DELAWARE STATE BAR ASSOCIATION

CONTINUING LEGAL EDUCATION

# THE BASICS OF TRIAL: LITIGATION NUTS & BOLTS 2022

## DSBA WEBINAR VIA ZOOM

SPONSORED BY THE DELAWARE STATE BAR ASSOCIATION

**THURSDAY, JUNE 2, 2022 | 1:00 P.M. – 3:00 P.M.**

**2.0 Hours CLE credit for Delaware and Pennsylvania Attorneys**

### ABOUT THE PROGRAM

Hear the tips and tricks that have helped other young lawyers thrive in the courtroom. We will cover opening and closing arguments, direct and cross examination, and hear from presenters about what they wish they knew when they started out. Attendees will leave with new found confidence in your ability to take a case to trial.

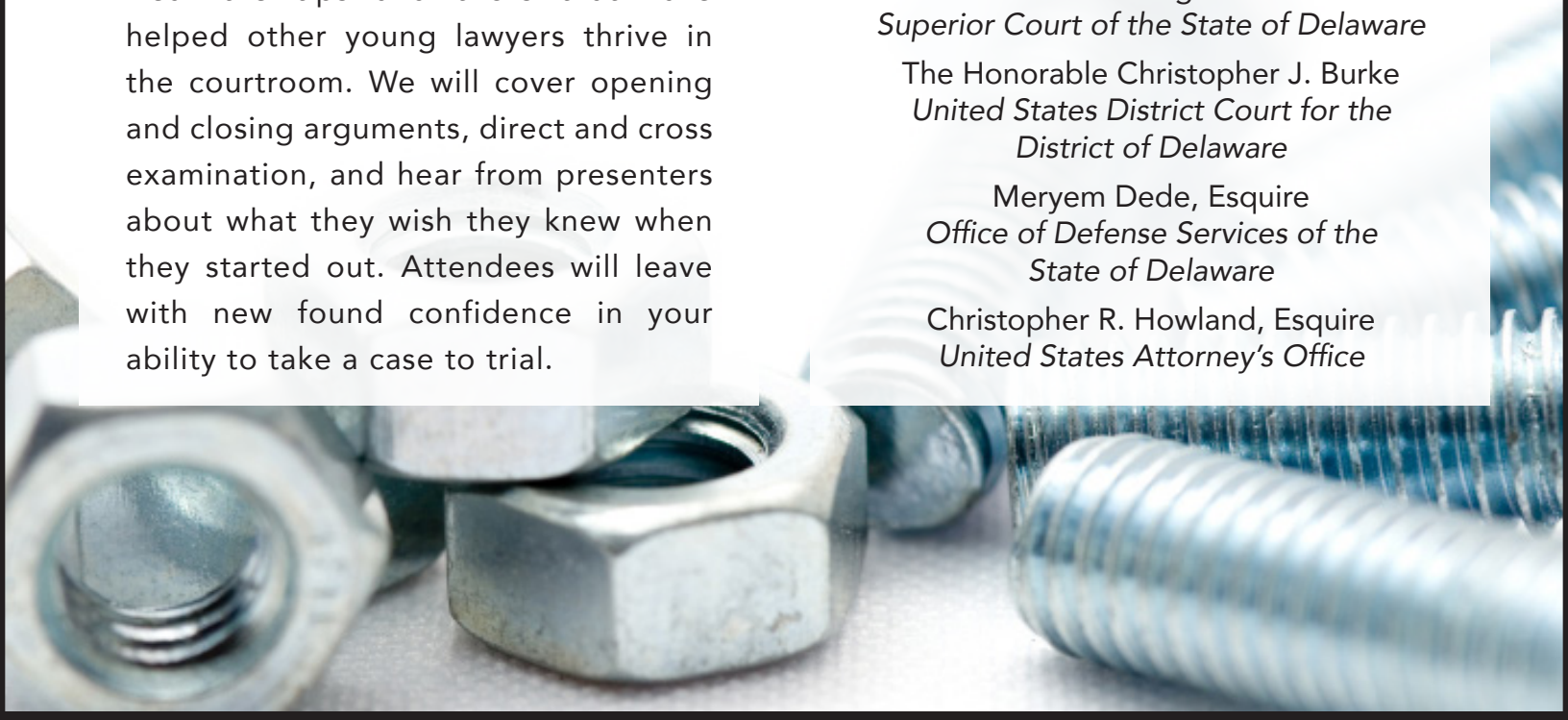
### PRESENTERS

The Honorable Meghan A. Adams
*Superior Court of the State of Delaware*

The Honorable Christopher J. Burke
*United States District Court for the District of Delaware*

Meryem Dede, Esquire
*Office of Defense Services of the State of Delaware*

Christopher R. Howland, Esquire
*United States Attorney's Office*



**Visit https://www.dsba.org/event/the_basics_of_trial_2022/ for all the DSBA CLE seminar policies.**

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# Presenters

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**UNITED STATES DISTRICT COURT**
**DISTRICT OF DELAWARE**

CHAMBERS OF
CHRISTOPHER J. BURKE.
U. S. MAGISTRATE JUDGE

UNIT 28
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U.S. COURTHOUSE
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# HONORABLE CHRISTOPHER J. BURKE

Judge Christopher J. Burke has served as a United States Magistrate Judge on the United States District Court for the District of Delaware since August 4, 2011. Judge Burke's civil caseload predominantly consists of patent litigation matters, and he often oversees civil cases from their initial stages up through and including expert discovery, summary judgement and/or trial.

Prior to joining the bench, from 2005 to 2011, Judge Burke was an Assistant United States Attorney at the United States Attorney=s Office for the District of Delaware. From 2001 to 2005, he was an associate at the Washington, D.C. office of the law firm of Covington & Burling LLP. Prior to that, he served as a judicial law clerk for the Honorable Kenneth F. Ripple of the United States Court of Appeals for the Seventh Circuit.

