The following are opinions issued by the Standing Committee on Legal Ethics. The opinions are issued pursuant to the Rules of Court, Part Six: Section IV, Paragraph 10, and are advisory only. The opinions have no legal effect and are not binding on any judicial or administrative tribunal.

Upon requests for LEOs involving a specific issue, the VSB Ethics Counsel will furnish full texts or relevant opinions at no cost. The bar reserves the right to charge for volume requests. Charges will be based upon staff time and copying costs.

LEGAL ETHICS OPINION 1735
ATTORNEY RENDERING PROFESSIONAL SERVICES FOR CLIENTS OF A LAW FIRM WHEN ATTORNEY IS AN INDEPENDENT CONTRACTOR RATHER THAN AN EMPLOYEE OR PARTNER OF THE LAW FIRM

You have presented a hypothetical situation focusing on whether an attorney (the "Attorney") may render professional services to or for the benefit of the clients of a law firm (the "Firm") as an independent contractor rather than as an employee or partner of the firm. You have given the following operative facts:

> The Firm and the Attorney desire to enter into an exclusive agreement[1] for the Attorney to render professional services to or for the benefit of the clients of the Firm. For professional services rendered, the Firm shall pay to the Attorney a specified hourly rate. The Firm may bill the clients on behalf of whom the Attorney provides professional services at a reasonable rate based upon the rate charged by other law firms for professional services rendered by employee associates with experience and background comparable to that of the Attorney. The rate may be higher than the hourly rate paid to the Attorney by the Firm; however, this need not be disclosed to the clients, and the Attorney shall have no claim against the Firm for the differences in these two rates.
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> Professional services to be rendered by the Attorney to the Firm shall include review of client files, drafting and review of client legal documents and correspondence, meetings with attorneys or staff employed by the Firm to discuss client files, research requested by attorneys or staff employed by the Firm, strategy and marketing meetings with attorneys or staff employed by the Firm, seminars given by the Attorney on behalf of the Firm and all other matters performed by the Attorney at the request of attorneys or staff employed by the Firm. The professional services rendered by the Attorney to the Firm shall be performed under the direct supervision of an attorney employed by the Firm, and as such shall be considered the work product of the Firm. Only those professional services rendered directly to or for the benefit of clients may be billed to the clients by the Firm; all other professional services rendered shall be considered charges to overhead for the firm.
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> The Attorney shall have a close and continuing relationship with the Firm, and as such may be considered to be "of counsel" to the Firm. If so, the Attorney shall be entitled to carry business cards designating her as "of counsel" and shall be allowed to sign the Firm's letterhead as "of counsel." If the Attorney is designated as "of counsel," then she may also have both direct and indirect contact with the Firm's clients.
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> If the Attorney is not designated as "of counsel," she shall neither carry business cards of the Firm with her name on them nor be entitled to sign the Firm's letterhead. Also, if the Attorney is not designated as "of counsel," she shall not have direct contact with the Firm's clients. Indirect contact refers to professional services performed by the Attorney on the client's file on behalf of the Firm.
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> When referring a prospective client to the Firm, the Attorney shall provide the prospective client with a business card with the name of an attorney employed by the Firm to call for an appointment. The prospective client shall be interviewed by an attorney or staff person employed by the Firm. If retained, the client shall be a client of the Firm, not the Attorney. The Attorney shall not be entitled to any portion of the fees generated by such referred clients to the Firm. The Attorney shall only be entitled to the specified hourly rate based upon professional services rendered by her to or for the benefit of the client on behalf of the Firm.
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> The Attorney shall provide her own health, dental, life and disability insurance. The Attorney shall also provide her own professional liability insurance. The Attorney shall maintain and pay all annual fees associated with her license to practice law in the Commonwealth of Virginia. The Attorney shall provide her own computer and office supplies, and shall work primarily out of her home office. The Attorney shall obtain no less than the minimum number of hours of Continuing Legal Education each year.
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> The Attorney shall be subject to the same confidentiality and conflict of interest rules as if she were an employee associate attorney for the Firm. If the Attorney is designated as "of counsel," the nature of the relationship between the Attorney and the Firm

