Recent inquiries to Bar Counsel have raised questions about how attorneys might secure fees generated by the representation of a client. Those issues have raised questions as to whether, among the ways an attorney may secure fees owed by a client, the attorney may take an interest, such as a mortgage interest, in real estate owned by the client when the representation involves that same property. Such a circumstance might occur when the underlying property is the subject of a boundary or title issue and the attorney is retained to defend the client's interest in the property. Under such circumstances, may the attorney secure that fee by taking a mortgage in the property which is the subject of the title or boundary issue?

Our enduring opinion this week, Opinion 64 (assertion of contingent fee interest in real estate which is the subject of the lawsuit), provides the answer to this question which is that the attorney may not take a proprietary interest in property which is the subject of litigation that the attorney is conducting for a client. Opinion 64 made clear that while an attorney might enter into a contingent fee agreement which would be satisfied in part by either property owned by the client and/or the proceeds from the sale of such property, nonetheless Maine Bar Rule 3.7(c) would prohibit the attorney from obtaining a mortgage or other direct proprietary interest in the property.

The conclusion expressed in Opinion 64 is consistent with the provisions of the Maine Rules of Professional Conduct now in effect, as well as the comments to those Rules. Comment 4 to Rule 1.5 of the Maine Rules of Professional Conduct states in part as follows:

"A lawyer may accept property in payment for services such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client." Rule 1.8(i) states that:

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

1. Acquire a lien authorized by law against the proceeds of such action or litigation to secure the lawyer's fee or expenses; and
2. Contract with a client for a reasonably contingent fee in a civil case, subject to the limitations in Rule 1.5(c)(d). The application of Rule 1.8 reinforces issues dating back to Opinion 64. In particular, the Rule makes clear that there continues to be a prohibition against an attorney obtaining a proprietary interest in the cause of action or subject matter of litigation the attorney is conducting for the client. Rule 1.8 goes on to stress that an attorney must be mindful of any fee arrangement with the client that involves a transfer or potential transfer of a non-monetary property interest from the client to the attorney since such an arrangement may constitute a business transaction with the client that must comply with the provisions of Rule 1.8(a) as to fairness, consent, and the desirability of independent counsel.
In short, Opinion 64 is another enduring opinion which is consistent with the Maine Rules of Professional Conduct prohibiting an attorney from obtaining a proprietary interest in the subject matter of litigation the attorney is hired to conduct on behalf of a client.