



WILMER CUTLER PICKERING HALE AND DORR LLP

*Roping the Bull:  
Cross-Examination Tips for  
Both Beginners and Experts*

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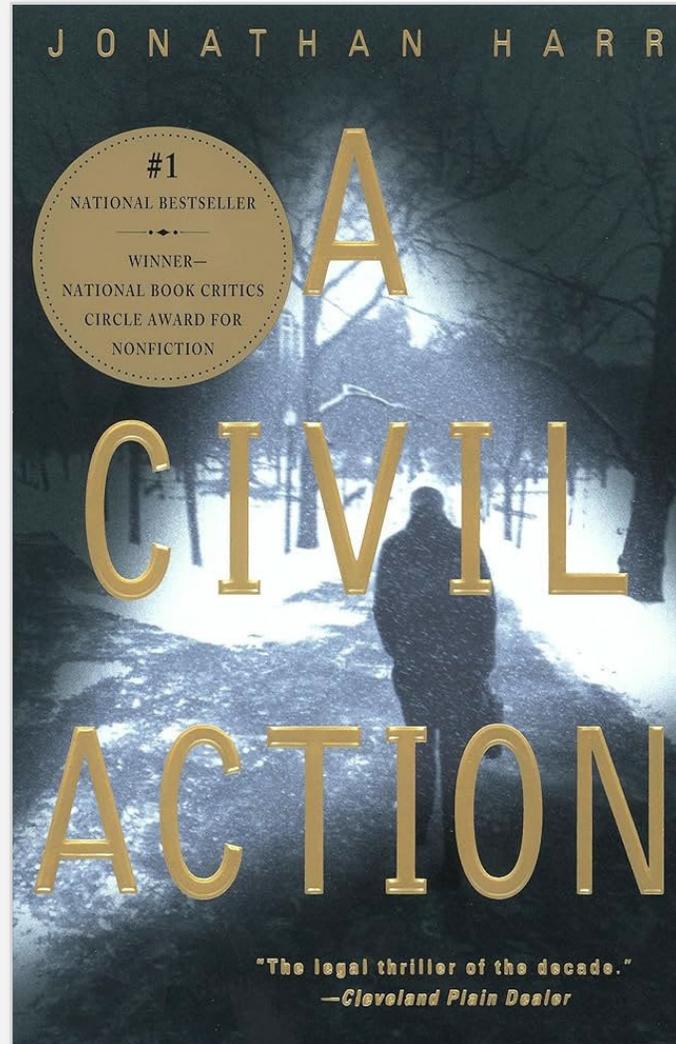
Joe Mueller

