Persuading a Cold Judge

by Peter R. Bornstein

Having your case decided by another human being who may rule against your client out of ignorance is to stare into the abyss. Of all the reasons to tell your client why their case was lost, the least satisfying and most embarrassing is having to say, "The judge never understood what it was about." Every trial lawyer has candidly said, "I won cases I should have lost and lost cases I should have won." The reason for this truism is often the "cold" judge—the judge who hears and rules without knowledge, understanding, depth, or concern. So, what do you do when you stand before a cold judge? Don't panic. Keep your cool. Do your best. And remember that even when your judge is prepared, scholarly, and mindful of her reputation, you still know more about your case than anyone else in the courtroom.

Colorado has had its fair share of ignorant, lazy judges, and we practitioners tell our war stories about them over drinks. One friend told me of the time he appeared for a settlement conference before a federal magistrate judge as plaintiff's counsel in a medical malpractice case against the Veterans Administration Hospital. The plaintiff had suffered catastrophic injuries because of what my friend believed was the hospital's inexcusable negligence. The settlement conference was a mandatory court requirement, but he considered it opportune because an early settlement was important to his client. A settlement statement was submitted a week before the conference. He had thoroughly prepared his case and submitted a statement with the salient facts, the extent of the damages, an analysis of liability, and the applicable law.

The conference began with all parties in one room. In front of his client and opposing counsel, the magistrate announced, "You have no case. You will lose in front of the jury." My friend swallowed his surprise and asked the magistrate if he had read his brief and his settlement statement. The magistrate admitted, "No, I haven't read them." My friend stared into the abyss when his client gave him a look of incredulity at this turn of events. Needless to say, the settlement conference went nowhere. When the matter was later submitted on a motion for summary judgment to the trial judge, a thoroughly prepared, sagacious lion of the bench, the judge ruled that there was liability as a matter of law and the only issue remaining for trial was the amount of damages. My friend got his settlement.

For many years, law-and-order politics meant that Colorado state judges were appointed from the ranks of career prosecutors. These new judges had little or no experience with civil law generally and even less with business law. Shortly after being sworn in as a new judge, one former career prosecutor was assigned to hear a case involving law specific to the Uniform Commercial Code. The facts of this case revolved around a complicated commercial transaction, and the law was governed by Colorado's version of the code. However, the applicable code sections were not intuitively fair. As the trial progressed, it became clear to the lawyers that the judge "just didn't get it." Whatever contract classes the judge had taken in law school and in bar refresher courses were only a dim and hazy memory. Perhaps the judge knew he was out of his element when he asked the attorneys to prepare both written closing arguments and proposed findings of fact and conclusions of law.

Although he didn't grasp the law and the appropriate rules of equity, the judge decided that he wanted to find for the defendant based on his personal view of what was fair and equitable. He drafted his decision using the cut-and-paste method. He took the plaintiff's version of the findings of fact and the defendant's version of the conclusions of law. The result was a decision for the defense that was internally inconsistent, contrary to clear provisions of the code, and

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unfathomable to the lawyers' clients. Ultimately, the court of appeals had to sort it out and reverse the trial court ruling.

I had a similar experience with a career-prosecutor-turned-judge who was in her second week on the bench. My client was the promoter of youth wrestling tournaments. He rented a large sports complex where the National Western Stock Show is held, and he advertised in niche magazines, on the Internet, and by word of mouth through the network of youth wrestling programs. He operated on a limited budget with a small margin of profit. The event was weeks away when an angry former partner began promoting a competing event. The former partner adopted a confusingly similar name, logo, promotional material, and Internet site. My client wanted a temporary restraining order and a preliminary injunction. Timing was everything. If the two events went head to head, both would lose. Five days after we filed, we appeared for the injunction hearing.

From the moment the judge sat down and began asking questions of me as plaintiff's counsel, it was clear that she "hadn't a clue" what needed to be established and proved in order to obtain a preliminary injunction. And she hadn't a clue that if both tournaments went forward, neither party would have any money left for a trial seeking damages. She heard the evidence on a Saturday morning before a courtroom filled with parents whose children wrestled in storefronts and local gyms around the community. Some experienced judge must have told her that she wouldn't be reversed if she denied the injunction by ruling that there was no irreparable injury and it wasn't clear that the plaintiff ultimately would prevail on the merits. That was her ruling exactly—injunction denied. My client asked me what went wrong and added, "The judge didn't understand what the case was all about. I could tell from the dumb questions she asked me while I was on the stand." I explained the adverse ruling as truthfully as I could. My client picked up his papers and left the courtroom, and I never received another piece of business from him. He also refused to pay the remainder of his bill.

