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Mitigating Death

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MITIGATING DEATH

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Capital mitigation specialists are critical members of the capital defense team. Their job involves investigating the life history of the defendant in order to develop a comprehensive defense against execution at the sentencing phase of a capital trial. To develop the life history of the defendant, capital mitigation specialists must uncover as much information as they can about the defendant from the defendant's family, friends, and virtually any other person in the defendant's life. This Article examines the role of mitigation specialists who have formal social work training, exploring how legal ethics and world views they experience on capital defense teams interact with ethical norms and world views they learn as social workers. By understanding how ethical norms and world views from law and social work interact, this Article strives to ensure that interdisciplinary capital defense teams anticipate and resolve ethical conflicts in order to safeguard the capital defendant's constitutional right to effective assistance of counsel.

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INTRODUCTION

In the past eight years, the United States Supreme Court has been vocal about the importance of capital mitigation specialists in death penalty defense. Beginning with *Williams v. Taylor* in 2000,[1] and continuing with *Wiggins v. Smith* in 2003[2] and *Rompilla v. Beard* in 2005,[3] the Court launched a series of decisions underscoring the importance of thorough capital mitigation investigation.[4] Through these decisions, the Court examined trial counsel's failure to conduct extensive mitigation investigation and found that failure to thoroughly investigate capital mitigation constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.[5]

In addition to emphasizing that thorough mitigation investigation is critical to achieving effective assistance of counsel at the sentencing phase of a capital trial, these decisions also highlight the Court's recognition that a capital defense team must do an enormous amount of work prior to trial in order to be ready to present an effective mitigation defense. The clarity of the Court's decisions has also coincided, whether directly or indirectly, with a surge in hiring mitigation specialists in capital public defender offices, as well as with increased training opportunities for mitigation specialists nationwide.[6] At the same time, the Court's decisions say nothing about how to conduct a mitigation investigation or how capital defense attorneys should manage ethical issues and conflicting world views that may arise when the capital defense team is comprised of people from interdisciplinary professional backgrounds, which is often the case when mitigation specialists are professionally trained in a field other than law. Indeed, mitigation specialists come from a variety

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[1] 529 U.S. 362 (2000).

[2] 539 U.S. 510 (2003).

[3] 545 U.S. 374 (2005).

[4] In *Williams*, the Court found that capital trial counsel fell below the "*Strickland* standard" when they failed to conduct an extensive mitigation investigation. 529 U.S. at 395–97; *see also infra* note 5 and accompanying text for more on the *Strickland* standard. In *Wiggins*, the Court found that capital trial counsel had fallen below the *Strickland* standard when it failed to thoroughly investigate Wiggins' social history. 539 U.S. at 526–28. And in *Rompilla*, the Court found that counsel's limited mitigation investigation fell below professional norms. 545 U.S. at 385.

[5] *See* discussion *supra* note 4; *see also* Strickland v. Washington, 466 U.S. 668, 687, 694–95 (1984) (holding that in order to establish ineffective assistance of counsel, an accused must show (1) that counsel's performance was so deficient that counsel was not functioning as the kind of counsel guaranteed by the Sixth Amendment of the United States Constitution, and (2) prejudice, by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

[6] *See* Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 697 (2008) (observing that qualified mitigation specialists are in "great demand" and that the "demand for qualified mitigation specialists exceeds the supply").

of backgrounds, such as social work, psychology, anthropology, history, law and journalism. Although mitigation specialists utilize their prior professional training when they work on capital trial teams, mitigation is its own profession and is not a subspecialty of any one discipline.

One could view the increasing number of appointments and training of mitigation specialists on capital defense teams as evidence of an improvement in safeguarding the integrity of a capital defendant's constitutional right to a fair trial by ensuring effective assistance of counsel.[7] At the same time, the rise of capital mitigation specialists has not occurred without the potential to introduce social costs into the capital trial system. These costs include the tension an interdisciplinary capital team experiences when its legal obligations and directives conflict with the non-legal professional training of some of its team members. Such internal tensions can in turn impact the effectiveness of the capital defense, especially if conflicting norms result in a mitigation specialist disagreeing with the attorney's directives or compromising client confidentiality during the mitigation investigation. Moreover, competing ethical norms and world views may also impact the defendant's family or society at large, such as when a social-worker-trained mitigation specialist struggles against what she believes to be mandatory reporting requirements for child abuse—especially when mandatory reporting would detrimentally affect the defense at the sentencing phase of the capital trial.

In the same way that the Supreme Court's jurisprudence has not addressed these and other tensions that mitigation specialists bring to the death penalty arena, so have legal scholars failed to analyze these tensions. Much of the scholarship relating to capital mitigation specialists either gears itself toward practitioners[8] or focuses on the use of mitiga-

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[7] For example, on March 23, 2007, the Arizona Supreme Court Capital Case Task Force noted that there were 140 pending capital cases in Maricopa County alone, that fourteen of those pending capital cases did not even have public defenders or first chair defenders assigned to them, and that the public defender needed more mitigation specialists to staff its pending caseload. *See* Minutes, Arizona Supreme Court Capital Case Task Force, Judicial Education Center, Phoenix, Ariz. (Mar. 23, 2007), *available at* http://www.supreme.state.az.us/cctf/Original%20Task%20Force/Min07-03.pdf (last visited May 22, 2009).

[8] One of the preeminent scholars and foremost experts in the United States in the field of capital mitigation is Russell Stetler. Stetler is the national mitigation coordinator for the federal death penalty projects. From 1995 to 2005, he was the Director of Investigation and Mitigation for the Capital Defender Office in New York City. He has investigated all aspects of capital cases, both trial and post-conviction, since 1980. Much of his writing can be found in past issues of *Champion*, a magazine published by the National Association of Criminal Defense Lawyers. *See, e.g.*, Russell Stetler, *Capital Cases: Mitigation Investigation: A Duty that Demands Expert Help but Can't Be Delegated*, CHAMPION, Mar. 2007, at 61. For other examples of articles discussing capital mitigation, see Arlene Bowers Andrews, *Social Work Expert Testimony Regarding Mitigation in Capital Sentencing Proceedings*, SOC. WORK, Sept. 1991, at 5; Jesse Cheng, *The Capital Ethnography Project*, CHAMPION, July 2006, at 53; Cecile G. Guin et al., *From Misery to Mission: Forensic Social Workers on Multidisciplinary Teams*, SOC. WORK, July 2003, at 3; Michael Ogul, *Capital Cases: Dealing with Victim Impact Evi-*

tion information or mitigation specialists during the capital trial itself.[9] For example, one strand of scholarship examines the use of social workers testifying as experts in capital sentencing proceedings.[10] This scholarship focuses on how mitigation information is presented during trial instead of examining how mitigation evidence is investigated prior to trial. Another strand of scholarship addresses the role of social workers in public defenders' offices.[11] While providing insight about ethical constraints that social workers experience when they are hired to work as social workers inside public defender offices, this scholarship does not address the unique issues that arise when social workers serve as mitigation specialists on capital defense teams.

This Article seeks to fill the void between these two strands of scholarship. Instead of focusing on the use of social workers as testifying experts during the trial itself, this Article examines the use of social workers as mitigation consultants during the pre-trial investigative phase.[12] Similarly, instead of focusing on the general use of social workers in public defender offices, this Article explores the specialized use of social workers as mitigation specialists on capital defense teams. In sum, by examining critical issues that arise during the pre-trial investigation that social-worker-trained mitigation specialists conduct as members of capital defense teams, this Article explores the inherent complexity that the Court's mitigation jurisprudence has brought to the death penalty arena. When the legal ethics and world views of capital defense attorneys conflict with the professional ethics and world views of mitigation specialists working on the capital defense team, such unresolved tensions

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dence, CHAMPION, Aug./Sept. 2000, at 42; Julie Schroeder, *Forging a New Practice Area: Social Work's Role in Death Penalty Mitigation Investigations*, 84 FAMILIES IN SOC'Y: THE J. OF CONTEMPORARY HUMAN SERVS. 423 (2003).

9 As an introductory resource to capital mitigation investigation, see generally the June 2008 issue of the *Hofstra Law Review*, 36 HOFSTRA L. REV. 663–1093 (2008). While these articles provide critical depth to the understanding of capital mitigation investigation, they do not discuss the ethical tensions between law and social work that this Article addresses.

10 *See, e.g.*, Bowers Andrews, *supra* note 8.

11 *See, e.g.*, Jose B. Ashford et al., *Advocacy by Social Workers in the Public Defender's Office*, SOC. WORK, May–June 1987, at 3; James L. Scherrer, *How Social Workers Help Lawyers*, SOC. WORK, July 1976, at 4.

12 The distinction between a mitigation specialist who serves as a testifying expert at trial and a mitigation specialist who serves as a consulting member of the capital defense team is critical. Testifying experts waive protections such as attorney-client privilege and work product, whereas non-testifying consultants arguably retain such protections. *See* Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 HOFSTRA L. REV. 775, 802 (2008) (observing that "it is absolutely necessary, in order to preserve these 'vital' privileges and protections, that counsel make the decision whether a consultant will testify early on, lest he or she be placed in jeopardy of exposing privileged communications or otherwise non-discoverable information from or about [the] client"); Telephone Interview with Professor Jose B. Ashford, Dir. of Office of Forensic Soc. Work, Ariz. State Univ., in Phoenix, Ariz. (July 28, 2008).

have the potential to negatively impact the constitutional rights of the capital defendant by compromising the effective assistance of counsel the defendant receives.[13]

To begin this analysis, Part I explains the historical development of capital mitigation specialists and the extent to which the Supreme Court's capital jurisprudence and legal ethics have shaped the role of mitigation specialists. It analyzes pivotal moments in the Court's early capital mitigation jurisprudence, and then discusses the role of the American Bar Association's (ABA) *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA *Guidelines*) in establishing the core duties of mitigation specialists.[14] Part I concludes by discussing three of the Court's recent mitigation cases, *Williams*,[15] *Wiggins*,[16] and *Rompilla*,[17] and how these cases rely, in part, on the ABA *Guidelines* to explain how capital mitigation investigation is a critical component of a capital defendant's constitutional right to effective representation of counsel.

Part II discusses the different world views and practice methods that social workers bring to capital defense teams when they work as mitigation specialists. It contrasts a social worker's multidimensional, systems-based approach to a capital defense attorney's linear, diagnostic approach, concluding that a systems-based approach brings important depth, perspective, and expertise to the mitigation investigation.

Part III examines some ethical conflicts that capital attorneys and social-worker-trained mitigation specialists may experience when they work together on capital defense teams. Beginning with the ABA's

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13 *See* AM. BAR ASSOC., GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 4.1 cmt. (rev. ed. 2003) [hereinafter ABA GUIDELINES], *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf ("For all of these reasons the use of mitigation specialists has become 'part of the existing "standard of care"' in capital cases, ensuring 'high quality investigation and preparation of the penalty phase.'" (quoting SUBCOMM. ON FED. DEATH PENALTY CASES COMM. ON DEFENDER SERVS., JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION, 24 (1998))); *see also* discussion *infra* Part III.

14 ABA GUIDELINES, *supra* note 13. In addition, the American Bar Association Death Penalty Representation Project recently collaborated with the Public Interest Litigation Clinic and the University of Missouri-Kansas City School of Law to supplement the ABA *Guidelines*. *See Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008) [hereinafter *Supplementary Guidelines*]. The *Supplementary Guidelines* provide even more detail about the duties of mitigation specialists and the interaction of mitigation specialists with capital attorneys. *See, e.g.*, *id.* §§ 4.1—The Capital Defense Team: The Role of Mitigation Specialists, 5.1—Qualifications of the Defense Team, 10.4—The Defense Team: The Role of Counsel with Respect to Mitigation Specialists, 10.11—The Defense Case: Requisite Mitigation Functions of the Defense Team.

15 Williams v. Taylor, 529 U.S. 362 (2000).

16 Wiggins v. Smith, 539 U.S. 510 (2003).

17 Rompilla v. Beard, 545 U.S. 374 (2005).

Model Rules of Professional Conduct,[18] it first examines relevant legal ethics rules. It then examines relevant social work ethics rules by exploring provisions from the National Association of Social Workers' *Code of Ethics*.[19] Part III concludes by exploring the importance of recognizing the ethical tensions social workers experience when they work as mitigation specialists on capital defense teams. The final section concludes this Article. By understanding how ethical norms and world views from law and social work interact, this Article strives to ensure that interdisciplinary capital defense teams anticipate and resolve ethical conflicts in order to safeguard the capital defendant's constitutional right to effective assistance of counsel.

I. THE DEVELOPMENT OF CAPITAL MITIGATION SPECIALISTS

A. *What Capital Mitigation Specialists Do*

In contrast to a typical criminal defense team comprised of one or two attorneys and a fact investigator, a capital defense team is more complex. At a minimum, the ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA *Guidelines*) observe that such a team must consist of two attorneys (at least one of whom has extensive experience in death penalty litigation),[20] a fact investigator, and a mitigation specialist.[21] The ABA *Guidelines* also indicate that at least one member of the capital defense team must know how to identify mental health issues that the capital defendant may have,[22] a job that often falls to the mitigation specialist.

Although the ABA *Guidelines* require the appointment of a mitigation specialist to the capital defense team, they do not specify the professional background that mitigation specialists should have. Because no specific educational background is a prerequisite to becoming a mitigation specialist, mitigation specialists are drawn from a variety of diverse professional careers, including prior work as probation officers, private

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18 MODEL RULES OF PROF'L CONDUCT (2008).

19 *See* NAT'L ASSOC. OF SOC. WORKERS, CODE OF ETHICS OF THE NAT'L ASSOC. OF SOC. WORKERS (rev. 1999) [hereinafter NASW CODE OF ETHICS], *available at* http://www.socialworkers.org/pubs/code (last visited May 22, 2009).

20 *See* ABA GUIDELINES, *supra* note 13, § 5.1(B), cmt. (detailing specific qualifications of defense counsel, and also discussing other possible qualifications); *id.* § 4.1(A)(1); *id.* § 10.4(A) (specifying that at least two attorneys should be assigned to each capital case).

21 *See id.* §§ 4.1(A)(1), cmt., 10.4(C)(2), cmt.

