Fleisher's Rule Violations in Regard to Sentencing

Irrespective of Schwartz's guilty plea on June 12, 2009, Fleisher committed outrageous unethical acts in the Federal Court following and in spite of the Plea Hearing, before Sentencing on June 8, 2010.

Fleisher failed to personally attend a highly essential Pre-Sentence Investigation Hearing with the Pre Sentence Investigator in Cincinnati. It was the Investigator's job to determine sentence to aid the Federal Court Judge. Fleisher failed to attend the meeting or prepare Schwartz for the meeting. At the time, Schwartz was not aware of the high importance of that meeting. Schwartz was forced to attend the meeting without Fleisher's presence.

Federal Court Sentence was a full one year later, June 8, 2010, after the Plea Hearing, June 12, 2009. The purpose of the long time span was, in part, to allow Fleisher to request the Pre-Sentence hearing. He never followed through. Instead, finally, at the last opportunity to mitigate the plea, in a closed In-Chambers discussion with the Federal Judge, secretly, out of Schwartz's presence, Fleisher committed fatal violations of ***The Rules of Professional Conduct*, Rule 3.3 - FALSE STATEMENT A lawyer shall not knowingly make or fail to correct a false statement of fact to a tribunal.** Fleisher also violated **Rule 1.3: Diligence:-A lawyer shall act with reasonable diligence and promptness in representing a client.** He also violated **RULE 1.4: COMMUNICATION: (a) A lawyer shall...(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these rules;**

These violations are revealed in the later unsealed transcripts that will be discussed in the next section of this Grievance Claim.

Because Fleisher failed to request his promised hearing, the Court ordered Schwartz to serve 4 years in federal prison and pay a monetary order as follows (Exhibit G):

Restitution to Hadassah	**$2,292,469.00**
Payment to Internal Revenue Service	**935,217.12**
Forfeiture to United States	**2,492,469.00**
Fines	**10,000.00**
Assessment	**$200.00**
Total Monetary Order	**$5,730,355.12**

Unsealed In-Chambers Meetings - Misconduct Revealed

Fleisher's failures to act and communicate were more than lack of diligence. They were intensional, outrageous and unethical betrayals in the face of the Professional Rules.

Unsealed In-Chambers Transcripts later revealed what shockingly took place at the private Sentencing Hearings. They were meetings with the Judge that Pinales and Fleisher attended in the Judge's chambers. Schwartz could have, should have, and would have attended the meetings if Fleisher had informed him. The full Transcripts of the In-Chambers Meetings are available. Excerpts are quoted here. Schwartz was appalled to learn what the unsealed Transcripts revealed. Fleisher never thought these transcripts would be seen by Schwartz. The transcripts demonstrate that even the Judge was appalled by Fleisher's conduct in regard to his client.

In-Chambers Conference, Page 2, lines 5 through 10:

MR. PINALES: First of all, for the record, I have spoken to my client, and he knows he has the right to be here. He has specifically waived his presence, with the Court's permission.

THE COURT: All right. If you'll enter your appearance for the record.

This was a lie! Schwartz would have wanted to be present at an In-Chambers Hearings. Schwartz never would have waived his presence at this meeting. Schwartz did not even know that a meeting was taking place. Fleisher did not tell Schwartz that he had a right to be there. Fleisher, with Pinales, secretly waived that right. This was a fatal violation of **RULE 1.4: COMMUNICATION:**

> **(a) A lawyer shall...(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these rules;**

These were Pre-Sentence Hearings. Schwartz had sent many letters and documents to Fleisher to aid in his promised Pre-Sentence presentations. There was more than enough time for Fleisher to prepare for Sentencing. The first scheduled Pre-Sentencing Hearing was on April 8, 2010, just short of a year after the Plea Hearing. Fleisher was not prepared. This discussion took place when Fleisher was asking for a continuance of the Sentencing Hearing.[1]

Fleisher's frequent use of the word " absolutely" to the Court is reminiscent of Fleisher's above discussed promises at the Plea Hearing, when Schwartz requested "time outs":

> **THE COURT: I have the final [Pre-Sentence Investigation] report on my desk. It was sent to me March the 30th or 31st, and then you have your 14 days to review it.**
>
> **MR. FLEISHER: Yes, Your Honor. That's absolutely correct.**
>
> **THE COURT: And it says that there are no objections so far as the determination of the guideline range is concerned. There may be, and you've all reserved the opportunity to argue at length and present evidence at length concerning the elements of 3553, Title 18.**
>
> **MR. FLEISHER: Yes, sir. Absolutely.**
>
> **THE COURT: Right.**
>
> **MR. FLEISHER: ... Mr. Pinales and I agreed that we would withdraw' many of our objections because it was agreed that it was more appropriate to present those issues to Your Honor in the sentencing proceedings in extenuation of mitigation. So we are attempting to --**

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[1] Motion to Continue on April 8, 2010, Transcript of Proceedings pages 1047 - 1048.

THE COURT: Well, I don't see how you're in any position to argue the guideline range. You've stipulated everything I need to make that determination.

MR. FLEISHER: Yes, Your Honor.

Without Schwartz's consent, Fleisher declined a hearing that was offered by the Judge to present those mitigating issues before the sentencing. Instead, Fleisher stipulated to all of the government's allegations. He gave up Schwartz's Pre-Sentence mitigating opportunity at this first hearing.

By the time of the second scheduled Pre-Sentence Hearing, a month later, on June 10, 2010, the Judge had reviewed more of the available facts. The Judge was more emphatic. He said he wanted to hear the mitigating facts, objections and defenses. He wanted to hear evidence of any wrongdoing.

In the private, but transcribed, In-Chambers Hearing, out of Schwartz's presence, the Judge expressed his serious concern over the unsubstantiated and highly incriminating stipulations made by Fleisher against Schwartz's interest. This was the last chance where Fleisher's professinal responsibility was to diligently "correct his false statement of fact to a tribunal."

Fleisher again violated:

Rule 1.3 by failing to act with reasonable diligence,

Rule 3.3 failed to correct a false statement of fact to a tribunal, and

Rule 1.4: promptly inform the client of any decision or circumstance with respect to which the client's informed consent.

The Judge offered to hold the needed hearings that Fleisher had promised. Fleisher, however, without communicating his intent to Schwartz, forfeited this last chance to make the Pre-Sentence presentation.

Fleisher did not communicate with Schwartz, who was waiting at counsel's table in the courtroom. Schwartz presumed the favorable Pre-Sentence information that Schwartz had provided to Fleshier during the year after the Pleas Hearing was being presented to the Judge at this second Pre-Sentence discussion.

Fleisher's office staff had armed Fleisher with a lengthy Sentencing Memorandum that included objections, colorful charts, and other documents to substantiate Schwartz's position. This information confirmed that more than enough money remained in the Estate and Trust to satisfy the overstated claim by Hadassah and that the government's claims were wrong. The Sentencing Memorandum and other documents were delivered to the Court by Counsel just before the morning of the hearing. Fleisher had showed them to Schwartz and made him believe they would impress the Judge. The Memorandum correctly stated that there were more than enough assets in the Estate to pay Hadassah:

> **...While Mr. Schwartz still did not know what would be the exact Probate Court computed claim of Hadassah at the time of his plea, he acknowledged a gross readily provable loss to Hadassah to be nearly $2.5 million. The calculated amount of entitlement that Mr. Schwartz computes, given the above credits, is [$1,972,953.30 (after Probate approved deductions) - $1,256,751.37 (transfer of intended cash payment) - $210,000.00 (distributed to Hadassah before new trustees were appointed)] - $506,202.00 without estate interests. If the entire value of trust owned real estate is transferred to Hadassah, there would be an excess of about $213,798.00.**

Schwartz wrote his own letter to the Pre Sentence Investigator on March 18, 2010. The letter contained an account of Schwartz's activities, Schwartz's position, and many of Schwartz's objections. The Court had read the letter and recalled it with certainty. The letter had impressed the Court. The Court was concerned about the withdrawal of all mitigation and Schwartz's letter to the Pre-Sentence Investigator. He wanted to hear the true facts.

Without Defendant's authority, that critical information contained in the Sentencing Memorandum was later withdrawn and abandoned by Counsel. This statement in the Sentencing Memorandum, that was prepared by counsel's staff, was never considered.

Fleisher, secretly, In-Chambers, without the consent or communication with Schwartz, ignored and withdrew the entire Sentencing Memorandum containing all of that mitigating information and all of Schwartz's objections. This unscrupulous act was the highest degree of unethical professional misconduct.

Page 7, lines 5 through 9:

THE COURT: **But I understand that there are issues here that are in the background that your client has decided that his extensive rendition to me of his activities back in March are going to be withdrawn, basically.**

MR. PINALES: **Yes, Your Honor.**

The Judge had numerous questions in mind and asked if Schwartz was advised about the serious consequences from what Counsel was doing.

Page 8, lines 9 through 16:

THE COURT: **And you understand I am going to talk with Mr. Schwartz?**

MR. PINALES: **Yes, Your Honor. I think I have him prepared for that.**

THE COURT: **Well, I don't know whether you do or not. You don't know what I am going to ask him.**

MR. PINALES: **No, Your Honor. I tried to outguess you, but I've never been able to in a number of years.**

[The Court was not amused by Counsel's comments and went on to question Counsel's unusual concessions.]

Page 9, lines 6 through 12:

THE COURT: **...I have a thousand questions that I was going to ask all of you. You would have to go back to the drawing board and**

it would take another week for you to get the information that I need to make a sufficient sentence in this case. But in view of what you're telling me here today, that Mr. Schwartz is resigned, I guess, to his fate, and certainly I've read enough. I've read your stuff, believe it or not.

Fleisher obviously did not read the "stuff" or he intentionally avoided the work of reviewing, understanding and discussing it. Schwartz would have wanted to answer any questions from the Judge. Schwartz expected to, "go back to the drawing board." Probably, after hearing from Schwartz or having been permitted to review the information that Fleisher had filed, the Court would have insisted that the plea be revised to "not guilty."

The learned Court was concerned that there was an obvious lack of evidence of any stealing by Schwartz. The Judge expressed, at the second In-Chambers conference, that in spite of Fleisher's stipulations the facts there was no evidence to support the amount of the government's claimed losses:

2nd In-Chambers Conference, Pg 3, lines 23 through Pg 4, line 11:

MS. BARRY : Yes, we ask for $2.492 million.

THE COURT: All right. And I'm asking why?

MS. BARRY: Because that was the amount that -- that he stole and that is the notice that we gave in the forfeiture notice to the Information.

THE COURT: All right. And where does that appear in the Plea Agreement?

MS. BARRY: I don't know if it actually appears in the Plea Agreement. When Mr. Pinales said that, I am not sure if it is actually directly addressed ....

The Judge had read the Pre Sentence Report and the Sentencing Memorandum which showed that the government's allegations in this meeting were factually unsupported. The Judge knew there was no Plea or allegation that Schwartz stole any money. Those statements by the U. S. Attorney, were contrary to the Court's Pre Sentence Report and contrary to the Plea. Fleisher waived Schwartz's attendance in the meeting and failed to object so the Judge, with expressed discomfort, accepted the government's claims.

Unsealed In-Chambers 2nd Transcript, Pg 14, line 4 to Pg 15, line 5:

> **MS. BARRY: Okay. He agreed that he stole $2.4 million.**
>
> **THE COURT: Let's see. Where is -- does he say -- where does he say I stole that?**
>
> **MS. BARRY: Well, Your Honor, he would have had to--**
>
> **THE COURT: Well, what does it say?**
>
> **MS. BARRY: Okay. Okay. Specifically, Defendant Schwartz made material misrepresentations and omissions to both the IRS and Hadassah with the intent to defraud Hadassah of approximately $2,502,469.**

Fleisher's promisses to "absolutely" correct the false statements made at the Plea Hearing, when Schwartz asked for "time outs," were fatally broken at these In-Chambers meetings, in unethical betrayal of his client:

Page 8, lines 16 through 19:

> **MR. FLEISHER: Your Honor, I don't think there's any question that we've agreed to the restitution. That's beyond dispute at this point.**
>
> **THE COURT: Right.**

The Judge said he would have conducted a hearing on that critical issue if Fleisher had objected:

> **THE COURT: I haven't had the opportunity to have an evidentiary hearing on the preliminary order, which I would have had if necessary, if somebody objected to the amount.[2]**

The Judge repeated his concern that there was no evidence of wrongdoing. The wisdom of the District Court Judge was apparent. The Judge pointed out in the unsealed In-Chambers meetings that Fleisher had not requested a preliminary hearing for a monetary order and that there was never evidence as to Schwartz's guilt, in spite of the plea:

Second In-Chambers Pre-Sentence Hearing, page 14, line 19 through page 15, line 10:

> **THE COURT: ...But also the presentence report says that there is no -- that they could not determine that he did anything wrong with the 501 amount, and that's Paragraph, I think, 29 of the presentence report.**
>
> ***
>
> **THE COURT: And I'm asking for evidence on the amount. I'm asking for the evidence of that amount.**

The Judge was aware that there had been no evidentiary hearing or litigation on the amount of money that was claimed as a loss by the US Attorney. But, the Judge also noted that there was never any objection or hearing request by Fleisher. Fleisher withdrew all of Schwartz's objections.

Pinales and Fleisher continued to misrepresent to the Court that Schwartz had been prepared for what was taking place In-Chambers and what Schwartz was to expect in the Sentencing Hearing that followed.

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[2] Second Unsealed In-Chambers Transcript, Pg 20, lines 15 - 23.

First In-Chambers conference, Page 7, lines 20 through 25:

> **MS. BARRY: No, I think we've agreed to the loss amount on the mail fraud.**
>
> **MR. PINALES: Correct.**
>
> **MS. BARRY: We've agreed to the loss amount on the tax loss.**

The Judge said he had reviewed the graphics and was interested in them. Instead of presenting the corrected facts as ethically required, Fleisher stipulated to all of the government's allegations without Schwartz's consent.

The Judge fairly repeated his offer of an extended sentencing hearing. Instead, the transcript revealed that counsel only inappropriately chatted informally with the Court and government attorney in an attempt to side track and appease the Judge to gain personal favor instead of pursuing Schwartz's rights.

The very concerned Judge asked the second time if Fleisher was certain about withdrawing such seriously critical issues from his consideration. Fleisher, unethically, continued to reassure the Judge that Schwartz fully understood and agreed to withdraw all objections.

Counsel stated that he personally wanted to **"take the shortest, easiest road"** to conclude the sentencing. Fleisher, in collusion with Pinales, encouraged the Court to impose an excessive prison term and pay excessive monetary orders.

Counsel told the Judge, on the record, that they had other commitments on their calenders that day. For counsel's personal convenience and benefit they secretly accepted the government's unsubstantiated claims, as a shortcut to sentencing. This too-busy-to-have-a-hearing admission by counsel was a violation of **Rule 1.7: CONFLICT OF INTEREST, because of counsel's inability to carry out an appropriate course of action for a client, due to his own personal conflicting interests.**

The Judge was willing to review the mitigating information, but Fleisher insisted on withdrawing all objections and exhibits. Here are the appalling statements of Fleisher and Pinales that took place in Schwartz's absence at the first In-Chambers conference:

Page 10, lines 19 through Page 11, line 15:

> **MR. PINALES: We are going to withdraw those.**
>
> **THE COURT: Yon don't need to.**
>
> **MR. PINALES: I understand. I understand, but we're trying to get to a certain goal, and I want to take the shortest, easiest road to get there.**
>
> **THE COURT: God bless America.**

It is obvious from the Court's exclamation, " **God bless America**" that he was astonished. Fleisher was sacrificing Schwartz's right to express facts that the Court knew could directly affect sentence, in favor of what Schwartz's own attorneys called "**the shortest, easiest road to get there**."

The Judge stated that he had read what Fleisher was withdrawing and was considering putting Schwartz on probation:

First In-Chambers conference, Page 5, lines 2 through 4:

> THE COURT: ... You don't have to go through all of this. And I'm -- **frankly, I may put him on probation.**

Fleisher had told Schwartz that probation was an available option of the Court. The unfounded implications by the government were false and perhaps, on hearing would permit a probationary sentence.