Experience is no cure for bizarre results. After I spoke about this article to a friend, she then told me her nightmare story. She represented the owner of a commercial shopping center who had to evict a tenant for non-payment of rent. The landlord had hired a broker to lease the vacant space without success, and the landlord offered to rent the space to any new tenant the evicted tenant could locate. The judge granted summary judgment on the issues of default under the lease and possession and then set a hearing on the remaining issue, the balance of future rent owed under the lease and mitigation of damages. The judge was clear that damages would be awarded; the question was how to compute them and the ultimate amount.

The morning of the damages hearing, my friend appeared in court and was told that the judge was in trial and had transferred the hearing to another judge down the hall. The second judge began by announcing, "I've handled thousands of evictions. We don't have to take any evidence. I've read the file. The tenant was paying the fair market rental for the property, and therefore, there are no future damages." Landlord gets nothing. Case closed. The landlord's lawyer left to tell her client that a judge who claimed to have handled thousands of evictions hadn't understood the case. To this day she has no explanation for what happened, but she salvaged a decent settlement. The lawyer for the tenant knew that an appeal would have gone against the tenant and agreed on an amount of damages that both sides could live with.

Why does a judge come into a case cold? The reason is not always obvious. The judge could be lazy, burned out after too many years on the bench, forced to take over the case for a colleague at the last minute, or overwhelmed by a crushing caseload. In many areas of Colorado, financial cuts mean that an overworked judge has no law clerk and has to set up the chairs for the jury personally. Once in a while, the practitioner runs into a judge who is out of his depth because he is new to the bench or comes from a jurisdiction where cases like yours are novel, as you will find in some rural areas. The electorate in some states and the governor in others choose judges for political reasons and not for their breadth and depth of experience. Some appellate courts are considered warm, some cold, and some hot. Municipal courts, and courts of small claims or limited jurisdiction, are almost always cold. Even a good judge can become disgusted with a case or be turned off by a stultifying presentation by an attorney. Trial judges are generalists. They do not specialize in real estate leases, contract warranties, product liability, copyright infringement, or capital murder. They know a little about a lot, and that makes them dangerous. I have found that whatever the reason, the fact that a judge doesn't know the case before the hearing or trial creates a special set of problems to overcome.

Every successful battlefield general studies the terrain, the topography, the weather, and the season of the year, as well as the opponent. A little study will help you analyze whether your judge is warm or cold, as well as the reasons why a particular judge is cold. Know your judge, and ask questions of other people who have appeared in her courtroom. Make sure you get opposing points of view to avoid bias. Sit in the court for an hour and watch. Ask local practitioners who see the judge often and under multiple conditions. Ask the newspaper reporter who is assigned to the courthouse. Do your homework on the judge. Then plot a course of action, a strategy.

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If the judge assumes your medical malpractice case is about construction defects in a medical building, your first job is to assure him that you will be a helpful guide. The judge may have been briefed by a law clerk and thinks he knows more about your case than he really does, or better yet, he may candidly admit that he is helping out at the last minute and needs all the help you can deliver. If you are before a probate court judge at the start of a four-week trial and he is "listening" as seven lawyers spend six hours in opening statements, droning through boring accounting valuations of the deceased's myriad business interests, find out what turns the judge on. If he loves the plays of Shakespeare, do what another colleague did as the seventh lawyer to give his opening statement—find the perfect quote from Shakespeare's plays to describe your part of the case and begin with it. Name the play, the act, the scene, and the character that speaks the quote. The judge will sit up,

