

# The Potentially Perilous Route of *Never and Always*

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In those jurisdictions that permit depositions of experts, the deposition of the liability expert is often an influential factor in determining several variables, including: whether the case will settle; how much the case will settle for, and what evidence will be presented at trial, should the case not settle. The deposition of the liability expert is, therefore, not surprisingly often an interesting battle of wits between the deposing attorney and the retained expert witness. One strategy used by counsel to undermine the strength of an expert's opinion(s) is to develop inconsistencies between the opinion(s) and the expert's deposition testimony by, first, committing the expert to a *never* and/or *always* position, then showing how that position is contradicted by a "real life" example.

One variation of this tactic was utilized effectively by the Ancient Greek Philosopher Plato in his "Socratic dialogues" – so named because Socrates is depicted in a discussion, "dialogue", with another who professes to *know* quite a bit about a particular subject. The dialogue, however, involves Socrates showing how the so called *expert* does not really know what he professes to know. This strategy is often referred to as the *Socratic Method* and is utilized by many law school professors, to teach students by asking probing questions on a particular case or area of law. For this reason, it is perhaps not surprising that some students themselves later seek to employ the *method*, or some version of it, in deposing opposing experts. (FN1 Although the focus here is the liability expert, there is no reason why *the method* could not be employed in a deposition of the damages expert).

The following example provides an illustration of *The Socratic Method*, and is drawn from Plato's Dialogue entitled *Euthyphro*. In this dialogue, Socrates encounters Euthyphro on his way to court, where Socrates will defend an indictment against him for Corrupting the youth of Athens and for Inventing "False Gods" (i.e. the Gods that official Athens does not believe in). The indictment largely resulted from Socrates engaging many citizens of Athens, including many young ones, in conversation which encouraged them to question things, rather than take them as true simply because someone in authority told them they were true. The encounter with Euthyphro happens as Euthyphro is on his way to court to prosecute his own father for murder. Socrates engages him in conversation about the nature of his father's crime, and the bases for his belief that his father committed murder. Socrates shows Euthyphro does not *know* nearly as much as he professes to know by getting Euthyphro to agree to supposed absolute *truths* (i.e. essentially an *always* position), followed by Socrates submitting a real life example that contradicts the absolute truth. In so doing, Socrates undermines the strength of Euthyphro's position. The following exchange is taken from the dialogue itself, and involves Euthyphro attempting to provide a definition of the term *piety*:

*S/ Tell me then what this form is, so that I may look upon it, and using it as a model, say that any action of yours or another's of that kind is pious, and if it is not that it is not.*

*E/...what is dear to the gods is pious and what is not impious.*

*S/Come then, let us examine....An action or a man dear to the Gods is pious, but an action or a man hated by the gods is impious. They are not the same but quite opposite, the pious and the impious. Is that not so?*

*E/It is indeed.*

*S/We have also stated that the gods are in a state of discord, that they are at odds with each other, Euthyphro....Has that, too, been said?*

*E/It has.*

Socrates has set a trap for Euthyphro. He first commits Euthyphro to a definition of piety (*that which is dear to the gods is always pious*), then shows how a 'real life' example contradicts that definition, since some gods disagree on what is *dear* and what is *not dear*. The same result can be accomplished by an attorney who commits an expert to a *never* or *always* position, and then demonstrates how a 'real life' example contradicts the position. The following exchange is drawn from a wrongful death case where the decedent truck driver was assisting with the unloading of merchandise from a flat-bed trailer. After being told by the unloading crew that he would have to cut his own bands, he pulled his own band cutters from the cab of the truck. The driver cut the wrong bands, and the merchandise tipped off the flat-bed and crushed him to death. The expert for the defense, in support of comparative fault argument, opined that the proximate cause of the death was the driver's ill-advised decision to cut the bands himself, rather than wait for properly trained personnel to do so. In support of the position, the expert opined that it is a rule in the commercial truck driving industry that "drivers are *never* to cut their own bands."

*Plaintiff's Attorney/....so it is your opinion that a truck driver should never cut bands anywhere on the truck?*

*Expert/ Correct, drivers are not to cut bands themselves....they are not trained to, nor are they ever expected to....*

*P.A/Ok, so driver's are never to cut bands, ever...,bright line rule, that's your opinion.*

*Expert/Bright line rule....driver's are never to cut bands. Period.*

The Plaintiff's attorney subsequently demonstrated the untenability of that position by showing the reasonableness, indeed the *necessity*, of a driver cutting a band that held a first aid kit in place on the back of a flat bed trailer. After the expert replied that he never heard of a first aid kit ever hurting anyone, the point was made. The expert, naturally, allowed for a 'common sense' exception to the *general rule* that driver's are not to cut bands. However, by committing to an *always* position, the expert had compromised the strength of his opinion once his *always* position was shown to have an exception, which was not allowed for by the way the expert defined the driver's obligation. The alternative for the expert was to carefully avoid the

*never* or *always* answer, by simply asserting that in the typical scenario confronting a truck driver in an unloading circumstance, including the one at issue, it would be unreasonable for a driver to cut bands. This answer is not controverted by the first aid kit counter-example, and yet maintains the consistency of the expert's opinion that driver's ought not to cut bands as a *general rule*.

The take-away is that agreeing to *never* or *always* positions, without carving out wiggle room for exceptions, is a potentially perilous position. Especially, with the *nearly* universal availability of options to avoid agreeing with the *never* and *always* categorizations.

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[Plato, The Trial and Death of Socrates] Translated by G.M>A Grube; Hacket Publishing Co; Indianapolis, IN.