November 4, 2003

State of Michigan
Attorney Grievance Commission
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This is a request for reconsideration of your decision to take no further action on my complaint against attorney Douglas W. Sprinkle (File No. 2401/03). I was notified of your decision in a letter from Associate Counsel Ruthann Stevens dated October 20 of this year (Attachment A).

I have subsequently received a letter from Assistant Deputy Administrator Cynthia C. Bullington (Attachment B), dated October 30 of this year, which begins with the startling observation, "You have sought reconsideration of the dismissal of the file in your correspondence." I characterize this statement as "startling" because (until now) I have never sought any such reconsideration. The only communication from me to the Commission subsequent to your decision to dismiss was a letter I sent to Ms. Stevens on October 27 of this year in which I asked for clarification of your decision and information about how it could be appealed (Attachment C).

Ms. Bullington noted, "Your present correspondence does not add any new evidence which would cause this office to change its initial determination." In that she was correct, I did not submit any new evidence. The reason that I did not submit any new evidence was, of course, because I had not asked for reconsideration. However, this **is** a request for reconsideration, and I have enclosed new evidence that I would like you to consider.

In Ms. Stevens' letter, she noted, "Our office feels that the attorney has answered your allegations adequately." Obviously, you reached this decision based on Mr. Sprinkle's response to my complaint. However, you were not aware that Mr. Sprinkle's response was filled with half-truths and misleading information. In this request, I am providing evidence of Mr. Sprinkle's attempts to deceive you. I believe that, once you review the new information that I am providing, you will no longer characterize Mr. Sprinkle's answer as "adequate."

Request for Reconsideration of Dismissal of Complaint Against Attorney Douglas W. Sprinkle (File No. 2401/03)

In the letter in which I was informed that your office would take no further action on my complaint, Associate Counsel Ruthann Stevens pointed out that, "As counsel for his client, Mr. Sprinkle is obligated to protect and serve the best interests of his client." Since I assume that Ms. Stevens did not mean to imply that Mr. Sprinkle's obligations would have required him to lie to a judge in Federal Appeals Court, I also have to assume that the Commission was an unwitting victim of the inaccurate, misleading, and cynical document that Mr. Sprinkle submitted to the Commission in response to my complaint.

As I said in my complaint, "The action about which I am primarily complaining is that Mr. Sprinkle knowingly made false statements of material facts in a hearing before the United States Court of Appeals for the Sixth Circuit." Accordingly, although Mr. Sprinkle has also tried to mislead you in his responses to the other charges as well, I'll confine my remarks here to ***Rule 3.3 Candor Toward the Tribunal***. Specifically, Mr. Sprinkle violated the first provision of that rule:

> *"(a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal;*

As part of his effort to prove to you that he had had not knowingly made false statements in federal court, he compounded the offence by making false statements to you as well. Unfortunately, you had no way of knowing that he was misrepresenting the truth, so you accepted his misleading explanations and decided not to pursue the charges. In this document I will show you how he manipulated you into reaching that decision.

There are three elements of a statement that would bring an attorney into violation of the section of Rule 3.3 that I quoted above:

1. The statement must be false.
2. The statement must concern a material fact.
3. The attorney must know that the statement is false.

Despite Mr. Sprinkle's misrepresentations, his statements in federal court met all three of those conditions.

"…make a false statement…"

In Mr. Sprinkle's response, he admitted more than once that his statement was false, so I won't devote any more space to that element.

"…of material fact…"

Mr. Sprinkle claims that the issue of the $1,000 offer was not material to the hearing. Specifically, he says, "The timing of the negotiations between the Complainant and The Taubman Company had absolutely nothing to do with any issue before the Sixth Circuit Court of Appeals." He adds that the issue was "disregarded by the Court," but then notes, contradictorily, that he "was somewhat taken off-guard by the Court of Appeals' questions in that regard." (Which is it? Did the Court disregard the issue? Or did they ask questions about it that caught Mr. Sprinkle off-guard?)

In regard to the materiality of the issue of the $1,000 offer, let me submit this appraisal of the case on appeal:

> "…it's about a cybersquatter, it's about a trademark infringer, and a fellow who saw that a new mall was going up, he immediately registered our name as a domain name in order to extract $1,000 from us. **That's what this case is all about**" (emphasis added).

