LAW OFFICES
GIFFORD, KRASS, GROH, SPRINKLE, ANDERSON & CITKOWSKI, P.C.
PATENT, TRADEMARK AND COPYRIGHT PRACTICE
280 N. OLD WOODWARD AVENUE, SUITE 400
BIRMINGHAM, MICHIGAN 48009-5394
(248) 647-6000
FACSIMILE (248) 647-5210
info@patlaw.com

ERNEST I. GIFFORD (3)
ALLEN M. KRASS
IRVIN L. GROH (1,2)
DOUGLAS W. SPRINKLE
THOMAS E. ANDERSON (3)
RONALD W. CITKOWSKI
JUDITH M. RILEY
JULIE A. GREENBERG
DOUGLAS J. McEVOY
JOHN G. POSA
DOUGLAS L. WATHEN
AVERY N. GOLDSTEIN, PH.D.
MARK D. SCHNEIDER
BEVERLY M. BUNTING
LIONEL D. ANDERSON
ANGELA M. DAVISON

OF COUNSEL
ROBERTA J. MORRIS, PH.D. (4)

PATENT AGENTS
MARTIN S. BANCROFT, PH.D.
JULIE K. STAPLE, PH.D.

ALFRED L. PATMORE, JR.
(1929-1997)

ANN ARBOR OFFICE
101 NORTH MAIN, SUITE 800
ANN ARBOR, MICHIGAN 48104-1476
(734) 913-9300
FACSIMILE (734) 913-6007

FLORIDA OFFICE
101 WEST VENICE AVE., SUITE 28
VENICE, FLORIDA 34285
(941) 488-4245
FACSIMILE (941) 484-5258

ALSO ADMITTED IN:
(1) WISCONSIN
(2) OHIO
(3) FLORIDA
(4) NEW YORK

October 15, 2003

Ms. Ruthann Stevens
Associate Counsel
State of Michigan Grievance Commission
Marquette Building
243 W. Congress, Suite 256
Detroit, MI 48226-3259

Re: Henry C. Mishkoff
Your File No. 2401/03

Dear Ms. Stevens:

This letter is in response to your letter of September 26, 2003, regarding the above-identified matter.

After 28 years of practice before the Michigan courts, no client or other attorney has ever filed a grievance against me, at least none of which I am aware. As of this date, that record stands. More specifically, the Complainant, Mishkoff, was a *pro se* defendant (later represented by counsel) in a lawsuit in which our firm represented the plaintiff. Despite being notified by the Court of the advisability of being represented by a lawyer, Mr. Mishkoff chose to represent himself. In this capacity, Mr. Mishkoff put himself in the position of dealing directly with the plaintiff's lawyers.

As discussed in greater detail below, Mr. Mishkoff does not set forth a single grievable offense, nor have I committed any. Instead, as set forth in greater detail herein, Mr. Mishkoff, the self-appointed champion of Free Speech, and the proprietor of the string of heavily publicized gripe websites, including www.giffordkrasssucks.com, complains to this Commission about, *inter alia,* the "tone" in one of my telephone messages, and about my responding to a newspaper reporter who sought my comment. Aside from the obvious irony of this position, and aside from the fact that my firm and I have never responded to any of the hundreds of pages of online, often libelous ranting about this litigation, I believe a full review of the facts and procedural history in this case will dispel a possible interpretation of my conduct in this case as constituting a knowing violation of any ethics rule. Some procedural history is in order.

My firm represents The Taubman Company, a rather well-known developer of shopping malls. As a part of its business operations, The Taubman Company built a mall in Texas called "The Shops at Willow Bend". As is its usual practice, The Taubman Company routinely creates websites to promote its shopping malls. In this case, The Taubman Company created the website www.theshopsatwillowbend.com to promote the mall. The Taubman Company also sought and obtained a United States Trademark Registration for "The Shops at Willow Bend" to protect the name of its mall.

The Complainant herein, Mr. Mishkoff, a website designer, secured for himself the domain name incorporating the mall's trademark, at www.shopsatwillowbend.com. On the site, he promoted the mall with graphics extracted from our client's own website, and advertised his girlfriend's shirt business. He also promoted his own website design services. This appropriation of Taubman's mall trademark for a domain name fits the classic pattern of the offenses of trademark infringement and cybersquatting and, understandably, upset The Taubman Company.

Consequently, The Taubman Company, through this firm, contacted the Complainant and requested that all use of the mark, including, specifically, the domain name, cease. In connection with the discussions between our firm and Mr. Mishkoff, an informal settlement offer of $1,000 was made for the transfer of the website. Mr. Mishkoff agreed to these terms, in writing, but when a written settlement agreement was forwarded to him for signature, he was outraged at the inclusion of a standard non-disclosure clause requesting that the terms of the settlement be kept confidential. This ultimately de-railed the settlement, and the litigation proceeded, with the Honorable Judge Zatkoff issuing a preliminary injunction against Mr. Mishkoff's use of the domain name, pursuant to the Court's injunctive powers under the trademark laws.

It was at about this stage that Mr. Mishkoff informed our firm that he had secured a string of separate websites, including, among others, taubmansucks.com, shopsatwillowbendsucks.com, and giffordkrasssucks.com, which he intended to use only if we proceeded with the litigation against him. Ultimately, the Court expanded its preliminary injunction to also enjoin the use of these additional "sucks.com" websites.

Mr. Mishkoff secured the *pro bono* services of Mr. Levy, of Public Citizen Group, a first amendment proponent, as counsel to represent him in his appeal of these two injunctions. Early in Mr. Levy's involvement, the possibility of settlement was revisited, and dismissed when Mr. Mishkoff requested $10,000 for the mall domain name.

Ultimately, after a hearing, the Sixth Circuit Court of Appeals vacated the preliminary injunctions on a variety of grounds, including that Mr. Mishkoff was entitled to promote the mall on the mall domain name in connection with his first amendment rights.

The litigation received substantial attention in the press. A copy of one article summarizing the litigation is attached to this letter as Exhibit A. Because of the extensive publicity of this case, much attention has been given to Mr. Mishkoff's "gripe sites," and he has painstakingly publicized every detail, including his disparaging opinions of my partner Julie Greenberg, our firm, and, of course, myself. See, by way of example only, the following tiny excerpt:

> I have to admit that Ms. Greenberg's request for a default judgment put me in a mini-panic. (I hate to admit it, because I know she'll read this, but it's the truth. I realize that a compulsion to tell the truth puts me at a severe disadvantage in dealing with lawyers, but that's the way it is.)

Contrary to Mr. Mishkoff's statements in his complaint to this Commission, this grievance is not about a violation of any ethics rules. It is his fulfillment of his threat, set out on his gripe site, at the last page:

> In any event, at long last, this entire matter finally appears to be over.
>
> Unless, of course, I decide to initiate some kind of action against *them*...
>
> Stay tuned.

In any event, the various complaints raised by the Complainant in his grievance will be addressed *seriatim*.

Rule 3.3 Candor Toward the Tribunal

> "(a) A lawyer shall not knowingly: (1) make false statements of material fact or law to a tribunal; . . . or (4) offer evidence that the lawyer knows to be false."

In order to violate Rule 3.3, it is necessary that the lawyer **knowingly** make false statements to a tribunal and that these false statements relate to a **material** fact or statement of law. This rule also prevents a lawyer from offering evidence known to be false to the lawyer. Each will be addressed separately.

With respect to the representation made to the Court, i.e. that Mr. Mishkoff offered to sell his domain name to The Taubman Company prior to "that letter", 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.

In short, the substance of the communication, i.e. the negotiation between the Complainant and The Taubman Company through this firm to pay off the Complainant for $1,000 to obtain his website was clearly accurate; I was only in error with respect to the timing of that negotiation.