22 *See id.* § 10.4(C)(2)(b) (explaining that one member of the defense team must be "qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments"); *id.* § 4.1 cmt. ("[Mitigation specialists] have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf.").

investigators, lawyers, psychologists, journalists, anthropologists, and social workers.[23] Within the field of social work, "forensic social work" is an established subspecialty that happens to provide useful building blocks for skills that would be further developed if the forensic social worker later decided to enter the field of capital mitigation—such as the skill of developing social histories.[24] While mitigation specialists might therefore benefit from building on some of the skills acquired through prior social work training, mitigation is by no means a subspecialty of either social work or forensic social work. It is a field unto itself. Because mitigation specialists must be able to explore a wide array of investigative avenues, no one field provides the sole professional training for capital mitigation specialists. At the same time, mitigation specialists who have training in other disciplines—such as social work—bring with them skills sets, world views, and professional expertise that can be especially valuable to capital defense teams.[25]

Mitigation specialists uncover extensive information about the defendant from the defendant's family, teachers, friends, and almost anyone who was ever part of the defendant's life.[26] Mitigation specialists gather this information in order to construct a psycho-social history—or life story—of the capital defendant. Because often the best defense a capital attorney can render is to negotiate an agreed-upon disposition, mitigation evidence might be critical in helping to obtain such a plea bargain.[27] Alternatively, if the case does proceed to trial, the attorneys will integrate the mitigation evidence with the overall preparation of the case, culminating in the presentation of mitigation during the sentencing phase in order to argue to the jury that a sentence less than death (which

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23 Telephone Interview with Danielle Waller, Mitigation Specialist and Licensed Clinical Social Worker, Mitigation and Sentencing Servs., in Springfield, Ill. (June 10, 2009).

24 *See* Albert R. Roberts & David W. Springer, *An Introduction to Forensic Social Work Perspectives*, in SOCIAL WORK IN JUVENILE AND CRIMINAL JUSTICE SETTINGS 25, 25 (3d ed. 2007) ("The overriding goal of forensic and justice social work is to improve the quality of life and deliver mental health and social services to victims and offenders. . . . The scope of forensic social work includes a wide range of evidence-based assessment and treatment methods with crime victims as well as juvenile and adult offenders.").

25 *See infra* text accompanying notes 118–31.

26 For example, the ABA *Guidelines* recognize that "[m]itigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (*e.g.*, family sexual abuse) that the defendant may have never disclosed." ABA GUIDELINES, *supra* note 13, § 4.1 cmt.

27 *Id.* §10.9.1 cmt. ("'Death is different because avoiding execution is, in many capital cases, the best and only realistic result possible'; as a result, plea bargains in capital cases are not usually 'offered' but instead must be 'pursued and won.' Agreements are often only possible after many years of effort. Accordingly, this Guideline emphasizes that the obligation of counsel to seek an agreed-upon disposition continues throughout all phases of the case." (quoting Kevin McNally, *Death Is Different: Your Approach to a Capital Case Must be Different, Too*, CHAMPION, Mar. 1984, at 8, 15)).

usually means a sentence of life without the possibility of parole) is appropriate.[28] The training that a social worker receives interviewing and compiling social histories can thus provide useful baseline skills to develop and hone if that person later decides to become a mitigation specialist.

Indeed, the extensive poverty, neglect, and abuse[29] that mitigation specialists uncover during their investigation of the capital defendant's life is also something that social workers are trained to understand. The typical capital defendant has experienced "family poverty and deprivation, childhood neglect, emotional and physical abuse," as well as "institutional failure and mistreatment in the juvenile and adult correctional system."[30] As one social scientist explains, "There is not much glamour in these stories, not much stylized evil, not much brilliant, diabolical, deliciously twisted violence. Just a lot of mundane truths about how deprivation, abuse, neglect, institutional failure and mistreatment, and so on can all combine to twist a life badly out of shape."[31] Because universities specially train social workers to work with those people entrenched in poverty, abuse, and neglect, they are well suited to identifying these same issues as members of the capital defense team.

Identifying patterns of abuse, poverty, and neglect, then compiling this information into an extensive psycho-social history of the defendant is a critical part of the mitigation specialist's job, but it is not the only task. A typical court affidavit[32] offered in support of seeking funding for a capital mitigation specialist contains many single-spaced pages outlining different tasks a mitigation specialist must do in order to perform her

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28 *See Id.* § 4.1 cmt. ("Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation . . . is integrated into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict.").

29 *But cf.* Jessie Seyfer & Howard Mintz, *Next Peterson Battle: Life Term or Death? The Defense Will Try to Humanize Him as the Prosecution Tries to Demonize Him*, ORLANDO SENTINEL, Nov. 14, 2004, at A16 ("The defense will emphasize every positive aspect of Peterson's personality that they can. Usually, defense attorneys . . . present testimony about difficult, abusive childhoods, mental illness or drug addiction . . . [but] '[t]his isn't going to be a usual type of penalty phase . . . .'").

30 Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 608 (1995). In 1978, anthropologist Colin Turnbull issued a "call to arms" to fellow anthropologists that basically went unanswered until researchers and mitigation specialists such as Craig Haney picked up the ball more than twenty years later. *See* Cheng, *supra* note 8, at 53–54. Within the last fifteen years, Haney and others have dedicated much attention to understanding the complex life stories—the "social histories"—of capital defendants. Their work strives to more thoroughly document the social histories of capital defendants and what part their families played or did not play in the capital defendants' lives.

31 *See* Haney, *supra* note 30.

32 A sample affidavit in support of seeking funding for a capital mitigation specialist is on file with the author [hereinafter Mitigation Affidavit].

job competently. According to the ABA *Guidelines*, some of these duties should include ensuring that the mitigation specialist

> compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation.[33]

In essence, the ABA *Guidelines* require mitigation specialists to know virtually everything there is to know about the defendant, his family, his friends, his employers, and even his nemeses—contemporarily (at the time of the crime and post-crime) and historically (going as far back as possible through generations of the defendant's descendants).[34] Such investigation includes detailed information about the defendant's own childhood as well as intergenerational investigations of the defendant's family. It may also include exposure to environmental pollutants such as lead poisoning or asbestos.

While fulfilling all of the above tasks and more, capital mitigation specialists keep track of their hours and bill their time just like any other member of the defense team. Capital mitigation specialists employed full-time through state or federal capital defender offices do not need to seek appointment in individual cases. In contrast, court-appointed attorneys (who may have been assigned to a capital case to resolve a conflict with the capital defender office, because of multiple co-defendants, or because the jurisdiction does not have a capital defender office) must seek court-approved funding to hire private capital mitigation specialists. In the years before the ABA *Guidelines* and recent Supreme Court jurisprudence expressly endorsing the work of capital mitigation specialists,[35] such funding was more difficult to receive than it is now.[36]

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33 ABA GUIDELINES, *supra* note 13, § 4.1 cmt.; *see also Supplementary Guidelines*, *supra* note 14, § 4.1.

34 *See* Mitigation Affidavit, *supra* note 32; Stetler, *supra* note 8, at 63.

35 *See* discussion *infra* Part I.B.3.

36 While it is true that some courts remain reluctant to fund capital mitigation specialists, what is more widely true is the extent to which capital mitigation specialists must continue to educate the court (and sometimes even the capital defense attorneys for whom they work) about the full investigative latitude and comprehensive funding they need in order to perform their jobs effectively. That is where a detailed affidavit painstakingly listing the various kinds of investigation mitigation specialists must undertake comes into play. It is one step for a

The Supreme Court's recent mitigation jurisprudence has clarified the mitigation specialist's role in safeguarding the defendant's right to effective assistance of counsel, which in turn helps to explain the critical role that mitigation specialists serve on capital defense teams. The next section highlights some pivotal moments in the Court's jurisprudence that underscore the connection between extensive mitigation investigation and effective assistance of counsel.

B. The Supreme Court's Capital Mitigation Jurisprudence

One of the reasons that social science researchers have had such rich data with which to describe the psycho-social histories of capital defendants is because of the thorough mitigation investigation that they have been doing on the ground, in courtrooms, and in public defenders' offices across the country, well before the mid 1990s. Indeed, what one might call the "birth" of capital mitigation specialists began in the early 1970s, coinciding with the Supreme Court's historic *Furman v. Georgia* decision dismantling all existing death penalty statutes and the post-*Furman* cases examining whether revised death penalty statutes that state legislatures passed in the wake of *Furman* remedied the constitutional infirmities that *Furman* had identified.[37]

1. The Supreme Court's Early Cases: 1970–1989

In 1972, the United States Supreme Court dismantled all existing death penalty statutes through *Furman v. Georgia*.[38] In light of *Furman*, states were forced to examine their death penalty procedures before returning to the business of capital prosecution. They did so in quick order, and the resulting post-*Furman* cases forced the Court to examine whether new procedures passed constitutional muster. Through cases such as *Woodson v. North Carolina* in 1976[39] and *Lockett v. Ohio* in 1978,[40] the Supreme Court underscored the great weight it placed on particularized consideration of mitigation evidence, going so far as to mandate that capital jurors must be allowed to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than

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court to agree to fund a mitigation specialist for a given case; it is sometimes another step altogether for a court to approve the extensive expenses that competent mitigation investigation involves. Telephone Interview with Danielle Waller, Mitigation Specialist and Licensed Clinical Social Worker, Mitigation and Sentencing Servs., in Springfield, Ill. (June 10, 2009); *see also* O'Brien, *supra* note 6, at 698 (reporting that "every jurisdiction in the United States that authorizes the death penalty has a mechanism to provide mitigation specialist services").

37 408 U.S. 238 (1972).

38 *Id.*

39 428 U.S. 280 (1976).

40 438 U.S. 586 (1978).

death."[41] While not requiring capital defense attorneys to investigate every aspect of the capital defendant's life, the mandate that jurors must be allowed to consider any aspect of the defendant's life implicitly signaled that capital defense attorneys could (and should) broaden their areas of inquiry.

Although these early decisions recognized that relevant mitigation evidence could be extremely broad,[42] such recognition did not translate into immediate on-the-ground changes. It took capital defense teams some time to realize the full potential of the Court's jurisprudence. As one scholar remarked, even though the Court had signaled that mitigation evidence could be extremely varied and far reaching, capital defense teams "were largely at a loss to figure out what to do with their newfound freedom."[43] Because attorneys were used to judges constraining their mitigation evidence to that which addressed specific factors listed in state statutory schemes,[44] attorneys needed time to brainstorm new ways to present mitigation evidence now that they could litigate outside the list of statutory mitigating factors.[45]

Despite the fact that defense attorneys needed time to envision new ways to present mitigation evidence, the Court continued to encourage outside-the-box thinking through such cases as *Skipper v. South Carolina*, where the Court emphasized that a jury could consider any evidence offered in mitigation, whether or not a statute specified it, and even if the

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41 *Id.* at 604.

42 *See, e.g.*, Stetler, *supra* note 8, at 61 (explaining that *Woodson* "captured the breadth of potential mitigating evidence by referring simply to the 'diverse frailties of humankind'").

43 *See* Cheng, *supra* note 8.

44 An example of current statutory mitigating factors includes:

> (1) the defendant has no significant history of prior criminal activity; (2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution; (3) the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act; (4) the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm; (5) the defendant was not personally present during commission of the act or acts causing death.

720 ILL. COMP. STAT. ANN. 5/9-1 (West 2008).

45 While capital defense attorneys in the 1980s were beginning to brainstorm new kinds of mitigation evidence, victims' rights programs—many of which were housed in and developed through state district attorney offices—were pushing for expanded aggravation evidence. In contrast to the Court's commitment to increasing the breadth of mitigation evidence, and despite the increasing strength of victims' rights programs, the Supreme Court did not immediately endorse such efforts. In 1987, the Court created a *per se* bar to victim impact evidence. *See* Booth v. Maryland, 482 U.S. 496 (1987). In 1989, the Court prohibited prosecutors from arguing about the victim impact of a crime. *See* South Carolina v. Gathers, 490 U.S. 805 (1989). Thus, at the same time that the Court was keeping close reins on victim impact evidence in aggravation, it was also expanding the breadth of mitigation evidence.

evidence happened after the crime had taken place (such as good conduct in jail after being arrested for a capital offense).[46]

2. Enter the ABA Guidelines: 1989–1999

As the Court continued to loosen the reins on admissible mitigation evidence, the American Bar Association entered the discussion by offering additional guidance to capital defense attorneys. In 1989, the ABA adopted its first *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989 ABA *Guidelines*).[47] Although the ABA had previously adopted positions on "the effective assistance of counsel in capital cases,"[48] the 1989 ABA *Guidelines* formalized and expanded upon its previous positions. While the 1989 ABA *Guidelines* offered numerous suggestions, most relevant for the purposes of this Article is the extent to which the 1989 ABA *Guidelines* specified sources of information that trial counsel should investigate in order to prepare for the sentencing phase of a capital trial.[49] According to the 1989 ABA *Guidelines*, such investigation should include "efforts to discover all reasonably available mitigating evidence."[50] In other words, in addition to the usual suspects in discovery (such as charging documents, talking with one's client, and examining the client's mental state),[51] the 1989 ABA *Guidelines* suggested more novel sources for mitigation investigation.

Not only did the 1989 ABA *Guidelines*' specificity serve as a checklist for defense attorneys trying to conceptualize new ways to approach mitigation investigation, but it also spoke to judges reluctant to concede that such evidence was now admissible in capital sentencing proceedings. For example, the 1989 ABA *Guidelines* explained that investigating a client's "medical history" should include investigating possible "birth trauma and developmental delays,"[52] that "family and social history" investigations should include looking into "physical, sexual, or emotional abuse,"[53] that "religious and cultural influences"[54] were relevant, and that it was important to interview "potential witnesses" who knew "aspects of the client's life history" that were relevant to "other mitigating evidence to show why the client should not be sentenced to

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46 476 U.S. 1, 4–9 (1986).

47 AM. BAR ASSOC., ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989) [hereinafter 1989 ABA GUIDELINES], *available at* http://www.abanet.org/deathpenalty/resources/docs/1989Guidelines.pdf.

48 *See id.* Introduction.

49 *See id.* Guideline 11.4.1.

50 *Id.* Guideline 11.4.1(C).

51 *Id.* Guideline 11.4.1(1), (2).

52 *Id.* Guideline 11.4.1(2)(C).

53 *Id.*

54 *Id.*

death."[55] Such sweeping breadth of mitigation was unheard of before cases like *Woodson*, *Lockett*, and *Skipper*. By the late 1980s, the ABA hoped its 1989 ABA *Guidelines* would ensure that such breadth was the norm.

Against this increasing breadth of mitigation evidence throughout the late 1980s, it is perhaps no surprise that by the early 1990s, the Court began to signal a willingness to begin pulling in the reins (however slightly) on capital mitigation evidence. Starting with *Saffle v. Parks* in 1990, the Court made clear that even though the range of potential mitigation evidence was virtually infinite, some limitations did exist.[56] The *Parks* decision amplified the Court's 1987 holding from *California v. Brown*,[57] wherein the Court upheld the constitutionality of a capital jury instruction that told a jury not to be "swayed by 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling'"[58] during the sentencing phase of a capital trial. This meant that even though *Woodson* and *Lockett* had said that jurors must be allowed to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death,"[59] any aspect did not actually mean any evidence: evidence intended only to appeal to a jury's sympathy or passions was excluded.

One year later, the Court took an even more decisive step in *Payne v. Tennessee* when it observed that the scales in capital trials had become "unfairly weighted."[60] The Court recognized that "while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances,"[61] the Court's jurisprudence had effectively "barred [the State] from either offering 'a quick glimpse of the life' which a defendant 'chose to extinguish,' . . . or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide."[62] To "'keep the balance true'"[63]

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55 *Id.* Guideline 11.4.1(3), (3)(B).

