Weathering the Storm

by Theodore M. Grossman

On the eve of trial, as you are preparing an important witness, he suddenly announces that his recollection has changed, and what he told you in earlier interviews was wrong. You had been depending on his testimony; it was to be a foundation of one of your central trial themes. Now it has evaporated. Or the witness waits until you put him on the stand to change his story. Or he gives his anticipated testimony on direct examination, but then turns red, apologizes, and recants on cross-examination.

It gets worse. Your co-counsel begins his first cross-examination in what is potentially a multibillion-dollar case by placing a box on counsel table, opening it, and removing its contents one by one. They consist of a cowboy hat, chaps, a vest, spurs, boots, and a big-buckled belt. Then, to the surprise of everyone in the courtroom, not the least you, he dresses himself as a cowboy. (This actually happened in one of my cases.) Or after spending years working with you preparing a joint defense, counsel for your co-defendant starts to defend his client by pointing a finger at your client.

It gets even worse. A juror who seemed fair and even friendly during voir dire starts to glare at all your witnesses, occasionally appearing to make gestures that look as if he is shooting an air-Uzi. Or the judge appears to become a partisan during trial and threatens jury instructions that would fill in the holes in your opponent's case. Having previously said some of your critical evidence would be admitted, the judge excludes it. Having previously excluded some of your opponent's evidence, the judge without warning allows it. Or the judge allows your opponent's expert to offer previously undisclosed tests and opinions, including purported expert opinions on "ethics" (that your client has sunk below the ethical standards of his industry) and on "truthfulness" (that your client is a liar). Or your own expert conducts, with great drama and fanfare, a demonstration in the courtroom that fails on the spot.

Had enough?

The mind reels with fantasies of potential surprises out of one's control. It should. No matter how well-prepared a case may be, no matter how thorough the discovery, no matter how extensive the pretrial litigation of legal issues, there is always the possibility of surprise. If you have prepared even one case for trial and thought through all its permutations, I suspect you will agree. We are paid to worry about these things.

I would like to offer for your consideration some thoughts on dealing with potential surprises, but before going further, if your one and only reaction to nightmare scenarios such as those set out above would be to settle at all costs, I sympathize, but this article probably is not for you. Settlement is often the best course. It needs to be considered at all steps of litigation, but sometimes settlement is too expensive, and sometimes it is impossible.

I have tried many cases for clients that have policies of never settling because, in their circumstances, settlement would invite too much further litigation; we have simply had to win. Similarly, many other types of cases, such as cases against the government challenging the constitutionality of a statute or regulation, often cannot be settled because there is no available middle ground.

More generally, when a witness turns or a judge turns, it is not a private event; your opponent knows as well as you do. So your opponent may become obstinate, making the price of settlement exorbitantly high. Or if you represent the plaintiff, the offer may be too low, and you will need a counterpunch to show some strength in court before you can make any progress in settlement negotiations.

Take heart. Annals are filled with cases that were won by lawyers who creatively responded to and surmounted bad developments beyond their initial control. But before you do anything, first talk with your client.

Your client needs to know about the bad days in court, not

Theodore M. Grossman practices with Jones Day in Cleveland, Ohio.

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just the good. If there are any rules for dealing with metaphorical punches to the gut at trial (and there are few), this one is at the top of the list. When one of your witnesses does not live up to her promise, or when your opponent offers what he says is evidence he just found, or when the judge turns on you, reversing her prior rulings, your client needs to know. Similarly, your client needs your thoughts about how you will respond. The case is your client's, after all, not yours.

Based on conversations with in-house counsel at many companies, I find it remarkable how often this simple rule is broken. In just the last couple of months, I have had conversations with two general counsels from two of the world's largest corporations who complained of lawyers they had hired with just this problem. I know that both have worked with well-respected lawyers and firms, and their comments were dumbfounding.

One asked me over dinner, "When you get a case, do you discuss your strategy with your client?" It was clear that he had experienced important times when outside counsel had failed in that basic task. The other general counsel, over lunch, complained of conduct from a variety of otherwise successful lawyers that perhaps went beyond mere communication problems. He said, "If I ever hear another lawyer tell me at the end of trial that we have it in the bag, I'll scream." Be honest with yourself, do not predict what you cannot know, and level with your client.

