

LEGAL ETHICS OPINION 1737

ATTORNEY'S OBLIGATION IN CAPITAL
MURDER CASE WHEN CLIENT DESIRES
DEATH SENTENCE AND REQUESTS
ATTORNEY TO NOT PRESENT MITIGATING
FACTS AT SENTENCING HEARING.

You have presented a hypothetical situation in which Client has pled guilty to capital murder. Client has been evaluated by a psychiatrist and found to be competent. Client has informed counsel that he desires a death sentence rather than life in prison. Although counsel has investigated and found mitigating evidence in Client's background, Client has instructed counsel not to present any mitigating evidence at the sentencing hearing.

Under the facts you have presented, you have asked the committee to opine as to whether counsel would violate the Code of Professional Responsibility by presenting mitigating evidence when the client has instructed him not to do so.

The appropriate and controlling disciplinary rules relative to your inquiry are: [DR:7-101\(A\)\(1\)](#) which states that a lawyer shall not intentionally fail to seek the lawful objectives of his client

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The Supreme Court of Virginia has yet to address the effect of a defendant's demand, in a capital case, that no evidence be presented during the penalty phase. There is no statutory requirement that counsel in capital murder cases present evidence at the penalty phase. Direct review of a death sentence by the Court is mandatory. See Va. Code § [17.1-313](#)(1998).

² Virginia Rules of Professional Conduct, [Rule 1.2](#), effective January 1, 2000 requires an attorney to “abide by a client's decisions concerning the objectives of representation.”

³ The committee's research has found only one case holding the contrary view that capital defense counsel should present evidence in mitigation over the objection of the client. In *People v. Deere*, 41 Cal.3d 353, 222 Cal.Rptr. 13, 710 P.2d 925 (Cal. 1985), the defendant barred his attorney from presenting evidence at the penalty phase in a capital case, and gave a simple statement that he wished to die for his crimes. The court ruled that there was ineffective assistance of counsel and that imposition of the death penalty was improper. However, four years later in *People v. Bloom*, 774 P.2d 698 (Cal. 1989), the California Supreme Court disapproved, but did not overrule *Deere*, *supra*, stating that the failure to introduce mitigating evidence at the penalty phase did not automatically render the imposition of the death penalty unreliable and criticizing any requirement that defense counsel present mitigating evidence over a client's objections.

through reasonably available means permitted by law and the Disciplinary Rules; and [DR:7-101\(B\)\(1\)](#) which provides that a lawyer may, with the express or implied authority of his client, exercise his professional judgment to limit or vary his client's objectives and waive or fail to assert a right or position of his client. Also pertinent to your inquiry are Ethical Considerations [EC:7-1](#), [EC:7-5](#), [EC:7-7](#), [EC:7-8](#), [EC:7-9](#), [EC:7-12](#), [EC:7-16](#), and [EC:7-17](#).

There are no prior ethics opinions which offer any guidance in resolving this difficult ethical dilemma. The problem is a significant one requiring thoughtful analysis of the conflicting professional responsibilities of those attorneys who represent competent capital murder defendants who by trial or plea have been found guilty and have instructed their attorneys to forgo presentation of mitigating evidence during the sentencing phase, thereby inviting the death penalty.¹ The attorneys normally have an ethical obligation to diligently and competently represent their client by making the best possible case for leniency. [DR:6-101\(A\)](#); [EC:7-1](#). However, the attorneys are also required to achieve the client's lawful objectives and follow the client's directions. [DR:7-101\(A\)](#).² Under these circumstances, the critical issue is whether the lawyer should follow the lawful demands of the client when those demands may cause prejudice or damage to the client's case.

In the facts you present, the committee believes as long as the defendant, in the attorney's judgment, is competent to make an informed, rational and stable choice regarding whether to

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fight the death penalty with mitigating evidence, the attorney is ethically obligated to respect the client's decision. [DR:7-101\(A\)\(1\)](#) requires an attorney to seek his client's lawful objectives. [EC:7-5](#) states in pertinent part:

A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing the client of the practical effect of such decision. He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous position.

Client autonomy is further emphasized in [EC:7-7](#), which states in pertinent part:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. *But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. . . .* A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

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[EC:7-8](#), in pertinent part, further advises:

He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. . . . the lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client and not for himself.

The committee believes that attorneys in capital cases are ethically required to advise such clients of the adverse legal consequences of failing to produce mitigating evidence during the penalty phase and how much more difficult it will be to attack the death sentence on direct appeal, or collaterally, if the client insists on that direction. For that reason, the ethical requirements of zealous and competent representation dictate that the attorney must counsel the client regarding the risks and benefits of presenting mitigating evidence.

Because of the severe and irreversible consequences of failing to make a case of mitigation in the penalty phase, the attorney must try to discern whether the defendant has expressed a rational and stable preference for a death sentence. The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of the client. [EC:7-11](#).

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Where the attorney has a reasonable basis to believe that the client's preference for the death penalty is rational and stable, the client's decision controls, even if it is contrary to the lawyers' professional judgment and advice. In reaching this conclusion, the committee acknowledges the moral and ethical difficulty that some may experience in following the client's directives. However, most of the courts which have struggled with this issue have similarly concluded that the attorney is ethically bound to carry out the client's directive, even though such instruction is tantamount to a death wish. Further, the death row defendant cannot thereafter claim successfully that their trial counsel was ineffective in not having introduced evidence in mitigation. *Zagorski v. State*, 983 S.W.2d 654 (Tenn. 1998) (performance of defense counsel in not investigating or presenting mitigating evidence at sentencing stage per defendant's instructions did not fall below objective standard of competence); *Petit v. State*, 591 So.2d 618 (Fla. 1992) (a competent defendant may waive his right to present mitigating evidence at sentencing); *Singleton v. Lockhart*, 962 F.2d 1315 (8th Cir. 1992) (defendant may make a knowing, intelligent waiver of his right to present mitigating evidence) *Koedatich v. State*, 112 N.J. 225, 548 A.2d 939 (1987) (defense counsel's failure to present mitigating evidence, during penalty phase of capital prosecution, in accordance with defendant's instructions, did not constitute ineffective assistance of counsel); *Trimble v. State*, 693 S.W.2d 267 (Mo. Ct. App. 1985) (defense counsel did not render ineffective assistance in acquiescing in defendant's instruction that no evidence be offered and no argument be made in penalty phase of trial, which resulted in imposition of death penalty).³

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