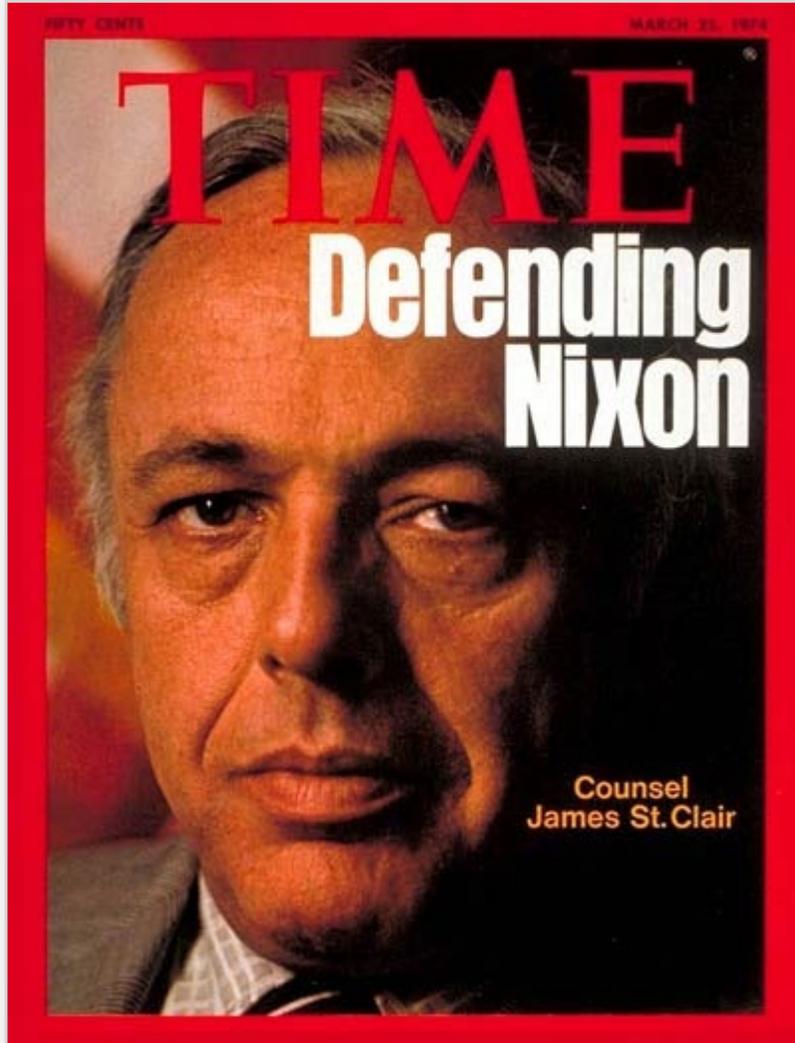
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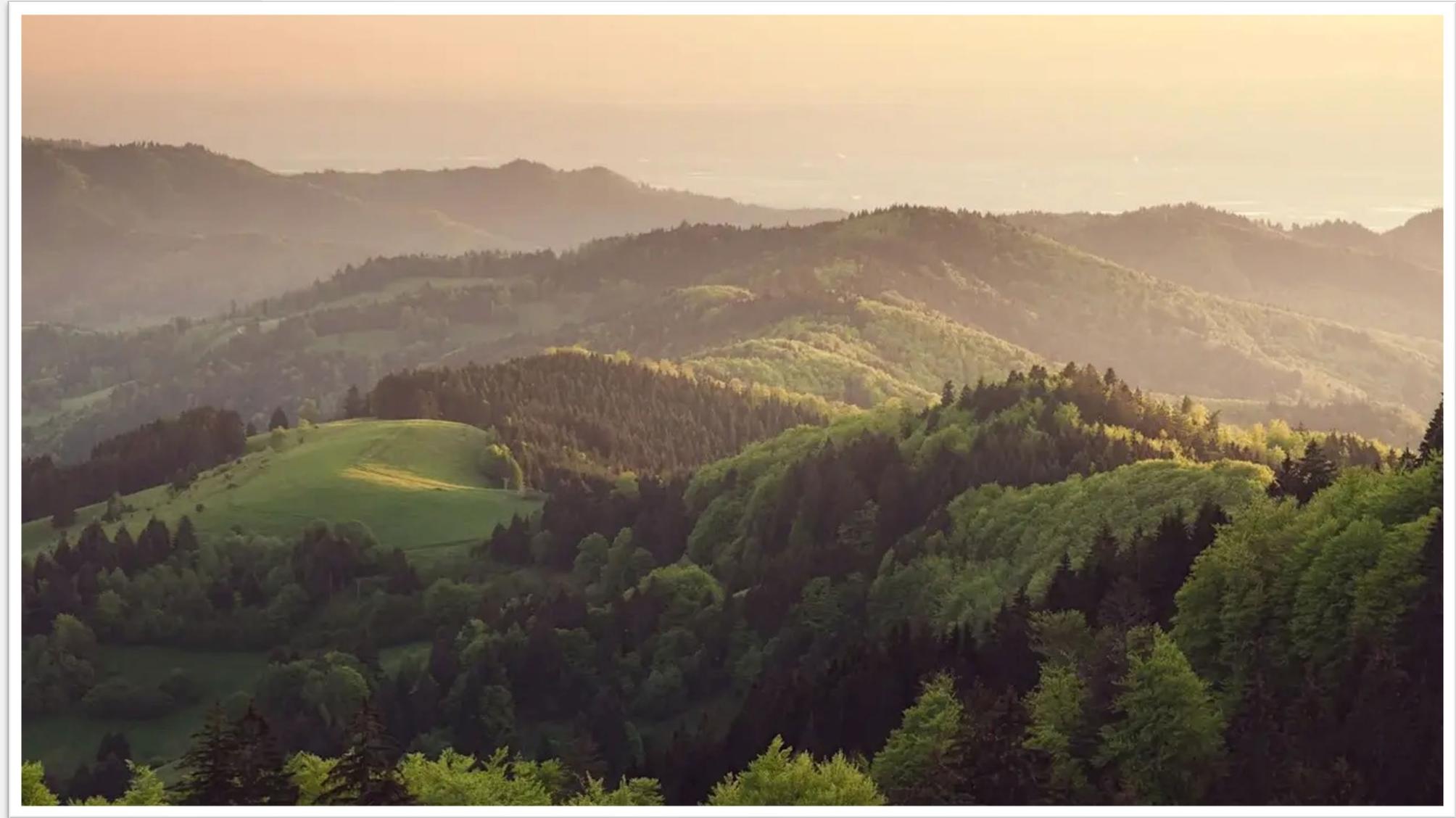
Cross-examination is “beyond any doubt the greatest legal engine ever invented for the discovery of truth.”