56 *See* Saffle v. Parks, 494 U.S. 484, 487–90 (1990).

57 479 U.S. 538 (1987) (decided after Parks' conviction became final in 1983). Although the *Parks* holding did not add any additional constraints and simply repeated an earlier holding from *California v. Brown*, 479 U.S. 538 (1987), the fact that the Court took pains to amplify this holding was an early indication of its desire to scale back the "no-holds-barred" mentality of capital sentencing.

58 *Saffle*, 494 U.S. at 493 (citing *California v. Brown*, 479 U.S. at 542).

59 Lockett v. Ohio, 438 U.S. 586, 604 (1978).

60 501 U.S. 808, 822 (1991).

61 *Id.*

62 *Id.* (citing Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)). The Court contextualized this statement by explaining that *Booth* had been misinterpreted: "The language quoted from *Woodson* in the *Booth* opinion was not intended to describe a class of evidence that *could not* be received, but a class of evidence which *must* be received." *Id.*

63 *Id.* at 827 (quoting Snyder v. Massachusetts, 291 U.S. 97, 122 (1934)).

between the State and the capital defendant, the Court held "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar."[64] Some scholars have interpreted this language to mean that a state must proactively choose whether to permit the introduction of victim impact evidence by codifying it in a state death penalty statute.[65] Other scholars have used the "circumstances of the capital crime" statutory catchall phrase to justify the admission of victim impact evidence when such evidence has not been expressly codified in the state statute.[66] While most states have relied on one of these two interpretations to allow victim impact evidence to be admitted at every capital trial,[67] a few states have held out against either interpretation, enacting state statutes expressly forbidding the admission of victim impact evidence if "it is not directly related to the circumstances of the offense or necessary for rebuttal."[68] Whatever the interpretation any one particular jurisdiction adopted, the overall impact was clear: *Payne* resulted in the admission of victim impact evidence—in some capacity—at virtually every capital trial thereafter, and that victim impact evidence began a direct tug-of-war with mitigation evidence.[69]

Such was the posture in the early 1990s. With *Payne* paving the way for victim impact evidence[70] and with "virtually no limits"[71] on admissible mitigation evidence, the 1990s set the stage for intense sentencing hearings in the capital courtroom. Although the Court had taken pains to restrict counsel from appealing to juries through "'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling,'"[72] practically speaking, such prohibition did not do much to alter the temperament of the capital courtroom. With judges reluctant to cede any potentially reversible grounds to defense counsel, and with the Court's "virtually no limits" capital mitigation jurisprudence firmly in

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64 *Id.*

65 *See* Michael Ogul, *Capital Cases: Dealing with Victim Impact Evidence (Part 1)*, CHAMPION, June 2000, at 43.

66 *See id.* at 44.

67 *See id.* at 43–44.

68 *Id.* at 44 (citing Smith v. Texas, 919 S.W.2d 96, 102 (Tex. 1996)).

69 *See Payne*, 501 U.S. 808.

70 At the same time that *Payne* established this precedent, victims' rights groups were also increasing their pressure to be heard. For example, by 1993, a total of fourteen states had ratified constitutional amendments for victims' rights; by 1996, twenty-nine states had ratified such amendments. *See* Nat'l Ctr. for Victims of Crime, *Crime Victims' Rights in America: An Historical Overview*, http://www.ojp.usdoj.gov/ovc/ncvrw/1999/histr.htm (last visited May 22, 2009).

71 *Payne*, 501 U.S. at 822 (citing Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

72 Saffle v. Parks 494 U.S. 484, 493(1990) (citing California v. Brown, 479 U.S. 538, 542 (1987)).

place, judges wishing to err on the side of caution (by limiting the errors defense counsel could later cite on appeal) continued to allow capital defendants to introduce and to argue a wide range of mitigation evidence to the jury.

Capital trials in the 1990s thus unfolded in high gear. Capital defense offices began hiring full-time mitigation specialists to help safeguard the rights of capital defendants by more thoroughly investigating and presenting effective mitigation evidence at the sentencing phase of capital trials.[73] Throughout the remainder of the 1990s, the Court stayed largely out of fray, but by the beginning of the twenty-first century, the Court was ready to intervene again.

3. The *Williams-Wiggins-Rompilla* Triad: 2000—Present

Starting with *Williams v. Taylor* in 2000,[74] and then continuing with *Wiggins v. Smith* in 2003[75] and *Rompilla v. Beard* in 2005,[76] the Court launched a series of decisions emphasizing the importance of thorough mitigation investigation in capital defense cases. In *Williams*, the Court found that capital trial counsel failed to meet the "*Strickland* standard"[77] when trial counsel "did not begin to prepare for [the mitigation] phase of the [capital sentencing] proceeding until a week before the trial"[78] and when "they failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records."[79] Instead of conducting mitigation investigation and preparing for the sentencing phase of the capital trial, Williams' defense attorneys stressed in their closing argument to the jury that Williams had turned himself over to the authorities.[80] Indeed, the death of Harris Stone, for which Williams was eventually convicted and sentenced to death, was not even under investigation when Williams sent authorities a note implicating himself as Stone's murderer.[81] Local authorities had concluded that the cause of

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73 At the same time as capital defender offices began hiring full-time mitigation specialists, victims' rights offices continued to proliferate, thereby exerting increasing pressure on prosecutors' offices to find new and better ways to protect the rights of capital victims' families. *See, e.g.*, John W. Stickels, *Victim Impact Evidence: The Victims' Right That Influences Criminal Trials*, 32 TEX. TECH. L. REV. 231, 235–46 (2001) (explaining how victims' rights expanded and the "evolution of the victim's right to participate at punishment hearings").

74 529 U.S. 362 (2000).

75 539 U.S. 510 (2003).

76 545 U.S. 374 (2005).

77 *See supra* note 5 and accompanying text for a description of the *Strickland* Standard.

78 *Williams*, 529 U.S. at 395.

79 *Id.*

80 *See id.* at 369.

81 Williams was incarcerated at the city jail on an unrelated offense when he wrote an anonymous letter to police confessing that he had "killed 'that man down on Henry Street.'"

Stone's death was alcohol poisoning and closed the case, but they reopened it and charged Williams for capital murder after receiving his confession note.[82]

In evaluating Williams' post-conviction ineffective-assistance-of-counsel claim, the Court focused on what trial counsel did and failed to do in preparation for the capital sentencing phase.[83] While recognizing that "not all of the additional evidence [that trial counsel did not investigate and therefore did not know about] was favorable to Williams,"[84] the Court underscored that the "failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession."[85] The Court also stressed that trial counsel's omissions in investigation "clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background."[86] In support of the defense attorneys' failure of their obligation to conduct a thorough investigation of the defendant's background, the Court cited the ABA's *Standards for Criminal Justice* and its supporting commentary to emphasize capital counsel's critical responsibility to

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Id. at 367. The police quickly determined that Williams had written the note, in part because the note contained a reference to the unit of the local jail in which Williams was housed (the "I" unit). *See id.* In addition to confessing to the Stone murder, Williams' note also confessed to other acts. *See id.* at 368 (referencing the "brutal" assault of an elderly woman who was rendered to a vegetative state and was not likely to recover). As soon as the police determined that Williams had authored the note, the police interrogated him about the murder and the other acts to which he had confessed and obtained several statements. *See id.* at 367–68. The State eventually used Williams' statements against him in aggravation at his capital trial. *See id.*

82 *See id.*

83 *See id.* at 367–74 (describing the limited evidence introduced during the sentencing phase of the trial and what was argued during state and federal habeas proceedings).

84 *Id.* at 396 (explaining that "juvenile records revealed that he had been thrice committed to the juvenile system—for aiding and abetting larceny when he was 11 years old, for pulling a false fire alarm when he was 12, and for breaking and entering when he was 15").

85 *Id.* Some of the evidence that the state trial judge (who had presided over Williams' trial and sentencing)—and eventually the United States Supreme Court—found to be "significant mitigating evidence" that trial counsel had failed to present included "documents prepared in connection with Williams' commitment when he was 11 years old that dramatically described mistreatment, abuse, and neglect during his early childhood, as well as testimony that he was 'borderline mentally retarded,' had suffered repeated head injuries, and might have mental impairments organic in origin." *Id.* at 370–71, 395–96. In addition, the Court observed in a footnote that juvenile records documenting why Williams' parents had been imprisoned for the criminal neglect of Williams contained descriptions of a home that was such a "complete wreck" that "there were several places on the floor where someone had had a bowel movement," that the parents were "so intoxicated, they could not find any clothes for the children" (who were "all dirty and none of them had on under-pants") and that some of the children themselves were "under the influence of whiskey" at the time they were removed from the house and placed in a hospital. *Id.* at 395 n.19 (citation omitted).

86 *Id.* at 396.

complete a thorough investigation of the psycho-social history of the defendant.[87]

The coupling of Supreme Court jurisprudence with ABA ethical guidelines continued three years later in *Wiggins v. Smith*,[88] when the Court found that Kevin Wiggins' capital trial counsel had fallen below the *Strickland*[89] standard because trial counsel had failed to thoroughly investigate Wiggins' social history.[90] The trial court found that Wiggins had drowned a seventy-seven-year-old woman in her bathtub.[91] His attorneys tried the case before a state judge who convicted Wiggins of "first-degree murder, robbery, and two counts of theft."[92] Following the conviction, Wiggins elected to try the sentencing portion of his capital case before a jury, and his attorneys filed a motion to bifurcate that sentencing proceeding into two phases. During the first phase of the bifurcated sentencing proceeding, his attorneys sought to argue that Wiggins was not eligible to receive the death penalty because he was not directly responsible for the killing (i.e., he was not a "principal in the first degree").[93] If the defense attorneys won the first phase, the case would not proceed to a second phase because Wiggins would not be death-eligible. If, however, the defense lost the first phase and the case proceeded to the second phase, his attorneys intended to introduce mitigating evidence.[94] The Court denied the motion and Wiggins' attorneys "decided to focus their efforts on 'retry[ing] the factual case' and disputing Wiggins' direct responsibility for the murder."[95] His attorneys introduced no mitigating evidence describing Wiggins' life history, even though their opening statement to the jury at the sentencing phase promised the jury such evidence.[96]

In finding that Wiggins' trial attorneys' investigation "fell short of the professional standards that prevailed in Maryland in 1989,"[97] the Court noted that "standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report,"[98] and that the Public Defender's office provided funding to retain a

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87 *Id.* (citing 1 AM. BAR ASSOC., ABA STANDARDS FOR CRIMINAL JUSTICE §§ 4–4.1 cmt. (2d ed. 1980)).

88 Wiggins v. Smith, 539 U.S. 510 (2003).

89 Strickland v. Washington, 466 U.S. 668, 692–94 (1984); *see also supra* note 5 and accompanying text for a description of the *Strickland* standard.

90 *See Wiggins*, 539 U.S. at 534–38.

91 *See id.* at 514–15.

92 *Id.*

93 *See id.* at 515.

94 *See id.*

95 *Id.* at 517.

96 *See id.* at 515.

97 *Id.* at 524.

98 *Id.*

mitigation specialist to help prepare such a report.[99] Despite the ease with which his attorneys could have prepared such a report, they chose not to do so.[100] Rather than attributing this decision to tactical strategy, however, the Court amplified the "unreasonableness" of the decision[101] by comparing it to the same professional norms it had cited in *Williams*—the ABA's *Standards for Criminal Justice*—as well as to the 1989 ABA *Guidelines*.[102] After highlighting how Wiggins' attorneys' performance fell below both the ABA's and the state of Maryland's professional norms, the Court agreed with the federal district court's finding that "any reasonably competent attorney would have realized that pursuing [the few leads trial counsel did uncover] was necessary to making an informed choice among possible defenses."[103] In sum, it was impossible for Wiggins' attorneys to make a tactical decision to limit their mitigation investigation when they did not even do enough investigation to make strategic decisions about what to leave out.

The Court emphasized the critical importance of thorough capital mitigation investigation—as well as the Court's reliance on ABA ethical guidelines to define the outer limits of professional capital norms—in *Rompilla*,[104] just two years after *Wiggins*. Unlike counsel in *Williams*[105] and *Wiggins*,[106] the Court noted that Ronald Rompilla's situation was "not a case in which defense counsel simply ignored their obligation to find mitigating evidence."[107] Indeed, the Court emphasized that counsel made "a number of efforts"[108] to find mitigating evidence, including "interviews with Rompilla and members of his family, and examinations of reports by three mental health experts who gave opinions at the guilt phase."[109] Nonetheless, the Court found that counsel's limited investigation fell below professional norms because counsel had failed to examine

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99 *Id.*

100 *See id.*

101 The Court stated that the "record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Id.* at 526.

102 *See id.* at 524–25 (citing 1 AM. BAR ASSOC., ABA STANDARDS FOR CRIMINAL JUSTICE §§ 4–4.1 cmt. (2d ed. 1982)); 1989 ABA GUIDELINES, *supra* note 47, Guideline 11.4.1(C) (explaining that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor" (emphasis added)).

103 *Wiggins*, 539 U.S. at 524.

104 Rompilla v. Beard, 545 U.S. 374 (2005).

105 Williams v. Taylor, 529 U.S. at 395 (noting that counsel did not even begin to prepare for the sentencing phase until one week before trial).

106 *Wiggins*, 539 U.S. at 524 (noting that counsel failed to commission a social history report "despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker" to complete such a report).

107 *Rompilla*, 545 U.S. at 381.

108 *Id.*

109 *Id.*

a court file containing information relating to a prior conviction that the Commonwealth intended to introduce as an aggravating factor at the sentencing phase.[110] The Court explained that counsel would have discovered "any mitigating evidence the Commonwealth would downplay, and [would have anticipated] the details of the aggravating evidence the Commonwealth would emphasize" if counsel had examined the file.[111] In finding that counsel's performance fell below professional norms, the Court cited the ABA *Standards for Criminal Justice*[112] as well as the 1989 ABA *Guidelines*.[113] The Court emphasized its reliance on the ABA *Standards* when it stated that it "long [had] referred [to these ABA *Standards*] as 'guides to determining what is reasonable.'"[114]

In addition to not looking at the critical file relating to the prior conviction that the Commonwealth intended to use in aggravation, the Court also noted that although counsel had conducted some mitigation investigation, it had failed to investigate a "number of likely avenues" to build a mitigation case, such as failing to examine school records, failing to examine records related to his prior juvenile and adult incarcerations, and failing to look for evidence of a history of alcohol dependence that

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110 *See id.* at 383.

111 *Id.* at 385, 386.

