

Federal Court - Summarized and Additional Unethical Misconduct

1. Throughout Schwartz's case, Fleisher repeatedly assured Schwartz that because of the prearranged "Plea Bargain," Schwartz must admit to all of the unsupported facts claimed by the government, but that those erroneous facts would "absolutely" be corrected prior to sentence. He did not do so.
2. Schwartz needed an evidentiary hearing to contest the "readily provable loss" of \$2,492,000.00 claimed by Hadassah, and the \$935,217.12 claimed by IRS. Both figures suggested by the government would have been shown to be absolutely wrong.
3. Fleisher failed to inform the Court of his having written the letters that the government regarded as a scheme of Mail Fraud, but let Schwartz take the full responsibility. He had the ethical responsibility to admit his personal involvement and withdraw as counsel out of that personal conflict of interest.
4. At the In-Chambers Conferences, prior to the Plea Hearing, Fleisher:
 - a. failed to allow Schwartz to attend the Conference,
 - b. failed to notify Schwartz that the Conference was taking place, and
 - c. with his co-counsel, Pinales, wrongly stated to the Federal Judge that Schwartz had waived his right to attend the In-Chambers Conference.
 - d. Fleisher, without Schwartz's knowledge or consent, withdrew all objections and waived all rights to a hearing on sentencing.
 - e. Fleisher, without the knowledge, consent or authority of Schwartz, withdrew from the court's consideration a letter written by Schwartz to the Pre Sentencing Investigator in March 2010, which the Judge stated was favorable to Schwartz.

- f. Fleisher, without the knowledge, consent or authority of Schwartz, withdrew Schwartz's objections to the government's claim that there was a loss to either Hadassah or the IRS. The government claims of those losses were never litigated or determined by a separate hearing.
- g. In spite of the Court's insistence to hear evidence, Fleisher, without the knowledge, consent or authority of Schwartz, failed to present promised mitigation and objections to the Court, at the Sentencing Hearing.
- h. Fleisher could have shown that there was no theft, that there were material monetary discrepancies and present facts favorable to Schwartz. Instead Fleisher withdrew all objections, agreed with the government to accept the never prior alleged new claim of theft, and take "**the shortest, easiest road**" to sentence.
- i. Fleisher failed to demonstrate Schwartz's obvious transparency in his actions. The fact that Schwartz had hired another "expert" office to guide his actions and monitor his work was, in itself, evidence that his dealings with the trust were intended to be proper and without criminal intent.
- j. Fleisher, without the knowledge, consent or authority of Schwartz, failed to review, present, and discuss favorable material in the Sentencing Memorandum, Charts, Diagrams, and other information, that his staff had prepared for him and filed only one day before the hearing. The Judge saw and read those items, but over the Judge's encouragement to present and discuss them, Fleisher withdrew them from consideration.
- k. The Sentencing Memorandum and other documents were only delivered to the Court by Counsel just before the morning of the hearing. The Memorandum did correctly state that there were more than enough assets in the Estate to pay Hadassah.
- l. Without Schwartz's authority, that critical information contained in the Sentencing Memorandum was withdrawn and abandoned by Fleisher.

- m. The following was a summarizing statement in the Sentencing Memorandum, but never presented:

“If the entire value of trust owned real estate is transferred to Hadassah, there would be an excess of about \$213,798.00.”

- n. Fleisher then, without the knowledge, consent or authority of Schwartz, also withdrew this point presented in his own Sentencing Memorandum
- o. Fleisher then, without the knowledge, consent or authority of Schwartz, also withdrew, Schwartz's own letter to the Pre Sentence Investigator.
- p. Fleisher failed to communicate to Schwartz the sentencing considerations which include minimum and maximum sentence exposure used as “Sentencing Guidelines” which is based on the amount of proven loss.
5. Fleisher failed to advise Schwartz or to refer him to an expert for advice as to Schwartz's contentions:
- a. that there was no time limit wherein Hadassah was to be paid and
- b. that it was impossible to pay the very large lump sum to Hadassah until the audit by IRS was complete on the estate tax return and Probate Court issued a distribution order.
6. Fleisher failed to permit Schwartz to attend a hearing with the US Attorney in order to aid in the drafting of a Plea Agreement. Instead he drafted the Plea Agreement with Schwartz's apparent authority, but without Schwartz's knowledge, contriion, or consent.