According to this view of the case, the issue of the $1,000 offer is not only material, it's a key issue in the case. The statement is direct, to the point, unambiguous, and forceful.

The statement was made, by the way, by attorney Douglas W. Sprinkle in his appearance before the United States Court of Appeals, the appearance that is the subject of this complaint. Mr. Sprinkle offered his evaluation of the importance of the issue voluntarily – the subject had not been raised by my attorney in his argument which preceded Mr. Sprinkle's presentation, and it had not been raised by the judges in any of their questions of Mr. Sprinkle prior to that time. Mr. Sprinkle raised the issue and stressed its importance – and he now claims that the issue was immaterial and that he was surprised that the judges asked questions about it.

Later during his presentation, Mr. Sprinkle tried to show that my website was a "commercial use" of his client's trademark. Although I'm not a lawyer, my understanding is that establishing commercial use is a key element in proving trademark infringement – which is another way of saying that the issue of "commercial use" was a material issue at the hearing. (I assume that Mr. Sprinkle agrees with that statement, since he's the one who raised the issue at the hearing, and why would he have brought it up if it were not material?) He proceeded to list the aspects of my use of his client's trademark that he felt were commercial, including, "…one of the purposes was to sell the website to us for a thousand dollars…. That's commercial use." Again, nobody asked Mr. Sprinkle to list the commercial uses of my website, no judges asked him any questions that caught him off-guard, he simply decided to inject this "non-material" issue into the hearing.

(By the way, I suspect that the reason that Mr. Sprinkle felt that he could make such misleading statements in his response to you was because I had not attached the transcript of the hearing to my complaint. I did refer you to the transcript as it appears on my website, thus attaching it "by reference" – but my suspicion is that Mr. Sprinkle correctly

assumed that you would not have the time to track down documents that I had not explicitly attached, allowing him the liberty to misrepresent that hearing in any way that he chose to do. To make it more difficult for Mr. Sprinkle to continue to abuse your trust and to persist in misleading you, I have included a transcript of Mr. Sprinkle's presentation at the hearing [Attachment 1]. You will note that my quotations from it are accurate. You will also notice that more than a few of Mr. Sprinkle's characterizations of it are not.)

And it was not just Mr. Sprinkle (according to his own words) who felt that the issue of the $1,000 was material. Judging from their questions, about a dozen of which related to the issue, the judges felt that it was material as well. And not just the issue of the $1,000 in general – several of the judges' questions specifically concerned the timing of the $1,000 offer, the very issue that was the subject of Mr. Sprinkle's false statements.

As to Mr. Sprinkle's claim that the subject was "disregarded by the Court," it appears that he is not familiar with the Court's decision in the case (Attachment 2). If he were, he would have read Section III.B., entitled "Propriety of the Injunctions," and more specifically Subsection 1 of that Section, entitled "Likelihood of Success on the Merits." (I'm not an attorney, but I suspect that even Mr. Sprinkle would concede that the propriety of an injunction and the likelihood of success on its merits were material issues at the appeals hearing.) In Part (a) of that Subsection (which reached the critically important conclusion that my use of the domain name "is not 'in connection with the sale of goods'"), the Court noted:

> "…not only has Mishkoff not made a practice of registering and selling domain names, but he did not even initiate the bargaining process here. **Although Taubman's counsel intimated at oral argument that Mishkoff had in fact initiated the negotiation process, correspondence in the record supports the opposite conclusion**…" (emphasis added).

So although Mr. Sprinkle would have you believe that the subject of the timing of the $1,000 was "disregarded by the Court," the plain fact is that it was not only **regarded** by the Court, his explanation of it was explicitly **contradicted** by the Court. And their correct interpretation of the very facts that Mr. Sprinkle now claims were immaterial became a key element of their decision.

"A lawyer shall not knowingly…"

Finally, we have the issue of whether Mr. Sprinkle's admitted false statements were intentional. He says that they were not – but obviously, anyone in Mr. Sprinkle's position would make the same claim. If denial of intent alone was sufficient to cause the dismissal of a complaint, nobody could ever be held to have made an intentional false statement, and there would be no reason to have that provision in your Code of Ethics.