1 Attorney would not provide services to any other law firm but the Firm would be free to employ other contract lawyers in addition to Attorney.

shall be properly and fully disclosed to clients with whom the Attorney has direct contact. Whether the Attorney is designated as "of counsel" or not, the relationship between the Attorney and the Firm need not be disclosed to those clients with whom the Attorney only has indirect contact. As noted above, the rendering of professional services is considered to be indirect contact, shall be provided under the direct supervision of an attorney employed by the Firm, and shall be considered the work product of the Firm.

Under the facts you have presented, you have asked the committee to opine on the following questions which shall be answered in the order they appear:

1. May a firm authorized to practice law in the Commonwealth of Virginia (the "Firm") enter into an exclusive agreement with an attorney licensed to practice law in the Commonwealth of Virginia (the "Attorney") for the Attorney to render professional services to or for the benefit of the Firm's clients on behalf of the Firm?

   Yes, it is permissible for Attorney and Firm to have an arrangement in which Attorney provides part-time or full-time services for Firm's clients as an independent contractor, contract attorney or "of counsel." LEOs 442, 1293, 1554 and 1712. However, Attorney and Firm shall be bound by the requirements of confidentiality and the conflicts of interests rules in the same manner as if Attorney were associated with the Firm. LEO 1712. DRs 4-101 and 5-105.

2. May the Firm bill clients for work performed by the Attorney at a rate which is reasonable based upon the experience and background of the Attorney, even though the rate paid by the Firm to the Attorney per hour for professional services rendered to those clients is less?

   In LEO 1712, the committee addressed a similar question in the context of a law firm using the services of a contract or temporary lawyer. In that opinion, the committee reached the conclusion that the Firm has essentially two options. The Firm can charge the Attorney's services as a disbursement or cost advance, in which case the amount charged to the client for the Attorney's services must be the amount actually paid by the Firm to the Attorney for the work performed by the Attorney on that client's case. The client may, of course, agree to a markup on the disbursement, but this would require disclosure of the compensation paid by the Firm to the Attorney. Under this first option the Firm cannot, absent full disclosure and consent, charge the client more than the amount which the Firm actually paid the Attorney. Alternatively, instead of billing the actual amount paid to Attorney as a disbursement, the Firm may simply bill the client for services rendered in an amount reflecting its charge for the Attorney's services, based upon the Attorney's experience and background, in the same manner as it would bill the client for an associate's work on the client's case. The fee charged to the client must be reasonable. DR 2-105. This second option obviates the need to disclose to the client the payment arrangement between the firm and the Attorney.

3. Must the Firm disclose to the clients for whom or for whose benefit the Attorney renders professional services the difference between the rate billed to the clients by the Firm for professional services rendered and the rate actually paid to the Attorney by the Firm for professional services rendered?

   The committee refers you to its response to inquiry number two, supra. Disclosure of a markup (the difference between the amount paid by the Firm for the Attorney's services and the amount charged to the client) is required if the firm bills the amount paid to Attorney as an out-of-pocket expense or disbursement. Disclosure is not required if the firm bills for Attorney's work in the same manner as it would for any other associate in the Firm and so long as either the attorney works under the direct supervision of the firm or, absent that supervision, the firm adopts the work product as its own.

4. May the Firm designate the Attorney as "of counsel" because of the close and continuing relationship between the Firm and the Attorney, even though the Attorney is not and never has been either an employee associate or a partner of the Firm?

   Yes, the firm may designate Attorney as "of counsel" provided the requirements for that relationship are met. Prior opinions issued by the committee would permit a law firm to designate as "of counsel" an attorney, working on a full-time or part-time basis, where the Attorney has a close, continuing relationship with the Firm and direct contact with the firm and its clients. LEOs 1554, 1293 and 442. See also ABA Formal Op. 90-357.

