Ethical Issues in Criminal Defense

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Topics Covered:

I. What to do when conflicts arise between:
   - A. Current Clients
     - RPC 1.7 (with examples);
     - *An Unnamed Attorney v. Kentucky Bar Association*, 186 S.W.3d 741 (Ky. 2006)
     - *Mattingly v. KBA*, 364 S.W.3d 171 (Ky. 2012)
     - *Commonwealth v. Muchrison, 542 S.W.3d 923 (Ky. 2018)*
   - B. Current Client and Former Client
     - RPC 1.9;
     - Ohio Supreme Court Bd. Of Commissioners on Grievances, Op. 2013-4 (2013));
     - *Samuels v. Commonwealth*, 512 S.W.3d 709 (Ky. 2017))
   - C. Client and Personal Interest of the Attorney
     - *United States v. KBA*, 439 S.W.3d 136 (Ky. 2014));

II. What to do when the Client is insistent upon lying on the stand:
   - RPC 1.6 v. RPC 3.3
   - *Brown v. Commonwealth*, 226 S.W.3d 74 (Ky. 2007);

III. What does it mean to be "Competent" to handle a case Under RPC 1.1:

IV. What does it mean to be "Diligent" under RPC 1.3 (especially given the new prevalence of the criminal "Rocket Docket?")
   - *Commonwealth v. Tigue*, 459 S.W.3d 372 (Ky. 2015)

V. This is *what*? The "smoking gun?" What in the Glock does the Criminal Defense lawyer's do now?

I. What to Do when Conflicts Arise between…

Kentucky's version of the Rules of Professional Conduct are codified at SCR 3.130(1.0 – 6.5).[1] The rules pertaining to ethically conflicts are Rules 1.7, 1.8, 1.9. 1.10 and 1.11, and contemplate that conflicts come in several varieties: current client v. different current client, current client v. former client, current client v. personal/ethical interest of the attorney, and current client v. the client's own mental state. Criminal prosecutors typically do not have to worry about such conflicts; prosecutors do not represent individuals, and while some might state that the prosecutor represents the state or the United States, in fact, as Comment 1 to Rule 3.8 explains, a prosecutor "has the responsibility of a minister of justice and not simply that of an advocate [which] carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Since the prosecutor is not an advocate of the government, there are no concerns with sponsoring a state's witness in one case and then prosecuting the same person in a different case.

On the other hand, the criminal defense practitioner who does more than just dabble in criminal law is bound to, eventually, come upon situations which present conflicts. Current clients may wish to cut a deal to testify against another current client, or a former client. The ethical criminal defense attorney has to circumnavigate all of the conflict rules in order to make sure his or her reputation, or in some cases law license, is not being placed in jeopardy

Were only it as simple as reading the rule! Too many times the issue of whether a lawyer has a conflict is not clear cut, and the lawyer must engage in in-depth analysis to determine the existence of, and the appropriate response to, a conflict. On occasion, a formal ethics opinion by the Kentucky Bar Association is required, and other times, a court opinion. This article attempts to identify some of the more prevalent, repeating conflicts that can confront the criminal defense practitioner, and offers some practical (hopefully) advice how to handle the conflict when it occurs.

A. Current Client v. Different Current Client

Rule 1.7 "Conflict of Interest; current clients" Subsection (a) provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (1) the representation of one client will be directly adverse to another client; or
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> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

"Directly Adverse"

[1] Hereafter, the SCR 3.130 will not be added to the citations, and the Rules will be referenced by their Model Rule number only, e.g., SCR 3.130(1.7) will be referred to simply as "Rule 1.7."

Focusing for the moment solely on section (a)(1), the attorney cannot represent two different current clients where they are directly adverse. The clearest example of this is when two defendants in the same case blame each other.

> Ex: Abel and Baker are both charged with receipt of stolen property when the vehicle they are riding in contains a stolen pig. Abel claims that Baker stole the pig and Abel knows nothing about it. Baker claims Abel stole the pig and HE knows nothing about it. The attorney clearly cannot represent both of them.

Another example is when the attorney represents both of them, but on different matters, and one of them is still pointing the finger of blame at the other.

> **Ex: Suppose attorney represents Abel on a charge of drug trafficking, and he is in jail. While in jail, he claims to have overheard your client Baker, who is also in jail for trafficking, confess to an unsolved burglary. Abel wants you to offer this testimony to the authorities in exchange for a better deal.**
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> Obviously a direct conflict. Attorney cannot offer client Baker as a witness against client Abel, because that would be disloyal to Baker. But Abel is entitled to an attorney who *can* call Baker as a witness. In this instance, attorney would have to discontinue representation of Abel, at least to the extent that Abel continues to insist that he overheard Baker confess. Perhaps the attorney could get another attorney (not in his firm) to take over the representation. If the police is interested in making a deal for the info, then the attorney keeps the case. But if the police are not interested in trading for the info, or if the police believe the information to be false, then the original attorney can step back into the representation.

"Significant Risk" of "Materially Limited" Representation.

Rule 1.7(a)(2) requires only that there is there be a significant risk that the representation of one or more clients will be materially limited by representing another client. In essence, (b)(2) makes (b)(1) superfluous, because in a directly adverse conflict, representation of at least one of the clients will be materially limited. Right?

But (b)(2) is not quite the "litmus test" that a conflict arising under (b)(1) is. It requires analysis of at least two terms: "significant risk" and "materially limited." The rule seems to imply that a current conflict under this subsection is one that must be real, and not imagined.

> **Ex: Abel, Baker and Charley are partners in a meth lab. All are arrested when the police show up and see the three standing around a cooking meth lab in the back of Abel's house. But none of the three are talking, none give a statement. Each of them want to hire you as a lawyer. Is there a significant risk that your ability to consider,**

recommend or carry out an appropriate course of action for one of these persons will be material limited as a result of your responsibilities to the other two?

Probably a conflict.

- What if one is the cook, but the other two just brought an ingredient, like ephedrine, to the cook? Your ability to get a lesser included charge of possession of precursor for one of them may require you to point to the other defendant(s) as a cook.

- What if Baker or Charley want to say that the meth was cooking before they got there, and they just came other because they are friends of Abel, just visiting?

