



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1022 (9/26/14)

Modifies N.Y. State 882

Topic: Seller's concessions in real estate transactions

Digest: A lawyer may participate in a real estate transaction where the form TP-584 reports the full (gross) sales price, and the form RP-5217 reports the sale price as the price net of the seller's concession, and neither form discloses that the purchase price was grossed up prior to application of the seller's concession, even though this will result in a different sale price on the two documents. Neither document is misleading within the meaning of this Committee's prior opinions on seller's concessions, because the forms are completed in accordance with their instructions and the lack of disclosure will not result in foreseeable negative consequences.

Rules: 8.4(b), (c) and (d).

FACTS

1. A lawyer working on a residential house closing inquires as to the proper method of completing the TP-584 and RP-5217 forms so as to comply with our opinions on seller's concessions.
2. The TP-584 is a tax form used to satisfy the filing requirements regarding certain taxes, including the real property transfer tax (or to claim a transfer tax exemption). The form requires the filer to report the consideration for the conveyance, among other things. The instructions to the form TP-584 define "consideration" as "the price actually paid or required to be paid for the real property," including cash consideration, assumed mortgages and the fair market value of other property received. In other words, the full (gross) purchase price must be reported on this document. If there has been a gross-up of the purchase price, the price reported would be the grossed up price. There is no place on this document to indicate that a seller's concession is a part of the transaction.
3. The RP-5217 also is used to report the sale price of a conveyance. The purpose of this document is to provide information that taxing authorities will use to calculate certain assessments. Like the form TP-584, the form calls for the total amount paid for the property, including cash consideration, assumed mortgages and the fair market value of other property received. Unlike the TP-584, however, the instructions for this document expressly state that a seller's concession is not to be included in the "full sale price," i.e. it calls for the sale price, net of the "seller concession":

Do NOT include seller concessions in the full sale price (i.e., the buyer and seller have agreed on a price of \$100,000 for the purchase of the property. As part of the agreement, the seller will pay \$4000 of the buyer's closing costs. Therefore, the actual full sale price paid by the buyer (or received by the seller) is \$96,000 (\$100,000 - \$4000)).

This form also contains a place to note information affecting sale price and to describe that information. However, the instructions to the form indicate that a seller's concession should not be included at that location.

QUESTION

4. Will a lawyer's accurate completion and submission of the TP-584 and RP-5217 forms in accordance with their instructions result in misrepresentation under the prior opinions of this Committee on seller's concessions, even though the gross up would not be disclosed in all deal documents?

DISCUSSION

5. This Committee has issued four opinions on seller's concessions (N.Y. State 817 (2007), 882 (2011), 892 (2011) and 993(2013)). All of these essentially opine, as we first stated in N.Y. State 817, that:

[A] lawyer may not ethically participate in such a "gross up" of the actual purchase price and concomitant seller's concession, unless there is neither deception nor misrepresentation at work in the transaction and its predictable consequences. At a minimum this means that the gross-up (and not merely the grossed-up purchase price) must be disclosed in the transaction documents.

N.Y. State 817, ¶14. The opinion cites the Disciplinary Rule predecessors to Rules 8.4(b), (c) and (d). In N.Y. State 882 we said the amount of the gross-up and the amount of the seller's concession must be "expressly and meaningfully disclosed in all documents that state the sales price, including but not limited to the contract of sale, the HUD-1 Settlement Statement, and all other documents that the attorneys prepare, review or approve."

6. The question presented in the current inquiry is whether filling out these two forms as required by the forms and their instructions is a misrepresentation. It is not. The governmental entities that use these forms have specified how the sale price should be reported, for the particular purposes of the governmental entities. Furthermore, failure to disclose the gross up does not undermine the purpose of the form or result in either entity receiving less in taxes than it would have in the absence of the gross-up. In the case of the TP-584, where the sale price was grossed up, the tax is computed on the grossed-up amount, potentially resulting in higher transfer taxes. In the case of the RP-5217, if there has been a gross-up, the sale price for purposes of tax assessments would be the price net of the gross-up. But if there had been no gross up and seller concession, the sale price for purposes of tax assessments would

also have been the net price. Consequently, if a lawyer states the purchase price on each form in accordance with the instructions for the form, there cannot be a misrepresentation.

7. In the case of the RP-5217, this conclusion differs from our conclusion regarding that form in N.Y. State 882. That opinion involved a contract for the sale of a home for \$306,000, and a seller's concession of \$6,000 to pay for closing costs, where the sales contract expressly stated that the sales price had been increased by \$6,000. We discussed disclosures in a number of closing documents, including the RP-5217. Of that form, we said:

We assume that the real property will be assessed based upon the \$306,000 disclosed sales price, not the \$300,000 actual price, unless the documents make clear to the assessor that the true sales price was \$300,000. See RP-5217 Real property Transfer Report Instructions ¶13, (requiring that the seller's concession be deducted to reach the actual or full sales price.)

8. Upon reconsideration, for the reasons stated in paragraph 6 above, we do not believe that failure to disclose the gross-up is misleading to the government or to other persons who may see the forms. There are no foreseeable negative consequences within the meaning of N.Y. State 817. This situation is markedly different from failure to disclose the gross-up on other transaction documents, such as the sales contract and the HUD-1 Form, where other parties affected by the transaction (including lenders and subsequent purchasers of the mortgage) may be misled as to the terms of the transaction and there may be foreseeable negative consequences (e.g. the bank lending more than it otherwise would, or a purchaser assuming that a stated sales concession is a genuine sales concession and not an inducement to purchase). To the extent N.Y. State 882 reaches a different conclusion, it is hereby modified.

CONCLUSION

9. A lawyer may participate in a real estate transaction where the form TP-584 reports the full (gross) sales price and does not disclose that a seller's concession is a part of the transaction, and the form RP-5217 reports the sale price as the price net of the seller's concession, and does not disclose that the purchase price was grossed up prior to application of the seller's concession, even though this will result in a different sale price on the two documents. Neither document is misleading within the meaning of this Committee's prior opinions on seller's concessions, because the forms are completed in accordance with their instructions and the lack of disclosure will not result in foreseeable negative consequences.

(15-14)