PART

One

MY NASD ARBITRATION—FROM START TO FINISH

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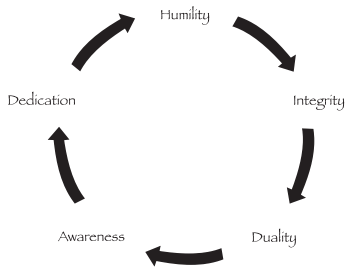
CHAPTER 1



Sweating Bullets

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How Did I End Up Here?

1 Liberty Plaza, 27th Floor
New York, New York
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Sometimes life's big moments are not the ones you choose in advance, but rather those that events force upon you. This, for me, was going to be one of those moments. After months of preparation and anticipation, I was finally going to face my former client, my accuser in the final dispute arena of our profession—an NASD (National Association of Securities Dealers) arbitration. This event is sometimes innocuously referred to as an "arbitration hearing." I didn't think about it that way. As far as I

was concerned, it was both a "trial" and a "battle," and in my preparation I had come to picture this moment in those terms. Despite the very heavy dose of reality I was experiencing regarding what was about to take place, in the back of my mind I couldn't help but think: How did I end up here?

A Million-Dollar Producer

I love the investment advisory business. It is, for me, a dream career. It requires me to give everything that I have every day of my career. I am an analyst, a strategist, a sales professional, a chief executive of my practice, a leader and motivator of my staff, a user of technology tools, a voracious consumer of ideas and information, and sometimes a little bit of a personal and family counselor. I love to work with clients and, using all my experience and every resource at my disposal, understand the specifics of their financial needs and goals and to help guide them through the perilous shoals of investing to secure the future for themselves, their families, and future generations.

Beginning with my first day in the business, I set my sights high. I had worked for the first 11 years in the business with other firms. In 2001, I went out and started my own firm. In 2003, my practice reached the magical million-dollar mark in terms of annual revenue generated, and I became what is known as a "million-dollar producer." Reaching this level is understood as a significant accomplishment in the business.

I admit to having a streak of idealism about our profession. From time to time, I am jokingly accused of being a "Boy Scout" by my colleagues. I am the rep who arrives 15 minutes early and sits in the front row of the training classes, taking notes as if my life depended on it. I have always been an organizer and a documentor. There are times when I exasperate my staff, calling back to check on a detail that might seem minor, but I can't rest until I have a sense of completion. For more than 10 years working with clients, I had a spotless U-4, the standard in our industry for a clean bill of health.

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A Statement of Claim Appears—Out of Nowhere

It was a complete surprise when on September 17, 2002, I received a faxed NASD Statement of Claim at my office, notifying me that a former client had filed for arbitration with the NASD asking for $85,000 in damages, alleging, among other things, that I had put him into investments that were "unsuitable." I couldn't believe it.

I later found that it is typical for clients to first forward through attorneys a "letter of demand," which is a claim of losses or damages and an attempt to negotiate a settlement of those demands. In this approach, the threat of going to the NASD arbitration process is part of the lever the claimant has. In this case, the client had skipped that step entirely and filed for NASD arbitration.

I was stunned to read that my former client was claiming "losses" of $85,000. As I read it, I felt as though I were having an out-of-body experience. Reading this document with my name on it felt like a nightmare into a surreal, make-believe world being described in legal language.

The chronology that my former client and his attorney had sketched out in the complaint was filled with blatant mischaracterizations. To me, it read like a work of fiction. Had the document not had my name on it, the entire episode might have had a comic tinge to it. People have often thought of me as the clean-cut, wide-eyed *Mr. Smith Goes to Washington* character. The rep described in this document seemed like the financial equivalent of Darth Vader.

But there wasn't anything humorous about it. This was serious business. As my mind raced to try and recall details of our working relationship, I didn't recall anything whatsoever that would have justified a complaint.

Notify Everyone and Anyone

I put the document down and tried to think everything through. I realized that there were some immediate actions I had to take. I

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had the clarity to place a call to a private attorney who had some experience in securities litigation. I have always believed in getting the best expert advice possible, and my strong Rolodex came through with this resource. She quickly returned my call, heard the details of the situation, and informed me that I had an obligation to notify everyone and anyone who might be affected by this.