112 *Id.* at 387. The Court cited *ABA Standards for Criminal Justice* §§ 4–4.1 in the text of the opinion because that was the standard that was applicable at the time of Rompilla's trial:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

AM. BAR ASSOC., 1 ABA STANDARDS FOR CRIMINAL JUSTICE §§ 4–4.1 (2d ed. 1982 Supp.). In a footnote following this citation, the Court then noted that "the new version of the Standards now reads that any 'investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities,' whereas the version in effect at the time of Rompilla's trial provided that the 'investigation' should always include such efforts.'" *Rompilla*, 545 U.S. at 387 n.6 (citing AM. BAR ASSOC., ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION §§ 4–4.1 (3d ed. 1993)). The Court then noted that it sees "no material difference between these two phrasings, and in any case cannot think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities." *Id.*

113 *Rompilla*, 545 U.S. at 387 n.7. The Court also explained how the 1989 ABA *Guidelines*, "applied . . . clear requirements for investigation set forth in the earlier Standards," and how the 2003 ABA *Guidelines* made "even more explicit" that "'[c]ounsel must . . . investigate prior convictions . . . that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction.'" *Id.* (quoting ABA GUIDELINES, *supra* note 13, Guideline 10.7 cmt.). The Court also emphasized that its "decision in *Wiggins* made precisely the same point in citing the earlier 1989 ABA Guidelines." *Id.*

114 *Id.* at 387.

"might have extenuating significance."[115] Although the Court did not rest its failure-to-investigate finding on the failure to investigate these avenues because the failure to investigate the prior conviction file was dispositive,[116] the Court never went so far as to say that failure to investigate these other avenues would have met existing professional norms. And while the Court acknowledged that "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up,"[117] it did not venture an opinion as to how it would have ruled about the failure to investigate these other avenues had counsel not failed to look at the critical court file.

In sum, the Court interweaves mitigation jurisprudence with the ABA *Guidelines* to establish baseline professional norms that capital trial counsel must meet in order to render effective assistance of counsel. While clarifying how important thorough capital mitigation investigation is to safeguarding the constitutional rights of the capital defendant, neither the Court's opinions nor the ABA *Guidelines* discuss how such investigations might impact people beyond the capital defendant. For example, they do not discuss how mitigation investigation might impact the defendant's family, whose deeply personal information is often under intense scrutiny during the investigation. Nor do they discuss how capital mitigation investigation might impact society at large.

Because the Court's mitigation jurisprudence and the ABA *Guidelines* focus on protecting the constitutional rights of the capital defendant, it is no surprise that they focus on the capital defendant himself. At the same time, a capital mitigation investigation reaches beyond the capital defendant by intimately scrutinizing and involving family members and society at large. In this way, the *Rompilla* Court could be read to treat the defendant's family and society at large as objects to be investigated rather than as subjects with independent needs. The social costs resulting from such objectification are necessary to protect a capital defendant's right to effective assistance of counsel even if this objectification goes largely unexamined.

II. COMPLEMENTARY WORLD VISIONS

The preceding section explored how the kinds of skills that a person with social work training brings to the capital defense team are essential to help conduct the kind of extensive mitigation investigation that the Court's jurisprudence requires. In addition to the skills that social workers learn during their education and training, the world visions that corre-

115 *Id.* at 382.

116 *See id.* at 383.

117 *Id.* (citing Wiggins v. Smith, 539 U.S. 510, 525 (2003)).

spond with their professional skills are also an essential attribute they bring to the capital team.

One way to understand how social workers' world views complement attorneys' world views is to explore how "social workers focus on persons-and-environment in interaction."[118] Because social workers try to understand a person in his environment,[119] they engage in theories and systems-based practice methods that help them understand both the societal and individual components of the interaction between people and their environment.[120]

> . . . [I]n analyzing the causes of problems and in identifying targets for change, social workers investigate a range of conditions, from social factors such as poverty, discrimination, and educational and employment opportunities, to individual factors of motivation such as capacity, behavior, history, and family relationships. . . . Both in the ways they understand situations and in the interventions they select, social workers focus on the interrelationship between the individual and the environment, whether it be the immediate environment of the community or the larger society of which we are all a part. [They have an] attention to multiple causality and multiple ways of addressing situations . . . .[121]

In contrast to a social worker's attention to persons in their environment and their multidimensional, systems-based assessment, an attorney is often trained to employ more of a linear diagnostic approach to solving issues. For example, instead of exploring the interaction between the criminal defendant and his environment, an attorney is trained to analyze the elements of the offense with which the defendant is charged, then to examine how the facts of the case help to prove or disprove the elements of the offense.[122] Capital defense attorneys may therefore need team members who will help them break out of their linear, deductive reasoning and understand their client (and their client's case) from a multidimensional, systems-based perspective, because the range of evidence an attorney must investigate in preparation for defending a client charged with a capital crime is so unlike the evidence an attorney prepares for a

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118 Frank P. Cervone & Linda M. Mauro, *Response to the Conference: Ethics, Cultures, and Professions in the Representation of Children*, 64 FORDHAM L. REV. 1975, 1976 (1996) (quoting *Working Statement on the Purpose of Social Work*, in Anne Minahin, *Introduction to Special Issue: Purpose and Objectives of Social Work Revisited*, SOC. WORK, Jan. 1981, at 5, 6)).

119 *Id.*

120 *See id.* at 1977

121 *Id.*

122 *See id.* at 1977–78.

non-capital murder case. When social workers bring such vision to the team, they may contribute an essential counterweight to the attorneys' linear, deductive reasoning.

In addition to a systems-based perspective, social workers' professional experience interacting with families in environments is also important to their success as mitigation specialists.[123] Through their social work education, they learned skills that enable them to interview family members about highly sensitive information. Those skills do not exist in a theory-less vacuum, but are instead incorporated into a world vision that respects the dignity and worth of the person being interviewed and strives to maintain ethical principles throughout the interview.[124] In this way, the participation of social workers on capital mitigation teams does more than simply serve as a counterweight to attorneys' linear and deductive reasoning; their participation could also act as a counterweight to lessen the objectification of clients' family members that might otherwise occur during preparation for a capital trial. In other words, the participation of social workers on capital mitigation teams could help to counteract the degree to which the Court's capital jurisprudence has tended to relegate the capital defendant's family to "object" status—as things to be investigated, rather than subjects with independent needs. A social worker's training in respecting family dynamics and individual dignity may help to lessen the degree to which the client's family members are objectified, while also staying within appropriate legal constraints.

At the same time, a social worker's world vision of respecting the dignity and worth of the person might also bring tension to the capital team. For example, if a social worker consulting as a mitigation specialist tries to ensure that members of the defendant's family are approached as subjects with needs rather than as objects possessing information, this world view contrasts against the attorneys' vision of the capital defendant as the one and only person whose needs the capital defense team must protect. The resulting clash of world views can bring depth to the capital trial team but it can also promote tension, especially when the mitigation specialist is a social worker, and the act of objectifying a client's family members competes directly with a social worker's ethics and world views.

Although the Court's mitigation jurisprudence has emphasized the broad reach of mitigation investigation and the importance of mitigation specialists,[125] the Court has not recognized that the objectification its

123 *See* NASW CODE OF ETHICS, *supra* note 19, Preamble; *see also infra* Part III.

124 *See id.*, Preamble and Purpose of the NASW Code of Ethics.

125 *See* discussion *supra* Part I.B.

cases implicitly endorse might cause tension within the capital team.[126] Mitigation specialists trained as social workers learn to follow ethical standards that might be in direct tension with the attorneys' ethical norms—such as promoting the well-being and needs of family members with whom the mitigation specialist is working[127] rather than relegating the family members to object status and thereby ignoring their needs.[128] Similarly, even if a social-worker-trained mitigation specialist agrees that the mitigation specialists' vision and ethics must cede to legal ethics,[129] social workers could still contribute to the objectification of the capital defendant's family by virtue of simply being part of the system.

Given the objectification that the Court's own jurisprudence promotes, it is striking that the National Association of Social Workers has not followed the lead of the American Bar Association by issuing supplemental guidelines to resolve the tension that may result when capital defense teams are composed of persons trained in non-legal professions, such as social work.[130] Compounding this tension between law and social work is the possibility that one of the mitigation specialist's primary

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126 *See id.* Although the ABA *Guidelines* do not expressly recognize such ethical tensions, the *Supplementary Guidelines* clarify that non-lawyers on the defense team are "agents of defense counsel." *See Supplementary Guidelines*, *supra* note 14, Guideline 4.1(C) (finding agents "bound by rules of professional responsibility that govern the conduct of counsel"). This clarification does not recognize the inherent tension social workers on a capital defense team might experience reconciling their social work ethics and world vision with those of the attorney, but it does clarify the defense attorney's expectations from a legal ethics standpoint. *Id.*

127 *See* NASW CODE OF ETHICS, *supra* note 19, § 1.01. This reinforces the ethical principle that "[s]ocial workers respect the inherent dignity and worth of the person," which means that "[s]ocial workers treat each person in a caring and respectful fashion" and "promote clients' socially responsible self-determination." *Id.* Ethical Principles. Moreover, "[s]ocial workers seek to enhance clients' capacity and opportunity to change and to address their own needs" and "are cognizant of their dual responsibility to clients and to the broader society." *Id.* In addition, "[t]hey seek to resolve conflicts between clients' interests and the broader society's interests in a socially responsible manner consistent with the values, ethical principles, and ethical standards of the profession." *Id.*

128 *See* ABA GUIDELINES, *supra* note 13, § 2.1 cmt.; MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2008) ("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)."); *see also* MODEL RULES OF PROF'L CONDUCT R. 5.3(b) ("[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.").

Note that the ABA *Guidelines* find that "[i]t is essential that both full-time defenders and assigned counsel be fully independent, free to act on behalf of their clients as dictated by their best professional judgment. A system that does not guarantee the integrity of the professional relation is fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can afford to retain." ABA GUIDELINES, *supra* note 13, § 2.1 cmt.

129 *Supplementary Guidelines*, *supra* note 14, Guideline 4.1(C).

130 *See supra*, notes 14 and 129 (discussing *Supplementary Guidelines*, Guideline 4.1(C)).

responsibilities—developing a close rapport with the family[131]—may ultimately heighten the ethical tension a specialist experiences when learning information (such as sexual, physical, or drug abuse) that legal ethics rules prevent the specialist from disclosing or treating.

III. ETHICAL TENSIONS BETWEEN LAW AND SOCIAL WORK

The Court's decisions and the ABA *Guidelines* have made clear that extensive pre-trial mitigation investigation is critical to the capital defendant's ability to receive effective assistance of counsel.[132] Their endorsement of capital mitigation investigation has coincided, either directly or indirectly, with a dramatic increase in demand; when jurisdictions prosecute capital cases, the appointment of a mitigation specialist to the capital defense team is now a necessity instead of a luxury.[133] Coinciding with the Court's and the ABA's strong endorsements of capital mitigation specialists—as well as the marked increase of the number of capital cases prosecuted each year in some jurisdictions—is that capital defender offices have experienced a heightened need to hire and train new capital mitigation specialists to assist with pending capital cases.[134] To better understand the ethical constraints that social workers face as capital mitigation specialists, Section A explores the relationship be-

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131 *See, e.g.*, ABA GUIDELINES, *supra* note 13, Guideline 4.1(B) cmt. (noting that the mitigation specialist "plays an important role . . . in maintaining close contact with the client and his family while the case is pending").

132 *See* discussion *supra* Part I.B.

133 *See* O'Brien, *supra* note 6, at 697 ("Because qualified mitigation specialists are essential to the preparation of any capital case, they are in great demand. The unfortunate reality is that, just as with competent capital defense attorneys, demand for qualified mitigation specialists exceeds the supply.").

134 *See, e.g.*, Michael Kiefer, *Fast Death Penalty Trials Urged*, ARIZ. REPUBLIC, Feb. 3, 2007, at 1. The capital defender offices in Phoenix, Arizona, are a dramatic example of this phenomenon. As of February 3, 2007, more than 130 death penalty cases were pending in Maricopa County Superior Court. *Id.* This number "exceeds the total number of defendants who received the death penalty nationwide last year." Jennifer Steinhauer, *Policy Shift on Death Penalty Overwhelms Arizona Court*, N.Y. TIMES, Mar. 5, 2007, at A15. As a result of the exceedingly high number of pending capital trials, the three capital defender offices serving Maricopa County hired a number of new mitigation specialists to try to staff the capital defense teams for the pending death penalty cases. (Telephone Interview with Barbara Bumpus, Mitigation Specialist, in Maricopa County, Ariz. (Sept. 17, 2007)) (on file with author). According to Richard C. Dieter, the executive director of the nonprofit Death Penalty Information Center, Maricopa is "almost certainly" among the counties with the highest number of pending death penalty cases in the nation. *See* Steinhauer, *supra*, at A15. The policy change in charging more death penalty cases than it had previously charged is attributed, at least in part, to a new county attorney who took office in 2005. "By comparison, in 2004, the year before [Andrew P.] Thomas became county attorney, the office sought the death penalty in 28 of 108 cases." *Id.* Another apt comparison is Harris County, Texas, which has long been known as one of the most aggressive capital jurisdictions in the country. As of March 2007, Harris County had seventeen such cases pending. *See id.*

tween their extensive responsibilities and the ethical constraints they experience in both law and social work.

A. *Constraints Imposed by Legal Ethics*

Attorneys following the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (*Supplementary Guidelines*) will assert that legal ethics trump social work ethics when a social worker is employed as a member of the capital mitigation team: social workers are not "doing" social work when they are employed as capital mitigation specialists, so their capital "client" is not a client in the social work sense, but rather a client in the legal sense, and thus the legal ethics rules prevail.[135] Another version of this argument is that because the attorney was first assigned to the client in a legal capacity, any non-lawyer who joins the legal team does so under the attorney-client umbrella rather than under her own professional umbrella, and thus the attorney-client rules should prevail.[136]

While attorneys may assume that legal ethics should trump social work ethics in line with this guiding principle, the 1989 and the 2003 versions of the ABA *Guidelines* do not provide specific support for that position. It was only recently, through the newly issued *Supplementary Guidelines*,[137] that the *Supplementary Guidelines* clarified that "all members of the defense team are agents of defense counsel. They are bound by rules of professional responsibility that govern the conduct of counsel respecting privilege, diligence and loyalty to the client."[138] Given the wide range of investigative latitude a mitigation specialist must be capable of pursuing, and given that mitigation specialists are often trained social workers who come to the capital defense team with their own professional ethics codes—that may or may not conflict with legal ethics—this clarification was much needed. Even though the *Supplementary Guidelines* have clarified the expectation that non-lawyers serving on capital defense teams must obey professional legal ethics,[139] this clarification does not mean that tensions caused by conflicting professional norms suddenly disappear. To better understand how constraints imposed by legal ethics and social work ethics interact on interdisciplinary capital defense teams, it is necessary to analyze the interaction from the lawyer's vantage point as well as from the social worker's vantage point.