I can't prove to you that Mr. Sprinkle's misstatements were intentional by providing a snapshot of his state of mind. But I can provide you with evidence that strongly suggests that he knew that his statements were false at the time that he made them, including evidence provided by Mr. Sprinkle in his own words. I can show you that he misled you in his protestations that his was an honest mistake. And I can demonstrate that, despite an otherwise comprehensive rebuttal of my charges, Mr. Sprinkle studiously ignored the evidence in my complaint that pointed to the deliberate intent of his misstatements.

Mr. Sprinkle would have you believe that his false statements were accidental, born not of an intention to deceive but of a faulty memory about an insignificant incident in a lengthy and complex case. His memory problem, he would have you believe, was heightened by anxiety caused by a sense that the hearing was not going well for him.

Specifically, in his own defense, Mr. Sprinkle states:

> "… the Complainant is correct that that statement was inaccurate. At that time, however, it was my belief that the Complainant had contacted the Taubman Company prior to the letter when negotiating his $1,000 payment for the domain name. In subsequent discussions with my partner, Julie Greenberg, who was intimately involved with this case, I later discovered that that was not the case."

Subsequently he adds that he "was only in error with respect to the timing of that negotiation."

In making these denials, Mr. Sprinkle has completely mischaracterized his statements at the hearing. He implies that he inadvertently made an incorrect statement about a communication between me and his firm, and that he realized that his statement was in error when he had a chance to verify the exact nature of events with a partner who was more familiar with the details of the case. He would have you believe that his statements were substantially correct, that he was only confused about the timing of a particular series of events.

However, Mr. Sprinkle's characterization of these circumstances is false.

In the first place, Mr. Sprinkle's inaccurate statements in Court were not related to a communication between me and his "firm" (in general) – they were related to a purported conversation to which both he and I (specifically) were parties.

> [Judge Boggs] And then you offered the thousand dollars, right? I mean, so the thousand dollars only came up as your offer as -
>
> [Mr. Sprinkle] There were telephone discussions, Your Honor.
>
> [Judge Boggs] Okay.

[Mr. Sprinkle] There were telephone discussions between me and my partner, Julie Greenberg, and Mr. Mishkoff.

[Judge Boggs] Prior to that letter?

[Mr. Sprinkle] Yes.

Please note that, contrary to the impression he tried to give you in his response to my complaint, Mr. Sprinkle did not characterize the communication as one between me and someone else in his firm, someone with whom he would later have to verify the nature of the communication. Rather, he stated unequivocally, and without prompting, that he and I were involved in telephone "discussions" (note the plural) about the $1,000 offer.

The problem with Mr. Sprinkle's assertion is that no such discussion ever took place.

Note that I'm not suggesting that the discussions described by Mr. Sprinkle took place in a *manner* different from that described by Mr. Sprinkle. And I'm definitely not suggesting that those discussions took place in a *time sequence* other than that suggested by Mr. Sprinkle.

What I'm telling you is that the discussions described by Mr. Sprinkle in the United States District Court of Appeals never happened at all, not in any manner, not at any time. Faced with a hearing that, as he admits, was not going well for him, Mr. Sprinkle chose to manufacture discussions out of thin air.

How can I be certain that Mr. Sprinkle and I did not discuss the $1,000 offer?

I can be certain of that fact because **I have never engaged in a substantive discussion of any kind with Mr. Sprinkle about any issue in the case.** In fact, the only times Mr. Sprinkle and I have ever spoken were the two or three times I called to get his concurrence on motions that I was filing, which, in every case, he immediately refused. It is not even remotely possible that Mr. Sprinkle could have mis-remembered one of these brief conversations to the point where he actually believed that he and I had engaged in settlement discussions.

Despite Mr. Sprinkle's repeated contention that his error was merely one of timing, that is most emphatically not the case. Mr. Sprinkle could not have confused the discussion in question with another of our discussions because we engaged in no substantive discussions whatsoever. He could not possibly have been confused about the timing of our discussions because those discussions never took place – not only did they not take place in the sequence he suggested, they did not take place at all.