Federal Sentencing Guidelines are based on "proven" loss amounts. The critically false loss figures, which Fleisher was supposed to contest, dictated the sentence. Instead, the Federal Court, without the promised hearing and objections, sentenced Schwartz based on the government's claimed amounts of loss using the Federal Sentencing Guidelines.

The procedure and result would have been entirely different had Fleisher permitted Schwartz to be present In-Chambers or had properly communicated with Schwartz as ethically required by ***The Rules of Professional Conduct*, RULE 1.4: COMMUNICATION: A lawyer shall ... promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these rules....**; and if Fleisher had not violated **Rule 1.3 by FAILING TO ACT WITH REASONABLE DILIGENCE.**

Hadassah was fully paid from the Estate. The eventual claim of the IRS was proven later to be substantially less. Because Fleisher never challenged the claims prior to sentence, the Federal Court sentenced Schwartz to a 4 year prison term and a total monetary order of about $6 million.

The result of Fleisher's continued unethical misconduct was devastating. Schwartz's losses included loss by garnishments in excess of $1.3 million, personal liens, orders in excess of $6 million, loss of license to practice law, and an order of 4 years in prison, followed by three years probation.

How could Pinales and Fleisher in good conscience tell the Judge that Schwartz was "resigned to his fate." Unethical failure of Fleisher to abide by the ***The Rules of Professional Conduct*** was at its most damaging level. Had there been a hearing to present the truth, the sentence would have been substantially reduced or eliminated.

There is further substantiation of Fleisher' lack of diligence stated in an opinion of the Federal Appellate Court. By Court appointed counsel, Schwartz appealed to the 6th Circuit Federal Court of Appeals relative to the improper monetary sentence requiring the additional forfeiture of assets. The Appellate Court cited Counsel's failure to timely object in regard to that order. (Opinion filed November 1,2012 (*United States of America v. Robert L. Schwartz*; 2012 U.S. App. Lexis 22648):

> "To be clear, this Court does not condone the failure to seek or enter a preliminary order of forfeiture.... **Schwartz had an opportunity to object ...** and the district court's error was harmless."

The Appellate Court excused the Judge and stated that because Counsel had an **opportunity** to request a hearing, but did not request that hearing, an error by the Court was "harmless." The Court was not in error due to counsel's failure to timely object.

Also to be considered is an Affidavit by former US Assistant Attorney, Michael Carey, stating **"...defense counsel failed to meet the standard of competence and care required of criminal defense counsel in the federal system, particularly as it related to the issues of guilt, amount of loss, restitution and forfeiture." (EXHIBIT H)**

Another letter by Attorney Katherine MacPherson, who conducted the appeal on the question of failure of Fleisher to request a Forfeiture Hearing, states, **"In my professional opinion, your former attorneys' failure to understand the concept of forefiture in a criminal proceeding in general, and the defenses available to you both as to the case as a whole and is to the forfeiture component, resulted in, among other things, the imposition of a $2.4 million forfeiture money judgment against you." (EXHIBIT I)** .

In Fleisher's own handwriting, he endeavored to calculate the entire monetary claim against Schwartz. He specifically omitted the "Asset Forfeiture" amount, believing it to be a duplication (**Exhibit J**). Compare it to the actual Order on Page 12 of this presentation. This confirms, as Ms. MacPherson stated, that Schwartz's former attorneys failed " to understand the concept of forfeiture in a criminal proceeding."

Fleisher violated **RULE 1.1: COMPETENCE** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

These many matters, together, show the most egregious unprofessional misconduct in repeated violation of **Rule 1.3: DILIGENCE: A lawyer shall act with reasonable diligence and promptness in representing a client:**

Again, this is not a matter of review of the criminal case's merits. It is not about any claims of Schwartz's innocence. Fleisher unethically abandoned his client without notice leaving the Federal Judge limited in what he could do based on Fleisher's lack of diligence to make any presentation in Schwartz's defense or mitigation whatsoever. This is not to repeat any civil claim of counsel's malpractice. This is a Grievance having to do with violations while Fleisher was to be engaged in the criminal proceedings and the numerous civil legal concerns. In addition to the above Federal violations, there were many other acts of unethical misconduct. Here follows a Summarized statement of the above violations which includes Additional Unethical Misconduct: