DIGEST OF ETHICS ADVISORY PANEL
OPINION 90-19, REQUEST #97
Issued May 31, 1990

An attorney seeks Panel advice as to whether he should provide his former client with certain documents under the circumstances he describes.

The attorney advises the Panel that he was attorney for the plaintiff, Mr. X in a medical malpractice case. He states that no written fee agreement was executed but that he recalls advising Mr. X that it would be a standard contingent fee arrangement plus costs. The attorney states that in researching and preparing the case he hired various expert witnesses and obtained written opinions from them. He indicates that he paid for the expert opinions from his own funds as an advance of costs to be reimbursed at the conclusion of the litigation. The attorney adds that Mr. X knew that he had hired experts as part of his research and preparation and knew that he had advanced those costs.

The attorney explains that after he had completed his research and filed suit Mr. X discharged him and retained another attorney. The attorney states that he provided Mr. X's new counsel with a copy of the file and included the expert reports, with the experts' names deleted. The attorney adds that he told the other attorney that he would provide him with the names of the experts only if either the other attorney or Mr. X reimbursed him for the amounts he had spent obtaining their opinions. The other attorney refuses to reimburse him, stating that he will consider the inquiring attorney's costs to be a lien on the final recovery, not payable until then. The inquiring attorney asks the Panel whether he is obligated to provide Mr. X with the names of the experts under the circumstances.

Rule 1.16(d) provides:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

The question of what "papers and property . . . the client is entitled [to]" must be answered by reference to the work product doctrine. In Hickman v. Taylor, 329 U.S. 495 (1946) the United States Supreme Court reviewed the rationale underlying the work product doctrine stating:

> In performing his various duties, . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their

> counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways -- aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." 329 U.S. at 510-511, (emphasis added).

The Hickman Court notes that a failure to recognize the protective sphere of the work product doctrine would result in

> Inefficiency, unfairness and sharp practices . . . in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served. 329 U.S. at 511.

In Cabral v. Arruda, 556 A.2d 47 (R.I. 1989) the Supreme Court of Rhode Island followed Hickman, stating:

> [The Hickman Court] held that trial preparation material is the "work product of the lawyer" and that such "work product" is qualifiedly immune from discovery. One of the purposes of this immunity is to prevent an attorney from "freeloading" on his or her adversary's work. 556 A.2d at 48.

The Panel takes the position that the experts' identities which resulted from the inquiring attorney's research are his work product and, as such do not constitute "papers and property to which the client is entitled" within the meaning of Rule 1.16(d).

Ethics Advisory Panel advice is protective in nature. There is no requirement that an attorney abide by a Panel opinion, but if he or she does, he or she is fully protected from any charge of impropriety.