Judge Burke is a 2000 graduate of the University of Michigan Law School. He received his undergraduate degree from Georgetown University in 1997.

Judge Burke currently serves as the Chairman of the Federal Trial Practice Seminar, a trial skills development program jointly sponsored by the United States District Court for the District of Delaware and the Federal Bar Association=s Delaware Chapter ("FBA"). He also presides over the District Court=s criminal Re-entry Court, which focuses on providing oversight, support and assistance to individuals serving terms of federal supervised release. He is the District Court's liaison judge as to the FBA, as well as to the District Court=s Federal Civil Panel, which provides representation to indigent parties with civil cases pending before the Court. And he created and oversees the District Court=s High School Summer Fellowship Program, which provides mentoring to high school-aged youth in New Castle County and exposes those students to the work of the federal court system.

Meryem started her legal career at a firm in Delaware practicing Chancery litigation. After a few years in, she switched paths and now practices as a trial attorney in the state Public Defender's office. Outside of her job, Meryem also coordinates the Campaign to End Debtors' Prison, a community advocacy group working to reform Court fines and fees in Delaware and end poverty as an element of criminal punishment.

In her free time, Meryem enjoys spending time in the company of her husband, toddler, and two cats, and when she's not with them, playing Ultimate Frisbee.

**The Basics of Trial: Litigation Nuts and Bolts**

June 2, 2022
2 Hours of CLE credit for DE and PA attorneys

Hear the tips and tricks that have helped other young lawyers thrive in the courtroom. We'll cover opening and closing arguments, direct and cross examinations, and practice tips picked up over years of conducting trials. We will also have a Q&A with a Federal Magistrate and Superior Court judge, as well as federal prosecutor and state public defender. You'll leave with a newfound confidence in your ability to take a case to trial. This program builds on past litigation foundations courses, while being an excellent standalone overview of trial skills.

