

Procuring Cause

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As discussed earlier, one type of contract frequently entered into by REALTORS® is the listing contract between sellers and listing brokers. Procuring cause disputes between sellers and listing brokers. Procuring cause disputes between sellers and listing brokers are often decided in court. The reasoning relied on by the courts in resolving such claims is articulated in *Black's Law Dictionary*, Fifth Edition, definition of procuring cause:

The proximate cause; the cause originating a series of events which, without break in their continuity, result in the accomplishment of the prime object. The inducing cause; the direct or proximate cause. Substantially synonymous with "efficient cause."

A broker will be regarded as the "procuring cause" of a sale, so as to be entitled to commission, if his efforts are the foundation on which the negotiations resulting in a sale are begun. A cause originating a series of events which, without break in their continuity, result in accomplishment of prime objective of the employment of the broker who is producing a purchaser ready, willing, and able to buy real estate on the owner's terms. Mohamed v. Robbins, 23 Ariz. App. 195, 531 p.2d 928, 930.

See also Producing cause; Proximate cause.

Disputes concerning the contracts between listing brokers and cooperating brokers, however, are addressed by the National Association's Arbitration Guidelines promulgated pursuant to Article 17 of the Code of Ethics. While guidance can be taken from judicial determinations of disputes between listing and cooperating brokers, or between two cooperating brokers, can be resolved based on similar though not identical principles. While a number of definitions of procuring cause exist, and a myriad of factors may ultimately enter into any determination of procuring cause, for purposes of arbitration conducted by Boards and Associations of REALTORS®, procuring cause in broker to broker disputes can be readily understood as the uninterrupted series of causal events which results in the successful transaction. Or, in other words, what "caused" the successful transaction. Or, in other words, what "cause" the successful transaction to come about. "Successful transaction," as used in these Arbitration Guidelines, is defined as "a sale that closes or a lease this is executed." Many REALTORS®, Executive Officers, lawyers, and others have tried, albeit unsuccessfully, to develop a single, comprehensive template that could be used in all procuring cause disputes to determine entitlement to the sought-after award without the need for a comprehensive analysis of all relevant details of the underlying transaction. Such efforts, while well-intentioned, were doomed to failure in view of the fact that there is no "typical" real estate or a "typical" REALTOR®. In light of the unique nature of real property and real estate transactions, and acknowledging that fair and equitable decisions could be reached only with a comprehensive understanding of the events that led to the transaction, the National Association's Board of Directors, in 1973, adopted Official Interpretation 31 of Article I,

Section 2 of the Bylaws. Subsequently amended in 1977, Interpretation 31 establishes that:

A Board rule or a rule of a Multiple Listing Service owned by, operated by, or affiliated with a Board, which establishes, limits or restricts the REALTOR® in his relations with a potential purchaser, affecting recognition periods or purporting to predetermine entitlement to any award in arbitration, is an inequitable limitation on its membership.

The explanation of Interpretation 31 goes on to provide, in part:

... (T)he Board or its MLS may not establish a rule or regulation which purports to predetermine entitlement to any awards in a real estate transaction. If controversy arises as to entitlement to any awards, it shall be determined by a hearing in arbitration on the merits of all ascertainable facts in the context of the specific case of controversy.

It is not uncommon for procuring cause disputes to arise out of offers by listing brokers to compensate cooperating brokers to compensate cooperating brokers made through a multiple listing service. A multiple listing service is defined as a facility for the orderly correlation and dissemination of listing information among Participants so that they may better serve their clients and customers and the public; is a means by which authorized Participants make blanket unilateral offers of compensation to other Participants (acting as subagents, buyer agents, or in other agency or nonagency capacities defined by law); is a means by which information is accumulated and disseminated to enable authorized Participants to prepare appraisals and other valuations of real property; and is a means by which Participants engaging in real estate appraisal contribute to common databases. Entitlement to compensation is determined by the cooperating broker's performance as procuring cause of the sale (or lease). While offers of compensation made by listing brokers to cooperating brokers through MLS are unconditional, *the definition of MLS and the offers of compensation made through the MLS provide that a listing broker's obligation to compensate a cooperating broker who was the procuring cause of sale (or lease) may be excused if it is determined through arbitration that, through no fault of the listing broker and in the exercise of good faith and reasonable care, it was impossible or financially unfeasible for the listing broker to collect a commission pursuant to the listing agreement. In such instances, entitlement to cooperative compensation offered through MLS would be a question to be determined by an arbitration Hearing Panel based on all relevant facts and circumstances including, but no limited to, why it was impossible or financially unfeasible for the listing broker to collect some or all of the commission established in the listing agreement; at what point in the transaction did the listing broker know (or should have known) that some or all of the commission established in the listing agreement might not be paid; and how promptly had the listing broker communicated in cooperating brokers that the commission established in the listing agreement might not be paid. (*Revised 11/98*)