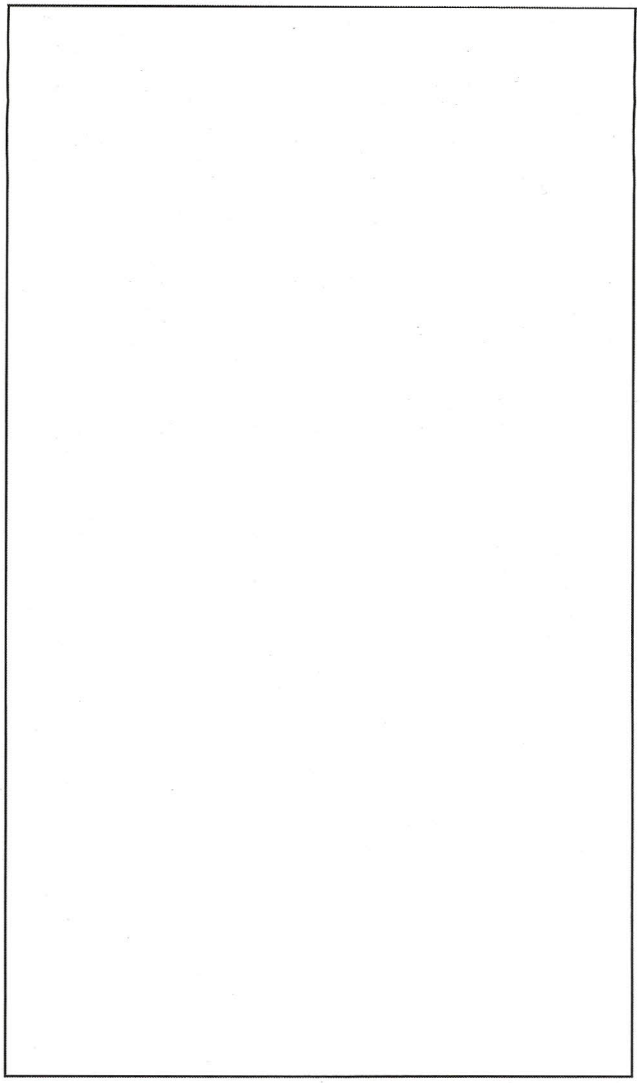
smile, and listen to you with fresh ears, and every time it's your turn to speak, you will find a warm judge. Then, when the four weeks are winding to a welcome close, end with another Shakespeare quote right on point. The judge who is cold to six lawyers will listen to what you have to say. As Shakespeare wrote in *Hamlet*, act 5, scene 2, "the readiness is all."

Begin at the beginning. In every court appearance, there are six basic queries to answer for a judge: Who are you? Who is with you, and whom are you representing? What is the controversy, in one sentence? Why are you here today? What outcome or relief do you want? Why should you get it? This last query is most often forgotten. Indeed, these six essential queries are a good beginning even when you are dealing with a warm judge. Consider putting them on a PowerPoint slide, a handout in the form of an "executive summary," or a demonstrative exhibit to project through Elmo or other presentation technology.

A judge in a suburban district told me that the one thing I could do to assist his judging was to begin succinctly by telling him what was before the court, remind him of the nature of the case, and tell him what action I wanted the court to take and why I thought I had the right to that action. Once I did this for him, he would be ready to listen to my argument. This particular judge told me that he has so many cases that he can't read the motions before the hearing, and if he has read them, it was so long ago that he couldn't recall what he'd read. He has no legal assistant to write memos for him; he does his own legal research, and if you cited more than 10 cases for him to read, he couldn't do it. He likes being a judge and wants to do the best job he can, but he is forced to come into hearings and trials cold. So, help him be the good judge he wants to be and the quality of his decisions will be your reward.