The war-gaming should start as soon as you get a new case.

While you need to be frank with your client, however, you also need to appear unfazed to your adversary, the outside world, and especially the jury. In the area of damage control, where responses need to be tailored to the specific situation—and there are so few principles of universal application—that is a second universal rule. It is apparently one that is tough for many to follow.

Much has been written about maintaining a "litigation face" or "poker face" at trial, but in my practice I have observed many otherwise good and successful adversaries who have been unable to maintain their composure when trial events have not gone their way. Some have audibly sighed, some have held their head in their hands. One banged his fist. These are not good things to do.

I recall one co-counsel who, during a difficult cross-examination, slowly walked backward, moving toward the back of the courtroom through the low swinging gates that separate counsel from spectators, moving farther from the witness he was interrogating and ever closer to the exit that seemed his salvation. He may not have known the tacit message he was delivering, but it was very strong; he looked terrified.

I recall, too, an otherwise skilled and successful adversary who revealed a recurring nervous tic whenever things got hot. During dramatic moments in the cross-examination of his witnesses, he sat at counsel table while the witness was being impeached with prior testimony or was giving up admissions harmful to his case, and with the index finger of his right hand, he began to spin circles in the hair above his right ear. As the admissions got worse, he would spin faster. We knew we were doing pretty well during our closing argument when we noticed that he had become a two-handed bi-lobal spinner.

The jury noticed all of these things, as they usually do. Juries pick up important cues from the conduct, tone, and demeanor of counsel. In my experience, those jurors who have the most difficulty following complex fact patterns often work hardest to analyze nonverbal cues. Many may have tried throughout their lives to compensate for problems with factual analysis by making their assessments from their perception of the demeanor and non-verbal posturing of others. Such jurors' response to complex, competing expert testimony or to differences in testimony between direct and cross-examination may depend heavily on their perception of your apparent confidence more than on their perception of the evidence itself.

At every moment of trial you are being observed, and unlike the jury, the judge, your colleagues, and your adversaries, you cannot see yourself. If, like my hair-twirling adversary, you have nervous habits that you engage in unthinkingly, you need to be particularly vigilant in avoiding them. If one of your colleagues has visible reactions to trial events, you need to tell him, too. And because you cannot see yourself, it helps to ask colleagues to monitor you.

As you may have encountered, there are media advisors who specialize in crisis management. They develop plans and checklists for dealing with public disclosures that threaten companies, politicians, and others in the news. They are called in for advice when a company's product has been targeted by *60 Minutes*, or is the subject of a widely publicized medical journal article, or when a company unexpectedly must announce bad performance, or worse. They typically advise that a spokesman be chosen, that public responses be made rapidly, and, if necessary, that the company or individual accept fault and move on.

Some of the advice they give is universal: Do not panic; find out the facts as soon as possible; show compassion. But their principal list of things to do has very little value to you in the courtroom. One cannot stop a trial to make a speech. If you are defending a product liability case brought by an injured party or his widow, it is too late to recall the product. Unless your only goal is to reduce damages, you cannot accept fault and move on (and such an approach may not reduce damages at all).

You need to be creative. You need to be light on your feet. You need to be ready, intellectually and emotionally, to respond on a made-to-order basis.

Mark Twain famously quipped that a good off-the-cuff remark can take hours to prepare. So it is with trial. Creative, extemporaneous responses to bad days in court do not appear from the ether even if they seem to. They come from long hours in the weeks and months before trial of thinking, war-gaming, and worrying.

The war-gaming should start as soon as you get a new case. Its central purpose should be the development and nurturing of themes that can bring you victory even if you confront an event such as those set out in the nightmare scenarios outlined above.

There are few well-tried cases in which the outcome depends on a single witness or a single fact. They depend, instead, on whether the jury finds the plaintiff's principal

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themes or the defendant's principal themes more salient, more consistent, and more supported in their totality. The two parties' themes are often ships in the night, having little relation to each other.