Having already swallowed this bitter pill, I wasn't particularly in the mood to start announcing my news to the world. But I knew my attorney was right, so I made the calls. This claim involved a period of time in which I was working with two broker-dealer firms.

After calling the home office of both firms, I called the errors-and-omissions insurance carrier, a step I have since found out is one that many reps don't take, either out of ignorance or not wanting to face reality. By the end of the day, I had a little life in me, and I was able to go home, tell my wife, and begin thinking practically and strategically about what to do next.

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Researching the Facts of the Case

After hearing back from the broker-dealer's home office and finding out that they were going to contact the errors-and-omissions insurer, who would assign me an attorney, I sat down again with a new level of seriousness. Like a first-year law student, I rolled up my sleeves and made a thorough review of the facts of my relationship and the documentation I had to support it.

In a simple sentence, this was the story of an individual who got started investing with me in 1997, rode the stock boom to a nice portfolio increase, and had his portfolio return to its original size as a result of the tech correction. That was the essence of it.

He came to me in the fall of 1997 as a result of a referral. He was in his early 60s, anticipating retirement, and at that point in time had approximately $850,000 of investable assets. He started his relationship with me cautiously, investing approximately $220,000 in October 1997. I served as a broker, not a fiduciary or

trustee. I had no discretion on his accounts. At the time he came to see me, his portfolio was earning 5 to 6 percent. He wanted more growth and to be able to withdraw an income stream. He expressed clearly the intention to invest for a period of at least 7 to 10 years, to ride out market fluctuations.

Although we had agreed at the beginning of the relationship that his risk tolerance classified him as a growth investor, I put his initial $220,000 in investments that were more appropriately classified as "growth and income," one level more conservative, as was my practice with new clients. We met regularly and reviewed his portfolio. He was pleased with his progress and wanted to increase his investable assets with me and become more aggressive.

He incrementally opened four additional accounts over a 27-month period. After he opened the last of these accounts, his holdings consisted of three non-qualified variable annuities, one qualified brokerage account (consisting of stock and bond mutual funds), and one non-qualified brokerage account (consisting primarily of utility stocks he had owned before he met me and some exposure to mutual funds). By January 2000, he had invested a total of $857,000, which represented the majority of his portfolio.

This client saw his portfolio achieve significant growth. Along with that growth, he expressed on a number of occasions the desire to become incrementally more aggressive in his posture. At one point, he called me expressing a desire to make a specific investment in a technology growth fund. By March 2000, his portfolio was worth nearly $1.1 million.

Over the next year, his portfolio experienced a decrease in value, as the market was in a period of correction. By March 2001, his portfolio was worth $798,000. Suddenly, and without any warning, in April 2001, he informed our firm that he was closing his accounts with us. When accounting for the $64,000 income he had withdrawn, his portfolio had a net gain of $5,000 over the 42-month period.

As would come out in the hearing, this client received a level

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of service that was well beyond the required standard of care, and arguably was in the top tier of the financial services profession. There were regular meetings and extensive communication. He had signed more than a dozen prospectus receipts that identified him as a growth investor. All in all, this was the story of an individual who had been disappointed by his investment results over a 42-month period of time—less than half of the 7 to 10 years he had initially said was his time horizon—but no real cause for complaint beyond that.

Investors who have their portfolio rise and then fall tend to regard any decrease in value as a "loss." Financial analysts look at it a little differently. If you start with a portfolio of a certain asset size, and end up after a period at that same size, analysts consider that "breaking even." Arguably, there has been some opportunity cost (the time value of money), but no real net asset loss. One could understand my former client's disappointment, but he was one of hundreds of thousands, if not millions, who had experienced the late 1990s and early 2000 market roller coaster. My view was that if the NASD was going to start covering this type of loss, it would change the meaning of the word *risk* dramatically. It would mean, in effect, that errors-and-omissions insurance carriers were now underwriting individual investor risks.

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Martial Arts Training—A Place of Peace

I returned to my normal schedule, which in addition to a fairly intense pace of professional responsibilities, also included martial arts training, which I had been doing regularly for more than 20 years. What had started at age 12 as an interest and revived again at age 19 as a hobby had literally become a way of life. I started training, as many do, for increased mental and physical discipline and to learn self-defense. I became absorbed in the majesty of the training and its ability to help me shape a working philosophy of life.

The training became an essential, integrated part of my day-

to-day existence. I considered my training time as an invaluable investment in my own development. While it may sound strange to the uninitiated, martial artists sometimes spend hours in a class repeating a single technique, until exhaustion overcomes them. In the latter stages of this type of workout, the body's natural fatigue relaxes the muscles, concentrates the attention on minor adjustments of the body, improves the strength of the stances, and almost naturally leads toward the elusive moment of perfection that martial artists seek.

I love the structure of martial arts, and the etiquette—bowing with respect, learning the fine points of the different ways to bow, and the purpose and meaning of each. You finish each workout with a silent, reflective meditation. After completing every belt test or tournament, I examined every aspect of the event to see how I could have done better. I relished pressing on to the next challenge, the next technique, and the next level of skill and awareness.

After four years of training, I received my first-degree black belt certification in Shotokan karate, and I was quite humbled by the experience. While many students level off or even quit at this stage, I continued to set my sights higher. By my twentieth year of training, I had earned the rank of fourth-degree black belt, and I had competed in national and international tournaments.

The serious practice of martial arts almost inevitably transforms other parts of your life in a positive way. To the true martial artist, the concepts of honor and integrity are so deeply ingrained that it is incongruous and inconceivable to engage in intentional deceit—personal or professional. You understand at a deep, intuitive level the meaning of the quotation "When you seek perfection, the difficult becomes easy." The training becomes a natural counterbalance to the stresses of modern life—a place where you go on a regular basis to be at peace, to push yourself to higher levels, and to be a good and faithful member of your dojo, or school. It becomes a place of peace, reflection, and certainty in an increasingly complex and fast-paced world.

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The Case Begins—Talking to the Attorney

I got a call informing me that I would be represented in the NASD arbitration by Jim Weller of Nixon, Peabody LLP. I did a little research and found out that their firm is highly respected. Any good news was welcome at this point.

I called Jim to set up a meeting and told him about the research I had done. He seemed pleasantly surprised by my aggressive attitude, telling me that in many cases he had to convince the reps he represented to come in and meet with him. With all that was at stake, I couldn't imagine being so lax.

I asked him what I could do between then and our meeting to prepare. He told me that it would be helpful to him if I could organize the client relationship in chronological order and prepare a document that would help him respond to the Statement of Claim. Although I had researched the facts, I had not actually sat down to write out the narrative. It turned out that it might have been a blessing, as Jim explained to me that from this point forward all such documents would be considered as work product, and therefore would be protected under attorney-client privilege.

He also gave me a list of items he would need. I had many of them, but not all. I was all over it. We went through the allegations from the Statement of Claim and I briefly told him the facts related to each. My confidence began to rise a little bit, as I really felt I could answer every single one of them, but Jim cautioned me that there are always bumps in the road that you can't see ahead of time.

It was a relief just to be working with someone on this. I got off the phone with a clear road map of what I needed to do between then and my meeting with him. My competitive nature had begun to kick in. I was determined to do everything I could to win the case.

I was also determined not to let this distraction take away any time from my normal business activities. I was disciplined in not taking normal work time to do my NASD arbitration "home-

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work." Over the next couple of weeks, using Weller's list, I went through my case again, first from the perspective of the Statement of Claim, and then in a chronological fashion. I wrote up a summary of what had happened with this client, so Jim could see in his mind the sequence of events, backed by the documents. I organized the files so that he could follow the narrative clearly. During this time, I hit one of those bumps in the road. Although I had a lot of documents and records about this client, unfortunately there were some notes I had taken in meetings with him that I was unable to locate. I hoped it wouldn't be a big deal.

No Alternative to Victory

I was soon fully invested in the process, and it was no longer a fight over money, or even avoiding a "ding" on my record. I looked at it as a matter of personal honor and professional integrity. I was committed to myself, my family, and even my clients, to get my day in court and to prevail. I believed deeply that if it could be proven before industry experts that I did something wrong with this client, then a sacred wall had been breached in my practice and in my character, and the consequences of that were too devastating for me to contemplate. It would mean that the very foundations of my professional practice were weak.