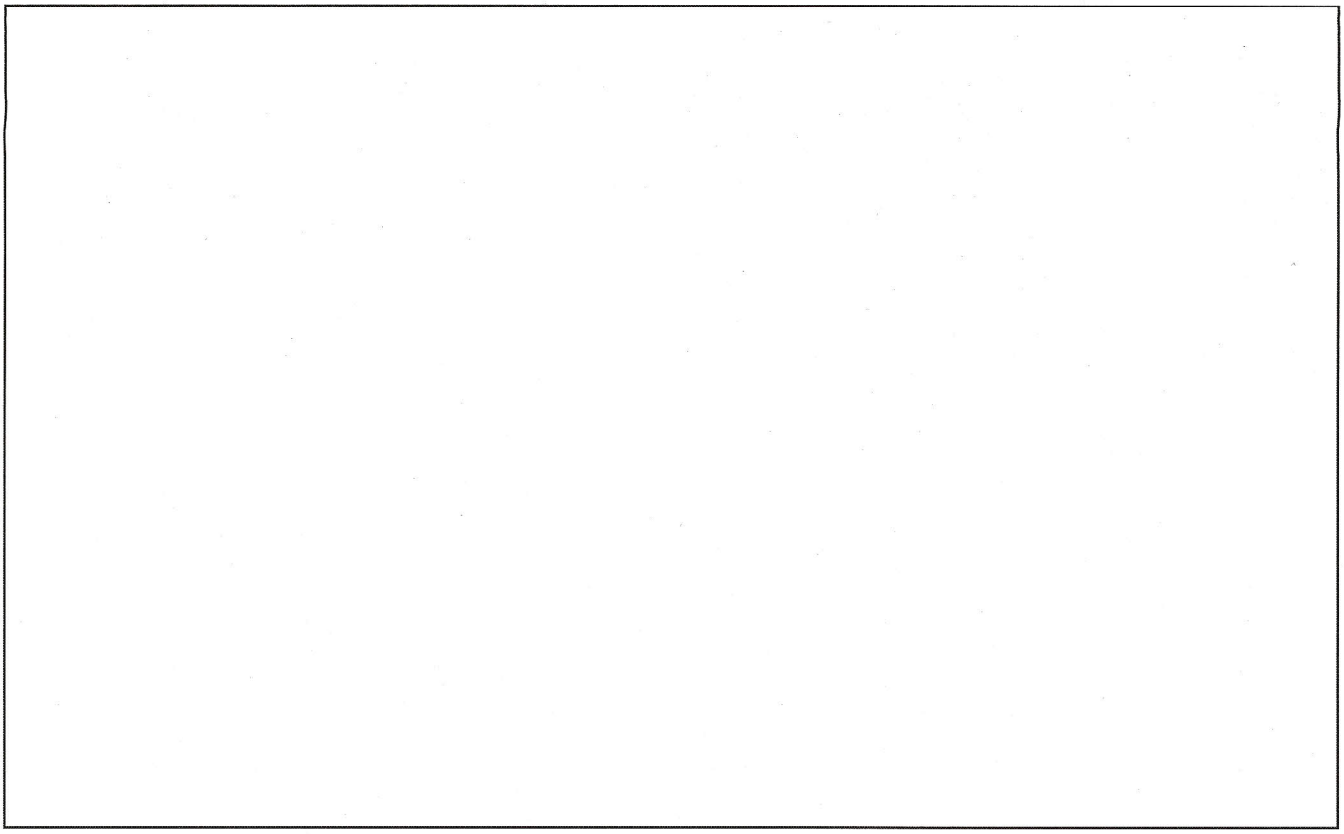
Ask your judge if she would like a chronology and cast of characters. You are sure to get a yes answer. Tell her the names of the participants and their basic roles in the dispute. Let her know the sequence of key events. If one event was the precipitating cause for going to court, let her know what it was. State the issues that she needs to decide. Do it in writing. If your opponent won't stipulate to these matters, call it a status report or a mini-trial brief. Call it a written opening statement. Call it anything. But leave out the editorial comments that signal that your offer to help is really a closing argument in disguise. If the judge believes that your offer is an attempt to gain an unfair advantage, you will lose your credibility with the court and set your case into a backward slide. On the other hand, if the judge reads your submission in chambers, gives it to the law clerk, and takes your cheat sheet onto the bench during the hearing or trial, your tactical advantage is two-fold: You will have solidified your credibility and earned points for making the judge's job easier.

When it comes to the law governing the case, it is useful to revert to law school practice in citing a case. Do not expect the cold judge to look up your cite and read the case. Do not just give the judge a sound bite of the paragraph you think is important. Describe the case in terms of the important facts, the issue before the appellate court, the holding, and the reasoning for the holding. A friend of mine, who now is a judge himself, had a clever way of dealing with a state judge who was notorious for never preparing. He would staple his brief at the top center of the pages and watch as the judge turned the page the first time, only to tear it in half. Obviously, my friend practiced in the days before electronic filing of briefs.