And even Mr. Sprinkle's contention that he was unfamiliar with the exact details of the case are contradicted by his own words at the hearing. Toward the close of his presentation, when Mr. Sprinkle repeated his contention that I had tried to sell my website to his client for $1,000, he and Judge Boggs engaged in the following exchange:

> [Judge Boggs] But that's not in the record. I mean, if we're going to make it sort of as an affirmative –
>
> [Mr. Sprinkle] Yeah, it is in the record. Sure it is.
>
> [Judge Boggs] I'm sorry. You mean his correspondence making the proposal to you rather than vice-versa?
>
> [Mr. Sprinkle] In the judge's decision, Judge Zatkoff said there were negotiations to sell for a thousand dollars. Now whether there was a finding of fact it was his intent when taking out the site to do it, you're right, there is no finding of fact.
>
> [Judge Boggs] Nor that it was at his initiation - that is, the thousand dollar figure.
>
> [Mr. Sprinkle] No, there's nothing in the record to show it.

So despite Mr. Sprinkle's claim that his false statements were merely a timing error, and that he was unaware of his misstatements until he verified the true nature of events with a colleague, we see here that he was, in fact, familiar enough with the record of the case to unhesitatingly confirm to Judge Boggs that the discussions he described, and the timing thereof, could not be confirmed by the record.

This is a curious situation that raises some interesting questions.

Despite his contention that he was caught off-guard and was confused about the exact sequence of events, Mr. Sprinkle was able to confirm to Judge Boggs, without hesitation, that the record would not confirm the version of events that he had just related. He had told the judge that he had personally engaged in settlement discussions with me, and that those discussions had taken place prior to the infamous $1,000 offer – but yet he unhesitatingly told Judge Boggs that the events he had described could not be confirmed by referring to the extensive record of the case.

But… If Mr. Sprinkle and I had engaged in settlement discussions, and if those discussions had occurred prior to their $1,000 offer, why on earth would those discussions not have appeared in the record? If I had attempted to sell the domain name prior to his offer, I would obviously have been a cybersquatter, and the case would have been a "slam dunk" for Mr. Sprinkle and his client. And yet he would have you believe that even though he "knew" that those discussions had taken place, he also knew that he had somehow neglected to ensure that those critically important discussions had been included in the record of the case!

Mr. Sprinkle knew that the record would not substantiate his version of events because he knew that his version of events was fictitious. There was nothing accidental about his statements, they were not the result of confusion, they were calculated and deliberate – they were, in fact, the very kinds of ethical lapses proscribed in Rule 3.3. If Mr.

Sprinkle's false statements do not violate Rule 3.3, I cannot imagine statements that would.

If Mr. Sprinkle persists in maintaining that his misstatements were accidental, that he discovered only after the hearing that his statements were false, then he will also have to explain why he refused to correct himself when his misstatements were subsequently brought to his attention. As I mentioned in my "Request for Investigation," my lawyer wrote to Mr. Sprinkle after the hearing and asked him to contact the Court to set the record straight (Attachment 3). Mr. Sprinkle responded to that letter but ignored the request to contact the Court (Attachment 4). My lawyer then explicitly asked Mr. Sprinkle to retract his statements (Attachment 5), but I do not believe that Mr. Sprinkle even bothered to respond to that request.

Mr. Sprinkle now admits that he realized subsequent to the hearing that he had made false statements in Court. Unfortunately, his first admission of his "error" was to this Commission, in response to my complaint. As far as I know, he still has not conveyed to the judges of the Sixth Circuit Court of Appeals the fact that he made false statements in their Court – and certainly, he did not bother to communicate this fact to them while they were deliberating their decision.

Mr. Sprinkle now claims that his misstatement of fact is "regretted." Unfortunately, it appears that Mr. Sprinkle began to regret his misstatements only after I filed my complaint with the Commission. Certainly, he did not regret them enough to convey those regrets to the Sixth Circuit Court of Appeals.