The unthinkable result would be that my practice, and my sense of myself as a professional, would be forever wounded. It couldn't have been clearer in my mind. There simply was no alternative to victory.

The Doctrine of Overwhelming Documentation

Once I had mentally joined the battle, I threw myself into preparation with a sense of commitment and even joy. I knew I had the facts on my side, and I wanted to be sure that the arbitrators knew this as well. I used what I call the Doctrine of Overwhelm-

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ing Documentation. I made it a major mission to organize all of the information I had on this client and be able to present it at a moment's notice during the hearing. I wanted to go completely beyond the standard of "sufficient" documentation. I wanted to overwhelm. If we were going to go into battle, I wanted every bit of information, every scrap of relevant paper, every bit of electronic documentation, and I wanted it completely organized and accessible. After going through this process to a level at which I was satisfied, I traveled to New York to meet Jim Weller.

Meeting My Attorney—And Getting a Passing Grade

Somehow, I had expected to meet an older attorney, a veteran of legal wars. But, in fact, Jim Weller was probably a little younger than I. His relaxed, open manner put me at ease immediately. But beneath that relaxed, next-door neighbor demeanor was someone you would want next to you in a foxhole with mortar rounds exploding overhead. He was a legal professional with a steel-trap mind, bulldog tenacity, and a real genius for legal strategy and timing.

Although there was, strictly speaking, nothing on the line when I went in for my appointment, I had butterflies in my stomach. I felt as if Jim were actually my first judge—a trial run, but my first test. I wanted to lay out the case to him and see if he could find any flaws. I fully expected him to be a tough critic and an acute questioner.

I walked into his office with a large container full of files and charts. To the extent that I could, I had absorbed the role of imagining that I was my own attorney, and I went through my case. I had been mentally rehearsing during the whole drive down. My heart was pumping, and I launched into the narrative.

At this point, a lot of the information was very sharp and clear in my mind. I went through the Statement of Claim point by point, and showed Jim how I could refute each one. It had al-

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leged that I had taken “de facto control” over the client’s accounts. The truth was that I was acting for the first 41 of the 42 months in question as a broker, not as a fiduciary, so there was no way I could have taken control of the accounts. He claimed to have desired a “very conservative investment strategy.” The truth was that he had filled out an initial questionnaire, which was also known as an investor scorecard, and had signed disclosure forms throughout our relationship that identified him as, variously, a “growth” or “growth and income” client. I had recommended specific funds consistent with this profile, sent prospectus receipts to the client, and had signed receipts that indicated he had reviewed them. I had signed disclosure forms that clearly showed this. He claimed that I had “misrepresented the risks of investments” recommended, but those same disclosure forms clearly indicated this was not the case. I had copies of the monthly statements he had consistently received from my clearing firm.

I continued. My former client’s Statement of Claim alleged that I had purchased individual “junk bond securities” when no such securities had been purchased. He stated that I was “churning” his accounts, which meant buying and selling primarily in order to generate transaction revenue. The truth was that the large majority of his investments were in financial products that did not generate transaction revenue. What I was doing, and any rep will be familiar with this, was simply rebalancing his variable annuity subaccounts, with his permission.

The other side claimed that there was a nearly three-month delay between his request and our office’s execution of a technology fund trade that had cost him money. The truth was that this was held up because he had not returned a form that he needed to sign to allow us to make the trade.

The Statement of Claim suggested that I had instigated much of the trading without my client’s knowledge. I had regular portfolio review meetings with him, one of which included his accountant, a CPA. I had printouts of the pie charts I had shown

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my client indicating his asset allocation and Morningstar ratings on his funds, virtually all of which were highly rated.

I delivered all of this information with seriousness and intensity. I remember thinking to myself that this was how I would feel when the time came to testify. When I was finished with the presentation and the follow-up questions, I learned that I had gotten a passing grade.

Jim cautioned me that this was just a preliminary review. He needed to study all the documents I had brought him, and he was sure he would have additional questions for me. He outlined for me my next assignment, which was to take this initial preparation and go to a much greater level of detail. He suggested that I put together charts about the client's actual portfolio performance over time. He also told me that I needed to begin "thinking like a lawyer," which meant to try and look at my own case from the claimant's point of view. He wanted me to examine all of the documents with a skeptical eye and see if I could find anything that the other side could put in a negative light. He said, "I want us to have a list of the worst questions they could possibly ask you." It all made sense to me.

