not intended to be an issue or burden of proof instruction dealing with spoliation. *Dardeen v. Kuehling et al.*, 213 Ill.2d 329, 821 N.E.2d 227, 290 Ill.Dec. 176 (2004).

Giving this instruction to explain this presumption has been approved. *Shiner v. Friedman*, 161 Ill.App.3d 73, 513 N.E.2d 862, 867; 112 Ill.Dec. 253, 258 (1st Dist.1987) (defendant failed to call busboys who inspected washroom floor after plaintiff slipped and fell); *Ryan v. E.A.I. Const. Corp.*, 158 Ill.App.3d 449, 511 N.E.2d 1244, 1252-1253; 110 Ill.Dec. 924, 932-933 (1st Dist.1987) (defendants failed to call employee who had been listed as their expert and twice deposed); *DeBow v. City of E. St. Louis*, 158 Ill.App.3d 27, 510 N.E.2d 895, 902; 109 Ill.Dec. 827, 834 (5th Dist.1987) (defendant failed to produce photos of plaintiff taken by defendant and jail inspection log reports); *Kane v. Northwest Special Recreation Ass'n*, 155 Ill.App.3d 624, 508 N.E.2d 257, 261-262; 108 Ill.Dec. 96, 100-101 (1st Dist.1987) (plaintiff failed to produce underpants of alleged rape victim); *Roeseke v. Pryor*, 152 Ill.App.3d 771, 504 N.E.2d 927, 932-933; 105 Ill.Dec. 642, 647-648 (1st Dist.1987) (defendant hotel failed to produce night manager's report summarizing events in question); *Santiemmo v. Days Transfer, Inc.*, 9 Ill.App.2d 487, 499; 133 N.E.2d 539, 545 (1st Dist.1956) (defendant failed to produce doctor who examined plaintiff by court order secured by the defendant); *Petersen v. General Rug & Carpet Cleaners*, 333 Ill.App. 47, 65; 77 N.E.2d 58, 67 (1st Dist.1947) (defendant failed to call driver of his truck which struck and injured plaintiff).

The adverse presumption depends on the lack of a reasonable excuse for the nonproduction, or the wilful withholding of the evidence. *Coupon Redemption, Inc. v. Ramadan*, 164 Ill.App.3d 749, 518 N.E.2d 285, 290; 115 Ill.Dec. 760, 765 (1st Dist.1987); *Singh v. Air Illinois, Inc.*, 165 Ill.App.3d 923, 520 N.E.2d 852, 858-859; 117 Ill.Dec. 501, 507-508 (1st Dist.1988) (reasonable excuse shown for failure to produce all of decedent's W-2 forms). One "reasonable excuse" for not producing the witness was the witness's conviction of armed robbery. *Lee v. Grand Trunk Western R. Co.*, 143 Ill.App.3d 500, 513; 492 N.E.2d 1364, 97 Ill.Dec. 491, 501 (1st Dist.1986).

The trial court is not required to permit a party to re-open his case to produce the missing witness. *Hollembaek v. Dominick's Finer Foods, Inc.*, 137 Ill.App.3d 773, 778; 484 N.E.2d 1237, 92 Ill.Dec. 382, 386 (1st Dist.1985); *Blackwell v. City Nat'l Bank & Trust Co.*, 80 Ill.App.3d 188, 399 N.E.2d 326, 330; 35 Ill.Dec. 492, 496 (2d Dist.1980) (would have been preferable to allow party to re-open or refuse instruction, but not abuse of discretion).

5.02 Failure Of Party To Testify

The [plaintiff] [defendant] in this case is [suing] [sued] as [administrator] [executor] [guardian] for a [deceased person] [incompetent person]. Since the deceased cannot be here to testify [since the incompetent person is incapable of testifying], the law does not permit the [defendant] [plaintiff] [or any person directly interested in this action] to testify in his own behalf [to any conversation with the] [deceased] [incompetent person] [or] [to any event which took place in the presence of the] [deceased] [incompetent person]. The fact that the [defendant] [plaintiff] did not testify to those matters should not be considered by you for or against him.

[In this case, however, the (plaintiff)(defendant) called (a witness)(the defendant)(the plaintiff) to testify on his behalf (to conversations with the)(deceased)(incompetent person)(or)(to an event which took place in the presence of the)(deceased)(incompetent person), and therefore the (plaintiff)(defendant)(interested person) had the right to testify as to the same (conversation)(event).]

[In this case, however, since the deposition of the (deceased)(incompetent person) was admitted in evidence on behalf of the (plaintiff)(defendant), the (plaintiff)(defendant)(interested person) had the right to testify as to the same matters admitted in evidence.]

[In this case, however, the law does not prevent the testimony concerning any fact relating to the heirship of the decedent.]

Notes on Use

The "Dead Man's Act" is applicable and this instruction should be given only when: (1) the witness is a party or an interested person; (2) the witness is called in his own behalf; and (3) an adverse party is suing or defending in one of the enumerated representative capacities.

The instruction is intended to avoid confusion in the minds of the jury by reason of the fact that a party in the case sat silent throughout the trial.

If there is a full waiver of the "Dead Man's Act," no instruction on the subject is needed. If there is a partial waiver, paragraph two will be needed. If a party, due to the invoking of the rule, was incapable of testifying at all, there is no need to use the bracketed portion of the first paragraph.

This instruction is based on the evidence act, 735 ILCS 5/8-201 (1994), as amended effective October 1, 1973. Prior to that amendment, a protected party waived the protection of the act by calling the party or interested person but not by calling a non-party witness to the event. The amendment broadened the waiver to include such witnesses, and the instruction has been modified accordingly.

This instruction combines former IPI 5.02, 5.03, 5.04, 5.05, and 5.06, some of which were unnecessary and others rendered obsolete by the 1973 statutory amendments. Use only those paragraphs or parts of paragraphs that are applicable to the facts of the case.

Comment

This instruction deals with the competency of a party as a witness and not with the admissibility of testimony or the competency of witnesses who are not parties. *Creighton v. Elgin*, 387 Ill. 592, 604; 56 N.E.2d 825, 830, 162 A.L.R. 883 (1944).

The giving of an instruction explaining the statute was approved in *Aldridge v. Morris*, 337 Ill.App. 369, 374; 86 N.E.2d 143, 145-146 (2d Dist.1949).

The disability is procedural and is waived if not asserted. *Karlos v. Pappas*, 3 Ill.App.2d 281, 121 N.E.2d 611 (2d Dist.1954)(abstract). However, where the objection is made, counsel may not comment on that fact. *Crutchfield v. Meyer*, 414 Ill. 210, 111 N.E.2d 142 (1953).