In Conclusion

Mr. Sprinkle admits that he made false statements in court. However, he claims that the false statements did not concern a material fact and that, at any rate, they were accidental. I believe that I have provided compelling and convincing evidence to the contrary.

I also believe that Mr. Sprinkle assumed that there would be no negative repercussions to his actions, that he was free to make deliberate false statements in federal court with impunity. I am counting on the Commission to show Mr. Sprinkle that, once again, he was mistaken.

Note #1: The Transcript

As I indicated earlier, I have enclosed a transcript of Mr. Sprinkle's presentation at the appeals hearing (Attachment 1). I paid a professional transcriptionist to create the transcript from an audiotape provided by the court. Since the transcript is not "official," it is possible (but unlikely) that Mr. Sprinkle will claim that it is inaccurate. However, I believe that anyone who compares the transcription to the audiotape will agree that it is accurate. In any case, in the unlikely event that Mr. Sprinkle challenges the accuracy of

the transcript, I would be happy to provide a copy of the audiotape so that the Commission can verify its accuracy (or I assume that the Commission can obtain a more "official" copy of the audiotape directly from the court).

Note #2: A Confidence Betrayed

In his response to the Commission, Mr. Sprinkle revealed information to you that his firm had previously agreed to keep confidential. And to compound the infraction, he blatantly misrepresented that information.

On January 28, 2002, my attorney Paul Levy contacted Mr. Sprinkle's partner Allen Krass with some suggestions about how we might begin to discuss a possible settlement of the case. Among Mr. Levy's suggestions was that, not only would the discussions not be used as evidence or in discovery proceedings, "neither party would discuss these conversations publicly…" (Attachment 6). On the same day, Mr. Krass agreed to the suggestions proposed by Mr. Levy (Attachment 7).

As a party to that agreement, I have never spoken of or written about those discussions (until now). However, Mr. Sprinkle has clearly violated the letter and spirit of that agreement by mentioning to you that "the possibility of settlement was revisited, and dismissed when Mr. Mishkoff requested $10,000 for the mall domain name." (I assume that Mr. Sprinkle will claim that he "forgot" that we had an agreement, in a similar fashion to how he forgot that his client had initiated the $1,000 offer.)

Later in his response, while trying to convince you that he had been misquoted by the press, Mr. Sprinkle claimed that he wouldn't have told a reporter that I tried to sell my website for $1,000, he would have used the $10,000 figure. In other words, he's claiming that he couldn't have been quoted correctly because he thinks that, if the subject had been raised, he would have violated our agreement! Personally, I think it's distasteful enough that he violated our agreement by revealing confidential information to you, but his boast that he was eager to reveal that same information to a reporter is absolutely breathtaking.

But the worst part is that, not only is his mention of the $10,000 in violation of our agreement, it's also a blatant misrepresentation of the situation. Clearly, Mr. Sprinkle is trying to raise an irrelevant issue in a not-so-subtle attempt to discredit me in the eyes of the Commission, to portray me as greedy, as someone who somehow tried to extort money from his client. However, nothing could be farther from the truth.

I have enclosed a copy of my lawyer's first proposal to Mr. Krass under the terms of the settlement discussions to which he and Mr. Krass had agreed (Attachment 8), and you'll notice that it doesn't mention money at all! Mr. Sprinkle's claim that our discussions fell through because I requested $10,000 for the domain is a vicious lie. As you can see, my lawyer's initial proposal did not even include the $1,000 that Mr. Sprinkle's client had already offered me – I was perfectly willing to settle for free! (The $10,000 figure may

have come up later, but it had nothing to do with the breakdown of the settlement discussions. If Mr. Sprinkle maintains otherwise, he is misrepresenting the truth. Again.)

Frankly, I feel very uncomfortable about discussing this subject – I have honored my end of the agreement, and I have not described the settlement discussions to anyone until now. However, I do not feel that I can continue to honor my part of the agreement while Mr. Sprinkle has not only dishonored our agreement but has misrepresented the discussions in order to portray me in the worst possible light.

I request reconsideration by the Attorney Grievance Commission.

Henry C. Mishkoff
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972.733.0616
November 4, 2003

The original of this document was signed by me, Henry C. Mishkoff.