

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary
Action against RICHARD CABRERA,
a Minnesota Attorney,
Registration No. 17242X.

**PETITION FOR REVOCATION
OF PROBATION AND FOR
FURTHER DISCIPLINARY
ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition upon the parties' agreement contained in the attached stipulation for probation (Ex. 1) pursuant to Rules 10(a) and 12(a), Rules on Lawyers Professional Responsibility (RLPR). The Director alleges:

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on April 22, 1986. Respondent currently resides outside of the state Minnesota. Respondent was suspended for nonpayment of the attorney registration fee on January 1, 2005.

INTRODUCTION

On September 15, 2003, The Lawyers Professional Responsibility Board (LPRB) Chair approved a stipulation for respondent's private probation. Respondent's probation was based upon an admission that respondent used his trust account as a personal/business account, commingled funds and failed to keep the required books and records in violation of Rule 1.15(a), (b) and (h), RLPR.

Among the conditions of respondent's probation was that respondent would abide by the Minnesota Rules of Professional Conduct and commit no further unprofessional conduct, and that if, after giving respondent an opportunity to be heard, the Director concluded that respondent had not complied with the conditions of the

probation, then the Director could file this petition without the necessity of Panel proceedings.

The Director, after giving respondent an opportunity to be heard, has concluded that respondent has not complied with the conditions of the probation.

Respondent has committed the following unprofessional conduct warranting public discipline.

DISCIPLINE HISTORY

1. Following his placement on private probation respondent received a December 2004 admonition for failing to submit documents timely pursuant to a trial order and for failing to provide his client with copies of court filings and her file in violation of Rules 1.3 and 1.4, Minnesota Rules of Professional Conduct (MRPC) (Ex. 2).

FIRST COUNT – OKOLIE MATTER

Incompetent Representation of a Criminal Defendant

2. Respondent represented Hakeem Okolie (Okolie) on a second degree assault charge. Okolie was convicted and sentenced to 36 months in prison.

3. Okolie appealed alleging ineffective assistance of counsel. The court granted Okolie a new trial based on three serious failures by respondent to competently represent his client. The court found:

a. Respondent failed to investigate and call a witness and failed to cross-examine the victim more vigorously. "This court agrees that Cabrera's decisions in this regard were unreasonable and rose to the level of ineffective assistance of counsel, even under the stringent standards of *Strickland*." Ex. 3, p. 5.

b. Respondent failed to move for dismissal of the prohibited person in possession of a firearm charge and failed to request a curative instruction regarding the charge and stipulation read to the jury. "Cabrera's action or inactions not only cannot be considered trial strategy or tactic, but were also unreasonable and, quite apparently, professional oversight or error." Ex. 3, p. 9.

c. Respondent failed to object to Judge Porter's instruction that the jury would have to return on Monday, failed to poll the jury and failed to move for a *Schwartz* hearing. "Cabrera's failure to do so was unreasonable and significantly undermines confidence in the verdict reached by the jury. Cabrera's failure rises to the level of ineffective assistance of counsel." Ex. 3, p. 13.

4. Respondent was personally served on March 21, 2005, with a subpoena to appear at a March 31, 2005, hearing. Respondent gave Okolie's public defender an affidavit and left the state before the March 31, 2005, hearing.

5. When respondent did not appear for the hearing, the court issued a bench warrant for his arrest. The warrant had not been executed by the rescheduled April 13, 2005, hearing date. Because of Okolie's prior effort to locate and secure respondent's attendance, the Court granted Okolie's motion to admit respondent's March 23, 2005, affidavit.

6. Respondent's conduct in providing incompetent representation to a criminal defendant and in failing to appear at the March 31, 2005, hearing after having been personally served with a subpoena violated Rules 1.1, 3.4(c) and 8.4(d), MRPC.

SECOND COUNT - GOODLOE MATTER

Neglect, Failure to Properly Withdraw and Return Unearned Retainer

7. Leonard Goodloe retained respondent to represent him in a murder case. Goodloe's relatives paid respondent \$1,900 toward respondent's retainer.

8. Respondent did not pick up Goodloe's file from Stuart Mogelson, Goodloe's public defender.

9. Respondent did not pay his attorney registration fee when due in January 2005 and stopped practicing law because of ill health.

10. Respondent did not notify Goodloe that he was withdrawing from representation nor did he take any steps to protect Goodloe's interests.

11. In his e-mailed response, respondent indicates that he spent approximately five hours on Goodloe's file and charges \$175 per hour. Even if one

accepts respondent's claim, he is not entitled to more than \$875. Respondent has not returned the unearned portion of Goodloe's retainer.

12. Respondent's conduct in failing to pursue Goodloe's defense and in failing to properly withdraw and return the unearned portion of Goodloe's retainer violated Rules 1.3, 1.4 and 1.16(d), MRPC.

THIRD COUNT - CYBERSTUDY MATTER

Neglect, Failure to Properly Withdraw, Conflict of Interest

13. Respondent represented five plaintiffs in a lawsuit against Cyberstudy 101, Inc. (Cyberstudy). Respondent had a 20 percent contingent fee arrangement with each of the plaintiffs. Respondent could not produce copies of a written fee agreement.

14. The claims of Jennifer Davis were dismissed with prejudice (Ex. 4).

15. Respondent obtained an arbitration award for Rachel Beauvoir-Dominique in the amount of \$8,498.15. Respondent entered judgment for Beauvoir-Dominique on December 22, 2003 (Ex. 4).

16. Respondent obtained an arbitration award for Xiong Fong in the amount of \$30,170.96. Respondent entered judgment for Fong on December 22, 2003 (Ex. 4).

17. Respondent obtained an arbitration award for Effie Hollie in the amount of \$18,856.85. Respondent entered judgment for Hollie on December 22, 2003 (Ex. 4).

18. Respondent obtained an arbitration award for Richard Savage in the amount of \$36,456.58. Respondent entered judgment for Savage on December 22, 2003 (Ex. 4).

19. On or about March 16, 2004, respondent learned about some Cyberstudy assets. Respondent obtained a writ of execution on behalf of Richard Savage and obtained \$21,989.56. After deducting levy and sheriff fees, respondent received \$21,040.46 which he placed in his trust account.

20. Respondent told Savage not to tell the other plaintiffs about his recovery. Respondent did not tell the other plaintiffs about his recovery on behalf of Savage.

21. Savage paid most of the fees and expenses for the case from his own pocket. Respondent disbursed 20 percent of the recovery to himself for attorney fees. Respondent then disbursed the remaining \$16,889.97 to Savage for the expenses he advanced and for his portion of the recovery.

22. Savage loaned respondent a couple of thousand dollars to help respondent sustain his practice. Respondent provided Savage with no receipt or loan documentation. Respondent has not yet repaid the loans.

23. In about June 2004 respondent scheduled a motion to attempt to pierce the corporate veil and hold Cyberstudy's principals liable for the Cyberstudy judgment.

24. Hearings on this motion were scheduled for July 2, August 17 and September 29, 2004. Each time the hearing date was stricken because respondent had not timely filed the motion papers.

25. The motion was scheduled again for November 10, 2004, at 9:00 a.m. before Judge Charles Porter.

26. Respondent did not properly calendar the motion and did not appear at 9:00 a.m. Both respondent's office and cellular phones were no longer in use. At 9:30 a.m. the court struck respondent's motion and issued an order sanctioning respondent \$2,000 and providing that the matter would be dismissed unless the sanctions were paid within 30 days of December 8, 2004 (Ex. 5).

27. Respondent wrote the court explaining that he had no funds with which to pay the sanction and asking that his clients not be penalized for his mistake. Judge Porter extended the deadline for payment of sanctions until May 8, 2005.

28. When respondent ceased practicing in January 2005 he did not notify any of his Cyberstudy clients, provide any of the clients with a copy of Judge Porter's order or letter granting an extension until May 8, 2005, by which to pay the sanctions, nor did he return their files.

29. Respondent's conduct in failing to (1) have a written contingent fee agreement, (2) timely file motion papers in support of his request for a hearing,

(3) appear timely for the November 10, 2004, hearing, (4) communicate Judge Porter's order to his clients, and (5) properly withdraw from representation and return the clients' files when he ceased practicing in January 2005 violated Rules 1.3, 1.4, 1.5(c), 1.16(d) and 8.4(d) MRPC.

30. Respondent's conduct in jointly representing four clients in their attempt to collect their Cyberstudy judgments without informed consent by each of the clients and his request that Savage not tell the other plaintiffs about his recovery violated Rule 1.7, MRPC.

31. Respondent's request for and obtaining undocumented, unsecured loans from a client violated Rule 1.8(a), MRPC.

WHEREFORE, the Director respectfully prays for an order of this Court suspending respondent or imposing otherwise appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Dated: September 15, 2005.

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