In an employment case, for example, the plaintiff's theme typically will be that her employer is discriminatory, unprincipled, and greedy; the defendant's theme will be focused on the plaintiff's performance and conduct. In a typical product liability case, the plaintiff's theme, usually based on company documents and company witness admissions, will be that the product was badly designed or had inadequate warnings because the company was only concerned with profits and was indifferent to its consumers' health and safety. The defendant's central theme will be about the plaintiff: that she knew the risks, failed to read the warnings, misused the product, or did not suffer the injury alleged. If the jury ultimately believes that the case is about the plaintiff's themes, the plaintiff will usually win; conversely, if the jury focuses on the defendant's themes, the defendant will usually win.

Soon after a new case comes in, I outline a closing argument. Of course, it is only aspirational and will be amended as discovery progresses. Outlining the closing argument has the advantage, however, of requiring an early focus on the broad themes you will need to prove to win and allows you to outline the evidence you will need to develop to support those themes. Thus, it provides a structure for discovery. Depositions of parties and experts should, like cross-examination at trial, be constructed of leading questions. But, to say the least, such depositions are helpful only if the witnesses are led in the right direction. Early articulation of themes is necessary to ensure not only that your case is riding on the rails but also that it is traveling in the right direction.

It is often a heady time when you undertake early brainstorming and drafting of a provisional closing argument, a time to stretch the imagination offensively in efforts to develop the most telling admissions. But a case cannot be won with offense alone, just as a game of chess cannot be won without considering the countermoves of one's opponent. Therefore, as part of the development of an aspirational closing, every successful lawyer I have encountered has undertaken an early and intense examination of her client's documents and potential testimony in light of her opponent's likely themes. This is a crucial step to understand the extent to which the record will support her opponent's themes and undercut her own proposed themes.

As discovery progresses, you can test your themes further and modify them as necessary. You can, and should, try to create multiple layers of proof, both through the development of your own witnesses and through cross-examination of your opponent's witnesses, so that you can support your themes regardless of the court's ultimate rulings on motions in limine. In essence, you should have alternative plans: a Plan A if you win your motions in limine and a Plan B if you do not.

Layering of strategies is necessary for all aspects of trial and case development. A few years ago, I was asked by a tobacco company to try a cigarette liability case in California. Several similar cases had recently been tried, and all had been lost by the defendants. Punitive damages had been awarded in all of the cases, and the two most recent had led to record verdicts of $3 billion and $28 billion. The results contrasted sharply with verdicts elsewhere in the country, where defendants had won most cases.

As part of case preparation, we set out to determine why the California results had been so extreme and idiosyncratic, and we sought ways to level the playing field. Among other things, we learned that California had a unique, publicly funded, and heavily broadcast negative advertising campaign aimed not just at smoking, but at the companies that make cigarettes. The campaign did not focus primarily on the health aspects of smoking (which would have been noncontroversial). Instead, it sought to affect the public perception of tobacco companies. One commercial showed an actor playing a tobacco executive lying under oath at a fictional hearing. Another showed cigarettes falling like rain into the hands of children in an elementary school playground, and had a voice-over in which a fictional tobacco executive said the viewer should not blame the tobacco companies for marketing to children because tobacco companies needed new customers to replace the old ones who had died. Similar themes ran through dozens of other commercials, and it was easy to see how such commercials would affect the jury pool and incite juries to award huge punitive verdicts. Indeed, documents from the committee that sponsored the ads suggested that a goal of the ads was to affect public perceptions of cigarette product liability lawsuits.

We commissioned a well-known polling company to conduct surveys to determine the extent to which the jury pool had seen, remembered, and believed the California ads. The surveys found that the ads had sunk into the consciousness of the community in California's big cities and that the advertisements' effect was potentially devastating.

The ads, the surveys, and expert testimony were offered to support a Plan A and, implicitly, a Plan B. Plan A was to obtain transfer of our case from Sacramento, where the ads had been ubiquitous, to a rural area outside a major media market (or to another state). We lost that motion. But the evidence we presented on the motion had an effect, supporting our Plan B. We were allowed to probe deeply in voir dire, and our motions to strike some jurors for cause took on greater urgency. We also had developed an appellate argument, if necessary. As matters turned out, due largely to our Plan B, we were able to seat a jury that listened fairly, and we obtained a complete defense verdict.

