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For additional information on this or any Real Estate related issue, please contact RMF's Real Estate Law Department co-chairs: Benjamin Weinstock, who can be reached at 516-663-6555 bweinstock@rmfpc.com; or Eric Rubenstein, who can be reached at 516-663-6513 erubenstein@rmfpc.com.

ATTORNEYS BEWARE: UPDATE ON ETHICAL CONSIDERATIONS IN RESIDENTIAL REAL ESTATE TRANSACTIONS

The practice of a seller providing a purchaser with a "concession" to artificially inflate the purchase price is nothing new, particularly in new construction projects. The goal is to assist the purchaser to finance closing costs. Notwithstanding the history or prevalence of the practice of "grossing up" the purchase price, i.e., increasing the purchase price in an amount equal to the "concession," it has long been the concern of many practitioners that the "grossing up" amounts to a misrepresentation as to the actual purchase price. The ethical considerations for an attorney to participate in such a transaction has troubled many. In a recent opinion by the New York State Bar Association's Committee on Professional Ethics, this issue is directly addressed.

Assume the following set of facts: Seller is selling his home to Purchaser for \$750,000. Purchaser anticipates delivering a 10% deposit upon contract signing and financing the balance of the \$675,000 purchase price. The closing of the transaction will require Purchaser to pay various closing costs totaling over \$20,000, which may make the deal too costly for Purchaser. In an effort to save the transaction, Seller agrees to provide Purchaser with a \$10,000 "concession" whereby Seller purports that it will pay on Purchaser's behalf \$10,000 of Purchaser's closing costs. In consideration for this "concession" the purchase price is increased by \$10,000 to \$760,000. However, it never was the intention of the parties that the Seller would pay \$10,000 of Purchaser's closing costs. Rather, Purchaser intends to use the inflated purchase price to increase the amount he can finance without changing the net purchase price due to Seller.

Anyone reading this set of facts immediately can identify that there is something wrong with this scenario. However, for as long as this practice has existed, many attorneys have either ignored the issue or attempted to mitigate the risk of misrepresenting the true nature of the "gross up" by making limited disclosures in various closing documents. The recent opinion by the New York State Bar Association's Committee on Professional Ethics sets forth a clear directive as to an attorney's ethical responsibility when participating in this type of transaction. The committee opines that a seller's "concession" and parallel "gross up" of a purchase price is, without full disclosure of the nature of the concession and "gross up", a misrepresentation regarding the purchase price and is thus improper.

Full disclosure means not only identifying the amount of the "concession" and the purchase price in the closing documents (e.g., the Real Property Transfer Tax Return, the Real Property Transfer Report and HUD-1 Settlement Statement), but also a statement in all closing documents where the purchase price appears that makes patently clear that the purchase price has been increased by an amount equal to the seller's "concession". A simultaneous "gross up" of a purchase price, if not clearly and expressly disclosed as such, amounts to a misrepresentation.

Attorneys who are mindful of this disclosure requirement will avoid a potential ethical violation without compromising the needs or wishes of their clients.

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