



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

Opinion 1033 (11/7/14)

**Topic:** Conduct involving misrepresentation

**Digest:** Where a prospective buyer makes an offer for real property and is asked both to pay the cost of a "short sale negotiator" and to reduce the offer price by the same amount, the lawyer for the buyer may not participate in the transaction unless the bank is informed that the offer price was reduced by the cost of the short sale negotiator. Disclosure on the HUD-1 form that the seller is paying the fee of the short sale negotiator is insufficient, by itself, to put the bank on notice that the offer price was originally higher.

**Rules:** 8.4(c)

**FACTS**

1. A lawyer represents a client (a prospective buyer) who made an offer to purchase residential real property for \$310,000. The sale price will be subject to approval by the bank that holds the seller's mortgage, since the sale price is less than the outstanding amount of the mortgage (*i.e.*, it is a "short sale"). However, the seller's real estate agent refuses to submit the offer to the bank for approval unless the buyer signs an agreement with a third party "short sale negotiator" for a fee of \$10,000 (payable upon completion of a successful short sale) and submits a reduced purchase offer for \$300,000. (The purpose of a short sale negotiator is to assist the seller in completing the paperwork necessary to support the bank's decision to accept less than the outstanding amount of the mortgage in satisfaction of all amounts owed to the bank. We assume for purposes of this opinion that this is a legitimate purpose and that the short sale negotiator will perform a valuable service.) The inquirer perceives an ethical issue because where a short sale is involved, the bank customarily requires that the offer submitted for its approval be the "highest and best" offer received by the seller. The Form HUD-1 would disclose that the \$10,000 fee of the short sale negotiator is being paid by the buyer, but apparently would not disclose that the buyer's original offer of \$310,000 has been reduced to \$300,000 to cover this cost.

**QUESTION**

2. May the buyer's lawyer proceed with a real estate transaction in which the buyer pays the cost of a short sale negotiator, and reduces the original offer price by the same amount, without disclosing that the original offer price was reduced to cover the cost of the seller's short sale negotiator?

## OPINION

3. Rule 8.4(c) of the New York Rules of Professional Conduct (the "Rules") states that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Although the Rules do not define dishonesty or misrepresentation, this committee has previously identified circumstances that would constitute misrepresentation. *See, e.g.*, N.Y. State 882 (2011), N.Y. State 817 (2007) (both involving a gross-up of the purchase price of real property before application of a so-called seller's concession). In N.Y. State 882 we stated:

In essence, we concluded in N.Y. State 817 that it is a misrepresentation under DR 1-102(A)(4) (the predecessor to Rule 8.4(c)) for the transaction documents in a residential real estate transaction either to contain an untrue statement of a material fact or to omit a material fact where the untrue statement or the material omission makes the statements contained in the transaction document materially misleading. . . . A statement may be literally true with respect to the facts stated, but may fail to include other facts necessary to prevent a false implication, and a "failure to disclose is generally considered as much a misrepresentation as a false affirmative statement." *U.S. Express, Inc. v. Intercargo Ins. Co.*, 841 F. Supp. 1328, 1337 (E.D.N.Y. 1994). An assertion need not be fraudulent to be a misrepresentation. Disclosing a seller's concession without disclosing a matching gross-up in the sales price produces a half-truth, which is a form of misrepresentation within the meaning of Rule 8.4(c).

4. In this case, disclosing that the buyer has offered \$300,000 for the property and is paying \$10,000 to a short sale negotiator, without also disclosing that the buyer's original offer was \$310,000, would be misleading. This would be particularly so if, under the bank's short-sale program, the bank typically authorizes real estate commissions and other expenses to be paid out of the sale proceeds but does not treat third party short sale negotiator fees as an authorized expense payable from the sale proceeds.

5. Accordingly, a lawyer may not proceed with the real estate transaction proposed here unless the short sale bank is given notice that the original offer was for \$310,000 and that it was reduced by an amount equal to the fee of a short sale negotiator. Failure to make that disclosure would constitute conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Rule 8.4(c). Disclosure on the HUD-1 form that the seller is paying the fee of the short sale negotiator is insufficient, by itself, to put the bank on notice that there was a higher offer.

## CONCLUSION

6. Where a prospective buyer makes an offer for real property and is asked both to pay the cost of a "short sale negotiator" and to reduce the offer price by an amount equal to that cost, the lawyer for the buyer may not participate in the transaction unless the bank is informed that the offer price was reduced by the cost of the short sale negotiator. Disclosure on the HUD-1 form that the seller is paying the fee of the short sale negotiator is insufficient, by itself, to put the bank on notice that the offer price was originally higher.