August 27, 2004

Office of the Clerk
United States Court of Appeals for the Sixth Circuit
532 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988

The enclosed is a Complaint of Attorney Misconduct against attorney Douglas W. Sprinkle, which I am filing in accordance with Sixth Circuit Rule 46. I believe that I have followed the filing procedures as specified in Rule 46, but I'm not an attorney, so I would appreciate it if you'd let me know if I have not met the filing requirements of the Rule.

Thank you for your help.

Complaint of Attorney Misconduct
Against Douglas W. Sprinkle

This is a Complaint of Attorney Misconduct against attorney Douglas W. Sprinkle, who appeared before the Court on October 16, 2002, in a hearing in the matter of Taubman v. WebFeats (case # 01-2648, 01-2725). I was the defendant-appellant in that case. ("WebFeats" is a name under which I do business.)

Sixth Circuit Rule 46(b)(2) states, in part:

> "This Court may impose discipline on any member who engages in conduct violating the Canons of Ethics or the Model Rules of Professional Conduct, whichever applies,…"

During the course of the hearing, Mr. Sprinkle made deliberate false statements of material fact in an attempt to influence the decision of the Court. These statements violated Rule 3.3 of the Model Rules of Professional Conduct ("Candor toward the Tribunal"), which states, in part:

> "(a) A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;…"

Not only did Mr. Sprinkle make statements that he knew were false, he failed to correct them even after my attorney complained to him that the statements were false, thereby violating both of the conjoined prohibitions of Rule 3.3(a)(1).

As Mr. Sprinkle's false statements were ostensibly made from his own knowledge, his conduct also runs counter to Comment 3 on that Rule ("Representations by a Lawyer"), which states, in part:

> "However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry."

While this is only a Comment rather than an actual Rule, I believe that it makes the point that a lawyer has a special responsibility to ensure the veracity of statements in court that are ostensibly made from personal knowledge.

The False Statements

The hearing during which Mr. Sprinkle made his false statements was my appeal of two preliminary injunctions that had forced me to remove my websites from the Internet, supposedly for violations of trademark law. During the hearing, Mr. Sprinkle pointed to my "attempt to sell" my websites (and/or domain names) to his client as evidence of my commercial intent, which is required to prove a violation of the Lanham Act.

Responding to Mr. Sprinkle's contention, Judge Danny J. Boggs pointed out that I had not asked for money for my websites, nor had I even initiated settlement discussions with Taubman; in fact, the first mention of money was in an unsolicited settlement offer from Mr. Sprinkle's firm. Mr. Sprinkle interrupted Judge Boggs to claim that he and I and engaged in settlement discussions via telephone prior to their offer. **This was a complete fabrication on the part of Mr. Sprinkle,** a transparent and cynical attempt to distract the Court from the weakness of his case.

Here is an account of their exchange:

> **[Judge Boggs]** Correct me if I'm wrong. My understanding of the facts is that the website had been in operation for at least a year, maybe nearly two years. You began by making a sort of standard trademark demand letter and ratcheted it up to, you know: "We're going to sue you." It didn't quite say: "You know, you've got a nice business there, shame if you had to litigate against us forever." 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.
>
> **[Judge Boggs]** Okay, but that's not directly in the record.
>
> **[Mr. Sprinkle]** That's not directly in the record.

[I've attached a complete transcript of Mr. Sprinkle's presentation, which was prepared for me by a professional transcriptionist from an audiotape provided by the Court. The excerpt that I've quoted above begins on page 7 of the transcript.]

The telephone discussions to which Mr. Sprinkle referred were entirely fictitious. In earlier proceedings (see below), Mr. Sprinkle has admitted that his statements were false, but he has claimed that his misstatements were accidental, and he has attributed them to a lack of familiarity with the case and to a faulty recollection of the timing of events. Further, he has claimed that his misstatements did not concern matters of material fact. However, I believe that the evidence points unequivocally to the conclusion that Mr. Sprinkle's false statements were deliberate and that they indeed concerned matters of material fact.

Earlier Proceedings

Although it is probably not relevant to these proceedings, I feel that I should mention that, on September 15, 2003, I filed ethics charges against Mr. Sprinkle with the State of Michigan Attorney Grievance Commission on these and other grounds. The Commission declined to take action against Mr. Sprinkle, stating that "the facts as you have stated in your Request for Investigation do not constitute professional misconduct." I submitted a request for reconsideration of their decision, which was the denied. I appealed the Commission's decision by submitting a Complaint for Superintending Control to the Michigan Supreme Court, but that court denied my appeal on June 30, 2004, saying only that "the Court is not persuaded that it should grant the requested relief."

I should also mention that the version of Rule 3.3(a)(1) that appears in the Michigan Rules of Conduct (under which I pursued ethics charges against Mr. Sprinkle in Michigan) differs in a seemingly minor but possibly significant way from the parallel version of Rule 3.3(a)(1) that appears in the Model Rules of Professional Conduct (under which I am pursuing this complaint).

Michigan's Rule 3.3(a)(1) states that a lawyer shall not knowingly "make a false statement of *material* fact or law to a tribunal;…" The emphasis (which is mine) is to highlight the absence of the word "material" in the version of Rule 3.3(a)(1) in the Model Rules. Note that the Michigan Rules and the Model Rules both require that, in order for a lawyer's statement to a tribunal to be considered to be misconduct, that statement must be knowingly false; however, the Michigan Rules have the additional requirement that the statement must relate to a *material* fact.

Having said that, I should add that I believe the difference to be moot, as Mr. Sprinkle's false statements were not only deliberate, they did indeed concern a matter of material fact. However, I just wanted to point out that it is possible for the Court to decide that Mr. Sprinkle's false statements did not relate to material facts and still find his conduct to be in violation of Rule 3.3(a)(1) in the Model Rules, which was not an option for the Attorney Grievance Commission under Rule 3.3(a)(1) in the Michigan Rules.

Note: Although I have not attached Mr. Sprinkle's arguments from the earlier proceedings, I have occasionally characterized those arguments in this Complaint. I

firmly believe that I have represented his positions fairly; I am certain that he will correct me if I he believes otherwise.

False Statements

Despite Mr. Sprinkle's confidently delivered contention, he and I have *never* engaged in any kind of discussion concerning any kind of offer, either before or after his firm's offer was made. I spoke with Mr. Sprinkle a couple of times to seek his concurrence on motions that I was filing with the District Court; other than that, I have engaged in no discussions with Mr. Sprinkle of any kind via any medium at any time. That was a fact at the time of the hearing, and it remains a fact today.

In the earlier proceedings, Mr. Sprinkle admitted that his statements were false – and on the assumption that he will not retract his admission, I will not bother the Court with evidence of the falsity of his statements in this Complaint.

Knowingly Made

In the earlier proceedings, Mr. Sprinkle claimed that his false statements were a result of his confusion about timing – in other words, he believed that telephone discussions about settling the lawsuit took place *before* his form sent me a letter that contained an offer to settle for a thousand dollars, when in fact those telephone discussions took place only *after* their offer. (Those discussions were with Mr. Sprinkle's partner and with an attorney who was an employee of Mr. Sprinkle's client; despite Mr. Sprinkle's assertion, I have *never* engaged in any such discussion with him.) And he further stated that his confusion stemmed from his relative lack of familiarity with the case, as his partner had actually shepherded the case through the District Court, so he was not intimately familiar with the day-to-day events that transpired as the case progressed.

However, Mr. Sprinkle's explanation flies in the face of two critically important facts:

- **There was no other discussion about which Mr. Sprinkle might have been confused.** I never discussed a settlement with Mr. Sprinkle. Not only did we not discuss a settlement *before* their offer, we did not discuss a settlement *after* their offer. It is most emphatically *not* a question of timing – the discussions to which Mr. Sprinkle referred simply did not ever take place, not at any time. And note Mr. Sprinkle's use of the plural ("discussions"), indicating that he and I had spoken multiple times, when in fact I have never engaged in a single settlement discussion with Mr. Sprinkle, neither via telephone nor by any other means. If Mr. Sprinkle maintains before this Court that he confused one of our discussions with a different discussion, I'd like him to explain with which discussion he was confused – which will be difficult, as there were no discussions.

- **Mr. Sprinkle knew that the record did not support his statements.** On two occasions during the hearing (in the example I cited above and again near the end of his presentation), Mr. Sprinkle readily acknowledged that his version of events was not supported by the record of the case. If Mr. Sprinkle believed that his statements were true, how did he know that his statements would not be supported by the record? If Mr. Sprinkle was as unfamiliar with the record of case as he has claimed to be, how was he able to tell Judge Boggs, without hesitation, that the record would not support his version of events? Or to look at it another way: If I had initiated settlement discussions, it would have changed the entire complexion of the case, and that fact would not only be in the record, it would have been prominently featured in many of the motions and other documents submitted by Mr. Sprinkle's firm. It is simply not credible that Mr. Sprinkle believed that he and I had engaged in settlement discussions prior to their offer, and at the same time *knew* that those discussions would not be reflected in the record. In Mr. Sprinkle's presentation to the Court, he stated twice, unequivocally, that our discussions were not in the record. With that in mind, I don't see how it is possible for him to maintain that, in spite of their absence from the record, he nonetheless believed that they had happened.

