

203. Party Having Power to Produce Better Evidence

You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence.

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Directions for Use

An instruction on failure to produce evidence should not be given if there is no evidence that the party producing inferior evidence had the power to produce superior evidence. (*Thomas v. Gates* (1899) 126 Cal. 1, 6 [58 P. 315]; *Hansen v. Warco Steel Corp.* (1965) 237 Cal.App.2d 870, 876 [47 Cal.Rptr. 428]; *Holland v. Kerr* (1953) 116 Cal.App.2d 31, 37 [253 P.2d 88].)

The reference to “stronger evidence” applies to evidence that is admissible. This instruction should not be construed to apply to evidence that the court has ruled inadmissible. (*Hansen, supra*, 237 Cal.App.2d at p. 877.)

For willful suppression of evidence, see CACI No. 204, *Willful Suppression of Evidence*.

Sources and Authority

- Evidence Code section 412 provides: “If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.”
- Section 412 does not incorporate the “best evidence rule,” but instead deals with “stronger and more satisfactory” evidence. (*Largey v. Intrastate Radiotelephone, Inc.* (1982) 136 Cal.App.3d 660, 672 [186 Cal.Rptr. 520] (giving of instruction was proper because corporate records concerning date of meeting could have been stronger evidence than recollection of participants several years later).)
- This inference was a mandatory presumption under former Code of Civil Procedure section 1963(6). It is now considered a permissible inference. (See 3 Witkin, California Evidence (4th ed. 2000) § 114, p. 152.)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 313, p. 358

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.93
(Matthew Bender)