So far, so good. But if you have tried enough cases, you know a Plan A and a Plan B may not be enough. You know that your opponent may not play by all the rules. You also know that some of your witnesses who seemed strong in preparation may get nervous and confused on the stand. You need to worry through those issues and develop, in essence, a Plan C: a plan to work through the nightmare scenarios.

Developing a Plan C is as uncomfortable as the early brainstorming on winning themes is exhilarating. You are, after all, trying to force yourself to consider everything reasonably imaginable that can go wrong so that you can avoid the bad events, control them, or surmount them.

Building a Plan C is also something that you cannot set out to do in a day, week, or month. It is something you need to develop throughout pretrial preparation as you observe your adversary, his witnesses, and your witnesses and as you let your imagination roam. By the time you get near trial, however, your development of a Plan C should be pretty well finished. By then, you should have the answers, and by then, you want to focus relentlessly on your themes.

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There are some things that absolutely should not happen at trial, but experience will tell you that sometimes they do. Appeals to prejudice, sometimes soft prejudice and less often hard prejudice, are an unfortunate example. Whether those appeals help your adversary or hurt him will depend largely on whether you are ready for them and how you respond.

Early in my career, when I was at the U.S. Department of Justice, I tried a case brought by the state of Texas in federal court in Dallas. Medflies had infested California orchards for the first time. The federal government had placed two counties in California under quarantine, and Texas, California's biggest agricultural competitor, was seeking to expand the quarantine to the entire state of California. The case had elicited a lot of publicity, had accentuated regional rivalries, and had obvious political dimensions.

There were not nearly enough seats in the courtroom to accommodate all of the reporters and spectators who showed up to hear the trial. After the courtroom filled, the doors were barred.

The fourth witness called by the state was the Texas commissioner of agriculture, a burly, gregarious, larger-than-life politician who played as much to the gallery as to the court in his direct testimony. When I asked my first question on cross-examination, he responded, "Could you speak up, *son*, I don't understand *Yankee* that well (the emphasis was his)." The line had more resonance than might appear from a cold transcript;

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my client representative at counsel table was African American. The gallery roared. (A few years later, the commissioner lost an election to retain his seat after he was recorded at a rally using an unmistakable racial slur.)

Today, after reflection, if I were presented with the same situation, I would deflect the comment and focus on the commissioner's non-responsiveness (as, for example, "That's a good one, Mr. Commissioner. Now please answer the question"). Back then, I was a bit more combative—I offered the services of my client representative as a translator. Fortunately, it was a bench trial and the judge was unmoved by the whole exchange. Texas's case was dismissed.

In the years since the Texas case, virtually all of my trials have been far from home. I have learned that it is much more important to be genuine and to be focused than to be local. There is lore among many lawyers that juries greatly prefer local lawyers, and I have seen some out-of-state counsel go to extremes to try to persuade juries that they are, in fact, local. I have even seen some hire special counsel just for voir dire to help them mix in local flavor (little facts about the prospective jurors' high schools or employers or neighbors) to make them sound as if they have lived in the forum all their lives. To my ears, voir dire conducted that way sounds like pandering, but more importantly, if the jury later hears that counsel is from elsewhere (and they often will, even though such comment is improper), the lawyer who worked so hard to appear as a local will come off as insincere and conniving, as well as foreign.

I have never seen a jury penalize a lawyer for being from elsewhere unless he approached the issue defensively. Juries expect litigants to hire the best counsel they can. I defuse the issue by telling the jury, at the outset, where I am from and how honored I am to be able to present my client's case to them. It has never hurt me. In fact, I recall my closing argument at a trial in Louisiana when a juror cried after I mentioned in passing that I had been away from my family for a long time.

It is good to be liked, but credibility is essential to success at trial. For that reason, I do not draft a proposed opening statement until soon before trial. It is only after all discovery has been conducted, the in limine motions have been ruled on, and I have worried through the possible impediments to my proof that I can know how far to go in making opening promises of proof to the jury. The worst injuries that I have witnessed at trials were self-inflicted, and some came at the outset, during opening statement.