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"Arbitration Cases Take on a Life of Their Own"

Jim complimented me on my documentation, which he said was beyond what most reps have in cases like this. But he also warned me that arbitrations by their nature are a roll of the dice. You have almost no control over who will be judging the case. The arbitrators may have little real experience in this. You just don't know once testimony starts how it is going to work out. You don't know if you catch an arbitrator on a bad day. There is often an underlying sympathy for the accuser. Once initiated, arbitrations take on a life and character all their own. Evidence that supports your side of the case and may seem clear sitting in a comfortable office may not seem as clear to the arbitration panel. In any adversarial proceeding, there is risk of an undesirable outcome.

Jim's hopeful but sobering analysis was well taken. As I drove back from New York, I felt that I had done as well as could be expected, but I knew there was a lot more work ahead. I found out after the entire process was over that Jim was impressed by the level of my conviction about my innocence. He said that in the NASD arbitration cases he had tried while most reps at first claim complete innocence, their conviction breaks down as the facts of their case come out.

He also told me that it was at this session that he got the idea that I would testify well in a hearing, if the case got that far. One of the hidden factors in NASD arbitration is the confidence that the defendant's attorney has in his client's ability to present himself in the unique crucible of testimony and cross-examination. Some registered representatives may be very good at their profession, highly persuasive when it comes to facing clients, innocent of the wrongdoing for which they are charged, and very knowledgeable about the facts of the case. But for any of a number of reasons they may not pass the test of being a good witness on their own behalf. This ultimately will factor into an attorney's judgment in terms of settlement and whether to push for continuing a case.

I deeply believe that this is just another example of the benefits of my years of martial arts training and competition. In a belt test or in a tournament, you have to be able to bring all of your concentration, focus, and energy to bear and act fearlessly and react instinctively and effectively under combat or conditions of uncertainty. Like an actor or actress who has been on the stage, these hours of preparation, along with my rock-solid conviction, all went into helping me prepare to present myself to the NASD arbitrators.

Finding Some Holes in My Case

Jim and I communicated regularly as the process went forward. The paperwork seemed to bolster my case. I had 17 signed prospectus receipts or new account forms, most of which

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checked “growth” as an objective. There were pie charts that had been shown to the client in portfolio reviews. There had been ongoing communication with me and with the staff. He had provided us with a referral, indicating he was happy with the service he was getting.

Nevertheless, as Jim Weller had asked, I faithfully tried to go through the documents and find something wrong in my argument—to try the case against me. Jim helped in that he tried to do the same with the documents I had sent him. Between the two of us, we had identified five potential problems.

First, the initial document that had been filled out for this client was known as an investor scorecard. Reps are familiar with this type of document. It contained a series of questions in three categories: risk tolerance, investment objective, and time horizon. Each question had a multiple-choice answer. Point totals are given for answers and added up on the last page of the category. Each potential client was given a score for each of those three areas, and also an aggregate score totaling all three areas (see Table 1.1).

My former client had scored a 93. Based on the ranges given, he could have been placed into any of three asset allocation model portfolios: income with moderate growth, growth with income, or growth. I had placed him as “growth.” It was clear that the other side was going to argue that this was too aggres-

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TABLE 1.1 Investor Scorecard

Adjusted Total Range	Score	Asset Allocation Model Portfolios
39–72		Income with Capital Preservation
60–95		Income with Moderate Growth
85–115		Growth with Income
90–120	**93**	**Growth**
105–125		Aggressive Growth

sive a classification, that I should have put him into a lower risk tolerance category.

I had made this recommendation based on a variety of factors. He had been in the market for years. He had stated unequivocally that he was a long-term investor, and planned to keep this portfolio for at least 7 to 10 years. On a number of other forms, he had indicated a desired annual rate of return of 10 to 15 percent. Jim felt that this issue would be a key to the case.