5. If the Attorney is designated as "of counsel" by the Firm, may she have direct contact with the Firm's clients as long as the nature of the relationship between the Firm and the Attorney is properly and fully disclosed to the clients prior to such contact with the clients?

   Yes, but as the committee has stated in a previous opinion, with regard to public communications regarding the Attorney who is "of counsel" the lawyers in the Firm must be scrupulously careful in their representation of the Attorney's professional status not to hold the Attorney out as being a partner or associate with the Firm. DR 2-101 (A), DR 2-102 (A), (C); EC 2-15; LEO 1293.

6. May the Attorney render professional services to or for the benefit of the clients of the Firm, although she will

have no direct contact with the clients, if she is not designated as "of counsel" by the Firm?

Under this scenario, while no direct supervision by the firm of the attorney would occur, the firm would adopt the attorney's work product as its own. The Attorney need not be "of counsel" to the Firm in order to provide legal services for or on behalf of clients of the Firm. Such services could be provided with or without the Attorney having direct contact with the Firm's clients. The "of counsel" relationship is but one of several relationships by which the Attorney may provide legal services to the Firm for or on behalf of its clients.

7. If the Attorney is not designated as "of counsel," must the independent contractor relationship between the Attorney and the Firm be disclosed to the clients to whom or for whose benefit the Attorney renders professional services on behalf of the Firm, even if the Attorney never directly interacts with or corresponds with those clients and if the Attorney never represents the clients in court?

   The committee believes that LEO 1712 is also dispositive of this inquiry. Normally, when a law firm associates another attorney outside the firm to work on a client's matter, the client must be informed and consent to the arrangement. DR 2-105(D). However, to the extent that a temporary or contract attorney works directly under the supervision of an attorney in the Firm, the temporary or contract lawyer is not regarded as a lawyer outside the firm as contemplated by DR 2-105 (D). The client hires the Firm and not simply the lawyer initially consulted and the work is assigned to an attorney "associated with the firm." If the contract lawyer will work on the client's matter under the direct supervision of an attorney associated with the Firm, the Firm will ordinarily not have to disclose to the client the fact that a contract attorney is working on that client's matter. In addition, if Attorney and Firm intend to form an "of counsel" relationship, DR 2-105 (D) does not apply. On the other hand, if the contract attorney will work independently, without close supervision by an attorney associated with the Firm, then the client must be informed of the contract attorney's participation in the client's case and the client's consent must be obtained.

8. May the Attorney, whether or not designated by the Firm as "of counsel," refer clients to the Firm by arranging for the prospective client to meet with an attorney or staff person employed by the Firm rather than interviewing such prospective clients herself on behalf of the Firm?

   Yes, but the Firm may not compensate Attorney, directly or indirectly, for simply referring a prospective client to the Firm, where Attorney assumes no other responsibility to the client. DR 2-105 (D).

9. Must the Firm maintain professional liability insurance for the Attorney if she is providing her own professional liability insurance in amounts deemed appropriate by the Firm?

This is a legal question beyond the purview of the committee.

Committee Opinion
October 20, 1999

LEGAL ETHICS OPINION 1736
ATTORNEY THREATENING NONPARTY OPPOSING WITNESS WITH "APPROPRIATE LEGAL ACTION" FOR WITNESS' DEFAMATORY STATEMENT ABOUT ATTORNEY'S CLIENT

You have presented a hypothetical situation in which an attorney is representing Plaintiffs in a discrimination claim. Plaintiffs contend that Defendants are attempting to force them to move from the neighborhood because of their race, and Defendants contend that the problem is Plaintiffs' disruptive behavior. Prior to the lawsuit, a resident of the neighborhood who is a nonparty witness wrote to the homeowner's association complaining of the Plaintiffs' behavior. Plaintiffs' attorney has written the nonparty witness, accusing the witness of making defamatory statements and indicating that if the witness stands by the statements, Plaintiffs' attorney will seek "appropriate legal action." Plaintiffs' attorney has now subpoenaed this witness for depositions and also subpoenaed witness' homeowner's insurance policy "just in case appropriate legal action is necessary."