However, this same judge now admonishes those who practice before him to get to the point and stay on it. Do not say, "As the court well knows…" Do not say, "The cases in my motion are dispositive." This judge wants the lawyer before him to be so familiar with any case he claims is important that he can recite the facts of the case if asked. He wants lawyers to eschew string citations, and heaven help the lawyer who tries to slip a case by him that doesn't hold for the proposition the lawyer claims it does. And if you advert to a previous ruling or opinion by that judge, be sure to give the name of the case in full and the date. There is a good chance the judge's memory needs to be refreshed. This is sound advice before a hot or a cold judge.

One kind of forum is almost always cold. In municipal, small claims, and misdemeanor courts, judges do not have the luxury of preparation. These judges do not know much about the cases that they process day in and day out, and they rarely know which of many cases will go to trial or hearing. Sometimes these judges are cold for more than one of the previously discussed reasons. Although the stakes in dollars or punishments may be smaller, the issues can be just as complicated and difficult as the issues in larger cases. To make matters worse, clients are often unwilling or unable to pay for the same level of preparation. Nevertheless, the client deserves as



much time and effort and preparation as is practical, economical, and efficient. The court deserves the best available level of advocacy possible, and the ideas and perspectives that work in the larger cases can be applied to the smaller ones. And the chances of a successful result are enhanced.

Some appellate courts have a policy of hearing oral arguments before the judges have read the briefs. Such courts are cold on purpose. Other appellate courts take the opposite approach, that of scheduling oral argument only after the judges have read the briefs and tentatively decided which side ought to prevail. These are hot courts. Some appellate courts take the middle road—a lukewarm approach. If you have an oral argument before a cold court, you must give a lot of thought to how you will divide up your allotted time. Some of your time must be allocated to the basics, and some must be allocated to the legal argument most likely to be dispositive for reversal or affirmance. You may need to save some time for public policy considerations. And some time must be reserved for meeting your opponent's best points. The allocation of time among these competing interests is the critical strategic decision. A well-planned strategy can warm the cold panel to your side.

When a judge comes in cold to a case that has been pending for a while, you sometimes are faced with previous rulings—right ones and wrong ones—made by the first judge. Invariably, one party wants to re-litigate the issues that it lost. Depending on which side of the argument you are on, the new judge can give you a second bite at the apple, or snatch your case back from the jaws of victory.

One case I can relate comes from another colleague's experience. His lawsuit involved a potential $200,000 attorney fee award, based on a ruling that the underlying civil suit was substantially groundless and frivolous. Judge M. had made that ruling on paper submissions without granting a hearing. This left the issue of whether the attorney fee request was reasonable. The lawyers were in agreement that the law required a hearing on all issues. When Judge M. died before he could finish the case, another judge took over. The lawyers asked the new judge to reconsider the earlier ruling based on law that the first judge did not find compelling. The court's response was, "Judge M. decided the question, and I am not going to second-guess him." No reconsideration, no hearing, no change.

My colleague asked to make a record on the issue of whether or not his client was entitled to a hearing to determine whether the case had been substantially groundless and frivolous and whether the fee request was reasonable. He got his chance to make a record. The new judge decided he was correct and reversed the ruling denying him a full hearing. The opposing side was chagrined that the entire outcome was now up for grabs, but the lesson of persisting when you believe the law is on your side of the issue is now lodged in my brain.

Appearing in front of a cold judge is not the time to get cold feet. Nor is it the time to be timid or shy. You must be assertive. For example, I have found it useful to begin a hearing or other proceeding for which I sense the judge might not be prepared by saying, "Your honor, I don't know if the court is up to speed or has had the time to read my brief. If the court hasn't had the time, I want to give the court the material it needs for this hearing." Most judges will welcome this chance to say, "I glanced at it but haven't studied your brief." This opens the door to a golden opportunity to assume the role of educating the judge and thereby turning her from a cold judge

into a warmer one. Now is the time to tell the judge what the case is about, as one would tell another person—maybe not even a lawyer—at the local bar across from the courthouse. Use plain, simple language, as you would with someone who knows nothing about your case, nothing about the facts, and little about the applicable law. Begin with the six basic queries described earlier and you will have made an excellent first impression.

Recently, I was preparing to try a white-collar criminal case in state court. It was a complicated accounting case involving a regulated gambling operation centering on a bingo hall. The charge was a pattern of racketeering under the Colorado version of the federal RICO statute. The attorney general and his investigators had spent two years putting their case together, and the state grand jury had had the case for 18 months before indicting 15 people on 63 different charges, including the one for racketeering and conspiracy to engage in racketeering. The attorney general had been very creative in coming up with charges he claimed fit the facts. Some of the charges were based on statutes that hadn't been used within anyone's memory. We received our discovery in digital format on five compact discs.