**Panelists:**

The Honorable Christopher J. Burke, U.S. Magistrate Judge
The Honorable Meghan A. Adams, Delaware Superior Court Judge
Christopher R. Howland, U.S. Attorney's Office
Meryem Dede, Delaware Public Defender's Office

**Panelist Bios:**

Honorable Christopher J. Burke

Upon graduating from law school, Judge Burke served as a judicial law clerk to the Honorable Kenneth Ripple of the U.S. Court of Appeals for the Seventh Circuit from 2000-2001. From 2001-2005, Judge Burke was an associate in the Washington, D.C. Office of Covington & Burling, where he engaged in pro bono projects such as a six-month appointment at the Children's Law Center. From 2005 to 2011, Judge Burke served as an Assistant U.S. Attorney in the U.S. Attorney's Office for the District of Delaware.

On August 4, 2011, Judge Burke was sworn in as a U.S. Magistrate Judge for the U.S. District Court for the District of Delaware. Judge Burke is currently the Chairman of the Federal Trial Practice Seminar, a trial skills development program jointly sponsored by the United States District Court for the District of Delaware and the Federal Bar Association's Delaware Chapter. Judge Burke also presently presides over the U.S. District Court for the District of Delaware's criminal Re-entry Court program, which focuses on providing oversight, support and assistance to individuals serving terms of federal supervised release, and helps individuals who are leaving the federal prison system secure jobs and better adjust to being back in society, so they will not recidivate.

Honorable Meghan A. Adams

The Honorable Meghan A. Adams was appointed to the Superior Court of Delaware by Governor John Carney on July 11, 2019.

Judge Adams received her J.D., cum laude, in 2007 from Widener University School of Law. During law school, Judge Adams served as Articles Editor for The Delaware Journal of Corporate Law and as a Judicial Extern for the Honorable Myron T. Steele, former Chief Justice of the Supreme Court of Delaware. She received her B.S. in Business Administration from the University of North Carolina at Chapel Hill, Kenan Flagler Business School, in 2003. Judge Adams is a native Delawarean, graduating from Dover High School in 1999.

Prior to joining the bench, Judge Adams was an attorney at Morris James LLP and Proctor Heyman LLP (now Heyman Enerio Gattuso & Hirzel) where she practiced corporate and commercial litigation.

Judge Adams is also the past-President of the Richard S. Rodney Inn of Court and a Fellow of the American Bar Foundation. Judge Adams is also actively involved in the Business Law Section of the American Bar Association, where she currently serves as a Business Court Representative. She previously served as Chair of the Partnerships and Alternative Business Entities Subcommittee of the Business Law Section.

Christopher R. Howland

Christopher R. Howland is an Assistant U.S. Attorney in the District of Delaware. After graduating from the University of Pennsylvania Law School in 2010, Mr. Howland clerked for the Honorable Leonard P. Stark on the U.S. District Court in Delaware. He also clerked for the Honorable Helene N. White on the U.S. Court of Appeals for the Sixth Circuit. Following these clerkships, Mr. Howland joined Skadden Arps in Washington D.C., where his practice focused on appellate litigation and government investigations.

In 2014, Mr. Howland joined the U.S. Attorney's Office in Washington D.C., where he served as an AUSA in the Superior Court division before becoming a senior appellate AUSA. Mr. Howland joined the U.S. Attorney's office in 2018, where he currently serves as the office's Elder Justice Coordinator and Civil Rights Coordinator.

Mr. Howland is a member of the Richard S. Rodney Inn of Court, as well as the LGBT Section of the Delaware State Bar Association.

Meryem Y. Dede

Meryem Y. Dede is an Assistant Public Defender in the Superior Court trial unit of the Office of the Public Defender of the State of Delaware. After graduating from the University of Virginia, Ms. Dede began her legal career practicing chancery litigation at Young Conaway Stargatt & Taylor in Wilmington. After a few years in, she switched paths and became a public defender, where she has practiced as a trial attorney ever since.

Outside of her job, Ms. Dede is an advocate for justice reform through the Delaware Campaign to End Debtors' Prisons, which she coordinates. The Campaign strives to end poverty as an element of criminal punishment.

Ms. Dede is a member of the Multicultural Judges and Lawyers and Women and the Law Sections of the Delaware State Bar Association and is an active member of the National Lawyers Guild.

