**02.23 CLOSING INSTRUCTIONS — FAILURE TO PRESENT EVIDENCE**

The evidence should be evaluated not only by its own intrinsic weight but also according to the evidence which is in the power of one party to produce and of the other party to contradict. If weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of one party to produce, the evidence offered should be viewed with caution.

# Use Note

Alaska R. Civ. P. 51(b)(4) requires such an instruction “on all proper occasions.” This instruction could be given if it appears that a party held back non-privileged evidence which was available and which might have been better evidence than the evidence that was presented.

## Comment

This instruction raises many issues. Witnesses and evidence today often are equally available to both parties, and the utility of such an instruction will be in doubt in many cases since both sides presumably could call witnesses and have chosen not to do so. The instruction also can cause problems when given to a jury that does not understand the law of privileges. Alaska R. Evid. 512 provides that making a claim of privilege is not a proper subject for comment by the judge or counsel and that no inference may be drawn from a claim of privilege. That evidence rule might be jeopardized by this type of instruction. Yet a third problem with the instruction is that it may penalize a party for choosing not to call a witness with a prior record or a bad reputation for veracity, when the calling of such a witness might actually do the party more harm than good. For these reasons, an instruction about the failure to call additional or different witnesses should be given in any particular case only after the trial judge explores the possible problems with such an instruction, and focuses on whether the facts of a particular case represent a proper occasion for the instruction.

If the judge is concerned only with a missing witness, rather than with absent real evidence, the judge might wish to use the following language:

In evaluating the testimony of witnesses called by a party, you may consider whether witnesses with more knowledge than those called to testify by a party were available to that party and yet were not called. If so, this might suggest a weakness in that party’s case.