Second, I had also uncovered a form known as a "financial fact-finding questionnaire," which we used at the time to review a client's personal and financial circumstances. This form was incompletely filled out. There were some handwritten notes in it that included some useful information. I explained to Jim that this particular form was to be used if you were charging a client a fee to prepare a financial plan. I did not perform that particular service for this client, thus the form was not filled out. Jim made the point that the other side would almost certainly argue that I had performed imperfect due diligence on this client, leading to a misdiagnosis of his risk tolerance.

Third, although there were numerous signed prospectus receipts indicating a desire for "growth," I had located one survey in which the client had conspicuously characterized his investment philosophy as "conservative with income—50/50." This contradicted virtually all of the other paperwork (signed prospectus receipts and new account forms), but Jim warned that he and his attorney would try and make a big point of this, underscoring their argument of unsuitability.

Fourth, unfortunately, I had been unable to locate some of my contemporaneous, handwritten notes from some of our portfolio reviews. Although I could reconstruct what we had talked about from his pie charts and the other signed paperwork from that time period, Jim told me that the notes would have been much better received by the arbitrators.

Fifth, I had dug a little further into researching the trade in which my former client had claimed he had lost value due to a

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delay in executing the trade. It turned out that he had sent in a check that arrived at our office a few days after our firm had switched broker-dealer firms. The office had apparently sent him new forms to fill out, but in the mix a couple of weeks had passed, and they were going to argue that he lost money because of it.

Setting My Goals

Jim tried to allay my concerns, explaining while each of these issues was a potential problem, overall, I had much better documentation than the typical rep. In addition, the patterns of the client relationship would enable him to argue that the client had ratified the work I had done on his behalf.

Personally, I had set my goals, and I didn't want to back off. First, I did not want to negotiate a settlement of the case, and I had told Jim that. I genuinely hoped I could prove that I had provided the appropriate level of care for this client. My thinking was that I would contest every point and fight it to the finish. I had set the standard of "no award" at the end of my case as the desired outcome.

I was also extremely conscious of "Plan B," which was a settlement or award of less than $10,000. All registered representatives know that any settlement of $10,000 or more becomes a permanent part of your U-4, the record that follows you throughout your career. This information is accessible by anyone at any time over the Internet through NASD BrokerCheck. It could someday make the difference that causes a potential client not to work with you and cause all kinds of additional professional complications. As much as I didn't want to consider the possibility of anything less than a total vindication, I was aware of this secondary, but really critical, objective.

Humility in Martial Arts

I had come to realize that this case was going to be one of the really big tests in my career to that point. So, I again was very

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grateful for the clarity I felt while training, and from what I had learned that I felt I might be able to apply to survive the test.

One of the first and most lasting lessons received by a beginning martial artist is that of humility. In attending your first martial arts class, humility is something that comes naturally to many students. Everyone in class knows more than you do, so you automatically respect them and listen to what they tell you.

Over time, humility becomes an important part of your growth as a martial artist, and it is derived from a number of sources. You have humility from respect for those more experienced and accomplished than you, respect for an opponent in a contest, respect for other students of all experience and skill levels, respect for your school, and respect for the entire system you are learning.

One of the most compelling aspects of martial arts is that as you develop technique and improve in every area, you come to realize that the more you know, the more there is to learn. As you improve, the instructor gets more demanding. Execution of technique can improve indefinitely. Just because you might perform a particular move or strike perfectly, or nearly perfectly, one time means almost nothing. It could have been a coincidence. Can you do it again and again? Can you increase the power with which you execute? Can you select and employ the proper technique at the proper moment? Can you perform at your best at a moment of truth, under maximum pressure, when your life might be in danger?

Over years of training and literally thousands of classes, in what is referred to by masters of martial arts as "the sweat of perfection," a martial artist becomes grounded in an attitude of genuine humility. Contrary to the Western approach to competitive athletics, in which so much of athletic prowess is centered around a concept of pride, it is almost universally true that the greatest practitioners of martial arts are individuals of profound humility. They walk into a room and radiate calmness, integrity, and purpose. They bow with perfect balance and reverence.

Through their demeanor and their character, they inspire others to improve themselves, as martial artists and as human beings.

The Power of the White-Belt Attitude

Early in my martial arts training, I became very committed to developing what is known as a white-belt attitude. Years ago in Korea and Japan at the founding of martial arts, there were only two belt colors—white and black. White belts were worn by beginners, and they remained at that belt level until they became black belts, a process that often took many years.