Only if all three have a common defense that all can share in, e.g., we were not cooking meth. We just ran outside when we smelled something and saw two boys standing around this smoking two-liter bottle, who ran away when they saw us step outside the house. You police showed up right after they ran away. But this alliance can be shaky, and can change. What if the government offers Charley a deal to give her time served on a misdemeanor if she testifies against Abel and Baker, and suddenly she wants to tell the "truth" hat "yeah, we were all cooking." In that instance, suddenly there is a significant risk that your ability to represent Abel and Baker will be materially limited by your representation of Charley. In fact, at that point you have directly adverse clients.

Waivers Between Current Clients

At this point, it is time to talk about waivers between current clients, because at this point you only have potential conflicts, not actual or real conflicts at the time of appointment or hire.

Rule 1.7(b) states:

Notwithstanding paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

***An Unnamed Attorney v. Kentucky Bar Association,* 186 S.W.3d 741 (Ky. 2006)**: Movant advised the Does that a conflict of interest could arise in the course of his work on their behalf.

He also advised them that if a conflict of interest did arise he might be required to withdraw from the joint employment. However, he did not advise them that any and all information obtained during the joint representation or obtained in any communication to him by them would be available to each client and exchanged freely between the clients in the absence of a conflict of interest. Movant asserts that he did not anticipate the possibility that the interests of the Does would become so materially divergent that there would be a conflict of interest in providing the results of the investigation to each of them. He acknowledges that he did not explain the potential ramifications of joint representation in that regard….

As neither of the Does had been charged at the time the representation commenced, the rule only required that Movant reasonably believe the representation of each client would not be adversely affected by the dual representation, and that each of the clients consent after consultation. In the context of common representation, consent must be informed, and this requires that each client be made aware of the full consequences of such representation. This includes the meaning of confidentiality, and the reasonably foreseeable means that conflicts could adversely affect the interests of each client. Such communication must "include explanation of the implications of the common representation."

> In this case there was a lack of required communication by Movant. Specifically, Movant failed to explain that there would be no confidentiality as between the two clients and the lawyer, that all information discovered would be furnished to both, and that each client was owed the same duty. When the investigation uncovered information that was favorable to one client but harmful to the other, Movant refused to release the information he had gathered without the acquiescence of both clients, which was not given. This resulted from his failure to initially explain the implications of common representation to both clients. When the investigation revealed that one of the clients was involved in the homicide, Movant had a duty with respect to that client to keep that fact confidential. On the other hand, he had a duty to the other client to provide exculpatory information which necessarily included information he was obligated to keep confidential.
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> A few noteworthy takeaways from the case:
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> - The unnamed attorney used the Kentucky Administrative Office of the Court's form for the waiver of conflicts between current clients, and it still was not enough. The responsibility for one's own ethics remains with the attorney.
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> - The advice given in the Ethics Hotline opinion does not shield Movant from this charge, as the charge arises from the commencement of the representation and before the events that led him to request an Ethics Hotline opinion. This case well illustrates the potential peril lawyers face when undertaking joint representation. Rule 1.7(2)(b) is mandatory and the consent element must be informed consent, including a full explanation of all foreseeable ramifications.

- Once your waivers collapse, you probably have to drop out of both cases. If the waivers are necessary in order to represent someone under the rule, once the waiver is vitiated, the ability to continue to represent both is probably also vitiated.

***Mattingly v. KBA*, 364 S.W.3d 171 (Ky. 2012**): Attorney Mattingly represented two codefendants in a criminal case concerning possession of forged instruments (checks) and other charges. At arraignment, the attorney did not inform the court that he represented both defendants until after the Commonwealth had brought it to the attention of the court. The judge warned the attorney about a possible Rule of Criminal Procedure 8.30 issue requiring separate counsel, and the attorney assured the court that he understood. However, the attorney continued representing both defendants without obtaining a written waiver of conflict of interest from either defendant.

Thereafter, the attorney procured from one of the defendants a sworn and notarized affidavit stating that he was solely responsible for all crimes. That client plead guilty and received five years in prison.

At a subsequent trial of the second codefendant, the attorney was notified by the Commonwealth Attorney that the first codefendant who had pled guilty would be subpoenaed as a witness at the second codefendant's trial. When the trial court learned of the possible conflict of interest, the judge ordered the attorney to withdraw as counsel. The second codefendant then pled guilty and was granted probation.

Later, the second codefendant filed a bar complaint, to which the attorney responded, and which resulted in KBA charges of engaging in a conflict of interest between clients by representing each codefendant with knowledge that their interests were adverse, and without consent of each client, in violation of Rule 1.7(b), and knowingly and intentionally disobeying an obligation under the rules of a tribunal (Rule 3.4(c)). The charges were compounded with an additional charge that the attorney had put false statements in his response to the bar complaint filed by the client, statements to the effect that the attorney had done more to advise his clients of the conflict than was actually reflected by the record. The attorney was publicly reprimanded and ordered to pay costs of $2,395.23.

***Muchrison v. Commonwealth*, 542 S.W.3d 923, (Ky. 2018):** In this case, the attorney in question represented Trent on theft charges. Trent told his counsel that he had someone working toward getting a bond reduction on his behalf, but declined to tell his counsel who was working and how. Sure enough, at the next court appearance, the Commonwealth did not oppose a bond reduction and Trent got out on an unusually sweet bail for this kind of offense. Later, however, Trent violated his bond conditions and he was sent back to jail. He eventually pled guilty to theft. Guess what, the person who had been working on Trent's behalf, Jennifer, was working as a confidential informant for the Commonwealth. Of course, she had to keep working for the Commonwealth to make good on her bargain that she had arranged on behalf of Trent. As it turns out, she not only had a romantic relationship with Trent, but she had one with Muchrison as well, another client of the Trent's attorney. Jennifer used that relationship to arrange a confidential sale of heroin to Murchrison. Muchrison hires Trent's attorney to defend him.

In court, just prior to Muchrison's trial, the Commonwealth discloses that the confidential informant, Jennifer, had agreed to sell to Muchrison in order to help her boyfriend Trent. So the attorney finds out for the first time that Jennifer was working for Trent, while Trent was the attorney's client. Additionally, even though Trent by this time had been sentenced, he remained a CURRENT client because he wanted his attorney to file some post-conviction motions.

Attorney filed a motion to withdraw before the court, and even sought an ethics hot line opinion. The trial court found that no conflict existed, but nevertheless ordered that defense counsel could no longer represent Trent.

