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.

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. Breed*, 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).

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, 1252-53, 110 Ill.Dec. 924, 932-33 (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, 261-62, 108 Ill.Dec. 96, 100-01 (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, 932-33, 105 Ill.Dec. 642, 647-48 (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 non production, or the willful 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, 858-59, 117 Ill.Dec. 501, 507-08 (1st Dist. 1988) (reasonable excuse shown for failure to produce all of decedent's W-4 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).