**The Basics of Trial: Litigation Nuts and Bolts**

Opening Statements (20 minutes)

Closing Statements (20 minutes)

Direct Examinations (20 minutes)

Cross Examinations (20 minutes)

Tips and Tricks, Or What We Wish We Would Have Known for Our First Trial (20 minutes)

Q&A: (20 minutes)

**The Basics of Trial: Litigation Nuts and Bolts**

***Opening Statements (20 minutes)***

It's controversial, but many say opening statements are the most important part of trial. Why? Several reasons. If you have a good, persuasive opening, the trial can be over by the end of the closing statements—because you tell the jury what the evidence is going to be and explain why that means your side will win. Openings

also set the stage and establish the credibility of the parties. Openings frame the entire case. So what are the hallmarks of a good opening?

- **First. Tell a Compelling Story with a Clear Theme**
  - Interesting. Get the jury's attention
  - Simple, straightforward, coherent—easy to understand
  - Theme—what is this case about
    - Get to the theme early and quickly
    - Should be something that can be expressed in a statement, or a phrase, or a short sentence
    - Want it to be something they can remember
  - The theme gives the jury a way to frame everything else
    - Prosecuting a drug case: 1600 baggies of heroin. A loaded firearm. And the Defendant's clothes and ID documents. That's what law enforcement discovered when they searched D's bedroom on March 10, 2016.
    - "Where is my money?" That's what the Defendant said on a phone call with a bank representative in July 2017. The trouble was that money didn't belong to the Defendant. And he knew it didn't belong to him. He had been told for months that the money was dirty money—that it had been stolen.
  - Focus on the people and the players involved, not the "problem"
  - Personalize it—make the jury want to relate to your client or your side
  - Defense: point out holes, find ways prosecution/plaintiff's side is not persuasive or logical or present an alternative story altogether
- **Second. Explain the Evidence and Simplify the Law**
  - Simplify, simplify, simplify
    - Tell the jury what evidence they will see and hear—but be succinct
    - Don't need to go into every piece of evidence, every detail
    - Focus on the key pieces of evidence—especially those critical pieces of evidence that are consistent with your overall framing of the issue and that hammer home your theme
  - Take the sting out?
  - If there's some piece of evidence that isn't great for you, go ahead and raise it in the opening but do so in a way that is consistent with your theory of the case
    - Had one recently where a key witness had some, credibility issues, shall we say. So I took a detour and explained them—but I did it in a way that gave the jurors a lens that made sense. She was a victim of a romance fraud. And I teed it up exactly that way—by the end of this trial, you will know that Jane Doe was a victim.

    - Don't overpromise—the evidence is what the evidence is. Why try to skew it?
    - The minute you start getting into legalese, you've lost the jury's attention
    - Just like with evidence, simplify the legal part of the case
    - Different ways of doing this, but most trials come down to really one or maybe two key legal issues or questions—at least from your perspective—and the dispute is how the facts fit that legal issue or don't fit that legal issue question
        - Were the gun and drugs his? Constructive Possession.
        - Did he know that the money was not his when he took it? Knowledge
        - Did he reasonably rely on the buyer's promise to pay when he built that house? Contract dispute/Promissory estoppel.
- **Third. Credibility: Present Directly, Pleasantly, and Confidently**
    - How you say what you say matters
    - Don't read—or if you do, make it seem as if you are not reading
    - Be prepared—worst thing to lose credibility is shuffling papers, seems unprofessional, not competent
    - Be confident: why would the jury believe in the case if the lawyer doesn't seem to believe in the case
    - Engaging language that gets the jury involved and invested
    - Be yourself—jurors sense insincerity
    - Don't be overdramatic, funny, entertaining

***Closing Statements (20 minutes)***

This is your last chance to talk to the jury, and one of only two opportunities to talk directly to the jury. Keep in mind that if you're plaintiff/prosecution side, you get first and last words, and if you're defense, you just get one shot.

