Judge Steven J. Kleifield
LOS ANGELES SUPERIOR COURT

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Examinations under Evidence Code section 776

DON'T CALL THE DEFENDANT JUST BECAUSE YOU *CAN*....

You have spent hundreds of hours and plenty of money on your case. The case didn't settle and you are ready for trial. The courtroom is open, and you can't wait to get this case in front of a jury. You have a story to tell, and you want the jury to hear it.

The to-do list is long. You have to line up your witnesses, talk to them, and give them everything they need to prepare for their testimony. You need to create an outline of your case. You need to summarize the depositions if that hasn't already been done, and create tentative outlines of their testimony. You need to spend time thinking about and writing a trial brief, as well as jury instructions, witness lists, and exhibit lists. You should spend a lot of time with your client, explaining what to expect. You may be in last-minute negotiations that take up a lot of your time. You need to prepare for jury selection. And on and on.

The juror

Now put yourself in the juror's place. You, the juror, received your summons in the mail. The summons tells you where and when you will be serving. You feel a sense of civic responsibility, even if it is an inconvenience (as it is for most everyone). You go online and register, wondering how you are going to deal with your work and family obligations. Perhaps you are concerned about getting behind on your bill payments; maybe you are dreading telling the boss that you won't be able to work on that important project; maybe you need to arrange for someone to take your mother to her three-days-a week dialysis treatments.

Your week comes up, and you dutifully check each night to see if you're going to have to drop everything and be at the mercy of the court. Your number comes up. Time to bite the bullet. You have your orientation, report to the courtroom, and have a seat. Jury selection begins.

The judge introduces herself, explains why you are there, introduces the participants, and tells you a little bit about the case. Then come the questions, first from the judge and then from the attorneys. On and on it goes, with (at least to the jurors) the same questions asked over and over again. You start wondering whether you should have used that last continuance on the court's website.

Eventually jury selection is over, and lucky you, you are on the jury that will hear the case. You weren't happy about the three-week time estimate; you thought it would be a couple of days, maybe three or four, maybe even five, but not three weeks!

The judge instructs you on what you should expect during the trial, how you are to conduct yourself, the burden of proof in a civil case, etc. The judge tells you it is now time for the opening statements of counsel – what they say is not evidence; it is merely an outline of what they believe the evidence will show.

The plaintiff's lawyer stands, introduces himself again, repeats what the judge said about what he is going to say is not evidence, but merely an outline of what the evidence is going to show, and gives his opening statement. This goes on much longer than you thought it would; after about thirty minutes your mind starts to wander, and the seat is starting to feel uncomfortable. The first lawyer finishes and sits down. After a fifteen-minute break (that turns into thirty) the defense lawyer stands up and the whole thing starts all over again.

The case is much more complicated than that brief statement read by the judge about what the case was about. You admit to yourself that you are somewhat interested in hearing the evidence. Maybe it will all be worth it!

Why is he calling the defendant?

The judge looks at the plaintiff's attorney and says, "Counsel, you may call your first witness." The show is about to begin! The attorney stands and says, "Your Honor, plaintiff calls the [defendant/ defendant's employee] under Evidence Code section 776."

What? Huh? You thought the attorney represents the *plaintiff*. But he's calling the *defendant* as his first witness. Why didn't he call his *own* client so we can hear what he's complaining about? Instead, he's calling the *other* person that he's *suing*. What's going on here? Did you misunderstand who was representing whom? Did the attorney switch clients? Why aren't you hearing from the plaintiff, or someone who's testifying *for* the plaintiff, and not *against* him?

Why, indeed? Under Evidence Code section 776 an attorney can call an adverse witness in the case-in-chief. The temptation to do it is strong. You've spent the last several years putting your case together against this very person, or the corporation he works for. Gosh darn it, you are going to put him on the stand and show him what's what!

As a bonus, Evidence Code section 776 says you can examine the witness as if under cross-examination. You can ask leading questions!

Why is the lawyer testifying?

And that's what the jurors hear – leading questions! Lots and lots of leading questions! Not only are they seeing the wrong witness on the stand, they're not actually hearing the witness testify. They're hearing the lawyer testify! The lawyer makes a statement and asks the witness, "true?" The witness says "yes," "no," "I don't know," "I'm not sure," or "I don't recall." The witness appears to have a very limited vocabulary.

Q. Your name is Glen Livet, correct?
A. Yes.
Q. And you graduated from Kansas State University in 1987 with a B.A. in engineering, correct?
A. Actually, it was a B.S. in engineering.
Q. But it was in 1987, true?
A. True.
Q. And you are the president and CEO of Acme Corporation, yes?
A. Yes.