During Muchrison's trial, the attorney made Jennifer out to be an alternative perpetrator, arguing that she had motive, means and opportunity to successfully fabricate a drug transaction. However, his ability to ask her questions about her involvement with Trent was limited, and the attorney was left with being able to ask questions about her need to make money for living expenses as being the primary motive.

On appeal, Muchrison argued that the trial court's denial of his attorney's motion to withdraw deprived him of a fair trial. Trial counsel's position was that his representation of Trent, and the ethical responsibilities inherent therein, precluded him from fully exploring exculpatory facts in his cross-examination of Jennifer, which prevented him from fully presenting Muchrison's defense.

The Court of Appeals agreed:

> Clearly, Muchrison's trial counsel became aware of the potential conflict stemming from Trent after he had begun to represent Muchrison. Suister's work as a confidential informant, in an effort to assist Trent, directly resulted in the charges against Muchrison. That his responsibilities to Trent would affect his cross-examination of Suister to Muchrison's detriment is a reasonable belief by trial counsel in this situation, particularly in light of the fact that Trent still expected trial counsel to file post-conviction motions. A client's reasonable belief or expectation that a lawyer will undertake representation is all that is necessary to create a current attorney client relationship. Lovell v. Winchester, 941 S.W.2d 466 (Ky.1997) (overruled on other grounds by Marcum v. Scorsone, 457 S.W.3d 710 (Ky.2015)). ***Muchrison v. Commonwealth*, 2016 Wl 3672209 (Ky. App. 2016), *overruled by Muchrison v. Commonwealth*, 542 S.W.3d 923, (Ky. 2018).**

However, the Supreme Court reversed:

> The Court of Appeals also cited [Rule 1.7] in support of its conclusion that there was a conflict of interest here. Subsection (a)(2) of that rule precludes an attorney from representing a client when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

Hitch's initial concern after receiving the Commonwealth's notification of the relationship between Trent and Jennifer is certainly understandable. The acknowledgment by the ethics hotline representative adds efficacy to this claim. However, we ultimately disagree with that determination. Although there was ***technically an "overlap"*** in Hitch's representation of Trent and Appellee, we fail to see any conflict of interest here. …

Similar to our decision in *Samuels [discussed supra]*, "[w]hen the totality of the circumstances [is] examined, it becomes clear that [Appellee] has not demonstrated that his lawyer was burdened by an actual conflict of interest during [his] representation of him." *Samuels, supra*, at 716. More precisely, there was no "significant risk" that the information provided by the Commonwealth concerning the relationship between Trent and Jennifer "materially limited" Hitch's responsibilities to either Appellee or Trent. Rule 1.7. In other words, there was no ethical impediment to cross-examining Jennifer regarding her relationship and agreement with Trent, and further arguing that Jennifer fabricated the drug transaction that led to Appellee's arrest. In fact, Hitch did cross-examine Jennifer concerning her relationship with Trent and how that impacted her motivation for working as a confidential informant.

B. Current Client v. Former Client

Rule 1.9 "Duties to former clients" provides

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Perhaps the most commonly asked question among attorneys at the Kentucky Department of Public Advocacy is the following example:

> **Ex: Abel used to be a client who was ultimately convicted of possession and probated, perhaps amended down from trafficking due to your good work as his attorney. But part of the deal is that he has to "work" for the Commonwealth and make buys. As it turns out, close to trial you are told by the Commonwealth that the CI in your current client's, Baker's, case was your old client Abel. Conflict?**
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> No, not if you don't use information you learned from him during your prior representation of him against him.

Ohio Supreme Court Bd. of Commissioners on Grievances, Op. 2013-4, 10/11/13, which interprets Ohio's Rule 1.9 (which is substantially similar to Kentucky's rule) came to the following conclusion:

> A public defender who learns during the course of a criminal proceeding that she previously represented a prosecution witness in an unrelated case generally will be permitted to impeach the credibility the former client by cross-examining him about his conviction in the prior matter, even though the attorney helped procure that conviction, under the "generally known" exemption to Rule 1.9(c).

However, the Ohio court also held that cross-examination must be limited to the existence of the prior conviction. The Court specifically stated that counsel would be prohibited from using any other information learned during that representation, and gave as an example if the former client indicated to the public defender a willingness to lie under oath within the prior representation, the public defender may not use that information against the former client in the cross examination.

While an Ohio opinion is obviously not binding on us, Kentucky also has this "generally known" exemption in its version of the rule, and this is precisely the advice that I have been giving public defenders in this situation, including even the exact example that I have been using to illustrate a cross-examination that goes too far. So, I am more confident than ever that I have been giving the correct answer.

***Samuels v. Commonwealth,* 512 S.W.3d 709 (Ky. 2017):** Samuels and Gravett were cellmates in the McCracken County jail. They got into a physical fight where Samuels bit off Gravett's ear. As a result, Samuels was charged with 2nd degree assault, and appointed a public defender. Gravett had his own public defender, who worked at the same public defender's office. Gravett ultimately pleaded guilty, and his case was resolved when his motion for shock probation was denied on May 12, 2009. That was 8 days before Samuels' trial on the second degree assault of Gravett. Samuels was convicted and given 10 years.

On the morning of trial, May 20, 2009, Samuels attorney told the court that she believed that Samuels' victim, Gravett, was still being represented by the office. In fact, that was no longer the case. She also prepared a waiver for Samuels to sign, but Samuels refused to sign it. The attorney's request for appointment of new, conflict counsel was denied, the judge ruling that no actual conflict existed.

On appeal, Samuels argued that he was denied conflict-free counsel in violation of his Sixth Amendment right to counsel, and the Court of Appeals reversed and remanded for a hearing because there was too little evidence on the matter in the record to determine whether a conflict actually existed. At the evidentiary hearing, Samuel's attorney testified that she did not think that the overlapping representation had created an actual conflict of interest, as did her supervisor. Samuel's attorney further testified that, despite this belief, she had raised this issue with the court and attempted to have her client waive any potential conflict "out of an abundance of caution." There was also testimony that neither Samuel's nor Gravett's attorney had worked on or known anything about the other's case. The court again found no conflict. On appeal, the Court of Appeals affirmed, finding no unconstitutional conflict of interest.

The Supreme Court granted discretionary review. In reversing the Court of Appeals, the Supreme Court made several holdings:

1. Samuels and Gravetts indeed had adverse interests during Samuel's criminal proceedings. One was the aggressor, and one was the victim. It doesn't get more adverse than that. "A conflict of interest may arise through simultaneous representation of a criminal defendant and a prosecution witness…. The victim of a crime is not a detached observer of the trial of the accused." IN this case, this was particularly at issue, as the defense was self-defense, and the credibility of the victim/witness is directly at odds and at issue. So, there clearly was a concurrent conflict.

2. The fact that representation of Gravett ended eight days before trial is of no consequences, because they were both current clients during the time that Samuels' defense was being prepared. "[T]he right to conflict-free counsel under the Sixth Amendment attaches at 'the initiation of adversary judicial criminal proceedings.' *Rothgery v. Gillespie Cty*., Tex., 554 U.S. 191, 198, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008) (quoting *United States v. Gouveia*, 467 U.S. 180, 188, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984)). Indeed, the Supreme Court has recognized that 'to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.' *Maine v. Moulton*, 474 U.S. 159, 170, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985)." So the trial court erred to the extent it treated the conflict issue as involving only past, not simultaneous, representation.

3. Had this involved the same attorney, rather than two attorneys in the same firm, this would be automatic, without Samuels having to show prejudice. At the hearing, it was determined that Samuel's lawyer had not pulled punches, had not comprised Samuel's representation in any way. When raised prior to trial, this requires automatic reversal. In cases where the conflict is raised only as a post-conviction matter, for the first time, there

was be a showing of prejudice. So, if both of these gentlemen had the same attorney, this case would have been reversed.

4. However, there were two attorneys, so the question is whether the conflict had there been but one attorney is imputed to the other for purposes of determining whether there has been a denial of counsel. The answer is "no," unless some prejudice is shown. Here, it was not. All the evidence indicated that these two attorneys were oblivious to what the other was doing, there was no sharing of information, there was no let down in zealousness of representation. So, Samuels is found not to have been denied his Sixth Amendment Counsel.

5. That said, Rule 3.130(1.10) imputes ethically the conflict of interest that one attorney may have to the other attorneys in the firm. So, there can be an ethical breach – to which the attorneys must answer –even though the relief is not granted to the defendant. This is the worst of both worlds. A potential ethical infraction suffered by one or more attorneys that does not result in relief for the client.

The Supreme Court's majority opinion left the issue at whether Samuels was denied Sixth Amendment Counsel. But in a concurrence, Justice Hughes squarely addressed the ethical issue head-on, and it is because of this concurrence that everyone should pay attention to the potential ethical ramifications:

> First, I am compelled to comment on the Paducah DPA office's apparently cavalier approach to shielding its clients from intra-office conflicts. While it may be that DPA offices need not bear the full brunt of the conflict rules that ordinarily apply to law firms—an issue the Court leaves for another day—the apparent disregard of those rules in this case is disturbing. To state the obvious, a red flag should go up in any DPA office when a client and the alleged victim of that client's assault were both inmates of the local detention center. Given the heavy caseload carried by DPA across the Commonwealth, it stands to reason that there is a good possibility that the victim is a local DPA client. Here the office appears to have employed no screening or "early warning" system because there is no record of a standard conflict detection procedure which, for whatever reason, failed in this particular case. If the conflict had been detected at the outset or even at a time further removed from trial, the trial court's options with regard to both inquiring into the potential conflict and exploring possible responses to it would have been far broader.

This case underscores the necessity of any public defender or private law firm office (because DPA was treated as a law firm, not a governmental office, in this case) developing and executing an effective intra-office conflict detection system to avoid future recurrences.

But what is chilling is that a through conflicts check WAS done, and it was still missed. This is because the client came in and out of being a current and former client. At the time Samuels was charged, Gravett was a former client. He had pled guilty on a drug charge, and was out on probation for a while. However, his probation was revoked, and DPA represented him on the

revocation, but then represented him again on the shock probation motion which was pending after Gravett had been bitten. Thus, a FORMER client became a current client again. While the conflicts check would have worked if he had been a client at the time Samuels bit him, it did not occur to Gravett's lawyer to recheck to see if there was another conflict when he came back as a current client again. Who would have thought that he might have a conflict when all you are doing is representing on a probation revocation proceeding and a subsequent shock motion?

C. Current Client v. Personal / Ethical Interest of the Lawyer

An obvious example of a personal interest of the lawyer is when the lawyer is the victim of the crime committed by the client. Less obvious examples might occur when the attorney has such a distaste for the client, e.g., maybe he is the current husband of his ex-wife, or maybe the ex-husband of the attorney. The attorneys in this case may be so biased against the client, that they personally should not handle the case.

Other times the personal or ethical conflict arises out of circumstances that do not involve the personal feelings of the attorney. For instance, an attorney who knows that he or she will be a witness or reasonably ought to be called as a witness in a matter has a personal conflict which by Rule 3.7 generally will limit his or her ability to represent the client. There are exceptions:

- If the testimony relates to an uncontested issue;
- If the testimony relates to the nature and value of legal services rendered in the case; or
- If disqualification of the lawyer would work substantial hardship on the client.

Rule 3.7 also provides that if a lawyer is disqualified under this rule, another lawyer in the lawyer's firm may act as an advocate.

> **Ex: A very common example of this rule put to offensive use by the prosecution is during a bail-jumping case, where the prosecution wants to call the attorney to the stand and ask whether he/she told the client when to come to court, was told by the client that the client wasn't coming to court, etc.**
>
> Very often, the solution is to simply have another lawyer in the firm take over the bail jumping case. But what if the attorney is a solo practitioner? In that case, the attorney will have the burden of proving that disqualification of the lawyer would work a substantial hardship on the client. This may well require a finding by the Court after an *in camera* showing as to what the attorney knows. If the attorney's information is damning to the client, then the attorney should withdraw and never even have an *in camera* inspection. But if the attorney's knowledge is minimal, it may be worth making the showing. Why involve the court? As a practical matter, if the court is not satisfied that the attorney has no knowledge, and has to decide the issue in a vacuum, the judge will likely not let the attorney represent the client on the bail jumping charge.

Ex: Client wants to withdraw his plea of guilty, and blames the attorney for not fully informing him of the consequences of the plea, etc.