In short, it was an honest mistake of fact based upon my own misunderstanding at that time and perhaps inspired by the stress of a hearing before a panel of the Sixth Circuit Court of Appeals, which, it was becoming increasingly clear, was not sympathetic to my client's positions. In any event, since the minor misrepresentation of fact to the Court of Appeals was not **knowingly** made, there is no violation of Rule 3.3. More importantly, however, for purposes of this Commission, it is also crystal clear, even from the short portion of the transcript cited by the Complainant, that the Court of Appeals immediately ignored the statement.

Rule 3.3 requires that the misrepresentation also be **material**. In this case, the only issues on the appeal were the appropriateness of the injunctions under the trademark statute and in view of the free speech rights of the Complainant. 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. Although the timing of that negotiation may have ultimately taken on significance in connection with the anti-cybersquatting claims of the case, it was immaterial to the issues on appeal, and further, disregarded by the Court. Indeed, to be frank, I was somewhat taken off-guard by the Court of Appeals' questions in that regard.

Since the timing of the negotiation between the Complainant and The Taubman Company was not material to any issue before the Sixth Circuit Court of Appeals, these statements in that regard are simply not material so that there cannot be a violation of Rule 3.3.

Lastly, Rule 3.3 forbids a lawyer to offer evidence that the lawyer knows to be false. There is no question that I did not ever offer false evidence. My statement was not evidence; it was argument in answer to the Court's question, and merely, reflected a misunderstanding of a fact. In contrast, "evidence" consists of sworn testimony from the witness box as well as any documents that are admitted by the court and submitted to the jury. Statements of counsel are not now and do not ever constitute **evidence** (except for a stipulation of counsel which is inapplicable here). Indeed, it is a standard jury instruction that arguments of counsel do not constitute evidence just as it was clear that the Sixth Circuit would not consider something not in the record as is clear even from the short transcript reproduced by the Complainant.

For all of the foregoing reasons, there is no violation of Rule 3.3

Rule 3.3 Candor Toward the Tribunal

> "(a) (4) . . . If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."

This rule requires an attorney who has offered material evidence and later comes to know of the falsity of that evidence to correct it. For example, if an attorney introduces a document that constitutes material evidence and later discovers that the document was false, he or she must correct it.

As discussed above, however, no false evidence was offered, and statements of counsel simply do not constitute evidence. More significantly, as discussed above, the statements themselves clearly were not material to the issues on that appeal.

Therefore, there simply has been no violation of Rule 3.3

Rule 3.4 Fairness to Opposing Party and Counsel

> "A lawyer shall not: . . . (e) during trial, allude to any matter that the lawyer does not believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, . . ."

The statement made was an answer to a question posed by the Court. It was understood to be accurate at the time, and it was never material. Moreover, this rule precludes an attorney **during trial** from in effect testifying by making representations of fact. When this occurs, the usual objection is "objection - opinion of counsel" and that objection is routinely upheld.

The Complainant's citation of Rule 3.4 is simply not understood. There was no trial and there never will be. Therefore, there is no violation of this rule.

Rule 3.6 Trial Publicity

> "A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have substantial likelihood of materially prejudicing an adjudicative proceeding."

This rule precludes an attorney from public communications that have a "substantial likelihood of materially prejudicing an adjudicated proceeding". There was no violation of this rule for a number of reasons.

First, the case against the Complainant was dropped immediately after the Sixth Circuit decision and shortly after the newspaper article so that there was no "adjudicative proceeding" that could be influenced.

Secondly, I do not believe that I advised the newspaper reporter that Mishkoff had offered to sell his website for $1,000. Since the price of Mr. Mishkoff's websites had, by that time, escalated to $10,000, if I were to relay a dollar amount to the newspaper reporter, I think I would have used the $10,000 figure.

Rather, I suspect, but do not really know, that the reporter obtained this information, i.e. the $1,000 offer, from reading one of the Complainant's sucks.com websites. In all of those websites, as shown in Exhibit B, those websites clearly set forth the $1,000 agreement which the Complainant thought they had with The Taubman Company and his desire to enforce that agreement.

Next, even if the $1,000 sum was relayed to the newspaper reporter (which I do not think occurred) it clearly could not prejudice the Complainant in view of his own sucks.com websites which clearly and repeatedly outlined the $1,000 "deal". In other words, how in the world could my statement, if actually made, be prejudicial whereas the identical statements publicized by the Complainant in his sucks.com websites not be prejudicial? In any event, the $1,000 "deal" could not "materially prejudice" a court proceeding since the "cat was already out of the bag" due to Complainant's own statements.

Next, the Complainant concludes that, since settlement offers are not admissible evidence, he was somehow prejudiced. In this, I disagree. Rather, if the case had actually gone to trial, in my view the various sucks.com websites would have clearly been admissible which would have included the specific information about the $1,000 "deal". Furthermore, an offer to sell, or in this case a counteroffer to sell, the website by the Complainant to The Taubman Company constitutes an element of the offense under the anti-cyber squatting act. As such, it would be admissible.

Lastly, I find it absolutely incredible that the Complainant can complain about pre-trial publicity regarding the $1,000 "deal" when it was he himself who publicized it to billions of people by the Complainant through his sucks.com websites. He himself admitted that he used the publication of the sucks.com websites as artillery to influence the outcome of the primary litigation. Apparently, at least according to the Complainant, the first amendment is available to him, but not the other side.

In any event, Rule 3.6 relates to **trial publicity** and there was no trial in this case. Further, any statements I made, **if** in fact I made them, could not affect any jury for the simple reason that those statements had already been made **publicly**, through the Internet, **by the Complainant**. There is no violation of Rule 3.6.

Rule 4.1 Truthfulness in Statements to Others

> "In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person."

As discussed above, I do not believe that I made the alleged statement to the newspaper reporter. However, even if I did, the statement was, in fact, true.

More specifically, I am now informed, and I concede, that the original offer was made by The Taubman Company through counsel to the Complainant for $1,000. Apparently, in the Complainant's mind, that means that he never made an offer to sell his website for $1,000 since the original offer came from The Taubman Company. This belief by the Complainant underscores the Complainant's lack of understanding of contract law.

More specifically, following the initial offer, there were negotiations between the Complainant and counsel for The Taubman Company and those negotiations involved counteroffers by the Complainant. Indeed, those offers escalated to $10,000 after Mr. Levy entered his appearance as counsel for the Complainant. That offer also involved counteroffers by the Complainant, at least through his counsel. Neither of those negotiations came to fruition, and a final settlement was not reached in either case.

In short, the statement made to the reporter simply was not false (if in fact it was at all made), and the Complainant's attempt to draw a narrow line between what constitutes an offer and who made that offer during a settlement discussion simply is legally incorrect. Consequently, there is no violation of Rule 4.1.

Rule 6.5 Professional Conduct

> "(a) A lawyer shall treat with courtesy and respect all persons involved in the legal process."

Although I did not memorize the conversation left on the Complainant's telephone answering machine, the transcript reproduced on page 7 appears to be quite correct. In fact, it sounds exactly like something that I would say.

The telephone message was not an attempt to intimidate the Complainant, who I doubt is easily intimidated in any event, but merely a statement of fact as to what would happen if he did not shut down his offending website.

I retract absolutely nothing. Indeed, this sort of complaint from the Complainant underscores the pettiness of this entire grievance.

Conclusion

The unintentional, immaterial, inconsequential and ignored misstatement of fact made to the Court of Appeals is regretted. However, humans make mistakes and sometimes confuse the facts. Attorneys who regularly practice before the various courts oftentimes unintentionally mix up facts; it happens. That is why the Court of Appeals relies upon the record before it which, of course, is exactly what happened in this case.

None of my actions violated any of the Rules of Professional Conduct; and the Complainant has suffered absolutely no harm, whatsoever, from any action of mine.

Very truly yours,

Douglas W. Sprinkle

DWS/am
Enclosures

am–\\NTPDC\WORD\Word Processing\dws\ruthann'stevens-ltr(final).doc