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Q. And Acme Corporation manufactures widgets, correct?
A. Yes.
Q. And you have been the president and CEO of Acme Corporation for the last 17 years, correct?
A. Incorrect.
Q. Didn't you testify at your deposition that you have been the president and CEO of Acme Corporation for the last 17 years?
A. I don't remember what I testified to at my deposition. When was the deposition taken?
Q. August 1, 2020.
A. Was that the first session or the second session? It's been so long I can't remember.
Q. The second session. I'm going to read from it.
Opposing counsel: "Your Honor, can I have a moment to get the transcript?"
The Court: "You may, and Counsel, have you lodged a copy with the court?" After a brief delay we now have our respective copies.
Defense counsel: "Can I have the page and line numbers?
Q. Page 52 line 12 through page 53 line 14.
(Pause in proceedings)
Defense counsel: Your Honor, may we approach?
(Sidebar)
Q. Well, let me read from your deposition and see if that refreshes your recollection.
(Deposition read.)
Does that refresh your recollection as to what you testified to at your deposition?
Yes.
Q. So, you have been president and CEO of Acme Corporation for the last 17 years, correct?
A. Incorrect. I have been president of Acme Corporation for the last 17 years and CEO for the last 15 years.
Q. But you did testify at your deposition that you have been president and CEO of Acme Corporation for the last 17 years, correct?
A. If that's what it says, I guess I did.
(Lawyer looks at the jury with an expression of smug satisfaction. Jurors look at the judge with an expression of puzzlement.)

Really? This is important?

This is interesting stuff, isn't it? So, *this* is why cousin Sarah is missing work to take Mom to her dialysis appointments.

After several hours we get to the heart of the case. You're going for the jugular.
"Q. So, as of July 2004 you knew there was a risk that someone could get injured using an Acme widget, correct?
A. There's always a risk that someone can get injured using any product.
Q. Your Honor, move to strike as non-responsive. (Doesn't wait for a ruling.) That's not my question. My question is, as of July 2004 you knew there was a risk that someone could get injured using an Acme widget, correct?
A. Not if it's used correctly.
Q. Your Honor, I'd like to read from the witness's deposition…

And the judge sighs…

I see this not only in jury trials – I see it in bench trials. The plaintiff calls the defendant to the stand. My heart sinks. I know this is probably not going to work out well, but I promised myself when I became a judge that I would let the attorneys try their case. In an effort to save court time I ask defense counsel if he would like to do his direct examination during cross. Sometimes the answer is yes; more often than not the answer is, "Your Honor, I'd like to question my client within the scope of the 776, and reserve the direct examination for my case in chief."

The natural response from the bench is "OK, but I don't want to hear repetitive testimony when your client testifies a second time."

That gives rise to the following during the direct examination of the defendant in his case-in-chief:

Q. What did you think when you were asked that question?

Plaintiff's counsel: Objection your honor, that was already asked and answered.

Defense counsel: No, it wasn't. It was slightly different. And besides, shouldn't I have a little leeway here? He's the one who called my client under 776.

Plaintiff's counsel: But he's wasting our time. Your Honor, I've been getting a daily from the reporter. Can I have a moment to look through the transcript and show you that he already asked that question?

The Court: The time that was wasted was the time you examined him during your case-in-chief. No, you may not. The objection is overruled.

Don't lose your storyline

Probably the worst thing about using 776 is it makes the fact-finder's job harder. I've never sat as a juror, but I have to believe they think like me in this respect – I want to hear the story. You want me to hear your story. More often than not a 776 examination does not help you tell your story. Too often it is a grab-bag of disjointed facts. You can't tell where it fits into to the factual puzzle until later, if at all. In the meantime, the confusion and waste of time may be held against you or your client.

Another downside is that it may appear that while you want me to hear *your* story you don't want me to hear the *defendant's* story. You want to "dirty him up" so that I won't even want to look at him when it's his turn to actually testify. It can give the impression that you're not playing fair. When you watch a sporting event, do you root for the team that doesn't play fair?

In fact, if the 776 examination is done wrong, the continued brow-beating by the plaintiff's attorney can actually cause the fact-finder to feel sympathy *for the defendant*. If you represent the plaintiff, the last thing you want is for the jury or judge to sympathize with the defendant. A smart defense attorney may decide to let the badgering go on for a while before stepping in and objecting.

I'm not saying there is never a time when it makes sense to call an adverse witness under Evidence Code section 776.

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In my experience, though, nine times out of ten it doesn't help your case. It might actually hurt your case. Think about *why* you are calling the opposing party under 776. If you have a good reason, limit the examination to what you really need. If you are going to lead, don't go overboard. You don't have to lead on non-controversial matters.

If you can't think of a really good reason to call a witness under Evidence Code section 776, don't do it. Just because you *can*, doesn't mean you *should*.

Steven J. Kleifield is a judge of the Los Angeles Superior Court. He was appointed by Gov. Gray Davis, and took the bench on September 12, 2002. He is currently assigned to a general civil court at the Stanley Mosk Courthouse in downtown Los Angeles, where he hears a variety of civil cases.