



## Committee on Professional Ethics

Opinion 892 (11/28/11)

**Topic:** Lawyer's participation in residential real estate transaction that includes both a "seller's concession" and an equivalent "gross-up" in the sale price.

**Digest:** The fact that the sales price in a residential real estate transaction has been "grossed-up" must be expressly disclosed in the transaction documents containing the sales price in addition to the amount of the "seller's concession."

**Rules:** 8.4(c)

### FACTS

1. Seller's attorney presented a contract for the sale of a single family home to the mortgagee bank with provisions stating that "At the closing of title Seller shall pay \$25,000.00 towards Purchasers' closing costs and points" and "Purchaser and Seller hereby and herewith acknowledge and understand that the sales price has been increased by the sum of \$25,000.00 to allow and provide for the aforesaid Seller's Concession."

2. Although seller's attorney has been using substantially similar language without objection by lenders for numerous residential real estate transactions, the lender in this instance advised the seller's attorney that the "Contract states price increased due to Seller concession; increase for this reason is not allowed."

### QUESTION

3. May a lawyer ethically participate in a residential real estate transaction where the lender objects to the disclosure in the sales contract and the HUD-1 Settlement Statement showing that the amount of the sales price has been increased ("grossed-up") in an amount equivalent to the amount of the seller's concession?

## OPINION

4. Rule 8.4(c) prohibits a lawyer from engaging in conduct involving misconduct. Under the facts of this inquiry the failure to disclose the increase or "gross-up" of the purchase price would constitute misrepresentation. In N.Y. State 817 (2007) this Committee opined that a lawyer's participation in a residential real estate transaction that includes a "seller's concession" and a "grossed up" or increased sales price is ethically prohibited, unless the gross-up is disclosed in the transaction documents. That opinion did not hold that a seller's concession or gross up was improper. Rather, the opinion held a full disclosure of the gross-up in the transaction documents was necessary to avoid a misrepresentation regarding the amount of the purchase price.

5. In N.Y. State 882 (2011) we affirmed what we said in N.Y. State 817 and clarified in which documents the disclosure of the gross up was required to be made:

The problem is not the seller's concession in the abstract. Many seller's concessions are legitimate. The problem here is the matching "gross up" of the selling price, which effectively wipes out the seller's concession. If a buyer has to pay \$6,000 in order to get a \$6,000 discount, then the true selling price has not changed. Thus, a gross up, if not expressly disclosed as such, is a misrepresentation and is proscribed by Rule 8.4(c). Consequently, if a lawyer participates in a real estate transaction in which the lawyer knows (or should know) that the transaction documents containing the grossed-up sales price do not expressly disclose that the sales price was increased by the same amount as the seller's concession, the lawyer violates Rules 8.4(c). The fact that the practice may be widespread does not authorize an attorney to participate in the misrepresentation. The Rule is equally applicable to the buyer's attorney, the seller's attorney, and the lender's attorney.

N.Y. State 882 ¶ 10.

Here because the mortgagee bank rejected the disclosure required by our ethical opinions, the attorneys for the buyer, seller and lender not only had reason to know that the documents with the deletion would contain a misrepresentation, they each had actual knowledge.<sup>1</sup>

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<sup>1</sup> Rule 1.0(k) provides as follows:

"Knowingly," "known," "know," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

A lawyer "should know" a fact when it can be readily inferred from the circumstances.

6. N.Y. State 882 addressed the issue raised by the current inquiry.

Even if the seller's concession and matching gross-up were suggested by a mortgage broker, a loan officer, or some other employee at the mortgage bank, the lawyer is not relieved from making the necessary disclosures. Disclosure may be even more important in that situation because the lender's representative – the very person who might be expected to detect a misrepresentation (the supposedly increased sales price that is fully offset by an unexplained seller's concession) – is encouraging the misrepresentation. No function other than to misrepresent the purchase price can be ascribed to a gross-up equal to an unexplained seller's concession. A lawyer may not participate in that misrepresentation no matter who suggested it.

*Id.* ¶ 11.

7. Under these circumstances, where the lender objects to the disclosure of the gross-up of the purchase price, none of the lawyers may ethically participate in the transaction. Their best course would be to advise the lender the "gross-up" is ethically prohibited unless disclosed in the documents that recite the purchase price and that if the lender will not agree to the disclosure, the lawyers for the buyer, seller and lender may not participate in the transaction.

### **CONCLUSION**

8. A lawyer may not ethically participate in a residential real estate transaction where the lender objects to the disclosure of the fact that there has been a gross-up of the purchase price equivalent to amount of the seller's concession.

(12-11)