Factors for Consideration by Arbitration Hearing Panels

The following factors are recommended for consideration by Hearing Panels convened to

arbitrate disputes between brokers or between brokers and their clients or their customers. This list is not all-inclusive nor can it be. Not every factor will be applicable in every instance. The purpose is to guide panels as to facts, issues, and relevant questions that may aid them in reaching fair, equitable, and reasoned decisions.

Factor #1. No predetermined rule of entitlement

Every arbitration hearing is considered in light of all of the relevant facts and circumstances as presented by the parties and their witnesses. “Rules of thumb,” prior decisions by other panels in other matters, and other predeterminants are to be disregarded.

Procuring cause shall be the primary determining factor in entitlement to compensation. Agency relationships, in and of themselves, do not determine entitlement to compensation. The agency relationship with the client and entitlement to compensation are separate issues. A relationship with the client, or lack of one, should only be considered in accordance with the guidelines established to assist panel members in determining procuring cause. (*Adopted 4/95*)

Factor #2. Arbitrability and appropriate parties

While primarily the responsibility of the Grievance Committee, arbitration Hearing Panels may consider questions of whether an arbitrable issue actually exists and whether the parties named are appropriate to arbitration. A detailed discussion of these questions can be found in Appendix 1 to Part Ten, Arbitrable Issues.

Factor #3. Relevance and admissibility

Frequently, Hearing Panels are asked to rule on questions of admissibility and relevancy. While state law, if applicable, controls, the general rule is that anything the Hearing Panel believes may assist it in reaching a fair, equitable, and knowledgeable decision is admissible.

Arbitration Hearing Panels are called on to resolve contractual questions, not to determine whether the law or the Code of Ethics has been violated. An otherwise substantiated award cannot be withheld solely on the basis that the Hearing Panel looks with disfavor on the potential recipient’s manner of doing business or even that the panel believes that unethical conduct may have occurred. To prevent any appearance of bias, arbitration Hearing Panels and procedural review panels shall make no referrals of ethical concerns to the Grievance Committee. This is based on the premise that the fundamental right and primary responsibility to bring potentially unethical conduct to the attention of the Grievance Committee rests with the parties and others with firsthand knowledge. At the same time, evidence or testimony is not inadmissible simply because it relates to potentially unethical conduct. While an award (or failure to make a deserved award) cannot be used to “punish” a perceived “wrongdoer”, it is equally true that Hearing Panels are entitled to (and fairness requires that they) consider all relevant evidence and

testimony so that they will have a clear understanding of what transpired before determining entitlement to any award. (*Amended 11/96*)

Factor #4. Communication and contact-abandonment and estrangement

Many arbitrable disputes will turn on the relationship (or lack thereof) between a broker (often a cooperating broker) and a prospective purchaser. Panels will consider whether under the circumstances and in accord with local custom and practice, the broker made reasonable efforts to develop and maintain an ongoing relationship with the purchaser. Panels will want to determine, in cases where two cooperating brokers have competing claims against a listing broker, whether the first cooperating broker actively maintained ongoing contact with the purchaser or, alternatively, whether the broker's inactivity or perceived inactivity, may have caused the purchaser to reasonably conclude that the broker had lost interest or disengaged from the transaction (abandonment). In other instances, a purchaser, despite reasonable efforts by the broker to maintain ongoing contact, may seek assistance from another broker. The panel will want to consider why the purchaser was estranged from the first broker. In still other instances, there may be no question that there was an ongoing relationship between the broker, and purchaser; the issue then becomes whether the broker's conduct or, alternatively, the broker's failure to act when necessary, caused the purchaser to terminate the relationship (estrangement). This can be caused, among other things, by words or actions or lack of words or actions when called for. Panels will want to consider whether such conduct, or lack thereof, caused a break in the series of events leading to the transaction and whether the successful transaction was actually brought about through the initiation of a separate, subsequent series of events by the second cooperating broker. (*Revised 11/99*)

Factor #5. Conformity with state law

The procedures by which arbitration requests are received, hearings are conducted, and awards are made must be in strict conformity with the law. In such matters, the advice of Board legal counsel should be followed.