I recall one trial where my opponent, who obviously had drafted an opening statement too early (or without reading depositions that had been conducted by others), argued an important thematic point to the jury. He said that "defendants will tell you that this case is about personal responsibility. It is. But my client will take personal responsibility for his conduct, and their client will not take responsibility for its conduct." The problem with counsel's opening was that the plaintiff had already been deposed and had testified that he did not take responsibility for his conduct. Counsel's mistake was one from which he never recovered.

If you have chosen your themes well and supported them well before trial, and if you relentlessly build your case around your themes from jury selection to closing argument, you will be in a much better position to withstand heavy seas, no matter how unpredictable they may be.

About ten years ago, I tried a case in which we were hit with about as bad—and unfair—a surprise as one can suffer and at the single most vulnerable moment possible in a trial. We represented a cigarette company defendant that had been sued by a long-time smoker who had contracted lung cancer. The jury knew that its verdict would be placed under the public microscope. Court TV had cameras in the courtroom throughout the trial. The plaintiff's lawyer had recently won the first product liability verdict ever against a cigarette company. His win had been in the same courthouse in the same city, and it had been very widely publicized. Even more publicly, the media were reporting that our client, along with other cigarette companies, had just agreed to settle claims brought by state attorneys general by paying hundreds of billions of dollars and agreeing to restrictions on marketing and other practices.

Notwithstanding external events, the trial had seemed to go well. Then, toward the end of trial, the judge reversed his prior rulings on evidence, allowing the plaintiff to use a succession of materials that had previously been excluded. Worst of all, the court allowed plaintiff's counsel, in rebuttal closing, to read editorials from the *Journal of the American Medical Association.* The editorials had not previously been entered into evidence, discussed, or even hinted at during the trial. They argued, with vitriol, that my client and other tobacco companies had deceived the public and had hidden information for decades.

Indeed, they specifically argued that plaintiffs should win

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individual liability suits, that doctors should not testify on behalf of cigarette companies, and that doctors should work with plaintiffs' lawyers to drive the companies into the ground. It should go without saying that editorials offered for the truth of their contents are hearsay, that their prejudice in this case was potentially devastating, and that the authors of the editorials were not subject to cross-examination. Further, because the editorials arose for the first time in the plaintiff's rebuttal closing, we could not even respond. There was nothing we could do but object and request a mistrial, which of course we did.

Despite the reading of the editorials and despite the admission of other similar evidence that the court had allowed plaintiff to read to the jury at the last minute, we won a unanimous verdict. Our themes had prevailed. It helped that we had established credibility with the jury and undercut our opponent's credibility throughout the trial. It also helped that we had girded the jury for surprise by anticipating what might happen in rebuttal.

During closing argument, we noted that plaintiff's counsel would have one more opportunity to speak, and that we could not predict what he would say. But we asked the jury, as it listened to rebuttal argument, to consider whether the plaintiff's argument was responsive to what we had said, and if it was not, to ask themselves why plaintiff's counsel had waited until the last possible moment, when there was no opportunity to respond, to present the argument. We also reminded the jury of previous instances when the plaintiff had made exaggerated claims or assertions that were later rebutted, and we asked the jury to think about how we might respond to the rebuttal argument if given an opportunity. In other words, we not only prepared ourselves for the possibility of an ambush, but we also prepared the jury.

Bombshells in rebuttal closings, of course, are the exception rather than the rule. In most cases you have an opportunity to respond directly to unsettling developments. How and when you respond will depend on the circumstances.

A trial runs by its own clock, almost oblivious to the pace of the outside world. The jury is a captive audience that will be listening to your evidence, cross-examinations, and arguments until the end.

Optimally, of course, it is best to respond immediately to apparently harmful events with strong counterpoints so that these events do not make even a temporary dent in your case. But if you need time to learn new facts, or to find out whether one of your witnesses can present contrary testimony to the bombshell that has been dropped on you, or to think through the implications of your opponent's surprise, the time is available to you and you should take it.

Apart from rebuttal closing, you are most vulnerable during the cross-examination of witnesses you have tendered. No matter how much time you have spent in preparation, you lose control of your witnesses as soon as you end your direct examination, and you sit almost helpless as you worry whether they will lose their temper, become argumentative, or say something troubling. So, as you prepare your witnesses before trial, you need not only do all you can to find out what their answers might be to all conceivable questions and to make them comfortable with testifying in court but you also need to prepare extensive questions—that you hope you will never have to use—for redirect examination. Like all other parts of trial, the redirect should focus on your principal themes. You may need to add some extra questioning on the fly during trial, but the more you have prepared, the better.