3 Wigmore, Evidence §1367, p. 27 (2d ed. 1923)











## *Start By Considering The Big Picture*

- Effective trial strategy requires careful attention to the elements of the claims and defenses, and consideration of how those elements can be proved or disproved through admissible evidence.
- Effective trial strategy also requires attention to the narrative and themes, and consideration of how those storytelling elements can be established through admissible evidence.
- Elements without narrative/themes can be dry and unpersuasive; narrative/themes without elements can be hollow and legally insufficient. Successful trial advocacy requires both.



## *Start By Considering The Big Picture*

- What are the elements we are trying to prove / disprove?
- What is our overarching narrative, and what are our themes?
- Then play the other side of the chessboard, and consider the other side's elements and narrative/themes.



## *Potential Cross-Examination Goals*

- Supporting substantive points relevant to:
  - Elements of our claims / defenses
  - Our narrative / themes
- Attacking substantive points relevant to:
  - Elements of the other side's claims / defenses
  - Other side's narrative / themes



## *Potential Cross-Examination Goals*

- For each potential goal, ask:
  - How does this witness specifically intersect with that goal?
  - For that goal, what is the role of the witness's credibility?



## *Potential Cross-Examination Goals*

- Are we using the witness to establish an area of agreement?
  - If so, we want the jury to believe the witness on that issue.
- Are we using the witness to show that in an area of disagreement, our evidence is stronger than the other side's?
  - If so, we likely want the jury to find the witness not credible on that issue.
- Often, a witness presents opportunities to do both—which requires careful consideration of how to approach credibility.



## *Potential Cross-Examination Goals*

- In considering how to approach credibility, relevant factors include:
  - *Bias*: e.g., financial interest, personal connection
  - *Contradictions*: with e.g., prior statements, documents, other witnesses
  - *Lack of knowledge*: e.g., limited personal experiences, lack of credentials
  - *Bad acts*: various forms of misconduct (if permitted to use—need to be careful)



## *Preparing The Cross-Examination: Macro Level*

- Modules are key.
- Set up a series of modules to pursue the particular goals.
  - Each module should be designed to culminate in a particular point
- Modules can be used in a dynamic fashion during the cross—can jump among modules as appropriate.
- Start strong, end strong.
  - Begin with a strong module, end with a strong module



## *Preparing The Cross-Examination: Micro Level*

- Potential materials to use for control:
  - Transcripts of prior testimony / affidavits
  - Publications / expert reports
  - Other relevant documents
  - Internet research
- Consider use of exhibits:
  - For admission
  - For impeachment
- Consider use of demonstratives (more on that later...)



## *Preparing The Cross-Examination: Micro Level*

- The form of the question is critical...

### **SHORT, SHORT, SHORT**

- Usually ask leading questions—e.g., “[short declarative statement], correct?”
- But in rare circumstances, open-ended questions can be effective
  - Where any answer will help
  - To make rhetorical points



## *Preparing The Cross-Examination: Micro Level*

- There are various ways of linking questions to control materials in your cross-examination outline, e.g.:
  - “Answers” being key sections of transcripts/documents/exact citations, e.g.:

**Q:** The traffic light was green, correct?

**A:** Smith 2/1/2023 deposition at 72:10-11 (“Q: Before the accident occurred, the traffic light was green, correct? A: Yes, that’s right.”)
  - Chart with the question on the left side and the “answer” on the right



## *Preparing The Cross-Examination: Micro Level*

- Whatever approach you use, you need a system to quickly navigate to the precise materials you use for control. You never want to be disorganized—to the contrary, you should be “in control” in every sense of the word.
- Also need to ensure that you have the full source material—beware of “control” that is a snippet taken from longer statements that contain other content helpful for the other side.