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135 *Supplementary Guidelines*, *supra* note 14, Guideline 4.1(C) (specifying that non-lawyers on the defense team are "agents of defense counsel" who "are bound by rules of professional responsibility that govern the conduct of counsel respecting privilege, diligence and loyalty to the client.").

136 *See id.*

137 *See id.*

138 *Id.*

139 *Id.*

To this end, Section 1 begins from a lawyer's vantage point—first, exploring additional guidance the ABA *Guidelines* provide, and then, turning to the ABA *Model Rules* to examine the guidance they contain.[140]

1. What the ABA Guidelines Do and Do Not Say

In addition to the *Supplementary Guidelines*' recent clarification regarding the roles of "agents of defense counsel,"[141] Commentary to Guideline 2.1 states the importance of the following:

> It is essential that both full-time defenders and assigned counsel be fully independent, free to act on behalf of their clients as dictated by their best professional judgment. A system that does not guarantee the integrity of the professional relation is fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can afford to retain.[142]

This Commentary speaks to the fact that counsel for the capital defendant must be free to act on behalf of the capital client in order to safeguard the integrity of the professional relation between client and attorney. Although its discussion focuses on attorneys, when read together with Supplementary Guideline 4.1(C),[143] other members of the legal team—such as mitigation specialists—are included in the Commentary because they are members of the capital defense team. Thus, the Commentary may be understood as stating that social-worker-trained mitigation specialists must be "free to act on behalf of their clients as dictated by their best professional judgment."[144] Because social-worker-trained mitigation specialists are non-lawyers on a legal team, the Commentary and the *Supplementary Guidelines* anticipate that their professional judgments are consistent with the lawyer's professional obligations.[145]

In addition to reading the new *Supplementary Guidelines* together with the existing ABA *Guidelines* and Commentary, in order to better understand the "professional obligations" a capital attorney brings to the

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140 *See* Fox, *supra* note 12, at 776 (asserting that the "core principles expressed in the ABA *Guidelines*, Commentary, and *Supplementary Guidelines* are no more than detailed, contextualized explanations of counsel's existing obligations under the *Model Rules of Professional Conduct*").

141 *See Supplementary Guidelines*, *supra* note 14, Guideline 4.1(C).

142 *See* ABA GUIDELINES, *supra* note 13, Guideline 2.1 cmt. (citing AM. BAR ASSOC., ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-1.3 cmt. (3d ed. 1992).

143 *Supplementary Guidelines*, *supra* note 14, Guideline 4.1(C).

144 *See* ABA GUIDELINES, *supra* note 13, Guideline 2.1 cmt.

145 *Supplementary Guidelines*, *supra* note 14, Guideline 4.1(C).

defense team, it is also necessary to understand the attorney's professional obligations under the ABA *Model Rules*.

2. Guidance from the ABA Model Rules

While each state has adopted its own ethics rules governing lawyers' professional conduct in the state where the lawyer practices, most states have based their ethics rules on the ABA *Model Rules*.[146] Historically, the guidance that the American Bar Association provides in legal ethics started with the original *Canons of Professional Ethics* (*Canons*) that the ABA adopted in 1908.[147] Through a long process of evaluation and self-study, the *Canons* continued to be updated throughout the ensuing years. Then in 1964, a special ABA committee produced the *Model Code of Professional Responsibility* (*Code*), which a large majority of states and federal jurisdictions adopted.[148] Through another self-study process,[149] the *Code* was eventually replaced by the *Model Rules of Professional Conduct (Model Rules)* in 1983. The ABA *Model Rules* have since been updated through various amendments, but the 1983 blueprint remains largely intact and continues to inform the ethics rules in all but one state (California).[150] Thus, while the ABA *Model Rules* are not binding within any state until that jurisdiction adopts them,[151] because

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146 *See* Am. Bar Assoc., ABA Model Rules of Professional Conduct Website, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited June 15, 2009) (observing that "to date, California is the only state[ ] that do[es] not have professional conduct rules that follow the format of the ABA Model Rules of Professional Conduct.").

147 *See* Am. Bar Assoc., ABA Model Rules of Professional Conduct Website, Preface to the Model Rules, http://www.abanet.org/cpr/mrpc/preface.html (last visited May 22, 2009) (explaining that the Canons "were based principally on the Code of Ethics adopted by the Alabama Bar Association in 1887, which in turn had been borrowed largely from the lectures of Judge George Sharswood, published in 1854 as *Professional Ethics*, and from fifty resolutions included in David Hoffman's *A Course of Legal Study* (2d ed. 1836).").

148 *See id.* ("[T]he House of Delegates of the American Bar Association created a Special Committee on Evaluation of Ethical Standards ('the Wright Committee') to assess whether changes should be made in the then-current Canons of Professional Ethics. The Model Code was adopted by the House of Delegates on August 12, 1969, and subsequently by the vast majority of state and federal jurisdictions.").

149 *See id.* Starting in 1977, a newly formed Commission on Evaluation of Professional Standards "under[took] a comprehensive rethinking of the ethical premises and problems of the legal profession," evaluated the Model Code, and "determin[ed] that amendment of the Code would not achieve a comprehensive statement of the law governing the legal profession." *Id.* Therefore, the Commission "commenced a six-year study and drafting process that produced the Model Rules of Professional Conduct." *Id.* The House of Delegates of the ABA adopted these Model Rules on August 2, 1983, and at the time the edition of the Model Rules it had passed went to press, "all but eight of the jurisdictions had adopted new professional standards based on these Model Rules." *Id.*

150 *See supra* note 146.

151 Am. Bar Assoc., ABA Model Rules of Professional Conduct Website, Preamble and Scope, http://www.abanet.org/cpr/mrpc/preamble.html (last visited May 22, 2009) ("Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and

most jurisdictions have adopted some form of the ABA *Model Rules*, they serve as the leading baseline and guide for what constitutes ethical practice of law.[152] With this understanding of the ABA *Model Rules* in mind, two of the rules that most impact the interaction of mitigation specialists and lawyers are examined next.

a. ABA Model Rule 5.3(b)

In addition to the *Supplementary Guidelines*' clarification that non-lawyers on capital defense teams are subject to the same legal ethics as lawyers,[153] the ABA *Model Rules* speak to this issue. According to Rule 5.3(b), "A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer . . . ."[154] Any remaining ambiguity within the ABA *Guidelines* concerning the legal ethical standards that apply to non-lawyers serving on capital defense teams is thus rendered obsolete when read in conjunction with Rule 5.3(b), which states that the "conduct" of "non-lawyers" over whom the lawyer has "direct supervisory authority" shall be "compatible with the professional obligations of the lawyer."[155] Moreover, even though the terminology section of the ABA *Model Rules* does not define "non-lawyer,"[156] the Comment to Rule 5.3(b) clarifies that the term "non-lawyer" includes "assistants in [the lawyer's] practice, including secretaries, investigators, law student interns, and paraprofessionals."[157] The Comment further explains that "[s]uch assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services."[158] The term "non-lawyer" is thus understood to include mitigation specialists working on a capital defense team. The lawyer who heads the capital defense team has "direct supervisory authority" over the mitigation specialist when the mitigation specialist works for the lawyer to help develop the evidence that the lawyer will introduce at the sentencing phase of the capital trial.

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finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.").

152 Fox, *supra* note 12, at 775 (noting that the "current iteration of the rules is in the process of being adopted in virtually every jurisdiction").

153 *See Supplementary Guidelines*, *supra* note 14, Guideline 4.1(C).

154 MODEL RULES OF PROF'L CONDUCT R. 5.3(b) (2008) ("Responsibilities Regarding Nonlawyer Assistants").

155 *Id.*

156 *See id.* R. 1.0 ("Terminology").

157 *Id.* R. 5.3(b) cmt. [1].

158 *Id.*

Similarly straightforward is the clause specifying that the non-lawyer's conduct must be "compatible with the professional obligations of the lawyer." A mitigation specialist who compromises client confidentiality to counsel or treat the client's relative would be an example of "incompatible conduct" because these actions would violate the confidentiality obligations the supervising attorney must follow.[159] The basic idea of Rule 5.3(b) thus reinforces Supplementary Guideline 4.1(C)'s clarification that mitigation specialists working on a capital defense team must follow the same ethical rules that the lawyer on that team follows, and that the lawyer must make "reasonable efforts to ensure" that the mitigation specialist is indeed following the same legal rules.[160]

The only ambiguity that remains by reading the *Supplementary Guidelines* together with Rule 5.3(b) is the subjective phrase "reasonable efforts to ensure." The Comment for Rule 5.3 helps clarify this phrase:

> A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.[161]

According to this Comment, "reasonable efforts to ensure" compliance with legal ethical rules includes "appropriate instruction" and "supervision" concerning the ethical aspects of the mitigation specialist's work.[162] It is not enough to assume that a mitigation specialist will know what the legal ethical rules are and will prioritize those legal rules above the ethical rules governing social work. Whatever "measures" the supervising lawyer uses to provide ethical instruction and guidance, such measures "should take account of the fact that [mitigation specialists] do not

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159 *See id.* R.1.6(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)."); *see also infra* Parts III.B.1.a, 2.a, 2.b.

160 This understanding of Model Rule 5.3(b) parallels the recent clarification in the *Supplementary Guidelines*, *supra* note 14, Guideline 4.1(C), which states that "[a]ll members of the defense team are agents of defense counsel" who are "bound by rules of professional responsibility that govern the conduct of counsel respecting privilege, diligence, and loyalty to the client."

161 *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [1].

162 *Id.*

have legal training."[163] Rule 5.3(b) thus specifies that the supervising lawyer take measures to ensure that the mitigation specialist knows and complies with the same ethical rules to which the lawyer must adhere.

b. ABA Model Rule 5.3(c)

In addition to ensuring that mitigation specialists comply with legal ethical rules, both Rule 5.3 and the Comment to Rule 5.3 highlight that if a mitigation specialist does not follow the rules, the supervising attorney—and not the mitigation specialist—is subject to professional legal discipline. Rule 5.3(c) makes this observation when it states:

> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.[164]

In other words, when a mitigation specialist's conduct violates the ABA *Model Rules*, the lawyer shall be subject to professional discipline if the lawyer (1) ordered the conduct, (2) knew about the conduct and approved of it, (3) knew about the conduct in time to stop it from happening but failed to do so, or (4) knew about the conduct in time to lessen the damage but failed to do so.[165]

Notably, the supervising lawyer on the defense team is not the only lawyer subject to professional discipline in such situations. Rule 5.3(c)(2) also contemplates that in addition to the lawyer on the defense team who is directly supervising the mitigation specialist, other lawyers in the same office or firm who have "managerial authority" (such as the head of the public defender office) are subject to professional discipline as well.[166] To this end, the second part of the Comment to Rule 5.3 "requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct."[167] Reading

163 *Id.*
164 *Id.* R. 5.3(c).
165 *See id.*
166 *See id.* R. 5.3(c)(2).
167 *Id.* R. 5.3 cmt. [2].

Rule 5.3 and its Comments together as a whole, the take-home message is that both the managerial attorney and the direct-supervision attorney must take steps to educate the mitigation specialists about their legal ethical duties and to comply with those duties themselves. If the attorneys fail to do so, courts could subject them to professional discipline. The fact that the mitigation specialist is not subject to the same professional discipline is no excuse, and is in fact further reason to ensure that the mitigation specialist knows what the rules are and follows them.

The fact that Rule 5.3 observes that a non-lawyer member of a legal team is not subject to legal professional discipline is especially interesting in the context of capital cases—while mitigation specialists are not subject to professional legal discipline when found in violation of the rules governing legal ethics, they may be subject to ethical discipline in their own professional field. As explained in Section B, the *Supplementary Guidelines* and ABA *Model Rules* could lead to a situation in which non-lawyers are forced to adhere to legal ethics they would not be disciplined for breaking in the legal field (because they are not lawyers), while their adherence to legal ethics results in ethical discipline in their own professional field.

B. Constraints Imposed by Social Worker Ethics

On a national scale, when one compares the national bodies influencing legal ethics with the national bodies influencing social work ethics, the ABA is to professional legal ethics as the NASW is to professional social work ethics. Just as the ABA has published a *Model Rules of Professional Conduct* for lawyers, the NASW has published a *Code of Ethics* for social workers. While each national organization has published national ethical standards to which lawyers and social workers should respectively abide, one structural difference is that the ABA *Model Rules* have a rule-based focus and the NASW *Code of Ethics* has a code-based focus.[168]

Another difference is the extent to which the two publications have influenced the ethical procedures and rules in individual states. The ABA *Model Rules* have had an enormous impact on state legal ethics rules, causing nearly every state to adopt some version of the ABA *Model Rules*.[169] In contrast, the NASW *Code of Ethics* has not had a

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168 *See* Fox, *supra* note 12, at 775–76 (observing that "there is never a suggestion that the standards established by [the ABA *Model Rules*] are mere goals" and that "there is universal recognition that the rules establish measurable levels of performance that lawyers in fact are expected to achieve, day in and day out, for clients large and small, criminal and civil, on Wall Street and on Main Street").

169 *See id.* at 775 (noting that the "*Model Rules of Professional Conduct* have basically occupied the field" and that the "current iteration of the rules is in the process of being adopted in virtually every jurisdiction").

similarly widespread impact on the state ethics rules governing social workers. For example, the NASW *Code of Ethics* is a fifteen-page document with one section detailing six "ethical principles" and corresponding "values," and another section detailing six "ethical standards." Each standard has multiple subparts beneath it further explaining what the standard means.[170] In contrast to this substantial fifteen-page document with multiple subparts, the Texas State Board of Social Work Examiners—the state body charged with processing complaints concerning Texas social workers—has adopted a one-page *Code of Conduct* containing thirteen one-sentence provisions with which Texas social workers must comply.[171] While some of Texas's thirteen provisions correspond with provisions in the NASW *Code of Ethics*,[172] the NASW's wide-reaching scope and level of detail does not compare to Texas's abbreviated document.

This means that on a state-by-state level, while each state has adopted its own legal and social work ethics rules with corresponding state procedures to process complaints, the influence that the ABA has had on each state's legal ethics rules is different from the influence the NASW has had on each state's social work ethics rules. This difference is worth noting, especially given that each organization shares a similar level of remoteness from the individual lawyers and social workers whom it purports to guide: national membership in both the ABA and the NASW is voluntary.[173] This means that if a citizen files a complaint with the NASW and the NASW investigates the complaint and finds that it is well-founded,[174] the worst consequence the social worker faces is removal from the NASW's membership list. Because membership in the NASW is voluntary, expulsion from membership in the NASW has no effect on the social worker's ability to practice social work in the state in which she is licensed because the ability to practice social work is regu-

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170 *See* NASW CODE OF ETHICS, *supra* note 19.

171 *See* TEX. STATE BD. OF SOC. WORK EXAM'RS, CODE OF CONDUCT [hereinafter TEXAS CODE OF CONDUCT], *available at* http://www.dshs.state.tx.us/socialwork/sw_ethics.doc (last visited May 22, 2009).