In today's "Americanized" version of martial arts, virtually every school and every system starts at white and progresses to black through a series of four or five colors, often including yellow, green, blue, and red or brown. In a mixed class that includes all belt levels, it is easy to pick out the white belts, the beginners.

I was taught as a white belt the importance of developing and always maintaining a white-belt attitude. This has also been referred to as "the beginner's mind." It means being in maximum learning mode in every class. It means asking questions of your instructors and their assistants until you really know a technique or principle. It means having tremendous enthusiasm for every aspect of the training—the warm-up; the kicks and punches; the *kata,* or forms; the self-defense techniques; and *kumite,* or sparring. I was taught that each class was an opportunity to learn and the goal was to finish the class learning as much as possible. A true white belt is a literal sponge, soaking up every bit of knowledge and insight from every moment of training. A white belt is someone committed to maximum self-development.

Applying the Humility Principle in NASD Arbitration

Humility and the white-belt attitude were absolutely critical to my ability to participate effectively in every part of the process.

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Humility helped me prepare as if the entire outcome depended on me. It kept my emotions in check during the NASD arbitration. I was able to minimize my distress at obstacles or setbacks. And I also kept the balance, not getting overconfident when it looked like I was doing well.

An attitude of humility meant that my lawyer and I arrived an hour early every day of the trial, completely organized and well dressed, ready for anything. It helped me to have the proper etiquette, which meant showing unfailing courtesy to the panel of arbitrators. It meant always disagreeing with my opponent and his attorney with complete professionalism, though at times it seemed nearly impossible to do so. It meant having an attitude that exemplified respect for the process and all of the participants. It meant going back over the case constantly, looking for ways to improve, and for new insights.

The white-belt attitude was a hidden weapon throughout the entire process. It gave me the impetus. As a self-described arbitration rookie, I wanted to learn everything I could about the process. It caused me to do extra work in preparing the documentation and the narrative. It required me to go and meet the lawyer, going eye to eye with the person who would represent me.

I insisted on personally going over every exhibit we were going to use. Normally, that is a job strictly for the lawyer and the paralegals. I made it my job. I didn't want to be susceptible to being confused at a moment of truth. I fully expected to go up against a top-gun attorney, and I didn't want to leave anything to chance.

During my preparation, without even asking Jim, I took it upon myself to invest some time researching my opponent's background through public records. As a result, I uncovered the fact that he owned $500,000 in real estate, which he had not disclosed in his filings. This revelation was significant because claimants often posture themselves as being both financially unsophisticated and, ironically, having as few assets as possible.

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This makes the actions of the representative appear to be even more damaging

The Attorney Switch

Two weeks before the hearing date, we received a bit of unexpected news. Jim informed me that the other side had switched attorneys. The law firm representing the complainant had handed the case from a junior attorney to one of the partners. When I first heard that, I was worried that the case had somehow been escalated. Jim Weller explained to me that this likely meant that the junior attorney had been assigned to try and go out and push for a settlement, hoping the case would not go to an actual hearing.

When it became apparent that we were not going to settle, the case had been kicked up to a more senior attorney. Jim said that, although this new attorney would have a higher level of legal skill, his lack of familiarity with the details of the case would set their side back. He would be going into the trial somewhat cold.

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Sweating Bullets

On Sunday night, November 2, 2003, I drove to New York and stayed over in a Manhattan hotel near where the hearing would be held. A momentous drive.

I remember with crystal clarity the meal I ate the night before—chicken fried rice and wonton soup—hoping it would bring me good luck. I slept very lightly that night, subconsciously fearing missing the alarm and backup wake-up call I had left with the front desk of the hotel. I recall carefully putting on the tie I had chosen for this momentous personal occasion. I had my shoes shined to a high gloss. Although from an external perspective I probably looked like any of hundreds of middle-aged executives walking around Wall Street, in my own mind I was dressed for battle. I was in a battle not only for my career, but for vindication of my character and the foundation of the

way I provided service to my clients. It is amazing how clear and concentrated the mind can become at a time of maximum danger. My senses and thought patterns were on high alert. My heart was palpitating, my mouth was dry, my stomach was grinding, and I was sweating bullets.

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