- **First, preparation.**
    - Ideally, before every trial you'd know what evidence is going to be presented, and you'd have your closing prepared, or at least mostly-prepared before the trial even starts. But that's not always possible. Especially in criminal practice, you can't know precisely beforehand what will happen. Think about your closing *throughout* the trial, and add to it as you go.
        - I (Meryem) keep a notebook during trials, and I keep a section devoted to points I want to bring up in closing.
    - Everything during trial should be geared towards closing. You may have the best argument for why your side should win, but if you haven't built up the evidence you need to support that argument during the body of the trial or if you haven't alluded to your argument

in questions put to witnesses during the trial, then the jury will miss your point or you won't be able to make it at all.
    - E.g., did no witnesses actually see your client commit the alleged crime? Make *every* witness confirm they didn't see your client commit the crime. Then bring that up as a major point in your closing.
- **Second, style.**
    - Ideally, you establish a theme in your opening statement that you reiterate in your closing. That's not always possible, but it's the ideal. Think of a catchy phrase or a simple idea you'll ask the jury to keep in mind in your opening, then bring it up again in your closing before explaining the theme/idea in more detail through the evidence.
    - Gravitas is everything. Not only is it grounds for a mistrial to misstate evidence in a closing, but it also loses you credibility with the jury. Be careful not to overstate or inflate what evidence was presented at trial—the jury has to trust you to buy your arguments.
    - **Tip:** Don't forget to thank the jurors. Most people don't like jury service, and most of us attorneys aren't as entertaining as TV would make us out to be. They've listened to you for however many hours or days—thank them. There are many broken things about the justice system, but the opportunity to have 12 members of the public weigh in on legal decisions before a tribunal is a beautiful process that deserves respect and thanks.
    - Keep in mind some basics of public speaking:
        - Pay attention to your body language—ground your feet, remember to breathe, think about what you're doing with your hands
        - Don't read. Everyone has different comfort levels with public speaking. If you need to write down every word, that's fine—but don't read it up there in front of the jury. If you're comfortable making a rough outline or going without notes at all, even better.
        - Props? Pictures? A powerpoint? Think if you want to use visuals. You don't have to, and sometimes closing are more effective without them. But studies show people absorb material better when presented with both visual and auditory presentations, not just auditory.
        - Don't panic :) Stumble a bit? Take a beat, no biggie. It's totally okay to say "one moment please," or heck, even say "Wow, lost my train of thought there for a moment!" We're humans, and so are the jurors. They'll get it.
- **Third, emphasis.**
    - Closing is your last chance to talk to the jury before they deliberate, but not all points are created equal. When thinking about how you

want to present your case, categorize your best points from your "eh" points, and organize your closing accordingly.
    - Recency and primacy—first thing you say and last thing you say will be the most memorable.
        - If I have 10 points for why my client is not guilty, but one is far stronger than the others, I might literally tell the jury that, quickly move through the 9 weaker points, and then bring it home with the last, strongest point.

***Direct Examinations (20 minutes)***

Direct examinations are often the building blocks of your case. Depending on the kind of case, when you are putting together your closing argument, you'll often be referring back to the direct examinations from the witnesses that you put on. So they are an important part of your trial strategy. A good direct examination should tell the story that you are calling the witness to tell and make the jury want to side with the witness who is telling it. The story needs to be the witness's story, so the witness should do most of the talking with guidance from the attorney. In order to get to a seamless presentation, a direct exam should be prepared but not *seem* prepared.