A different attorney will likely have to represent the client during the hearing on the motion to withdraw the plea. ***Commonwealth v. Tigue*, 459 S.W.3d 372, 394 (Ky. 2015).**

***United States v. Kentucky Bar Association*, 439 S.W.3d 136 (Ky. 2014):** Where a prosecutor offers a plea bargain on condition that the attorney waive any prospective 11.42 or ineffective assistance of counsel motions, it is unethical BOTH for the prosecutor to offer and for the attorney to accept. It is a personal interest of the lawyer v. the best legal interests of the client, and the latter prevails.

II. What to do when the Client is insistent upon lying on the stand:

Sometimes clients lie. We know this. On occasions a client will lie to protect him or herself. Or to gain advantage in a case, whether civil or criminal. Many times, we have this feeling that the client is lying, but we don't know for sure, we don't really want to know for sure, and we never really find out for sure. But sometimes, we KNOW our client lied, or we are told by our client that he or she WILL lie. What happens next?

If you are like me, then you start trying to remember what you learned about "candor to the tribunal" and "client confidentiality," and which one of these "absolutes" trumps the other. How do I counsel the client BEFORE he lies? What if he lies anyway? What if it's not a client, but it's a witness testifying on behalf of the client? Do I have to withdraw from the case – it's a week before trial! Do I remember something about "testifying in the narrative? Wait – isn't it objectionable to testify in the narrative? Am I going to have to give back a fee? Does it matter whether it's a criminal case or a civil case? ARRGH! It's all too much!

Okay, breathe. Don't kick yourself if you don't know the answer, because the truth is there is not a lot of authority with the answers out there. Ask five attorneys, you'll get five different answers. That's one of the reasons this is the "practice" of law, not the science of law. There is not necessarily a Newtonian answer for every question. This article will look at the paucity of answers that ARE out there, and try to figure out the best ethical answers possible. We will get through this; we will get through this together.

What Happens when a Nonstoppable Force Collides with an Immovable Object?

When I was first asked this question by my teacher in Middle School, I was enthralled by the question and could not wait to hear the answer. Then, disappointingly, I was taught that it is a trick question as there is no such thing as either a nonstoppable force or an immovable object. That is as good an answer as I have ever gotten in adulthood. In any collision between a force and an object, one or the other must yield. In our discussion at hand, let's call the nonstoppable force the duty of "Candor toward the Tribunal," and the immovable object the duty of

"Confidentiality of Information." Read in isolation, each rule speaks in absolute terms. But what happens when these two absolutes come into conflict? Which one prevails? [Spoiler Alert: Candor toward the Tribunal. The Rules of Professional Conduct (codified at Supreme Court Rule 3.130) anticipate such a conflict.

Looking at the Rules, **Preamble: A Lawyer's Responsibilities Section X** provides:

> In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

Next, look at **Rule 1.6 "Confidentiality of Information,"** which provides in full:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
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> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to secure legal advice about the lawyer's compliance with these Rules;
> (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including a disciplinary proceeding, concerning the lawyer's representation of the client; or
> ***(4) to comply with other law or a court order.*** [Emphasis added.]

Right away, it can be seen that the duty of confidentiality has an exception built in that favors the courts. Subsection (b)(4) provides that confidential information may be revealed by the attorney in order to comply with other law or a court order. However, the verbiage is "may," not "shall," implying that the attorney is not *obligated* to reveal the client's confidential information, which would include, for instance, the fact that the client lied or was intending to lie. Although an

exception to the duty nto to reveal information, it stops short of mandating revealing the information.

Now, look at **Rule 3.3 "Candor toward the Tribunal":**

> (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;
> > (2) fail to disclose to the tribunal published legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> > (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
>
> ***(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6***. [Emphasis added.'
>
> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

There you have it, the nonstoppable force prevails. Turns out the immovable object wasn't all that immovable: Subsection (a) does not allow the lawyer to assist the client or a witness in lying, subsection (b) imposes upon the lawyer a duty to take remedial measures in the event of a lie, and subsection (c) makes it plain that the duty of candor to the tribunal trumps the duty to maintain confidentiality under Rule 1.6. Sounds about right, doesn't it? It's Vegas rules; the house wins. We are competing in the courts, and we thus play by the court's rules. The court does not allow for lying to the court.

That does not mean, however, that the duty of confidentiality to the client has no further place. You don't just out-and-out tattle on the client to the court at the first instance of a lie, do you? There are still unanswered questions. What does it mean to "knowingly" "offer" false evidence (both words)? What reasonable remedial measures are the attorney to undertake? Under what circumstances is it necessary to disclose the lie to tribunal (after all, the rule says "if necessary)?

Are there differences between civil and criminal cases? Surely, there MUST be ample authority out there to answer all these questions.

***In Re Carroll*, 244 S.W.2d 474 (Ky. 1951): "Thou Shalt Not Lie":** This was an attorney discipline case, decided in the context of a civil[2] case, and under the Canons of Professional Ethics of the American Bar Association[3]. In this case, the attorney was suspended for ninety days and publicly reprimanded for – in the words of Kentucky's highest court at the time – "sit[ting] by silently and permit[ting] his client to commit what may have been perjury, and which certainly would mislead the court and the opposing party on a matter vital to the issue under consideration," *citing* ***In Re Taylor*, 189 S.W.2d 403 (Ky. 1945)**, also a divorce case. During a hearing on a motion for temporary alimony, Carroll's client was asked, under oath, how much property he owned, to which he answered "no property whatsoever except an old automobile." In actuality, Carroll held legal title to real property, in his own name, but in trust for his client, who had conveyed the title to the attorney only a few days prior to the hearing. The court acknowledged that there was some legal issue as to who held equitable title, but decided that – for purposes of inquiry of the divorce court – the property belonged to the client, as both attorney and client were taking the position that the client was the true owner. In defending the charge of helping perpetrate a fraud on the court, the attorney raised four defenses:

- No proof the property belonged to the client. There was no record proof to show that the client held actual title to, or possession of the property, or that he had received income from it, and that in any event, the client would not have been able to enforce the oral trust against the respondent Carroll, who apparently was taking the property as a fee. The Court made short work of this defense, pointing out that – as trustee – he had a fiduciary duty to hold the property on behalf of the client, and taking the position that the client could not enforce the trust was contrary to his role as trustee;

- The Duty of Confidentiality. The attorney argued that it was his duty to observe the utmost good faith toward his client, and therefore he could not divulge any confidential information. The Court held that the duty "does not extend to the point of authorizing collaboration with him in the commission of the fraud;

- It was a "white" lie. Carroll argued that the question of property ownership was immaterial in the proceeding for temporary alimony because the determination of that issue rested largely on the income of the husband, not the ownership of property. The Court held that income and property were closely related, and even if the false testimony

[2] The underlying case was a divorce case, where the husband was lying about how much property he owned, so just how civil could it have been?

[2] Although decided under a different code of ethics than are applicable today, In Re Carroll still is authoritative, as it was cited as authority in the case of *Brown v. Commonwealth*, 226 S.W.3d 74 (Ky. 2007), which was decided after Kentucky adopted the present Rules of Professional Conduct in 1990.

did not affect the value of the award of alimony, "it was still a fraud upon the court and the opposing party," *citing* ***Davis v. Commonwealth,*** **2 S.W.2d 1038 (Ky. 1928)**, another attorney discipline case arising out of a divorce);

- The other party was not deceived. Because Carroll and the opposing counsel, in connection with another matter, had discussed the question of whether or not Carroll's client was actually the owner, the other party already knew that Carroll's client was claiming an interest in the real estate in question. The Court stated that this might have been true, the ex-wife's lawyer could not be held to have a better knowledge of the true facts than Carroll's client himself, and both he and the court had a right to rely upon the sworn testimony. "Any proper sense of fair dealing would have impelled [Carroll] at least to state for the record and for the court's information the fact that a controversy existed on the question of ownership."

In sum, Kentucky's highest court found that the attorney's conduct was "unethical and was of the type which impairs public confidence in the high moral standards of the legal profession." It found that he had violated his "constant duty" to maintain the integrity of our judicial system, and that the punishment of a ninety day suspension was not too severe.

Boiling down all of the court's answers to a sentence***, even if the substance of the lie is immaterial to the relief sought, and even if the lie doesn't actually deceive, the rule of confidentiality does not outweigh the rule of candor to the court***. That is almost as straight and succinct black-letter law on the subject since the ninth commandment.

What the *Carroll* case lacks, however, is any guidance on what to do when the client insists on lying and the attorney – unlike Carroll – refuses to participate in the lie. Fifty-six years later, we get our answer.

Brown v. Commonwealth, **226 S.W.3d 74 (Ky. 2007): "In a *Criminal* Case… (but not in a civil case?)":** Unlike *Carroll, Taylor* and *Davis, supra, Brown* was not an attorney discipline case. To the contrary, the case arose out of the fact that the attorney involved knew that he could not participate in a fraud on the court, and sought to extricate himself from the case. *Brown* involved a criminal defendant who was convicted of possession of a controlled substance in the first degree, and persistent felony offender in the first degree. During trial, but before the presentation of the defense side, the lawyer informed the court that he could not ethically proceed further in the case, the clear implication to the court being that his client was about to offer perjured testimony. The actual phrasing by the Supreme Court was that the defendant "wanted to present through his testimony a theory that was not consistent with counsel's investigation of the case." After a discussion at the bench, the court allowed the attorney to withdraw, and the defendant continued in the case representing himself. On appeal, the defendant urged that his case should be reversed because he was forced to represent himself, a denial of his right to counsel under the Kentucky and United States Constitutions.

If you use the West Key Numbering System when you do your legal research on ethical responsibilities when a client lies, and you pull up the Brown case, one of the first thing you

notice as you scroll down is that one of the twelve headnotes begins with "[i]n civil cases," while seven of the headnotes begin with "[i]n a criminal case." Clearly, the editors of the headnotes were being extra careful to make clear that *Brown* was chiefly concerned about ethical duties of the criminal practitioner. But what does it actually mean when points of law are prefaced with "in a criminal case?"

On the one hand, it could mean that the court wants to be careful not to issue an advisory opinion, and therefore, since the case before them was a criminal case, the court wants to refrain from opining about the civil context. On the other, the court could be holding that the rules are indeed DIFFERENT in a criminal case, and they want to make a distinction between the two, such that "in a criminal case" implies NOT in a civil case. A careful reading of Brown indicates that in this case it is the latter alternative. The rules for how to behave in a civil case ARE different than in a criminal case.

The Rule in *Carroll* is Affirmed; SCR 3.130(3.3) Trumps SCR 3.130(1.6); The Lawyer Must First Attempt to Persuade the Client Not to Lie: The Supreme Court began by pointing out that the plain language of the rule pertaining to candor toward the tribunal overrides the duty of confidentiality. Whether a civil or a criminal case, the duty of confidentiality "is not absolute," whereas the rule requiring a lawyer to disclose information relating to the representation, in some circumstances, is absolute. Because the rule requires disclosure of false testimony, the lawyer's first recourse is to attempt to persuade the client that such false evidence should not be offered. Where this occurs, and is successful, the conflict is resolved, and "[t]here is no duty to inform the court of the problem in such a situation." *Brown*, at p. 79. That is the rule for both civil and criminal cases: No harm, no foul, no duty to report.

Where the Client Insists on Lying, the Rules are Different in Civil and Criminal Cases: Sometimes you just can't talk the client out of lying. Then what? According to the Supreme Court, in a civil case, "the general rule is that the deception must be disclosed to the court to avoid having the lawyer coerced into being a party to fraud on the court." So, if a party to a civil suit lies on the interrogatories, or request for admissions, or in a deposition or on the stand, the duty has an obligation to report it. But in a criminal case "other rights of the accused are also impacted, such as the right to counsel, the right to testify, and the right not to incriminate oneself." The Court then discussed the "substantially different opinions" on how a lawyer should proceed in a criminal case when a client is hell-bent on giving false testimony:

- Withdrawal. If the lawyer knows before trial, he or she may usually be allowed to withdraw without revealing to the court the specifics of the conflict; If trial is imminent or in progress, however, there are problems with any option.

- Informing the Court. If the attorney informs the court, "the lawyer brings a third party into the equation who must make rulings in regard to the disclosure," the impact of which may be to tip off the prosecution or the jury that perjury is about to be committed, "both of which are prejudicial to the client and may not be correct." *Id.*

- Not Informing the Court. If the attorney does NOT inform the court, the lawyer may be at least passively assisting in the deception of the tribunal, which could lead to discipline or even criminal complicity charges to perjury.