172 *Compare id.* R. (a)(9) ("A social worker shall not have sexual contact with a client or with a person who has been a client."), *with* NASW CODE OF ETHICS, *supra* note 19, § 1.11 ("Social workers should not sexually harass clients. Sexual harassment includes sexual advances, sexual solicitation, requests for sexual favors, and other verbal or physical conduct of a sexual nature.").

173 *See* MODEL RULES OF PROF'L CONDUCT, Preamble and Scope (2008) ("Compliance with the Rules . . . depends primarily upon understanding and voluntary compliance.").

174 The NASW has a comprehensive sixty-page document that thoroughly explains its procedures for professional review. In sum, the NASW has "established a peer review process that permits two methods (mediation or adjudication) of reviewing grievances pertaining to professional conduct." *See* BD. OF DIRS., NAT'L ASS'N OF SOC. WORKERS, NASW PROCEDURES FOR PROFESSIONAL REVIEW vii (4th ed. 2005) [hereinafter NASW PROCEDURES], *available at* http://www.naswdc.org/nasw/ethics/ProceduresManual2006.pdf.

lated strictly by state licensing boards. If, however, the same citizen files a complaint with the Texas State Board of Social Work Examiners and the Board finds that the complaint is well-founded, the Board has the ability to prohibit the social worker from practicing social work within the state of Texas.[175]

Another difference between the ABA and the NASW is that the NASW has a mechanism within it to process complaints through an adjudicatory or mediation-based process.[176] In contrast, the ABA has no similar mechanism. If a citizen reports an ethical violation by a lawyer to the ABA, the ABA merely refers the citizen to the appropriate lawyer disciplinary agency in the state where the lawyer practices.[177]

Summarily, the NASW *Code of Ethics* has some limited investigative and disciplinary capabilities that the ABA *Model Rules* lack, while the NASW *Code of Ethics* has not been as widely adopted by individual state governing bodies as the ABA *Model Rules*. Still, even though more states have adopted the ABA *Model Rules*, the NASW *Code of Ethics* is the most relevant national document describing the national values, principles, and standards that guide social workers' ethical conduct.[178]

Mindful of these similarities and differences between the ABA *Model Rules* and the NASW *Code of Ethics*, the remainder of this Section explores specific provisions detailed in the NASW *Code of Ethics* that are the most relevant to social workers employed as mitigation specialists. While every capital case is unique, three of the more common situations that social-worker-trained mitigation specialists might encounter are discussed under three rubrics: ethical conflicts that arise (1) when working with clients and clients' family members, (2) between clients' interests and the interests of society at large, and (3) when a client's decisions detrimentally affect his own well being. To explore these tensions in the context of capital mitigation, each section begins with a hypothetical mitigation scenario and then analyzes the applicability of social work ethics within the context of that scenario.

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175 *See* TEXAS CODE OF CONDUCT, *supra* note 171 ("Any violation of the code of ethics or standards of practice will constitute unethical conduct . . . and is grounds for disciplinary action.").

176 *See* NASW PROCEDURES, *supra* note 174, at ix.

177 *See* MODEL RULES OF PROF'L CONDUCT R. 8.5; ABA CTR. FOR PROF'L RESPONSIBILITY, DIRECTORY OF LAWYER DISCIPLINARY AGENCIES (2000), *available at* http://www.abanet.org/cpr/regulation/directory.pdf (last visited June 15, 2009).

178 *See* NASW CODE OF ETHICS, *supra* note 19, Purpose of the NASW Code of Ethics ("The *Code* offers a set of values, principles, and standards to guide decision making and conduct when ethical issues arise.").

1. Responsibilities to Clients and to Clients' Family Members

a. Ethical scenario one: Defendant's adult sister abused by father

Consider the adult sister of a capital defendant. The attorney for the criminal defendant assembles a defense team to prepare for trial. As part of the pre-trial mitigation investigation, the mitigation specialist interviews the defendant's adult sister. During a series of interviews, the sister discloses to the mitigation specialist that when she was a child, she was molested by her father and that her father also molested her brother—the capital defendant—when he was a child.

If the mitigation specialist obtains this information as a member of the legal defense team, the ABA *Model Rules* suggest that the mitigation specialist's ethical duty is not to the person who has provided the information but to the mitigation specialist's client—the capital defendant. This is because mitigation specialists are critical members of the defense team and must prioritize the interests and confidentiality of their capital clients above all else.[179]

ABA Model Rule 1.6(a) provides direct support for this position when it states that "[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)."[180] Rule 1.6(b) then lists six instances in which a lawyer may—but is not obligated to—reveal confidential information relating to representation of a client.[181] Of the

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179 *See* discussion *supra* Part I.A; *see also* ABA GUIDELINES, *supra* note 13, at 20 ("It is essential that both full-time defenders and assigned counsel be fully independent, free to act on behalf of their clients as dictated by their best professional judgment."); MODEL RULES OF PROF'L CONDUCT R. 1.6(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)."); *id.* R. 5.3(b) ("[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.").

180 MODEL RULES OF PROF'L CONDUCT R. 1.6(a); *see also Supplementary Guidelines*, *supra* note 14, at 4.1(D) ("Counsel must provide mitigation specialists with knowledge of the law affecting their work, including an understanding of . . . rules affecting confidentiality, disclosure, privileges and protections.").

181 The six instances listed in Model Rule 1.6(b) are:

> (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the

six instances in which a lawyer may reveal confidential information, none are relevant to the hypothetical scenario of an adult sister who was sexually abused by her father many years ago.

In contrast to the legal ethics governing confidentiality, a social worker has distinct ethical rules related to confidential information. Aside from possible mandatory reporting requirements, which will be discussed in the context of the second hypothetical scenario (analyzing ethical tensions between a client and society at large), a trained social-worker-mitigation-specialist must decide whether a professional obligation to work with the sister to counsel or treat her exists.[182] To answer these questions, the social-worker-trained mitigation specialist would consult provisions from the NASW *Code of Ethics* to decide whether those provisions provide useful guidance. The analysis of how to approach this first scenario from the vantage point of a social-worker-trained mitigation specialist thus begins by exploring the basic structure and purpose of the NASW *Code of Ethics*.

b. The NASW *Code of Ethics*: Purpose of the code

The NASW *Code of Ethics* is comprised of four parts: Preamble, Purpose of the NASW Code of Ethics, Ethical Principles, and Ethical Standards.[183] In terms of thinking about the collaboration between social-worker-trained mitigation specialists and attorneys on capital defense teams, the Purpose section specifies that the NASW *Code of Ethics* is "relevant to all social workers and social work students, regardless of their professional functions, the settings in which they work, or the populations they serve."[184] It also states that the "Code provides ethical standards to which the general public can hold the social work profession accountable."[185] This introductory section of the NASW *Code of Ethics* makes clear that its principles and standards are intended to guide social work professionals, no matter the context in which they may be working. Indeed, the Purpose section anticipates that professional obligations may

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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 concerning the lawyer's representation of the client; or (6) to comply with other law or a court order.

Id. R. 1.6(b).

182 *See* NASW CODE OF ETHICS, *supra* note 19, Ethical Principles ("Ethical Principle: *Social workers' primary goal is to help people in need and to address social problems.* . . . Social workers draw on their knowledge, values, and skills to help people in need and to address social problems."); *see also id.* Ethical Principles ("Ethical Principle: *Social workers recognize the central importance of human relationships.* Social workers understand that relationships between and among people are an important vehicle for change.").

183 *See id.*

184 *Id.* Purpose of the NASW Code of Ethics.

185 *Id.*

sometimes conflict, and when that happens, social work professionals should look to the NASW *Code of Ethics* for guidance because the "*Code* is designed to help social workers identify relevant considerations when professional obligations conflict or ethical uncertainties arise."[186]

While recognizing both that professional obligations may conflict and that social workers should consult the NASW *Code of Ethics* to help navigate such situations, nowhere does the *Code* help social workers decide when or if it should take priority over conflicting ethical standards from another profession. To that end, the most guidance the *Code* provides is to recognize that "[e]thical decision making is a process"[187] and that,

> [t]here are many instances in social work where simple answers are not available to resolve complex ethical issues. Social workers should take into consideration all the values, principles, and standards in this *Code* that are relevant to any situation in which ethical judgment is warranted. Social workers' decisions and actions should be consistent with the spirit as well as the letter of this *Code*.[188]

With these overarching purposes of the NASW *Code of Ethics* in mind, social-worker-trained mitigation specialists who consult the *Code* to see if it applies in their capacity as mitigation specialists on legal defense teams would conclude that at least thus far in their analysis of the *Code*, it does apply to them. The next section proceeds to analyze the *Code* in more depth by examining some of the ethical principles most relevant to social workers employed in capital mitigation and how those ethical principles may inform a social-worker-trained mitigation specialist about how to navigate the ethical tensions within the sister scenario.

c. The NASW *Code of Ethics*: Ethical principles

The NASW *Code of Ethics* identifies six core values on which corresponding principles are based: "service, social justice, dignity and worth of the person, importance of human relationships, integrity, and competence."[189] The ethical principles that are most relevant for capital mitigation are the ethical principles corresponding to social justice, the importance of human relationships, integrity, and dignity and worth of

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186 *Id.*
187 *Id.*
188 *Id.*
189 *Id.* Ethical Principles.

the person.[190] The next sections explore each of these ethical principles while also examining how they interact with the sister hypothetical.

i. Challenge social injustice

This ethical principle specifies that:

> Social workers pursue social change, particularly with and on behalf of vulnerable and oppressed individuals and groups of people. Social workers' social change efforts are focused primarily on issues of poverty, unemployment, discrimination, and other forms of social injustice. These activities seek to promote sensitivity to and knowledge about oppression and cultural and ethnic diversity. Social workers strive to ensure access to needed information, services, and resources; equality of opportunity; and meaningful participation in decision making for all people.[191]

Because capital criminal defendants are typically some of the most vulnerable and oppressed people in our society,[192] social workers employed as capital mitigation specialists are fulfilling this principle in direct and complex ways. By helping to develop mitigation evidence that a defense attorney presents at the sentencing phase, the mitigation specialist is striving toward social justice in the death penalty arena. To the extent that a mitigation specialist's work promotes "sensitivity to and knowledge about . . . [the] oppression and cultural and ethnic diversity" the defendant has experienced throughout his life, perhaps the mitigation specialist's work will result in the jury better understanding the humanity of the capital defendant.[193]

At the same time that this ethical principle seems to have positive application in the death penalty arena, the diverse responsibilities of a capital mitigation specialist complicate the matter. For example, returning to the sister hypothetical, because a mitigation specialist cannot counsel or treat the sister, it is difficult for the mitigation specialist to "strive to ensure access to needed information, services, and resources" for the sister.[194] Certainly the mitigation specialist can suggest referrals or give the sister a list of agencies or other professionals whom the sister

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190 The analysis of the first hypothetical discusses the principles relating to social justice, human relationships, and integrity. The analysis of the third hypothetical discusses the principle of dignity and worth of the person.

191 NASW CODE OF ETHICS, *supra* note 19, Ethical Principles.

192 *See* Haney, *supra* note 30, at 608.

193 *See id.*; *see also* NASW CODE OF ETHICS, *supra* note 19, Ethical Principles.

194 NASW CODE OF ETHICS, *supra* note 19, Ethical Principles.

should contact, but referrals and business cards only go so far toward "ensur[ing] access."[195]

Even more complicated is the notion of ensuring "meaningful participation in decision-making for all people."[196] In the sister scenario, a conflict could emerge between the need for the sister to testify about the abuse she and her brother have suffered and the fact that if only the sister's own best interests were at stake, the best course of action for the sister would perhaps be to undergo years of therapy to heal from the abuse before testifying publicly. Indeed, testifying about the abuse may never be in the sister's best interests, no matter how many years of therapy she benefited from prior to the trial.

In sum, if the mitigation specialist's professional duty is to the capital client and not to the sister, the degree to which the mitigation specialist can engage the sister in "meaningful participation" in the sister's decision whether or not to testify on behalf of her brother is limited. In the most conflict-laden situation, the mitigation specialist's duty may be to persuade the sister to testify on behalf of her brother, even though such a decision is against the best interests of the sister herself.

This first principle thus presents a complicated ethical tightrope for a social worker employed as a mitigation specialist, especially a social worker who interviews the sister of a capital defendant and discovers that she has been molested by their father. In some ways this job of the mitigation specialist follows the ethical principle of promoting social justice, but in other ways it undercuts the same principle.

ii. Recognize the central importance of human relationships

In describing the importance of human relationships, another ethical principle in the NASW *Code of Ethics* states,

> Social workers understand that relationships between and among people are an important vehicle for change. Social workers engage people as partners in the helping process. Social workers seek to strengthen relationships among people in a purposeful effort to promote, restore, maintain, and enhance the well-being of individuals, families, social groups, organizations, and communities.[197]

When a mitigation specialist tracks down a long-lost relative of the capital defendant and reunites them, such action might very well serve

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195 *Id.*
196 *Id.*
197 *Id.*

the social work principle of strengthening and restoring the individual's and the family's well-being, while simultaneously satisfying the legal principle of gathering the strongest evidence possible for the sentencing phase. Conversely, the sister scenario paints a different picture of the inherent tension in striving to build and restore relationships between people within the capital context: the mitigation specialist may need the sister to testify about her abusive father in order to present compelling mitigation evidence to the jury, but the act of testifying about the abuse may in turn pull the family further apart. Family discord is especially likely if other family members do not know about the abuse the son and daughter endured, or if other family members do not want the sister to make such personal family matters known to the public at large. In such situations, the mitigation specialist must somehow reconcile the legal ethical position of putting forth the best defense possible[198] with the social work ethical principle of restoring human relationships.

To do this, the mitigation specialist might decide that the best way to reconcile this tension is to be as honest as possible with the sister before she testifies, preparing her for the potential fallout with other members of her family while also ensuring that the sister will continue to testify. While not ideal, perhaps this approach is the best the mitigation specialist can do given the irreconcilable tension between the ethical mandates of the two professions. The underlying principle of behaving honestly and responsibly is explained further below.

iii. Behave in a trustworthy manner

The final ethical principle most relevant to the sister scenario speaks to the value of integrity:

> Social workers are continually aware of the profession's mission, values, ethical principles, and ethical standards and practice in a manner consistent with them. Social workers act honestly and responsibly and promote ethical practices on the part of the organizations with which they are affiliated.[199]

At the end of the day, after wading through the other ethical principles described above, perhaps this ethical principle is a lifeboat for social workers who serve on capital defense teams. While striving to be mindful of and act consistently with social work's mission and values, this principle recognizes the importance of "promot[ing] ethical practices on the part of the organizations with which [the social workers] are affili-

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198 *See* discussion *supra* Part I.A.