- **First, Decide which witnesses to call to tell your story**
    - Not all witnesses are created equal. If you have two witnesses who saw an event, but one of them has significant credibility issues or has other limitations that might lead them to be an easy target for cross examination, think carefully about whether you should only call one of them
    - Before you decide on whether to call a witness, however, make sure you know the story you are trying to tell
        - Juries have limited attention spans. Can't bring in every single detail and witness and piece of evidence
        - Be targeted and focused
        - Make a "Order of Proof" or a chart that lists out the witnesses and that has a bullet point of the most important things you need to accomplish with each witness
    - Plan out the order of the witnesses and call them in the ideal order, as best as you can
        - Calling an expert at the beginning of a case doesn't make a lot of sense if the jurors don't know the story of the case and the central questions they will be asked to answer
    - Experts—have to be careful about who to call as an expert. So-called "professional" experts who make their entire living from being an expert may not be as credible as someone who is more of a "hands on"

expert because of the day-to-day job that they do in that particular field.
    - Point is that it's context-dependent and you should carefully select which witnesses to call and understand the reasons for calling one witness over another.
    - Who is this witness? Why are they testifying? Contextualize the witness and personalize the witness
    - The most fundamental part of any trial is believability and credibility of witnesses and your evidence. It makes or breaks a trial
- **Second, Let the Witness Tell the Story**
    - Most stories are told chronologically if possible—beginning, middle, and end
    - Start with the basics—who the witness is and why they are on the stand
    - Don't lead—draws objections and ends up with a flat story
        - When possible, try to use open ended questions
    - At the same time, don't let witnesses start rambling
        - Use body language to signal that you're ready to get the testimony focused and back on track
    - Prep witnesses
        - For all witnesses, you ideally have at least 1-2 prep sessions. For important witnesses, I block off 3 preps.
        - First one or two, normally just to hammer out the big picture questions, make sure there's not a piece of the story that the attorney doesn't know
        - 3rd (or even 4th) is more of a dress rehearsal—using the exhibits, walking through the testimony.
        - Goal is to be prepared but not canned—a conversation between people who have talked about the subject before and they are just trying to tell the story to the jury
    - Listen carefully—no matter how much you practice, something will come out differently at trial
        - Don't get flustered. Listen to the testimony, process, and respond. Sometimes, it comes out even better in trial than it did in your prep sessions
    - Make sure you have your exhibits that you plan to use and introduce with the witness ready to go
    - Use your questions and body language to also tell part of the story
    - Every witness has weaknesses—draw those out on your own terms
- **Third, Use Compelling Evidence**
    - Jurors like to see evidence that witnesses are discussing—documents, items, demonstratives, pictures, locations
        - Makes it seem more real and keeps their attention

        - Helps jurors digest the witness's testimony and understand where it fits into the overall trial
    - Be 100% certain how you are going to introduce your evidence and think through any potential objections and responses
        - Pretrial memoranda and pretrial conferences are the best friend of a prepared attorney because you get to forecast to the judge what evidence you intend to introduce and how you plan to get it in
        - If opposing counsel tries to object, you can rely back on the "I raised this at PTC" and nobody said a word
    - Don't be afraid to let the witness use a pointer or describe the evidence
    - Use courtroom technology to your advantage—put your documents and your evidence on the screens so that the jury can see it for themselves

***Cross Examinations (20 minutes)***

Cross examinations are an opportunity to emphasize statements made during direct examination that benefit your side, and/or to tease out facts missed during direct examination that add light to your arguments. Not every effective cross examination needs to be long (in fact, you don't have to do a cross exam at all!), and not every effective cross examination is dramatic or confrontational. Sometimes the most effective cross examinations are in fact friendly in tone.

- **First, Define Your Goals of the Cross Exam: How Does this Witness Fit Into Your Theory of the Case?**
    - You can't effectively cross examine a witness if you don't know where this witness fits into your theory of the case.
    - At the outset, make sure you actually need to cross examine this witness.
        - Did the witness actually do any damage with her direct testimony? If not, sometimes a simple "I have no questions for this witness" is a perfect rebuttal.
    - If you do need to cross, establish what you need to do.
    - Two kinds of cross exams: (1) Corroborative or Constructive Cross Exams; and (2) Damaging or Destructive Cross Exams
    - Corroborative—many ways, simpler kind of cross exam
        - Establish critical facts that support your side of the story
        - That was the way that I was taught to do cross exams in every case, even if your ultimate goal was to damage credibility
        - "I believe I heard you just say that sample size polling is a scientifically acceptable methodology in your field, is that right?" "That's the methodology used by our expert, Dr. Burke. [Pause for answer] Right?"
        - Tone matters here.