The first year of the case was spent in motion practice before the assigned judge. There were numerous attacks based on whether the prosecutor had or had not presented sufficient evidence to the grand jury to establish probable cause. Other attacks were based on whether the law supported the charges as pled in the indictment. All sides submitted briefs and based their factual arguments on the transcripts of the witnesses who testified before the grand jury. The judge visited and revisited these issues and made his rulings. Some defendants were dismissed, but my client and his partners remained in the case as charged. The issues of provable guilt or innocence were six to eight months away when the case was re-assigned to a new judge for the purpose of conducting the trial.

Discussions with the two deputy attorneys general assigned to the case were unproductive. They would not admit the weaknesses in their case. Trial approached and it was clear that the newly assigned judge did not have the time (or energy) to plow through volumes of files. The judicial district, like many in this country, had too many criminal cases assigned to too few judges. Plea bargaining was not just a fact of life; it was lifeblood if the district was to avoid total chaos. Three weeks before trial, the court held a pre-trial conference. I used that time to give a brief outline of the legal and factual complexities of the case to the court. I asked the judge if I could submit a trial brief that would also contain proposed jury instructions. My offer was warmly received. My brief would not only help me educate a cold judge; it would also serve as my trial strategy and themes as well as the core of my trial notebook. I took the opportunity to present the law in the form of the likely jury instructions with appropriate legal support. Then I gave the judge the version of the facts I believed would be established by the prosecution witnesses and an argument for why the case shouldn't survive a motion to dismiss after the prosecution rested. Finally, I presented some of the evidence the defense would present if the case survived the half-time motions. I don't know to this day if the judge ever read my trial brief, but I know that the prosecutors did. They agreed to dismiss the case the week before the trial was set to commence.

A friend of mine who practices divorce law gave me an example of how even a good judge can become cold. She entered her appearance in a case in which the divorce took three years to reach permanent orders. Seven years of post-divorce controversies had further worn the judge down. By the time my friend appeared on the battlefield, the judge was tired of the case, the two protagonists, the professionals, and the lawyers. "Tired" is probably too weak a word. He hated everyone in the case and looked upon another hearing as "another day of crap." The husband's lawyer was inept, mediocre, and deceitful, and he personalized his client's case. To round out his better qualities, he also was aggressive. For example, he claimed that there were provisions in the permanent orders that he merely described as being "in the order." When asked for a specific place reference, he backed off and said, "Well, they were talking about it [the provision], but it never made it in."

The wife's previous lawyers were no better. They would get into harangues and name calling with the husband's lawyer in front of the judge, a practice designed to cause the judge to simply quit listening. The wife herself was disorganized and could not separate the important from the meaningless and the trivial. She wanted to win everything regardless of whether it was good, bad, or simply silly. And she could not keep quiet in front of the judge.

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My friend entered her appearance in this morass to present a contempt motion drafted by the wife's previous lawyer using standards that were no longer good law. It was clear that the judge might have had his eyes open, but his brain was disengaged—the elevator door was closed, the car was going nowhere. The judge did not know my friend, but he began the contempt hearing by ruling that her client was not entitled to punitive sanctions. He began to ride her mercilessly. My friend adopted an ultra-professional approach, demonstrating crisp organization and stripping the issues to their bare essentials. She did not argue with the adverse ruling and did not descend to the level of her opponent, but presented her client's case in the best light she could. By the end of the proceeding, the judge re-visited the issue he had foreclosed and held for the wife, commensurate with the harm done. The real winner was my friend, who received $6,000 of the $10,000 total award for her attorney fees.

Suggestions for warming up a cold court must always be adapted to the practitioner's personal style, experience, and comfort level. What works for one lawyer may not work for the next. Preparation can go down the drain if your case is bumped from one judge to another at the last minute. War stories are meant to be ways to demonstrate what works and what doesn't. The abyss is not pretty, and every tool at your command should be brought to avoid it. A last word on the subject—when you are before a cold judge and none of my suggestions work, it is time to recall the wise words of many a mentor: "Sometimes you just lose." ◻