Under the facts you have presented, you have asked the committee to opine as to whether this conduct by Plaintiffs' attorney is unethical in that it constitutes threatening and harassing a nonparty witness, or an attempt to intimidate the witness not to testify about the Plaintiffs' behavior as reported to the homeowner's association.

The disciplinary rules which appear to apply to your inquiry are DR 7-102 (A)(1) and(2) prohibiting the assertion of frivolous claims or asserting positions to harass or maliciously injure another; DR 7-108 (B) and EC 7-24 which prohibit a lawyer from causing a witness to secrete himself for the purpose of making himself unavailable as a witness; and DR 1-102 (A) (3) which prohibits a lawyer from committing a deliberately wrongful act reflecting adversely on the lawyer's fitness to practice law.

The committee has previously opined that it does not see a distinction between advising or causing a witness not to testify on the one hand, and advising or causing a witness to hide or leave the jurisdiction, on the other hand. LEO 1678 (applying DR 7-108; EC 7-24). In any event, it is improper for a lawyer, directly or indirectly, to persuade an opponent's witness not to testify. Id. See also *North Carolina State Bar v. Graves*, 50 N.C. App. 450, 274 S.E.2d 396 (1981) (suspension of lawyer who attempted to influence a potential

witness not to testify); Oregon State Bar Op. 1992-132 (lawyer may not attempt to dissuade either an adverse fact witness or an expert witness from testifying); *Harlan v. Lewis*, 982 F.2d 1255 (6th Cir. 1983) (defense attorney in medical malpractice case sanctioned for telling non-party physician who had treated plaintiff that he could be sued too, and that without his testimony, the plaintiff's suit would probably not be successful); Virginia Rules of Professional Conduct, Rule 3.4 (a) (a lawyer shall not obstruct another party's access to evidence) and 3.4 (g) (request a person other than a client to refrain from voluntarily giving relevant information).[1]

In the facts you present, the committee believes that the answer to your inquiry depends upon the motivation and intent of the lawyer representing Plaintiffs. Such matters involve factual determinations beyond the purview of the committee. In *Attorney M v. Mississippi Bar*, 621 So.2d 220 (Miss. 1992), the lawyer warned a witness who was a doctor that even though he "didn't do any thing wrong," the lawyer might be "forced" to join the doctor as a co-defendant in a malpractice case if the doctor was not willing to state that the plaintiff left his care in the same condition as when she arrived at the hospital. The court looked to Rule 3.1 noting that whether the lawyer viewed the doctor as blameless was irrelevant as long as the claim was colorable.

In the situation in your request, if the threatened legal action is without legal basis in law or fact, and the threatened suit is made merely to harass and intimidate the witness, or influence the witness not to come forward with truthful and relevant information, then the attorney for Plaintiffs would be in violation of the cited rules and opinions. On the other hand, if the lawyer for Plaintiffs has a well-founded belief that the threatened legal action is warranted based on the contents of the complaint letter sent to the homeowner's association, or that the letter gives rise to a colorable action, then such conduct would not be improper.

Committee Opinion
October 20, 1999

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 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 7-1, 7-5, 7-7, 7-8, 7-9, 7-12, 7-16, and 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 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

1 Comment [1] to Rule 3.4 states:

The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

The new rule, with accompanying comments, becomes effective January 1, 2000.

> 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.

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.

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]

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
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1 See *Davidson v. Commonwealth*, 244 Va. 129, 419 S.E.2d 656 (1992), where at the beginning of the penalty phase, counsel for the defendant informed the trial court that the defendant had directed him not to present any evidence on his behalf. The defendant affirmed this direction by his own testimony and no evidence in mitigation was presented. The opinion, however, contains no further discussion of this problem. The Court affirmed the imposition of the death sentence and declined to commute the sentence to life imprisonment.

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, 333 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.