- Elevate Confidentiality over Candor in a Criminal Case. Some argue that in a criminal case the attorney client relationship should outweigh the duty of candor to the court, because the ability of a client to feel safe in his confidences to his attorney is so important to adversarial jurisprudence that the lawyer should be "given a pass." [Here the Court basically said, "uh, no," and referenced the *Carroll* case, giving it new vitality after 56 years.

- Testify in the Narrative. Another possible solution is to "testify in the narrative" without the benefit of the attorney questioning the client, which the Court felt compromised both principles of maintaining confidentiality and candor to the court. It does signal to the other side that the client is about to lie, doesn't it? Yet, it also allows the person to then lie in court, and makes the attorney a passive participant.

The Court then decided to follow the approach taken in ***Commonwealth v. Mitchell*, 781 N.E.2d 1237 (Mass. 2003).** (Although the Court spoke in paragraph form, from pages 84-85, the liberty has been taken of quoting the court's opinion using a step-by-step format.)

1. When the question of a client's imminent perjured testimony arises during trial, the attorney must comply with Rule 3.3 by bringing the existence of a potential conflict to the court's attention.

2. Under Kentucky's Version of Rule 3.3, she must state "all material acts" necessary to establish the adversity between her and the client. This does not, however, require a detailed evidentiary statement of the disagreement. A clear statement of the nature of the problem will suffice.

3. Before an attorney invokes Rule 3.3, she must in good faith have a firm basis in objective fact for her belief, beyond conjecture and speculation, that the client will commit perjury. This does require a difficult judgment call from the attorney, but it is only one of many tightropes an attorney is called to walk during the complex process of litigation. Counsel must rely on facts made known to her by her client, not on a subjective belief that the client might be lying or that the client's consistent version of events differs from other evidence.

4. Once the trial court is made aware of the potential for perjury, the court must evaluate the situation and instruct counsel on how to proceed.

5. [The court should NOT] conduct an evidentiary hearing during trial because even though the Rule requires disclosure, it does not say it must be made with specific detail during trial. For reasons of judicial economy, it is appropriate to reserve specific disclosure of the basis of the attorney's

belief until a motion for new trial is made by the defendant; he could be acquitted, or the motion never made.

6. It is also not necessary for the court to appoint an independent attorney or question the defendant about his testimony.

7. However, the court should engage in a colloquy with the defendant, like that in this case, about the importance of truthful testimony and the attorney's ethical obligations and to generally educate the defendant about the nature of the situation, thus giving the defendant a chance to further consider any possible course of action.

8. "If the defendant, now informed, moves for appointment of new counsel (and, concomitantly, a mistrial), the judge should deny the motions unless the defendant can demonstrate that such motion must be allowed to prevent a miscarriage of justice." *Mitchell*, 781 N.E.2d at 1251.

9. It is also appropriate for the defendant to present the contested testimony in narrative form, in his attorney's presence, and with the attorney continuing to represent him by making appropriate objections on cross-examination regarding portions of the testimony she does not believe to be perjured. In this manner, the defendant is always represented by counsel on matters for which he is entitled to be represented, not involving perjury.

10. It is a denial of counsel to completely deprive a defendant of representation on matters not involving the alleged perjury. Because the defendant has made a knowing waiver of counsel as to any perjured testimony, there is no actual or prejudicial conflict between him and his attorney. An attorney may thus continue to represent her client on all parts of the trial not connected to the alleged perjury.

11. If on a motion for new trial a court determines that there was not a good faith basis for the attorney's belief and the attorney's actions prejudiced the client, then a new trial can be granted with new counsel.

There you have it, eleven easy steps for when the attorney, in a criminal case, knows that client is about to commit perjury and there is nothing he can do about it.

III. What does it mean to be "Competent" to handle a case Under RPC 1.1?

Rule 1.1 "Competence": "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

This rule presents an example of where the commentary is far more helpful than the rule. The first four **Comments to Rule 1.1** which pertain to "Legal Knowledge and Skill" provide:

> (1) In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.
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> (2) A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.
>
> (3) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.
>
> (4) A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Fortunately, Rule 1.1 is not a rule that is violated very often in Kentucky, apparently. There are only four published opinions noted under the Westlaw® decision notes which follow the rule, and of those, only one pertains to a lack of competence due to lack of knowledge of the law. ***Kentucky Bar Ass'n v. Wharton*** **(Ky. 1991) 810 S.W.2d 510:** An attorney who violates a bankruptcy rule providing that the filing fee for a bankruptcy case must be paid in full before the

debtor may pay an attorney for services in connection with the case is also guilty of violating SCR 3.130(1.1)…

IV. What does it mean to be "Diligent" under RPC 1.3 (especially given the new prevalence of the criminal "Rocket Docket?")

Rule 1.3 "Diligence" provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client.

While "diligence" can pertain to a lot of things, the focus here is on the duty to diligently investigate a client's case, even in the light of a "rocket docket" offer. By "rocket docket," it is intended any offer where an offer is mandated on a quick acceptance, before the attorney has adequate time to conduct an independent investigation of the case, or participate in discovery, regardless of whether the phrase "rocket docket" is used during the negotiations.

The National Legal Aid & Defender Association's *Performance Guidelines for Criminal Defense Representation* clearly specifies that the criminal defense counsel has "duties" to not only investigate the case, but to conduct discovery:

> **Guideline 4.1 Investigation**
> (a) Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible…

The duties of competence and diligence imply a duty to fully investigate a case before advising a client whether to accept or reject a plea offer, or whether to take the case to trial. In ***Commonwealth v. Tigue*, 459 S.W.3d 372 (Ky. 2015)**, the Kentucky Supreme Court held:

> While the duty to investigate is not absolute, a less-than-complete investigation may be supported only by a reasoned and deliberate determination that further investigation is not warranted. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." ***Strickland v. Washington*, 466 US at 690–91, 104 S.Ct. 2052.**

Though unpublished and therefore not authority, look at what the Kentucky Court of Appeals had to say in a case where a defendant was offered 9 years to serve on a case which potentially could have resulted in 30 years at trial. The charges and potential penalties were as follows:

Original Charges / Potential Years:	**Rocket Docket Offer:**
1st ° Sodomy (10-20)	1st ° Sex Abuse (1-5)
1st ° Wanton Endangerment (1-5)	1st ° Wanton Endangerment (1-5)
1st ° Unlawful Imprisonment (1-5)	Dismissed
Total Range of Penalty: 10 – 30 years	Total Years: 9

