

**TAB 19**

**Six Minute Experts Cross-Examination  
Demonstration**

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**The Six-Minute Family Law Lawyer 2011**



The Law Society of  
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**CONTINUING PROFESSIONAL DEVELOPMENT**

## **Cross Examination of an Unassailable Expert in Six Minutes - Considerations of a different approach from the usual "Cross" Examination Techniques**

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Cross examination has often been described as a “dark art” – one where the skilled cross examiner eradicates all but the last shreds of intellectual dignity belonging to the witness. The great cross examinations have been described as “wholesale destruction” of the witness. In the case of the expert witness, the challenge is often one of “out-witting” the expert – of pitting the cross examiner’s great intellectual acumen against the depth of the expert’s skill and knowledge. Hence the post cross examination stories that usually end with the conclusion that the witness was “destroyed”, or “could barely walk out of the courtroom”, or had “given up and admitted that a conclusion was just untenable”.

It is not surprising that cross examination is usually understood to be “cross”. And, many are of the view that all that is needed is to yell and be angry so as to impugn the credibility of the expert.

There is an alternative theory to the practice of cross examination. This theory evolves from the fundamental definition of cross examination: it is a series of discrete facts, each posed as a

statement [not a question], all leading up to a conclusion that ought to become obvious from the propositions that evolve through the series of discrete fact statements. Considering cross examination in this way allows the process to be seen as an aid to the trier of fact – as a means to illustrate a point, an argument, or a point of view, that is an alternative to that which is being proffered by the witness under examination.

If one conducts a cross examination using this basic theory, whether with an expert, or a lay witness, it is easy to see how the cross examination becomes much less adversarial and much more informative for the trier of fact. Using this theory to construct a cross examination of an expert helps to make the cross examination an opportunity for the court to reflect on the expert opinion under consideration by considering conclusions in light of different approaches, or by giving conclusions or methods different ways to be reviewed.

Of course, when actually conducting a cross examination in this manner, it becomes critical that each element of the cross examination be free from debate or disagreement. It is not possible to have a cross examination proceed along the lines above if each statement posed to the expert is one with which s/he will take issue.

In the example that will be presented at the Six Minute Family Lawyer (December 1, 2011), Irwin Butkowsky will be cross examined on a hypothetical assessment report that he has prepared in which he has assessed and made recommendations in respect of a family involved in divorce proceedings that have evolved into high conflict over both property division, support, and parenting. The parents will be referred to as “John” and “Mary”. They are in their late

thirties, both well educated, and both moderately wealthy. Their children are referred to as “Sally” and “Steve”. Currently, Sally is 2 and a half years old, while Steve is 4 years old. Separation occurred 18 months ago.

Dr. Butkowsky has recommended the following in relation to parenting:

1. That the parents live close enough to each other to facilitate a shared parenting arrangement;
2. That the parents make decisions jointly about major medical and pre schooling of the children.
3. That the parents share time with Sally and Steve, so that the weeks and weekends are evenly divided.
4. That the parents submit major disputes to a parenting co ordinator.
5. That the parents attend major medical and school related (pre school related) events and appointments together.

The basis for the shared parenting arrangement is as follows:

1. Both parents are equally capable of having a close and loving relationship with the children.
2. Neither of the children is clinically compromised from having a close and equal relationship with the children.

3. Parenting co ordination and planned communication methods will eliminate or resolve ongoing conflicts.
4. Each parent has a work schedule that is sufficiently flexible to allow for such sharing.
5. Both parents are sufficiently funded to permit their homes to be almost exactly similar.
6. The children appear to have a close and constructive relationship with both parents.
7. The children were observed to be communicative and bonded equally with both parents.
8. It is in the interests of the children to have and develop a close bond with both parents.
9. The children will benefit from having the guidance and care of both parents, and this will facilitate more positive development and is more predictive of better development for the children.

The cross examination of Dr. Butkowsky will attempt to consider his recommendations and conclusions in light of research about shared parenting/joint custody outcomes and will be designed to place before the court some considerations relevant to whether the court ought to implement the recommendations of Dr. Butkowsky, or whether some other measures or monitoring ought to be considered by the court in reaching its decision.