199 NASW CODE OF ETHICS, *supra* note 19, Ethical Principles.

ated."[200] Although this statement does not help a social worker decide whether legal ethics or social work ethics should trump when their ethical mandates collide, the *Code of Ethics*' recognition that it is an ethical principle in and of itself to promote ethical practices within the organization with which the social worker is affiliated—such as a legal capital defense team—at least opens the door to the possibility that the *Code* might anticipate situations in which social work's ethics cede to legal ethics.[201]

d. Ethical responsibilities to clients

In addition to ethical principles, the NASW *Code of Ethics* also sets forth specific ethical standards. The ethical standard entitled "Social Workers' Ethical Responsibilities to Clients" (Standard 1.06(c)), is relevant to the sister scenario because it begins by reinforcing the preceding discussion concerning social workers' responsibilities to clients and family members. Standard 1.06(c) explains that "[s]ocial workers should not engage in dual or multiple relationships with clients . . . in which there is a risk of exploitation or potential harm to the client."[202] This standard thus directs social workers to "provide services" only to people who are the social worker's designated "clients," as well as to ensure that family members with whom the social worker interacts are aware of who the social worker's clients are and are not. Applying this standard to capital mitigation, social workers interviewing a capital defendant's family members should clarify that all family members know that the capital client is the social worker's sole client.

If a social worker were to read this ethical standard and the corresponding ethical principles described above, the social worker would find support for the argument that an easy way to reconcile ethical tensions in the mitigation scenario is to warn the defendant's family members that they are not the social worker's clients, and that the capital defendant is the only client of the social worker. Indeed, this argument would seem relatively straightforward were it not for the introduction to Ethical Standard 1.01 ("Commitment to Clients"), which states:

> Social workers' primary responsibility is to promote the well being of clients. In general, clients' interests are primary. However, social workers' responsibility to the

200 *Id.*

201 This is especially true when understood in the context of the *Supplementary Guidelines*' clarification that non-lawyers on the defense team are "agents of defense counsel" who "are bound by rules of professional responsibility that govern the conduct of counsel respecting privilege, diligence and loyalty to the client." *Supplementary Guidelines*, *supra* note 14, Guideline 4.1(C).

202 NASW CODE OF ETHICS, *supra* note 19, § 1.06(c).

> larger society or specific legal obligations may on limited occasions supersede the loyalty owed clients, and clients should be so advised. (Examples include when a social worker is required by law to report that a client has abused a child or has threatened to harm self or others.)[203]

The introduction to Ethical Standard 1.01 thus reveals an inherent tension within the *Code* that social workers, as capital mitigation specialists, must strive to resolve: how to balance the social worker's ethical duties to clients and to society at large. Section 2 examines this question in greater detail.

2. Responsibilities to Clients and to Society at Large

The preceding section examined specific ethical principles as they relate to the capital defendant and his family. A social worker has an obligation to society at large as well as to a defendant. However, the interests of the defendant's family do not always coincide with the interests of society. Sometimes the interests of the defendant's family coincide with the interests of the defendant but diverge from the interests of society at large. In such situations, social-worker-trained mitigation specialists must decide how to reconcile their ethical duties to the capital defendant and their ethical duties to society at large. The next hypothetical scenario sets forth a context in which to examine this question.

a. Ethical scenario two: Defendant's adult sister abused by defendant

Consider the adult sister of a capital defendant who was sexually abused, when she was a child, by the capital defendant. As part of the pre-trial investigation, the mitigation specialist interviews the sister of the defendant and learns that the capital defendant molested her when he was a child. The sister haltingly discloses this information in the context of explaining that she believes the defendant himself was sexually abused by their father. The sister explicitly states that she does not want this information revealed to anyone and that she will do everything in her power to prevent her brother from being sentenced to death. In such a scenario, even though the defendant and the sister's interests diverge to the extent that the defendant harmed the sister when she was younger, because the sister wants to help save the defendant's life, their interests converge in this situation.

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203 *See id.* § 1.01.

As explained earlier, the legal ethics rules governing confidentiality, especially Model Rule 1.6(a),[204] suggest that because this information is discovered during the course of representing the capital client on the legal defense team, the mitigation specialist must keep this information confidential.[205] Even if the sister did not specify that she wanted the information to be kept confidential, Model Rule 1.6(a) could be read to entrust the mitigation specialist with the duty of not disclosing such confidential information in order to protect the client in certain circumstances. This is because Rule 1.6(b) lists six instances in which the attorney may choose to reveal confidential information, and of those six instances, the only one that is potentially relevant to information learned during pre-trial capital mitigation investigation is Rule 1.6(b)(1). That Rule explains that a lawyer may reveal such confidential information "to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm."[206] Since the adult sister who was abused in the past is not at immediate risk of death or substantial bodily harm, an attorney (and the non-lawyers on the attorney's team) must keep this information confidential in order to comply with the ethical mandates of the *Supplementary Guidelines* and ABA *Model Rules*.

In contrast to the legal ethics rules governing client confidentiality, a social worker has different ethical duties designed to protect society at large. This weighing of the client's needs against the needs of society stems from the fact that social workers have two simultaneous ethical duties, "to protect other people from potentially dangerous clients and to protect clients from themselves."[207] Because of their dual duties to protect both their clients and society at large, if mitigation specialists hear such information in their capacity as a social-worker-trained mitigation specialist, they must decide if they have a professional obligation to report the sexual abuse by the defendant to state authorities in the interests of protecting the "larger society."[208] The *Code of Ethics* does not give

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204 *See, e.g.*, ABA GUIDELINES, *supra* note 13, Guideline 2.1 cmt. ("A system that does not guarantee the integrity of the professional relation is fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can afford to retain."); MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2008) ("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)."); *id.* R. 5.3(b) ("[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.")

205 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT Rs. 1.6(a), 5.3(b).

206 *See id.* R. 1.6(b); *see also supra* note 172 and accompanying text.

207 NORMAN LINZER, RESOLVING ETHICAL DILEMMAS IN SOCIAL WORK PRACTICE 48 (1998).

208 *See* NASW CODE OF ETHICS, *supra* note 19, § 1.01 ("Social workers' primary responsibility is to promote the well being of clients. In general, clients' interests are primary. How-

much guidance about how to resolve these conflicting duties. The preceding discussion related to the first hypothetical began to examine a social worker's "responsibilities to clients" in the context of conflicts that arise between capital defendants and their family members. This section examines the social-worker-trained mitigation specialist's "responsibilities to clients" in more detail in order to explore any guidance the NASW *Code of Ethics* gives in helping social workers balance their duty to protect clients with their duty to protect society at large.[209]

The introduction to Ethical Standard 1.01 contemplates situations in which the client's interests are not primary, thereby complicating other sections of the NASW *Code of Ethics* that specify that the client's interests are always primary. The specific example described in the introduction to Ethical Standard 1.01—the situation in which the client has abused a child—is even more complex when it is applied to social workers employed in capital mitigation: extensive research documents that many capital defendants and capital defendants' family members have been abused or have engaged in abuse,[210] so it is not unlikely that a mitigation specialist may represent a capital client who has himself abused a child.

A social-worker-trained mitigation specialist whose client has abused a child must therefore decide whether a duty to report the client's abuse exists. While the *Code* is clear that a social worker must remain mindful of mandatory reporting requirements, the *Code* does not define situations in which a social worker is "required by law" to report the abuse. Because the NASW *Code of Ethics* does not answer this question, social workers must consult the state laws where they are licensed for further guidance about mandatory reporting requirements.[211] As an example of the intricacies of examining this question in a state-specific context, the remainder of this Section explores some of the questions that could arise for a Missouri-licensed social worker who is employed as a capital mitigation specialist for a criminal defendant facing capital charges in Missouri, who has also abused a child in Missouri.

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ever, social workers' responsibility to the larger society or specific legal obligations may on limited occasions supersede the loyalty owed clients, and clients should be so advised.").

209 *Id.* Ethical Standards (The six standards that the NASW *Code of Ethics* highlights concern social workers' ethical responsibilities (1) to clients; (2) to colleagues; (3) in practice settings; (4) as professionals; (5) to the social work profession; and (6) to the broader society).

210 *See, e.g.*, Haney, *supra* note 30.

211 According to the Children's Bureau/ACYF, "[a]pproximately 48 States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands designate professions whose members are mandated by law to report child maltreatment." *See* CHILD WELFARE INFORMATION GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT: SUMMARY OF STATE LAWS, *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/mandaall.pdf (last visited May 22, 2009).

b. Missouri's mandatory reporting statute: Abuse

According to Missouri state law, a Missouri-licensed social worker is a designated mandatory reporter of child abuse.[212] Missouri statutes further specify that mandatory reporting is required when a reporter "has reasonable cause to suspect that a child has been subjected to abuse or neglect" or when a reporter "observes a child being subjected to conditions or circumstances that would reasonably result in abuse or neglect."[213]

Applying this statute to the capital mitigation context, if social workers employed as mitigation specialists observe reportable child neglect[214] in the home in which they are interviewing a family member, such observations could trigger mandatory reporting requirements. Furthermore, if the mitigation specialists observe circumstances in the sister's house that would reasonably result in neglect to the sister's own children—such as drugs, drug paraphernalia, or simply deplorable living conditions—the social workers may have a duty to report those conditions as constituting child neglect in addition to the mandatory abuse provisions potentially set into motion by the information the sister provides.

In addition to reporting child neglect, mandatory reporters in Missouri must also report sexual or physical abuse "inflicted on a child by other than accidental means by those responsible for the child's care, custody, and control."[215] This section of Missouri law makes no distinction in how the social worker discovers the abuse: it does not matter whether the social worker learns about the abuse from the person who was abused, the person responsible for the abuse, or a third-party who knows of the abuse. Applying Missouri's mandatory reporting statute to a social worker on a capital mitigation team thus presents numerous mandatory reporting quandaries. For example, in the scenario in which the defendant abused his sister, a plain meaning interpretation of the provision could suggest mandatory reporting when the sister tells the mitigation specialist that the defendant abused her.

Reading further into the Missouri statutes, however, another section of Missouri law specifies that only the attorney-client or clergy-penitent privilege may legally excuse a person from reporting child abuse.[216] The permissive nature of the statute does not decisively indicate whether the

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212 MO. ANN. STAT. §§ 210.115, 568.110, 352.400 (West 2003).

213 *Id.* §§ 210.115, 568.110.

214 *Id.* § 210.110 (defining "neglect" as a "failure to provide, by those responsible for the care, custody, and control of the child, the proper or necessary support, education as required by law, nutrition, or medical, surgical, or any other care necessary for the child's well-being").

215 *Id.* § 210.110.

216 *Id.* § 210.140.

legal attorney-client privilege trumps the mandatory reporting requirement for a social worker who is a member of a capital mitigation team. Indeed, one way to read the Missouri statute would be to interpret it to include only those situations in which the client himself reports abuse he experienced, inflicted, or witnessed. Under this interpretation, because the sister is neither the social worker's nor the attorney's client, the attorney-client privilege does not extend to information the sister provides, so a social worker on a mitigation team may indeed have a mandatory reporting requirement relevant to that information.

A second way to read the Missouri statute would be to assert that the attorney-client privilege extends to all information discovered in the course of representing the client, even if such information is not provided directly by the client.[217] This interpretation of ABA Model Rule 1.6(a) was discussed earlier and is supported by the *Supplementary Guidelines*' clarification that non-lawyer members of capital defense teams must act consistently with lawyers' professional obligations.[218]

A third interpretation of the statute is to argue that mandatory reporting requirements are only relevant when the abuse is on-going. In situations such as those depicted in the sister scenario, when a sister reports abuse that happened a long time ago and that she is no longer enduring, such information does not trigger a mandatory reporting requirement because it is not on-going or current.[219] To explore the strength of this third argument, it is necessary to consider it in light of Missouri's statute of limitations.

c. Missouri's statute of limitations

In the criminal law context in Missouri, there is no statute of limitations for crimes involving forcible rape attempted forcible rape, forcible

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217 *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2008) ("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)."). In the capital mitigation context, the most relevant disclosures that Rule 1.6(b) anticipates are that a lawyer may reveal information relating to the representation of a client (1) "to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm," *id.* R. 1.6(b)(1); (2) "to secure legal advice about the lawyer's compliance with these Rules," *id.* R. 1.6(b)(4); (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 concerning the lawyer's representation of the client," *id.* R. 1.6(b)(5); or (4) "to comply with other law or a court order," *id.* R. 1.6(b).

218 *See Supplementary Guidelines*, *supra* note 14, Guideline 4.1(C).

219 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (anticipating that a lawyer may reveal information relating to the representation of a client "to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm").

sodomy, kidnapping, or attempted forcible sodomy.[220] Insofar as other sexual offenses against children are concerned, the statute of limitations for an unlawful sexual offense against a minor in Missouri "extends for 20 years after the minor reaches 18 years of age."[221] Neither the criminal statutes nor the Missouri ethics code specify how these criminal statutes of limitations interact with mandatory reporting requirements for social workers.

Applying the statute of limitations to the sister scenario, a defendant who molested his ten-year-old sister can be criminally prosecuted for that offense until the sister turns thirty-eight years old (or indefinitely, if the molestation included forcible rape). If the sister discloses the abuse to the capital mitigation specialist when she is thirty-five years old, the capital mitigation specialist may have an obligation to report the abuse because the criminal statute of limitations has not expired. Alternatively, a different interpretation may be to assert that the possibility of criminally prosecuting the defendant for his actions does not necessarily trigger a mandatory reporting requirement. For example, if the goals of the mandatory reporting requirements are grounded in the idea that a social worker has a societal responsibility to safeguard the welfare of children (both the person the defendant has abused and other children with whom he could come into contact), such goals are no longer served when the abuse happened in the distant past and the defendant is incarcerated. The abuser is not a risk to the child he already abused or to other children, both because the person he abused is no longer a child and because he is incarcerated.

In sum, a social worker must navigate complex ethical terrain vis-à-vis mandatory reporting requirements and duties to society at large when representing a capital defendant who has abused a child. In navigating this terrain, legal ethics suggest that the information remain confidential, while the NASW *Code of Ethics* instructs social workers to remain mindful of dual ethical responsibilities they have to their clients and to society at large. The next Section explores how further guidance from the NASW *Code of Ethics* might help social workers resolve such ethical dilemmas when they arise on interdisciplinary capital defense teams.

d. Ethical responsibilities to colleagues

The *Code*'s ethical standards contemplate and encourage social workers to engage in "interdisciplinary collaboration."[222] In addition to "ensur[ing] that such colleagues understand social workers' obligation to

220 MO. ANN. STAT. §§ 556.036; 556.037 (West. 2003).

221 MO. ANN. STAT. § 556.037 (West. 2003).

222 NASW CODE OF ETHICS, *supra* note 19, § 2.03 ("Interdisciplinary Collaboration").

respect confidentiality and any exceptions related to it,"[223] the standards explain that "[p]rofessional and ethical obligations of the interdisciplinary team as a whole and of its individual members should be clearly established."[224] With this language, the standards appear to contemplate ethical dilemmas such as those that may arise in interdisciplinary capital mitigation, placing the burden on social workers to ensure that ethical obligations are "clearly established," but giving no guidance about how to reconcile conflicting ethical mandates between law and social work.