Thus, the offer was for less than the defendant could have received had he gone to trial, lost and got the minimum on each charge, with concurrent time. Sound good? Well, in order to accept the plea, the defendant had to give up discovery rights. When later he appealed an attempt to withdraw his plea, and won, the Court of Appeals used the following language:

> …***hastily accepted*** rocket docket plea offer…in a case involving violent sex offenses…
>
> ***Lured*** by the Commonwealth's offer of a lesser sentence and accepting the plea offer just thirteen days after his initial arraignment… ***without the benefit of any discovery, investigation***, or meaningful exploration of possible defenses. ***Huddleston v. Commonwealth,*** **2015 WL 3429379 (Ky. App. 2015), unpublished, emphasis added.**

After remand, Huddleston's new counsel (who was the same counsel who had successfully appealed the case), was able to investigate the case and as a result ended up pleading the client to twelve months on a non-sexual misdemeanor charge, resulting in the client's immediate release. The outcome shows the perils of what can happen when a seemingly good rocket docket offer is accepted, but later investigation reveals that the case was not as strong as the Commonwealth would lead one to believe at the time of the making of the rocket docket offer.

How does the ethical attorney strike the balance? The best that can be done may be along the following lines:

- Do your best to evaluate whether this truly is a better deal than can normally be gotten.
- Explain everything the client is giving up to the best of your ability.
- Get as much discovery, do as much investigation as you can.
- Put it all in writing for the client.
- Put on the Record, in front of client, that you have not been able to investigate or participate in full discovery.
- Remember that you CANNOT pre-waive Ineffective Assistance of Counsel Motion **(*U.S. v. KBA*, 439 S.W.3d 136 (Ky. 2014).**

V. The Criminal Defense Attorney's obligations when evidence is handed to him by a client.

You are sitting in your office when your client's wife comes in with a bag in her hand. "Here, my husband wanted me to give you this." You open up the bag, reach inside, and pull out a Glock 1911 semiautomatic 9 mm pistol, exactly the same time of gun that the police are looking for, because they say your client, who is in jail awaiting trial, used just such a pistol to commit murder. Ouch! What the Glock do you do now?

Leave aside for the moment the obvious initial mistake made by you in this hypothetical (one that you would never actually make), that of blindly accepting an unknown something from someone acting on your client's behalf. (That we will discuss later.) For the moment, let's assume you have the "smoking gun," although in my experience, more likely the gun is not smoking, but is cold, wet, rusty and muddy from having been buried in a yard somewhere, but I digress.

As with any ethical question, the first place to start is the rule:

RPC 3.4(a) provides:

> A lawyer shall not: (a) **unlawfully** obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material **having potential evidentiary value**. A lawyer shall not counsel or assist another person to do any such act; [Emphasis added.]

Comment [2] to the rule provides:

> [2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. **Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.** [Emphasis added.]

From the rule and comment, it appears that you certainly have the option to have the firearm tested by an expert, perhaps to confirm or hopefully rule out the gun is the one in question. The problem becomes the loss of or accidental removal of any fingerprinting, touch DNA, or other evidence that can occur by testing the gun, or maybe even by just having grabbed it out of the bag. Look closely at the chain of custody employed by most Kentucky law enforcement departments. When a gun is recovered at a scene, first they send it to the lab to capture any DNA evidence, then to the fingerprint lab for recovery of latent prints, then to ballistics to look at bullet matching and other issues. Most of the time, the lab reports document the attempts to preserve the evidence which is likely to be lost if not looked for first.

[Side note: Where foreign bodily or other material is not an issue, such as when you have a client's computer examined by an expert who will tell you what is on the computer and can do so

without erasing anything, including metadata, taking temporary possession of the physical evidence may be an option.]

Rule 3.4(a) uses the word "unlawfully," and that alone should cause one to look at the laws pertaining to the tampering of evidence.

KRS 524.100 Tampering with physical evidence provides:

> (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
>
> > (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding; or
> >
> > (b) Fabricates any physical evidence with intent that it be introduced in the official proceeding or offers any physical evidence, knowing it to be fabricated or altered.
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> (2) Tampering with physical evidence is a Class D felony.

In this case, you have a gun exactly of the type that the police are looking for, and maybe THE gun the police are looking for. You didn't ask for it, but now you have it. So, let's run down the elements of the statute that are pertinent to this situation:

- Is an official proceeding pending? Check.
- If you told the spouse to take the gun back and get rid of it, or put it back where she found it, would that be concealing it, or impairing its availability in an official proceeding? Check. Even if there is an argument that you are not concealing it, she is, you are at worst complicit in counseling her to get rid of it, and at best guilty of facilitation.
- Is the gun "about to be produced or used in the official proceeding?" Actually, no, because the police and prosecution don't have the gun, so they cannot say that they were "about to produce it or use it in an official proceeding," and as criminal defense counsel, you CERTAINLY have no intention of doing so. If you tell the spouse to take possession of the gun back, and later get arrested for tampering with evidence, this is the element upon which you hang your defense, for sure. That said, you are running a big risk, here, one that can be avoided by turning over the gun to the police. This will hurt your client, likely, but the ethical rules contemplate that you may have to turn over evidence to the government at times, else it would not be in the commentary.

Had you a "do over," no doubt you would not have taken the bag into your possession, much less look inside and pull out a gun. Rather, you would say, "I don't know what you have in that bag, but I cannot accept anything from you until I talk to my client. He didn't mention anything about a bag, or that you would be stopping by to bring me something. Since I may have a legal obligation to turn it over to the police or prosecution, I'm not looking at it."

Then, you talk to the client. When he says, well, that is the gun I used, then you can tell him that if he gives it to you, you have to turn it over, and leave it at that.

Is that counseling another person to destroy or conceal the gun? Not if you do not tell him to do so. "I'm not giving you any advice about the gun, I'm just telling you don't give it to me" should suffice.

As a criminal defense attorney, I am quite willing to engage others in debate on this topic; meanwhile, for further reference, I encourage you to read Rodney J. Uphoff's articles on the subject, especially "The Physical Evidence Dilemma: Does ABA Standard 4-4.6 Offer Appropriate Guidance?", HASTINGS LAW JOURNAL, Vol. 62, p. 1177, 2011.

Good luck out there!