Surprise testimony by witnesses you are cross-examining, however, is much more in your control. I cannot count the number of times I have heard a witness try to explain away, during direct examination, the admissions he made at a deposition or simply to present new testimony that, he asserts, he just recently remembered. In any event, the response to changes or new additions to a witness's testimony should be at your fingertips.

Some lawyers fear hard cross-examination, particularly of lay witnesses. Especially in small towns and other non-metropolitan areas, these lawyers believe that jurors will sympathize with the witness being hammered and will dislike and penalize the lawyer asking the questions.

Maybe those lawyers are right, but not in my experience. I have found that jurors respect and even like hard cross-examinations so long as they have been earned. Jurors can get angered at ad hominem crosses, and rightly so. They also can see the weaknesses in stock crosses that some lawyers resort to when they have been surprised. When, for example, a lawyer asks an opposing expert, "Professor, the testimony you gave is just an opinion, isn't it?," it sounds desperate,

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and it probably is. When, as I have often heard, a lawyer, upon getting an answer that he did not like from an opposing expert, says for the third time, "How much did you say you are being paid to testify in this case?," it sounds as if he is being beaten, and he probably is.

A hard cross is earned, however, when it is based on the witness's previous testimony at deposition or upon another documentary record. So, if your case has been well prepared, you are less vulnerable during cross-examination of your opponent's witnesses than during almost any other time at trial.

Sometimes, however, you must try cases that were prepared by others long before you became involved, and sometimes you have to make do with deposition records that do not tie down your opponent's witnesses as you would have and that are not centered on your trial themes. Sometimes you have to wing it and weigh the risks of pushing hard for admissions.

If you have documentary evidence apart from a deposition, your risks are low, but trial is not a risk-free endeavor, and sometimes you need to construct your cross from pure logic and from inconsistencies in the witness's direct examination. It can be done, and done very effectively, but you need to try to consider every possible way the witness may attempt to weasel out of giving you the admission you are seeking and close down his escape routes through preliminary questions before going for the big admission.

You also do not have to impeach every unfortunate thing a witness says in direct. At times, the risks may be too great,

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and there are alternative means to an effective cross. Under the rules of evidence in federal courts and most state courts, cross-examination can extend throughout the subject matter raised on direct examination and to matters affecting credibility as well as to other areas in the court's discretion. That is a wide zone, and there is no reason why you should limit your cross to attempts to refute or soften testimony that was offered on direct. It may be much easier, considerably safer, and at least as effective to concentrate cross-examination on obtaining reinforcement for your themes that were not directly addressed on direct.

Every case, and every witness, is different and demands independent assessment, but consider, as an example, the typical testimony of the widow of a decedent in a wrongful death product liability case. On direct, one could expect the widow to testify that she misses her husband greatly, that she and her husband were very close, and that he suffered before his death. You do not need to cross any of those points, and in many cases, it would be counterproductive to do so. But the widow may be a fount for admissions on the decedent's intelligent awareness of risks, on his other risk-taking behaviors, or on other matters not likely to have been raised on direct.

When we began discussing trial surprises and damage control, I said that there are few universal rules apart from confiding in your client and maintaining your composure, but there is one other that cannot be stressed too much. You need to make your record.

Juries expect lawyers to do their jobs, and they respect competence. I have never seen a jury reward counsel for failing to object, but I have seen many appellate courts penalize parties for failing to object or to make an offer of proof or, when appropriate, to move for a mistrial. In all the cases I have tried and all the cases I have witnessed, I have never seen support for the idea, current among many lawyers, that you must choose between trying a case for the appeal (by making objections during trial) and trying a case for the verdict (by avoiding objections, especially if they may be denied at the trial level). You try each case for both.

In some European and Asian legal systems, judges ask almost all the questions at trial, and the role of lawyers is limited. Our system allows so much more power, freedom, and creativity. With adequate preparation, and with the confidence that comes from worrying through even the most unlikely eventualities long before trial, we can weather almost any storm. ◻

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