## *Preparing The Cross-Examination: Final Outline*

- The final outline should be aligned with our big-picture goals for the trial.
- The outline should be modular, with each module having a clear goal.
- Each module should include short, focused questions, with a clear roadmap to materials we may use:
  - Control
  - Exhibits to be admitted
  - Demonstratives



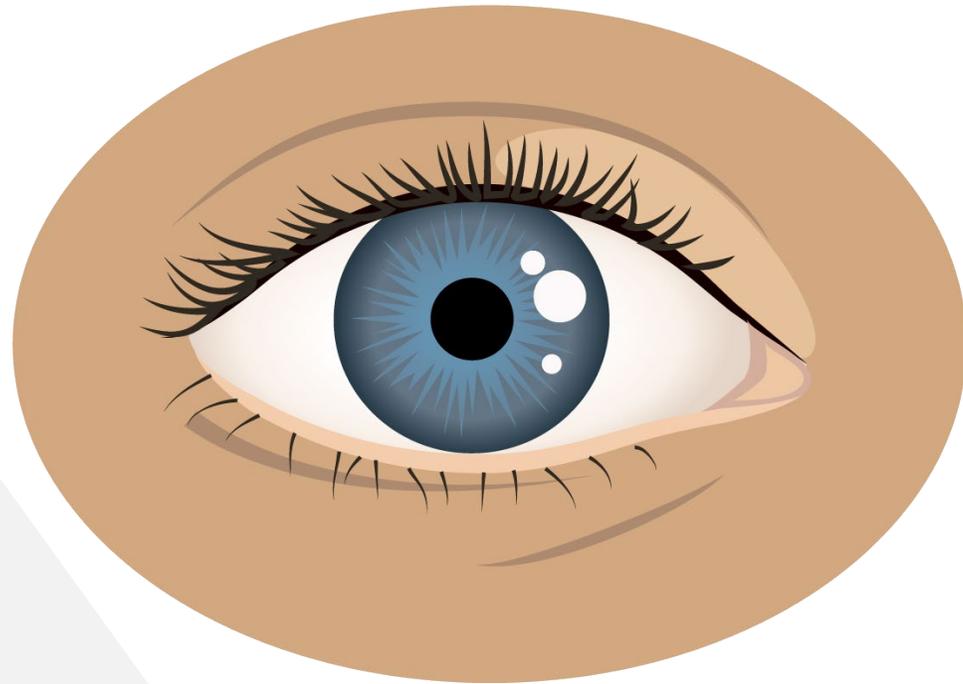
## *Conducting The Cross-Examination*

- Having carefully prepared your outline....

**Do not be bound by your outline**



## *Conducting The Cross-Examination*





## *Conducting The Cross-Examination*

**Demeanor: being tough does not mean being rude**

**Eye contact**

**Voice modulation**

**Handling of exhibits**

**Movement in courtroom**

**Impeachment**

Parallelism between questions and control material

Explaining depositions to the jury



## *Advanced Techniques: “Uncontrolled” Cross*

- High risk, but sometimes high reward
  - Outside-the-box lines of attack can throw witnesses off-balance
  - Witnesses may not have been prepped as well on such topics, and the result can be less guarded testimony
- Need to project confidence—same demeanor as when you have tight control
- Need an exit plan



## *Advanced Techniques: Extended Analogies*

- Extended analogies can take issues that might seem remote from jurors' lives, and make those issues more relevant / understandable to jurors.
- Analogies can also invest emotional and moral significance into otherwise dry issues.
- But need to be careful about...
  - Confusing analogies that lose the jury / irritate the judge
  - Analogies that the witness can easily distinguish from our case
  - Analogies that the other side can flip against us



## *Advanced Techniques: Extended Analogies*

Q. You've gone to the grocery store before, haven't you?

**A. I love it.**

Q. All right. I'm also going to represent to you that if we went to Walmart — we went to Walmart on the same day, you can buy 36 eggs, \$5.28. You see that?

**A. Okay. I do.**

Q. All right. Go to Target and buy 30 eggs, \$4.49. You with me?

**A. Yes, sir.**





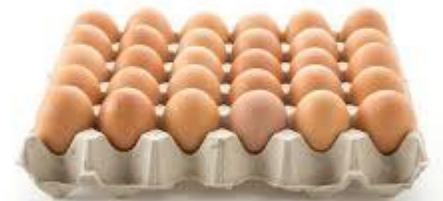
## *Advanced Techniques: Extended Analogies*

Q. And we know from looking at those five transactions, the average price of an egg is, in fact, 16 cents, right?

**A. Base — based on all the transactions and all the eggs, yes, sir.**

Q. Nobody in their right mind would pay \$5.11 for a half-dozen eggs when they know that a half-dozen eggs is only worth 98 cents, correct?