7. Fleisher, without the knowledge, consent or authority of Schwartz, entered a "C Agreement," which was an uncontested and unappealable full acceptance of responsibility as alleged by the government. Fleisher failed to explain to Schwartz the meaning of a "C Agreement" (Fed. R. Crim. P. 11(c)(1)(c)). Fleisher should have explained the rights that Schwartz was forfeiting and the consequences.
8. Fleisher had agreed with Schwartz to assert and argue the correct information, including the fact that there was to be no loss to Hadassah. Hadassah would not even be a victim. Fleisher failed to assert or argue these points.
9. Fleisher failed to attend the important meeting with the Pre Sentencing Investigator for the Pre Sentence Report to the Court. Fleisher failed to respond within the 35-day response time limit to the final Pre Sentence Report.
10. Fleisher failed to respect, investigate, advise, and respond to Schwartz's rights and requests for post-conviction relief.
11. Fleisher failed to file pretrial motions.
12. Fleisher failed to request an "Alford Plea," (N.C. v. Alford, 400 U.S. 25 (1972)), which prevents statements made by Schwartz for a Plea Agreement to be used against him in any other proceeding. Fleisher's lack of diligence missed this opportunity.
13. Fleisher failed to explain to Schwartz the Sentencing Guidelines and point system.
14. Fleisher failed to object to the government's recommendation of Sentencing Guidelines, but instead he accepted the government's point count for the Sentencing Guideline.
15. Fleisher failed to explain to Schwartz that the sentence could have been corrected at Fleisher's request up to 14 days after the sentencing. (Fed. R. Crim. P. 35(a)): Correcting Clear Error. The court may correct a sentence that resulted from arithmetical, technical, or other clear error. Fleisher, with lack of diligence, missed the opportunity for an earlier correction, and missed the deadline of 14 days after the sentence took place.

16. Fleisher failed to explain to Schwartz that Rule 35(b) of the Federal Rules of Criminal Procedure provides that a federal court may, within 120 days of sentence correct a sentence imposed in an illegal manner, or reduce the sentence, or place the prisoner on probation. Fleisher's lack of diligence missed this opportunity.
17. Fleisher failed to advise Schwartz that before sentence is imposed, the Court would allow Schwartz to voice an oral statement on the matters relating to an appropriate sentence. Instead, he instructed Schwartz to "apologize to the victim" for a loss that did not occur.
18. Fleisher failed, at critical stages, to review, discuss and present the facts that demonstrated Schwartz's credibility and transparency that would aid in defending the criminal charges. These facts included Schwartz's forty years of civil law practice, his civic and charitable intents and efforts, his long relationship caring for Beverly Hersh, his unique knowledge of the personal desires and personality of Beverly Hersh, his care to fully disclosure throughout his trusteeship, and his decision to have the trust written by other counsel, to provide full, complete, and open administration.
19. Fleisher failed to involve and press responsibility of the office Schwartz hired to administer the trust and share any blame with a claim of "advice of counsel." He later claimed that his failure to join that law firm was because of the undisclosed conflict he had "never sue a law office" because the law practice of Fleisher's firm always defended lawyers.

This Grievance sub-section primarily deals with Violations of the Code of Professional Responsibility and Disciplinary Rules committed by Fleisher relating to the Federal Criminal Matter. It is not intended to review the merits of a malpractice claim or the claim of innocence of Schwartz. It does, however, show the serious implications and consequences of Fleisher's unethical acts.

Other acts of unethical misconduct not related to criminal representation follow: