Maryland State Board of Law Examiners

REPRESENTATIVE GOOD ANSWERS FOR THE FEBRUARY 2016 MARYLAND OUT OF STATE ATTORNEYS' BAR EXAM

NOTICE: These Representative Good Answers are provided to illustrate how actual examinees responded to the Maryland Out-of-State Attorneys' Bar Examination. The Representative Good Answers are not "average" passing answers nor are they necessarily "perfect" answers. Instead, these are the two (2) highest scoring overall exam responses for this session. These answers are transcribed from the hand-written answer books without any changes or corrections by the Board, other than to spelling and formatting for ease of reading.

Representative Good Answer No. 1

Question 1

A. In criminal matters, the Circuit Ct. & District Ct. have concurrent jx. Where the "penalty may be confinement for 3 yrs. or more." Md. Ct. & Jud. Proc Article ("CJ") §4-302(d)(i). Allen can, therefore, be charged in either the Charles Cnty Circuit or District Court. If he is charged in Circuit Court for any of the offenses, the District Court will not have jurisdiction since all offenses arose "out of the same circumstances & w/in the concurrent jxs of the Dist. Ct. & Circuit Ct." CJ §4-302(f)(ii).

B. I would file to enter my appearance in writing. Md. R. 4-214(a). I would file a demand for a jury trial. See Md. R. 4-301(b). This should be filed no later than 15 days before the scheduled trial date. Id. 4-301(b)(1)(A). I would further request a preliminary hearing if still in Dist. Ct. w/in 10 days after an initial appearance. Md. R. 4-221(a); I would further file a mandatory motion under the unlawful search & seizure of Allen w/in 30 days of the earlier of my appearance or Allen's first appearance under Md. R. 4-252(a)(3), (b). The motion would seek suppression of the keys & PCP found in the car.

Because Allen's insistence that he is the "Chosen One," I would consider moving to bifurcate his trial so that he could put forward the defense of not criminally responsible. Md. R. 4-314; see also CP §3-109-110. This motion, based on reason of insanity, must be filed no later than 15 days before trial. Id.

CP§§3-101 et seq. covers incompetency and criminal responsibility in criminal causes. I would file a pleading alleging Allen's incompetence to stand trial under CP§3-104. §3-101 defines "incompetence to stand trial" as "not able (1) to understand the nature or object of the proceeding; or (2) to assist in one's defense." Allen appears unable at the very least to assist in his defense. The Ct. may order the Health Dep't to examine Allen to assist in its determination. CP §3-105. Going this route, however, may lead to Allen's commitment, see CP§§3-106, & given his wish to get out of jail, should be carefully considered.

Given Allen's desire to get out of jail in the immediate future, I would alternatively submit argument for the pretrial release of Allen, but in writing, & as part of the record, to meet the requirements of Md. R. 4-216(b).

C. I am bound by attorney-client confidentiality under Md. R. Prof'l Conduct ("RPC") 1.6 that does not permit revelation of info relating to representation of a client w/o informed consent or other authorization. Allen's statements do not meet the exceptions listed under RPD 1.6(b).

I am, however, also bound by a duty of candor toward the tribunal under RPC 3.3. I cannot put Allen on the stand and elicit false statements of material fact. RPC 3.3(a)(1). I generally must inform the court of a material fact to avoid criminal or fraudulent act by my clients. RPC 3.3(a)(2). Finally, I cannot offer evidence I know to be false & must take reasonable remedial measures. RPC 3.3(a)(4). Nevertheless, in a criminal case, I do not need to disclose that Allen intends to testify falsely or has testified falsely if I reasonable believe that the disclosure would jeopardize his constitutional rights. RPC 3.3(e).

I would discuss the legal consequences of Allen's proposed perjury with him as permitted under RPC 1.2(d). I would further state that I could not put him on the stand & elicit through questioning the falsehoods (RPC 3.3(a)(4)), but that if he insists, I would put him on the stand & permit him to give a narrative of his version of events. I will also defend him to the best of my ability otherwise. RPC 3.1, 1.3, 1.1.

D. This conviction of driving under the influence of a controlled dangerous substance is Allen's second one. To seek discretionary enhanced penalties, the State's Attorney should have served notice of the prior conviction on me or Allen at least 15 days before trial in Circuit court or 5 days prior to trial in District Ct. Md. R. 4-245(b). If there is a mandatory sentence b/c of the previous conviction, the State's Atty needs to serve notice of the prior conviction on me or Allen at least 15 days prior to sentencing in Cir. Ct. or 5 days before sentencing in District Ct. Md. R. 4-245(c).

If the SA fails to give notice, the court shall postpone the sentencing at least 15 days unless Allen waives the notice requirement. Id. The notice must be disclosed to the Court & a copy filed with the Clerk after conviction & not before (unless the prior conviction came in for an admissible purpose as evidence). Md. R. 4-245(d).

The SA can also present other info prior to sentencing that it wishes the Ct. to consider. Md. R. 4-342(d).

Question 2

A. The accident first gave rise to an action for wrongful death since David's wrongful act caused the deaths of Wilma & Fred. Md. Courts & Jud. Proc. Art. ("CJ") §§3-902(a). The action will be against David & to the benefit of Laura, Fred & Wilma's minor child. CJ §3-904(g)(1).

Paul, as personal Rep of the estates, further could file actions for negligence and gross negligence. See Md. R. 2-201 (personal rep may bring action). A claim can be made to recover the $50,000 in losses on the car.

A guardian or like could also file causes of action for intentional infliction of emotional distress on Laura's behalf. See Md. R. 2-202(b).

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B. If the promissory note from Bob was not under seal, the statute of limitations on a cause of action arising from its non-payment has run; i.e. it's been longer than 3 yrs. since it became payable (on demand = 1/15/10). See Md. Ct. & Jud. Proc. Art ("CJ") §5-101. If the SOL has run, it should no longer be listed as an asset in either estate. The facts do not state that Bob ever acknowledged his debt, which would revive an action. See, e.g. McMahon v. Dorchester Fertilizer Co., 184 Md. 155 (1994). If it was under seal, the estate may still have a live cause of action, since an action on such an instrument can be brought w/in 12 years. CJ §5-102(a)(1).

Because the promissory note was payable to both Fred & Wilma, as tenants by the entirety, it should be listed as an asset on both estates, but with notice that it is encumbered. See Md. R. 6-402.

C. First, the judgment was entered on 3/1/04 so it has not yet expired (i.e. it has not been 12 years), but since the expiration is fast approaching, Paul should file a notice of renewal. Md. R. 2-625.

W/in Calvert County, the judgment constituted a lien on Larry's interest in land located in Calvert Cnty from the date of entry in the amount of the judgment. Md. R. 2-621; Md. Ct. & Jud Proc Art (CJ)11-402.

(1) Larry's land conveyed to Tom. The land was conveyed after the date of judgment. The property had a lien on it prior to the conveyance. Md. R. 2-621. The facts do not show that Larry first requested the property be exempted or released. See Md. R. 2-643(c)-(d). Paul can request that the clerk issue a writ of execution directing the sheriff to levy the property. Md. R. 2-641. This is permissible even though Tom now has the property. Md. R. 2-643(c). The property can be sold by the Sheriff to satisfy the judgment w/ the proceeds. Md. R 2-644; CJ §11-501.

(2) Property conveyed by Larry & brother as joint tenants to Harry. A judgment lien cannot attach to an estate in joint tenancy. See Md. R. 2-621; Greenfield v. Estate of Jeung Soon Kim, 288 BR 431 (Bankr. D. Md. 2002). This land was therefore unencumbered when conveyed. Id. Paul therefore has no action available to collect on the judgment here. The time has passed where Fred & Wilma could have sought to sever the joint tenancy. The property could be sold to Harry who was a bona fide purchaser, for value. See Md. R. 2-216, Chambers v. Cardinal, 177 Md. App. 418 (2007).

(3) Joints saving account of Larry & wife. There is not a lien on personal property & generally Paul would have to request a writ of execution or garnishment issue. CJ §11-403; see also Md. R. 2-645. Nevertheless, spousal property held jointly cannot be garnished where both owners are not judgment debtors. CJ §11-603(a). This rule applies only if the account was established as a joint account prior to the entry of judgment. CJ §11-603(a)(2), so Paul may have a cause of action if he can show it was not joint prior.

D. The actions against David can be brought in Anne Arundel County, where he resides (Md. Ct. & Jud Proc. Art. (CJ) §6-201(a)) or where the cause of action arose, in Calvert County, CJ §6-202(8). An action for recovery based on the total loss of Fred's car alone must be brought in

Circuit Ct. as $50,000 exceeds the Dist. Ct.'s amount in controversy limit of $30,000, exclusive of interests, costs, atty's fees. CJ §4-401. All claims, therefore, may be filed in Circuit Ct. together since they arose out of the same facts and circumstances (but not b/c of an impermissible aggregation of claims). See CJ §§4-402; 1-501.

The action on the promissory note may be brought in Charles County, where Bob resides. CJ §6-201(a). The $25,000 amount in controversy means it can be brought in either in Dist. Ct. or Circuit Ct. CJ 4-401, 4-402 (concurrent jx where amt. in controversy exceeds $5,000, exclusive of prejudgment interest, costs, atty's fees).

The actions on Larry's property (where allowed) must be brought in Calvert County where the property is & the judgment entered. See CJ §6-202(7), Md. R. 2-641 (writ by court where judgment entered). Any hearing will be before the court that entered the judgment, i.e. Circuit Ct. of Calvert County.

Question 3

A. A right to appeal exists for a final judgment in a civil case. Md. Ct. & Jud Proc Art ("CJ") §12-301. A final judgment is one which settles the rights of the parties or concludes the cause. See Brooks v. Ford Motor Co, 261 Md. 278 (1971). Here all the claims are settled. Count I is voluntarily dismissed w/ prejudice. Count II is dismissed on motion. Count III is also voluntarily dismissed w/ prejudice. The orders on the MTD and voluntary dismissals have denied all relief sought & completely terminated the action in the court. See Litton Bionetics v. Glen Const. Co., 292 Md. 34 (1981). Further, a dismissal w/ prejudice is a final adjudication. See Md. R. 2-506; Byron Lasky & Assocs. v. Cameron Brown Co., 38 Md. App. 231 (1976). Moreover, dismissal of the balance of pending claims is permissible. Mildred Davis, Inc. v. Hopkins, 224 Md. 626 (1961). Mary & Jane have, therefore, exercised their rights to create a final judgment in the case.

B. The Joint Stipulation of Dismissal is merely conditional. It is denoted that the dismissals were w/o prejudice if the granting of the MTD Count I was vacated or reversed on appeal. A voluntary stipulated dismissal w/o prejudice is not a final, appealable judgment. Md. R. 2-506; Miller v. Smith at Quercus LLC v. Casey PMW LLC, 412 Md. 230 (2010). In other words, these claims are not finally settled and the "final judgment rule cannot be circumvented by volunteering dismissal pursuant to [Rule 2-506]." Miller, 412 Md. 230. The rights of the parties are only settled if the Ct. of Appeals affirms the court's decision. The conditional stipulation "further does not deny the appellant further means of prosecuting or defending his rights & interests in the subject matter of the proceeding." See CJ § 12-301; Smith v. Taylor, 285 Md. 143 (1979). I would argue, therefore, that the condition placed in the stipulation renders the action not appealable as a final judgment.

Question 4

First the parties should attempt to meet & confer to resolve the disputes. Md. R. 2-431. Next, if no resolution is reached, counsel may file a motion to compel discovery, both w/ regard to

interrogatories and document production. Md. R. 2-432(b)(1)(D), (E). The motion should be filed with reasonable promptness Md. R. 2-432(d). Further, it should set forth the rog & RFP, the answer & objection & reasons it should be compelled. Md. R. 2-432(b)(2).

Counsel may also move for immediate sanctions. Md. R. 2-432(a). Sanctions may be imposed as outlined in Md. R. 2-433.

W/o reasonable bases for w/holding, the motions should be granted.

Question 5

Md. R. Prof'l Conduct ("RPC") 3.4 governs interactions w/opposing counsel. W/ regard to discovery, both parties are failing to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party. RPC 3.4(d). They are further knowingly disobeying an obligation under the rules of the tribunal, including the good faith attempt to resolve disputes w/ opposing counsel as required by Md. R. 2-431 & the court order to cooperate on the preparation of a joint pretrial statement & to meet & confer & exchange witness & exhibit lists. RPC 3.4(c). They also are obstructing, unlawfully, each other's access to evidence. RPC 3.4(a).

They may, therefore, be in breach of RPC 8.4, which prohibits lawyers from engaging in conduct that is prejudicial to the administration of justice (part (d)).

They are also delaying the expeditious litigation of the claims, which may be a violation of RPC 3.2

Representative Good Answer No. 2

Question 1

A. Allen can be charge in either the circuit court or the district court for Charles County. Charles County is the proper county because that is where the crime was committed. Crim. P. §4-201(a).

These charges are apparently misdemeanors. Under CJP §4-301(b)(1), the district court has jurisdiction over the charging of "commission of a common-law or statutory misdemeanor regardless of the amount of money or value of property involved. Therefore, the case can be charged in district court. It may also be charged in circuit court. Under CJP §4-302(d), the circuit court has concurrent jurisdiction in a criminal case "in which the penalty may be confinement for 3 years or more . . ." CJP §4-302(d)(1)(i). Here, the unauthorized use of a motor vehicle and possession of PCP carry 4 year sentences, which is more than the three-year threshold. Therefore, the case may be charged in district or circuit court for Charles County.

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B. Allen will need to assert that he is incompetent to stand trial and that he is not criminally responsible for the charges. As his attorney, I would file a notice of appearance within 5 days of accepting the appointment as his attorney. Md. Rule §4-214(a). I would then make a motion under Md. Rule §4-251 or §4-252 to ask the Court to determine whether Allen is competent to stand trial (Crim P §3-104.)

I would then enter a plea of not criminally responsible by reason of insanity at the time Allen initially pleads Md. Rule §4-242(b)(3) or at the time the case is called for trial Md. Rule §4-242(b)(2). I would next file a motion for bifurcation of guilt vs. criminal responsibility under Md. Rule §4-314(a)(3).

I would also file a demand for jury trial under Md. Rule §4-301(b). This should be in writing and filed no later than 15 days before the scheduled trial date.

Last, I would file demands for discovery to obtain all required disclosure under Md. Rule §4-262 (dist. ct.) or Md. Rule §4-263 (circuit court).

C. As a general proposition, an attorney must not offer evidence to the tribunal that the lawyer knows to be false. MRPC 3.3(a)(4). There is an exception in criminal cases stating "a lawyer for an accused in a criminal case need not disclose that the accused intends to testify falsely . . . if the lawyer reasonably believes that the disclosure would jeopardize any constitutional right of the accused. MRPC 3.3(e).

In this case, I would counsel the client not to take the stand or testify truthfully, but I do not believe I have an ethical duty to correct the testimony under Rule 3.3(e) because the disclosure could affect his constitutional rights.

He may have the option of withdrawing as counsel if the confrontation with the client occurs before trial. Rule 3.3, comment [7]. The lawyer may also permit the client to testify essentially in narrative form so the lawyer is not assisting the perjury. Rule 3.3, comment [10].

D. The State's Attorney (S.A.) must comply with Md. Rule §4-245. If the S.A. wishes to seek permissive/optional enhanced penalties "because of a previous conviction," the S.A. shall serve a notice of the alleged prior conviction on the defendant 15 days before trial (circuit court) or 5 days before trial (district) if the law does not require the enhancement. Md. Rule §4-245(b). If the enhancement is a mandatory enhancement, the S.A. shall serve notice of the alleged prior conviction on the defendant or counsel at least 15 days before sentencing (circuit court) or 5 days before sentencing (district court).

As such, if the enhancement was optional, S.A. cannot do anything because permissive enhancement must be disclosed prior to trial. Here, the conviction already occurred. If it is a mandatory enhancement, S.A. must notify defendant/attorney 15 says before sentencing.

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Question 2

A. The first cause of action is for wrongful death. Under CJP §3-902(a), "an action may be maintained against a person whose wrongful death causes the death of another." The defendant would be David who ran the light. The action "shall be brought for the benefit of the . . . child of the deceased person. CJP §3-904(a)(1). It is likely that a guardian or other fiduciary would be appointed to prosecute the action for Laura since she is still a minor.