**A. If they could get them for 98 cents, sure.**





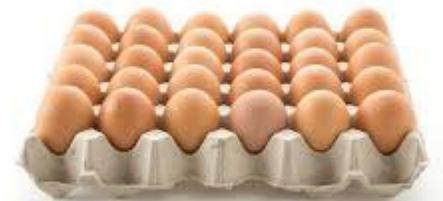
## *Advanced Techniques: Extended Analogies*

Q. And you came up with that number by not considering in — at all the number of patents that are involved in each of those transactions, correct?

**A. Well, I was — I was aware of those, but they don't enter into the calculation.**

Q. You did not do it?

**A. Correct.**





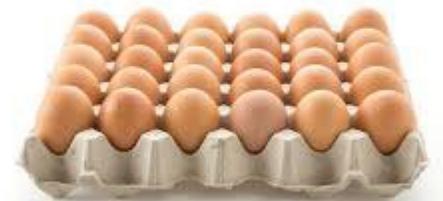
## *Advanced Techniques: Extended Analogies*

Q. And let's assume that you go to a grocery store, say it's Kroger's, to buy some eggs that you're going to prepare for this large breakfast event. Are you with me?

**A. Okay.**

Q. And let's say you go to Kroger's and you buy a hundred dozen eggs for this event. Are you with me?

**A. Sure.**





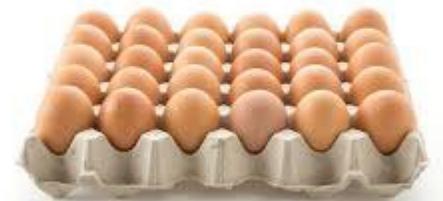
## *Advanced Techniques: Extended Analogies*

Q. I can't leave these eggs alone . . . so let's suppose that for whatever reason, because you're in the egg-buying business, you went down to Kroger and you got a hundred dozen eggs. And then you said I believe I'll go over to Super 1 and see what they've got. And you get over 6 there, and they've got a special going on golden eggs, okay?

**A. Okay.**

Q. As long as we're in the hypothetical world of egg buying. Now, did you think maybe you'd get the same price on the golden eggs as you did on the ordinary chicken brown and green eggs?

**A. No, sir.**





## *Demonstratives*

- Demonstratives are a great way to make cross-examinations more compelling.
- In terms of the form of the demonstratives, the possibilities are endless, ranging from simple to elaborate.
- They can help accomplish two goals:
  1. ***Breaking through a witness's defenses*** against more conventional questions—and thus facilitating key admissions.
  2. ***Keeping the jury engaged*** and interested in the action.





## *Advanced Techniques: Demonstratives*





## *Advanced Techniques: Demonstratives*

~~~~~  
"My truck is idling  
its engine."

~~~~~  
"My computer chip is  
putting a part of itself  
into an idle state."



## *Advanced Techniques: Demonstratives*



establish an idle state



## *Advanced Techniques: Demonstratives*

establish an idle state that holds at least a portion of the  
stand-alone IC in a reset condition



## *Advanced Techniques: Demonstratives*

13. A stand-alone IC comprises:

on-chip power converter;

processing module; and

memory operably coupled to the processing module, wherein the memory includes operational instructions that cause the processing module to:

establish an idle state that holds at least a portion of the stand-alone IC in a reset condition when a power source is operably coupled to the stand-alone IC;

receive a power enable signal;

enable, in response to the power enable signal, the on-chip power converter of the stand-alone IC to generate at least one supply from the power source; and

when the at least one supply has substantially reached a steady-state condition, enable functionality of the stand-alone IC.



## *Advanced Techniques: Demonstratives*



establish an idle state



## *Advanced Techniques: Demonstratives*





## *Advanced Techniques: Demonstratives*





## *Hallmarks of a Strong Cross-Examination*

- Aligned with big-picture trial strategy
- Focused on specific goals to advance that strategy
- Well-organized and easy to follow
- Creative and vivid
- Tough and hard-hitting—but respectful and courteous