        - "You would agree with me that XYZ?"
    - Destructive—just as the name implies, the goal is to destroy the credibility of the witness
        - You can do this in several different ways and it depends on the kind of case
        - Med Mal case or battle of the experts. Your goal is not necessarily to convince the jury that the witness is a liar.
            - You may want the jury to think of the witness as a charlatan or a quack. Or you may want to think of the witness as skewing the testimony for money. Or maybe that the witness has some other motivation that would cause them to be biased.
        - Negligence or Car Accident kind of case—third party witness
            - Goal not to establish bias, but to establish lack of memory, didn't have a clear view of the accident, maybe they aren't sure of their testimony
        - Criminal case? Prosecutor might try to make it seem that defendant is testifying only to save their own hide. Defense attorney might play up inconsistencies in police officers' statements at trial versus reports to attack their credibility.
    - Maybe the goal is both. If so, start with corroborative and then go to damaging.
        - Be strong at both ends—primacy and recency effect
- **Second, Organize Your Cross: Lead the Adverse Witness Where You Want Them to Go.**
    - Consistent with the above tip, once you know the goals of your cross, develop an outline of how you want to achieve them
    - Be strong at both ends of your cross exams.
        - Remember the primacy and recently effect. Jurors remember the first thing a witness says and the last thing. So start with your strongest point corroborative point and end with your strongest damaging point.
    - Structure your questions to box the witness in
    - Use leading questions that you already know the answer to
        - Testify on your own behalf—ask the question in such a way as to dictate the answer
        - In the same vein, use your body language to dare the witness to disagree with your implicit answer
    - Short, sweet questions: limit your questions to a single fact that you want to establish
        - Make one complex question into umpteen very *very* simple questions
        - Eg.,

- Statement you want: "The incident happened in the dark of night."
- Questions:
    - "It was 10 PM when the incident happened?"
    - "The incident happened in December?"
    - "December in Delaware?"
    - "The sun sets pretty early in December in Delaware?"
    - "Around 6 PM?"
    - "The sun had set several hours before the incident?"
    - "With the sun set, it was dark out?"
    - "With it dark out, it was night when the incident happened?"
    - "The incident happened in the dark of night?"

- Being succinct is critical: the longer a question, or the more facts or underlying premises, the more opportunity for the witness to quibble with the answer

- **Third, Expect Surprises and Be Cool.**
    - The only sure thing about cross examination is that there is no sure thing about cross exams
    - Know witness's prior statements or testimony or depositions cold
        - Far too important to try to wing it or search through documents or testimony or evidence on the fly or to have a vague sense of where a statement is
        - Jurors expect you to be prepared on cross examination—and you will lose credibility if you're not
        - If there are inconsistencies or conflicts in the testimony the witness is giving in court—and spoiler alert, there almost always will be—hold the witness to the prior testimony by confronting them with it and if they try to squirm, by impeaching them
    - Witnesses will try to run on you—how you deal with it matters
        - You have to maintain control. Otherwise, it can quickly go off the rails
        - Couple of different ways of handling it
            - My personal approach is to give it a few times where the witness is being evasive—and then say, "Dr. Smith, we are going to communicate much better if you just answer my questions with a simple yes or no." Or "This is going to be much easier for us if you listen carefully to my question I am asking and answer only that question, Okay?"

        - Sometimes, "That's not exactly the question I asked you. I asked you if you told the officer that you were certain the light was green on the day your saw the accident."
    - Be yourself—some people are sarcastic, maybe a little turn of the head in a disbelieving way, tone of voice—you can make the point you want to make without even saying a word. A simple, "Huh" can go a long way to making your point
- If all else fails, and only if all else fails, politely ask the judge to instruct the witness to answer the question
    - Don't be rude, don't be a bully—you want the jurors to like you, and they'll remember if you bully a witness

***Tips and Tricks, Or What We Wish We Would Have Known for Our First Trial (20 minutes)***

***Q&A: (20 minutes)***