The second cause of action is for negligence against David for recklessly running the red light. Specifically, there is at a minimum, a claim for the $50,000 in property damage to Fred's car. Under CJP §6-401 ". . . a cause of action at law, whether real, personal or mixed, survives the death of either party." In this case, the property damage claim survives the death of Fred & Wilma. This action can be prosecuted by Paul, the P.R. for the estate under Md. Rule §2-201, which permits a cause of action to be prosecuted by a personal representative.

Wilma in theory can have a cause of action against Fred if he was partially at fault for the accident. This could also be true of Laura against Fred if he was partially at fault for the accident. This could also be true of Laura against Fred with respect to the death claim. Based on the facts presented, this appears unlikely. (The death of Fred doesn't abate the cause of action against him. CJP §6-401(a).

B. This question raises issue as to simultaneous death. Under CJP §10-803, where there is no sufficient evidence that tenants by the entirety have died other than simultaneously, the property held shall be distributed one-half as if one had survived and one-half as if the other had survived.

In this case, the death was apparently simultaneous since Fred & Wilma were both dead upon the first person's arrival at the scene. The promissory note was held as tenants by the entirety. Therefore, half of the proceeds ($12,500) would be inventoried under Fred's estate and the other half under Wilma's estate.

C. (1)(fraudulent conveyance) Paul should be able to take action against the property. A money judgment constitutes a lien from the date of entry of judgment on the defendants interest in land located in the county. Paul may request a writ of execution under §2-641 and levy upon the property under §2-642(a). Since the property is not owned by Larry any more, a writ of garnishment may need to be filed since it's in a third party's hands. Md. Rule §6-245(a). Paul can then try to seek sale of the property.

(2) (joint tenants) Under CJP §11-402, I don't think Paul can collect against this property because a judgment lien does not attach to a property held as joint tenants. "A judgment lien cannot attach to an estate in joint tenancy until after severance and creation of a separate estate . . ." Eastern Shore Building & Loan Corp. v. Bank of Somerset, 253 Md. 525 (1969) (page 571 of Michies Ann. CJP Vol. 2).

(3) (joint/spousal property exception) Paul may seek a writ of execution under Md. Rule §2-641(a) ordering the sheriff to levy upon the property & the bank account. However, this will probably not be successful because the account is in the name of both Larry and his wife. Under

CJP §11-603(a), a garnishment against property held by husband and wife is not valid unless both owners are judgment debtors. This assumes that the bank account predates the judgment. CJP §11-603(a)(2).

D. (Wrongful death & property damage) The tort claims can be commenced in either Calvert County or Anne Arundel County. Calvert County is proper because that is where the accident and cause of action arose. CJP §6-202(b). Anne Arundel County is proper because that is where David the defendant resides. CJP §6-201(a). It should be filed in Circuit Court because the damages exceed the jurisdictional limit of the district court, which is $30,000. CJP §4-401(1). This is apparent based on the death and property damage.

With respect to any enforcement action on the judgment, those proceedings would likely need to be handled in the jurisdiction where the property is located. This is because under Md. Rule §2-641, the writ of execution is issued to the sheriff who can only levy property in the jurisdiction. A judgment can be transmitted to other jurisdictions under Md. Rule §2-622. More than one writ may be issued but only one satisfaction may be had. Md. Rule §2-641(a).

Since the property appears to all be in Calvert Co., the enforcement actions would take place in Circuit Court for Calvert Co.

Question 3

A. I would argue that this Joint Stipulation of Dismissal did create a final judgment under Md. Rule §2-601which states that each judgment shall be set forth on a separate document. Here, the separate document is the Stipulation. It creates finality with respect to all pending claims because Count I was dismissed by the Stipulation; Count II is preserved for appeal. Likewise, the Counterclaim is dismissed contingent on the appeal. Under Md. Rule §2-602(a), if all of the claims are adjudicated (here by Court order and Stipulation), it constitutes a final judgment and terminates the action. Md. Rule §2-602(a)(1-3).

I think it is plausible to argue that Count I is really resolved by Mary's Motion to Dismiss Count II (no indication it was addressed sua sponte). This is the case because both counts largely turn on the issue of whether amounts are due on the sums "associated" with the charitable tax deduction. It can be argued that concept is embodied in the agreement to dismiss because that issue has now been decided by the circuit court. So all issues have been adjudicated. As such a final judgment has really been achieved. (In other words, the disposition of Count II is dispositive of Count I.)

B. I would argue that the Stipulation of Dismissal did not create a final judgment under Md. Rule §2-602(a) because there was no mention that the court was "so set forth" to constitute a final judgment. Also, under Md. Rule §2-602(a), the Stipulation does not really dispose of the action. The Counterclaim and Count I were conditionally dismissed. This means that they (in theory) can be relitigated upon demand on vacation of the appeal on Count II. In other words, the stipulation does "adjudicate less than [the] entire claim." If that is the case, under Rule §2-602(a)(1)-(3), the judgment is not final, does not terminate the action, and is subject to revision by the Court until such time as all claims are finally adjudicated. Further, there is no mention that the Court

determined that there was "no just reason for delay" with respect to part of the claims. (Md. Rule §2-602(b)(1).

I would also argue that for a judgment to be final, it must be an "unqualified, final disposition of the matter in controversy." Rohrbach v. Rohrbach, 318 Md. 28 (1989) (Michie p. 541 2016 Ed.) Indeed, its effectiveness is contingent upon the outcome of the appeal on its face.

Question 4

Counsel must first make good faith attempts to resolve all discovery disputes without Court involvement. Md. Rule §2-341. Next, counsel must prepare a certificate describing the good faith efforts to resolve the dispute. Md. Rule §2-341.

Interrogatories: The parties failed to respond to interrogatories. Under Md. Rule §2-431(a), they are entitled to seek immediate sanctions because no response was ever made. This will require the filing of a written motion under Md. Rule §2-311. The motion must be filed with any affidavit or papers upon which it is based, such as a memorandum. Md. Rule §2-311(d). I would make a "request for hearing" in the title of the Motion under Md. Rule §2-311(f). The should be files "with reasonable promptness." Md. Rule §2-432(d).

Requests for Production: Because the parties made some response (albeit incomplete), the parties must first make a motion compelling discovery under Md. Rule 2-§432(b) because "a party [failed] to comply with a request for production." A motion under §2-311 must be filed as outlined above. If the party does not comply with the Order compelling discovery, the movant may seek discovery sanctions under Md. Rule §2-433.

Additional requirement for Motion (not noted above)

A motion to compel must also comply with Md. Rule 2-432(b)(2) and set forth the request, the answer/objection, and the reasons why discovery should be compelled.

An evasive or incomplete answer is treated as a failure to answer.

Question 5

The lawyers violated the following Rules:

Rule 1.1: The lawyers engaged in incompetent representation by failing to comply with the Scheduling Order, by not completing the required tasks. It is also likely incompetent to be so disagreeable that the lawyers cannot competently prosecute/defend the action and complete mandatory pretrial activities.

Rule 1.3: The lawyers failed to act with reasonable diligence in representing their clients by failing to satisfy all required pretrial responsibilities ordered by the Court.

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Rule 1.4: The lawyers violated Rule 1.4(a)(3) by failing to promptly comply with reasonable requests for information. Specifically, the defendant's lawyer didn't bring exhibits or witness lists. Pltf's attorney then withheld the information in response to defendant's actions.

Rule 3.2: Both lawyers violated Rule 3.2, which requires that the lawyers make reasonable efforts to expedite litigation. Here, there was evidence of violation by failing to properly address the "outstanding discovery". Then, there was the issue of the parties failing to and then refusing to provide exhibit and witness lists. This conduct could result in a delay of the trial.

Rule 3.4: The attorneys have violated Rule 3.4(a) by obstructing another party's access to evidence and by knowingly disobeying an obligation of the tribunal, such as the Scheduling Order. Here, they obstructed access to the exhibits and witness list, which the judge ordered to be disclosed.

Rule 4.4: The lawyers may have violated Rule 4.4(a), which prohibits means that have no purpose other than to embarrass a 3rd person. Here, the lawyers called each other names so its is arguable that they are doing to his for the purpose of embarrassing each other (3rd parties).

Rule 8.4: It is misconduct to violate the Md. Rules of Professional Responsibility. Rule 8.4(a). If the lawyers violated any other Rule in this case, it is likely they will be found to have violated this Rule also.