In short, Mr. Sprinkle would have you believe that he confused one discussion with another, despite the fact that we engaged in no such discussions whatsoever. And he would further have you believe that, even as he maintained that such discussions had taken place, he knew with certainty that they would not be reflected in the record. However, the simple explanation is that Mr. Sprinkle knew that his statements would not be supported by the record because he knew that they were false.

Failure to Correct

After the hearing, my attorney wrote to Mr. Sprinkle more than once to point out that Mr. Sprinkle's statements were not accurate and to ask him to contact the Court in order to correct them. As far as I have been able to determine, Mr. Sprinkle failed to do so. In fact, I have no reason to believe that he has ever contacted the Court to correct his false statements, meaning that he continues to defy the norms (and explicit rules) of ethical behavior even to this day.

Mr. Sprinkle's failure to correct his false statements lends additional weight to the conclusion that his false statements were part of a deliberate strategy. (If his false statements were accidental, he would have corrected them as soon as he learned that they were false.) More to the point, according to of Rule 3.3(a)(1), Mr. Sprinkle's failure to correct his misstatements constitutes misconduct in and of itself. And as he was explicitly notified that his statements were false, he can hardly maintain that that his failure to correct them was "accidental."

I have not attached my attorney's letters to Mr. Sprinkle to this Complaint because I assume that Mr. Sprinkle will not deny that he received such notices. If my assumption is mistaken, I would be happy to forward copies of the letters to the Court.

Material Fact

Unlike the Michigan Rules, the Model Rules do not require misstatements to relate to *material* fact in order for them constitute misconduct. (However, I should point out that the Model Rules do state that failure to correct false statements constitutes misconduct only if the false statements relate to material facts.) In the earlier proceedings, Mr. Sprinkle maintained that his false statements did not relate to material facts. (I did not entirely understand Mr. Sprinkle's reasoning, so I will not attempt to summarize it here.) However, I believe that even a cursory examination of the facts – and of Mr. Sprinkle's own words – reveals that he was mistaken.

The purpose of the hearing was my appeal of two preliminary injunctions that forced me to remove websites from the Internet. The injunctions were based on trademark law and specifically on the Lanham Act; showing that I had commercial intent was not only material but was absolutely critical to Mr. Sprinkle's case. (I'm not a lawyer, so I apologize in advance if I've made any technical legal errors in this discussion, but I am fairly certain that my understanding of the broad concepts involved is accurate.) Mr. Sprinkle listed several items to support his premise, including my supposed offer to sell my websites to his client. For example, on page 2 of the transcript, Mr. Sprinkle says:

> "But what this case is really about, Your Honor, 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."

And on page 8 he adds:

> "As far as commercial use, it's been mentioned, there's at least four commercial uses…. It says one of his purposes was to sell the website to us for a thousand dollars…"

Mr. Sprinkle's own words clearly indicate that he raised this issue specifically in order to characterize my supposed effort to sell the websites to his client as an element of commercial intent – which not only is material, but which is absolutely essential to establish a violation of the Lanham Act. If Mr. Sprinkle was not introducing the discussion of the $1,000 as material evidence of my commercial intent, then frankly I have no idea why he brought it up in the first place.

Again, a knowingly false statement in Court does not have to be related to a material fact in order for that statement to run afoul of Rule 3.3(a)(1). However, in this instance, I

don't see how there can be any doubt that Mr. Sprinkle's false statements did, indeed, relate to matters that were obviously of material fact.

Conclusion

I believe that Mr. Sprinkle deliberately made false statements at the hearing in a desperate attempt to mislead the Court, which was motivated by the fact that, as he has admitted in the earlier proceedings, he recognized that the hearing was not going well for him. But I also believe that he tried to mislead the Court because he believed that there would be no negative repercussions to his actions. Unfortunately, the experience with the Michigan Attorney Grievance Commission has not done anything to disabuse Mr. Sprinkle of his notion of invulnerability. I firmly believe that something must be done to demonstrate to Mr. Sprinkle (and to others of his ilk) that actions do, indeed, have consequences, and that he cannot lie to the Court with impunity.

Rule 46(c) of the Federal Rules of Appellate Procedure states that the Court "may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any Court rule." Attorney Douglas W. Sprinkle failed to comply with the Rule that requires honesty in court, surely the most basic rule of civil procedure, compliance with which is the *least* that should be expected of every attorney who appears before the Court. I urge the Court to initiate the proper disciplinary proceedings against Mr. Sprinkle.

Required Statement

Not only have I read this Complaint, I have written it myself, and therefore I am entirely familiar with its contents. Under the penalty of perjury, I hereby state that that the factual allegations contained herein are correct to the best of my knowledge.

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August 27, 2004