Moreover, when conflicts do arise on interdisciplinary teams, a social worker "for whom a team decision raises ethical concerns should attempt to resolve the disagreement through appropriate channels."[225] The standards do not define what constitutes an "appropriate channel," but they do specify that when "disagreement cannot be resolved, social workers should pursue other avenues to address their concerns consistent with client well being."[226] Again, it is unclear whether "other avenues" means avenues within the social work profession (such as state boards or licensing agencies), whether "other avenues" means legal licensing agencies that govern the attorneys, or whether some combination of the two is acceptable. The opaqueness of how to resolve the intertwining and conflicting ethical rules between law and social work is a reason why all members of the interdisciplinary team should be aware of the potential ethical issues members of their team might encounter and formulate a plan about how the team will resolve such ethical issues before they occur.[227] The ABA *Model Rules* and the *Supplementary Guidelines* hold the capital defense attorney responsible for ensuring that all members of the interdisciplinary team abide by legal ethics rules,[228] but when legal ethics do not coincide with social work ethics, the NASW *Code of Ethics* contemplates that social workers also take responsibility for attempting to reconcile competing ethical norms.

3. Responsibilities to a Client When His Decision Detrimentally Affects Himself

The preceding two sections explore ethical tensions that arise between clients and clients' family members, as well as between clients' interests and the interests of society at large. Much of the analysis in these sections examines the extent to which the legal mandate of the capital defense team—that the capital client is the team's only client—

223 *Id.* § 2.02 ("Confidentiality").

224 *Id.* § 2.03(a) ("Interdisciplinary Collaboration").

225 *Id.* § 2.03(b) ("Interdisciplinary Collaboration").

226 *Id.*

227 *See* discussion *supra* Introduction.

228 *See* discussion *supra* Part III.A., discussing MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [1] (2008), and *Supplementary Guidelines*, *supra* note 14, Guideline 4.1(C).

translates to the social-worker-trained mitigation specialist who is a member of the interdisciplinary team. The ABA *Model Rules* and the *Supplementary Guidelines* specify that mitigation specialists must cede to the legal ethics that govern lawyers, even if the legal ethics do not coincide with the mitigation specialist's own professional ethics.[229]

Even when a social-worker-trained mitigation specialist accepts the principle that she must cede to legal ethics, this position does not eliminate other tensions that might arise when social work ethics and world views compete with legal ethics and world views. The last scenario describes how a decision the capital client makes on his own behalf that is detrimental to his own well-being may raise still other ethical issues with a social-worker-trained mitigation specialist.

a. Ethical scenario three: The "volunteer" defendant

Imagine a capital defendant with an average IQ who is not mentally insane or mentally ill. Before the trial begins, he announces to his capital defense team that he appreciates all that the team is doing to try to win his case, but if he is found guilty at the guilt/innocence phase of the trial, he would prefer to die by state execution than to spend the rest of his life in prison. This means he does not want the defense team to defend him at the sentencing phase of his capital trial: if he loses at the guilt/innocence phase and is found guilty of capital murder, he does not want to introduce any mitigation evidence. He wants to be executed.

Before analyzing how social work ethics apply in this scenario, it is important to note that capital defense attorneys themselves take diverse positions on what to do from a legal ethics standpoint.[230] Some reluctantly agree to the client's request while others work against it.[231] Of

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229 MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [1]; *Supplementary Guidelines*, *supra* note 14, Guideline 4.1(C).

230 *See, e.g.*, C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849 (2000). In addition to capital defense attorneys, legal scholars are also divided on this issue. *See, e.g.*, Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 HASTINGS L.J. 693, 699 (2006) ("Commentators disagree on whether a capital defendant should be allowed to veto a mitigation presentation in the penalty phase. What they agree on are three things: (1) a capital sentencing jury must consider mitigation evidence presented at trial, (2) a capital defendant cannot be impeded in presenting mitigation evidence, whether by evidentiary ruling, prosecutorial misconduct, or defense counsel's dereliction, and (3) a mitigation waiver involves the collision between the Autonomy Ideal and the Reliability Ideal. They may even agree on a fourth proposition, that because 'death is . . . different,' what is legitimate or countenanced in a non-capital context does not perforce mean that the action or judgment is permitted or countenanced when death is a possible punishment.").

231 In *Rompilla*, 545 U.S. 374 (2005), the Court observed that although Rompilla was "uninterested in helping" to develop mitigation evidence and was sometimes "actively obstructive," *id.* at 381, capital trial counsel nonetheless had a duty to develop mitigation evidence, and in failing to do so, counsel provided ineffective assistance of counsel. *Id.* at 393. In a

those who ignore the client's desire to die, some do so because they believe the client does not fully understand the ramifications of this decision; they believe the client will change his mind later, when he is on death row and it is too late to save his life.[232] Because it would be too late to save his life later, these attorneys believe it is their legal duty to try to change his mind and save his life at the time of trial, even when the client states that he is firmly opposed to such action.[233]

Attorneys on both sides of the equation claim to find support in the ABA *Model Rules*,[234] which recognize that the lawyer must "consult" with the client but leave the ultimate decision about the specific "means" to employ up to the discretion of the attorney:[235]

> . . . [A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.[236]

Some attorneys interpret the "objective of representation" as being the goal of trying to save the client's life: the client cannot dictate the

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more recent Court decision, *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007), the Court found that a capital defendant who had told his trial attorneys not to present any mitigating evidence could not establish prejudice under the *Strickland* ineffective assistance of counsel prong. Because Landrigan could not establish prejudice, the Court held that the trial court did not abuse its discretion in finding that "Landrigan could not overcome § 2254(d)(2)'s bar to granting federal habeas relief." *Id.* at 1941–42.

232 *See* Harrington, *supra* note 230, at 850 ("Preliminary evidence suggests the majority [of death row inmates] elect to halt appeals at some point . . . though most eventually change their minds.").

233 *See id.* at 856 ("For the lawyer, the problem goes from subtle to sublime. On the one hand, they have the obligation to zealously represent their clients, yet they also have to respect the wishes of those they represent in the overall strategy of how the case will be defended. The macabre solution would be for the defense counsel to join the prosecution in seeking the defendant's execution."); Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 857 (1987) (stating that when a capital defendant expressed a desire to die, "many capital defense attorneys" believed the defendant's "sentiment posed an obstacle to effective representation rather than an ethical dilemma," in part because the attorneys believed it was their duty to try to change the defendant's mind, and most attorneys did successfully change the client's mind).

234 *See* J.C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 WASH. & LEE L. REV. 147, 179, 183 (2006) (observing the "[u]selessness of the Model Rules," in this regard and that "capital attorneys see whatever they project into them and act accordingly, . . . [a]nd because the Model Rules are largely silent, lawyers are ultimately left to exercise their discretion in determining ethical conduct, weighing up the values of autonomy against paternalism and using their own idiosyncratic belief systems as decisionmaking heuristics"). In addition to capital defense attorneys being divided on this issue, the "cases that have dealt with the ethical dimension of this problem are split." White, *supra* note 233, at 857 (collecting cases).

235 *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2008) (the only client decisions by which the lawyer must abide are decisions "as to a plea to be entered, whether to waive jury trial and whether the client will testify").

236 *Id.*

"means" to try to save his life, so attorneys claim they are ethically justified in choosing the "means" of trying to save his life, even when the client claims he does not want those means employed.[237] Attorneys on the other side of the argument believe that the client has asserted that the "objective of representation" is *not* to save the client's life if the choice is life without parole or death by execution. Following their perceived ethical obligations, these attorneys reluctantly cede to the client's wishes.[238]

Assume a mitigation specialist is working on the capital defense team of an attorney who refuses to give up at the sentencing phase of the capital trial, no matter what the client says. This attorney tells the team that the team will investigate the case and present mitigation at the sentencing phase of the trial, even if the capital defendant does not want them to present any mitigation evidence. A social-worker-trained mitigation specialist deciding how to reconcile the client's expressed wishes with the attorney's actions, and also with relevant social work ethics principles, would analyze this question by examining the final ethical principle discussed below: respect the inherent dignity and worth of the person.

b. Respect the dignity and worth of the person

Similar to the principle of pursuing social justice by promoting sensitivity to vulnerable and oppressed groups,[239] the NASW *Code of Ethics* contains an ethical principle directing social workers to respect a person's inherent dignity and worth:

> Social workers treat each person in a caring and respectful fashion, mindful of individual differences and cultural and ethnic diversity. Social workers promote clients' socially responsible self-determination. Social workers seek to enhance clients' capacity and opportunity to change and to address their own needs. Social workers are cognizant of their dual responsibility to cli-

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237 White, *supra* note 233, at 857–58 ("[I]n allocating decision-making responsibility between criminal defendants and defense attorneys, the ABA's Model Rules of Professional Conduct do not specifically identify the decision whether to oppose the death penalty as one of those in which the defendant has ultimate authority.").

238 *See, e.g.*, Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 323 (1983) ("The legal obligations of the defense counsel toward [defendants who wish to die] are less clear than is the case with cooperative clients, and it could be argued that counsel has no obligation to insist upon helping those who choose not to attempt to help themselves."); *see also* Fox, *supra* note 12, at 791 (asserting that it is nonetheless the duty of defense counsel to investigate the case for mitigation because "the client cannot make an informed decision as to how to proceed until the client knows what is possible, and it is the lawyer's ethical duty to present the full smorgasbord, even to an uninterested client").

239 *See* discussion *supra* Part III.B.1.c.i.

> ents and to the broader society. They seek to resolve conflicts between clients' interests and the broader society's interests in a socially responsible manner consistent with the values, ethical principles, and ethical standards of the profession.[240]

In light of this ethical principle, a social-worker-trained mitigation specialist must reconcile how she will fulfill the ethical principle of helping her capital client promote his own "socially responsible self-determination"—his desire to die by execution—with the capital defense attorney's instruction to ignore that wish.

A mitigation specialist in such a position would be able to reconcile the attorney's legal position with her social work principles by working with the client to help him understand the full ramifications of his decision and to ensure it is an informed decision, ultimately hoping to change the client's position in the process of ensuring that he understands the finality of the decision. But if the client does not change his mind, the mitigation specialist must ultimately decide whether to follow the attorney's instruction to help put on mitigation evidence during the sentencing phase of the trial, in direct defiance of the client's "self-determination." Such a dilemma is a stark reminder of the complex, conflicting ethical norms that can arise on interdisciplinary capital defense teams. Even when the team has agreed that legal ethics should prevail, and even when the team has agreed to ways to resolve ethical conflicts that arise between the defendant and the defendant's family members, or between the defendant and society at large, the decisions the client makes on his own behalf may throw still other ethical quandaries into the mix.

CONCLUSION

This Article explored the complex ethical landscape that capital defense teams with social-worker-trained mitigation specialists might encounter. It also highlighted the capital attorney's duty to ensure that non-lawyer team members are aware of, and comply with, the same ethical obligations with which attorneys must comply. Although the NASW *Code of Ethics* does not provide guidance about how to reconcile competing ethical rules between law and social work, capital defense attorneys assert that legal rules should trump social work rules when a social worker is employed as a member of the capital mitigation team. This Article examined the strength of that position, while also illuminating the inherent complexity within it. The NASW *Code of Ethics* for social workers anticipates interdisciplinary collaboration but does not provide guidance about how to reconcile competing ethical tensions on interdis-

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240 NASW CODE OF ETHICS, *supra* note 19, Ethical Principles.

ciplinary capital defense teams. To understand the complexity of these ethical tensions, this Article examined three scenarios in which such tensions may arise.

In these and other ways, this Article underscored how the growth of social workers employed as mitigation specialists on capital defense teams may come with certain social costs. If capital attorneys expect social-worker-trained mitigation specialists to cede to legal ethics whenever their ethical norms conflict, then people who have been trained as social workers must be willing to forego some of their own profession's principles in order to work on a capital team. Some social workers may argue that this is too great a price to pay. Other people may wonder why capital attorneys remain interested in hiring social workers to be capital mitigation specialists, given the inherent ethical tensions they could bring to the team. This Article showed how the complementary skills and world vision that social workers bring to the capital defense team balances against the complex ethical tensions that also accompany them. Because the world vision and skills that social workers learn during their formal professional training—such as the development of psycho-social histories—can be extremely valuable to effective mitigation investigation, mitigation specialists who have undergone similar training can serve important roles on capital defense teams.

In sum, ever since the United States Supreme Court opened the door to the jury's ability to consider any evidence offered in mitigation,[241] capital mitigation specialists have strived to explore a wide range of investigative avenues. As part of that investigation, they undertake a significant role working with defendants' families to develop mitigation evidence. Even though capital mitigation specialists are well positioned to identify and to help stop cycles of family violence before they impact the society at large, in order to safeguard the capital defendant's constitutional right to a fair trial, the mitigation specialist's job does not include such interventions. These and other inherent ethical tensions between law and social work must be recognized and discussed prior to conflicts arising so that capital defense teams can formulate plans for resolving conflicts if, and when, they arise. The ABA's *Supplementary Guidelines* clarified that from the capital defense attorney's perspective, mitigation specialists are agents of defense counsel who are bound by the same rules of professional responsibility that govern defense counsel.[242] Perhaps the NASW could issue a *Supplemental Code of Ethics for Social Workers Serving as Mitigation Specialists* to explain that social workers who are employed to develop mitigation evidence for capital defense teams are agents of the team's capital defense attorneys, so they are

241 Skipper v. South Carolina, 476 U.S. 1, 4–9 (1986).

242 *See Supplementary Guidelines*, *supra* note 14.

therefore bound by the same rules of professional responsibility that govern the capital defense attorneys with whom they work (even if those rules conflict with the NASW's *Code of Ethics*). This Supplemental Code could also highlight the distinction between social workers who are members of defense teams and social workers who are hired as independent experts by defense counsel: social workers who are members of capital defense teams abide by the same ethical rules that the attorneys on their teams follow, whereas social workers who are hired as independent experts abide by the NASW's *Code of Ethics*.[243]

By understanding how ethical norms and world views from law and social work interact, the Article strives to ensure that interdisciplinary capital defense teams anticipate and resolve ethical conflicts in order to safeguard the capital defendant's constitutional right to effective assistance of counsel. In this way, capital mitigation specialists can continue to help attorneys effectively safeguard the sacred constitutional rights of the capital defendant.

243 *See, e.g.*, SOCIAL WORKER'S DESK REFERENCE (2d ed., forthcoming) (on file with author), at 1058 (chapter written by Jose Ashford, an expert who has worked as both a mitigation specialist and a social worker, highlighting different roles of forensic social workers when they testify as fact witnesses, expert witnesses, or education witnesses, and explaining that "consultants to legal teams should not serve as an expert witness in the case for which they were hired as consulting experts").