Factor #6. Consideration of the entire course of events

The standard of proof in Board-conducted arbitration is a preponderance of the evidence, and the initial burden of proof rests with the party requesting arbitration. This does not, however, preclude panel members from asking questions of the parties or witnesses to confirm their understanding of testimony presented or to ensure that panel members have a clear understanding of the events that led to the transaction and to the request for arbitration. Since each transaction is unique, it is impossible to develop a comprehensive list of all issues or questions that panel members may want to consider in a particular hearing. Panel members are advised to consider the following, which are representative of the issues and questions frequently involved in arbitration hearings.

The nature and status of the transaction

1. What was the nature of the transaction? Was there a residential or commercial sale/lease?
2. Is or was the matter the subject of litigation involving the same parties and issues as the arbitration?

The nature, status and terms of the listing agreement

1. What was the nature of the listing or other agreement; exclusive right to sell, exclusive agency, open or some other form of agreement?
2. Was the listing agreement in writing? If not, is the listing agreement enforceable?
3. Was the listing agreement in effect at the time the sales contract was executed?
4. Was the property listed subject to a management agreement?
5. Were the broker's actions in accordance with the terms and conditions of the listing agreement?
 - a. Were all conditions of the listing agreement met?
 - b. Did the final terms of the sale meet those specified in the listing agreement?
 - c. Did the transaction close? (Refer to Appendix I to Part Ten, Arbitrable Issues)
 - d. Did the listing broker receive a commission? If not, why not? (Refer to Appendix I to Part Ten, Arbitrable Issues)

Nature, status, and terms of buyer representation agreements

1. What was the nature of any buyer representation agreement(s)? Was the agreement(s) exclusive or non-exclusive? What capacity(ies) was the cooperating broker(s) functioning in. e.g., agent, legally-recognized non-agent, other?
2. Was the buyer representation agreement(s) in writing? Is it enforceable?
3. What were the terms of compensation established in the buyer representation agreement(s)?
4. Was the buyer representative(s) a broker or firm to which an offer of compensation was made by the listing broker?
5. Was the buyer representative(s) actions in accordance with the terms and conditions of the buyer representation agreement(s)?
6. At what point in the buying process was the buyer representation relationship established? (*Revised 05/03*)

Nature, status, and terms of the offer to compensate

1. Was an offer of cooperation and compensation made in writing? If not, how was it communicated?
2. Is the claimant a party to whom the listing broker's offer of compensation was extended?
3. Were the broker's actions in accordance with the terms and conditions of the offer of cooperation and compensation (if any)? Were all conditions of the agreement

met?

Roles and relationships of the parties

1. Who was the listing broker?
2. Who was the cooperating broker or brokers?
3. Were any of the parties acting as subagents? As buyer brokers? In some other capacity?
4. Did any of the cooperating brokers have an agreement, written or otherwise, to act as agent or in some other capacity on behalf of any of the parties?
5. Were any of the brokers (including the listing broker) acting as a principal in the transaction?
6. What were the brokers' relationships with respect to the seller, the purchaser, the listing broker, and any other cooperating brokers involved in the transaction?
 - a. Was the party to whom the property was sold represented by a party with whom the broker had previously dealt?
 - b. Is the primary shareholder of the buyer-corporation a party with whom the broker had previously dealt?
 - c. Was a prior prospect a vital link to the buyer?
7. Are all appropriate parties to the matter joined?

Initial contact with the purchaser

1. Who first introduced the purchaser or tenant to the property?
2. When was the first introduction made?
 - a. Was the introduction made when the buyer had a specific need for that type of property?
 - b. Was the introduction instrumental in creating the desire to purchase?
 - c. Did the buyer know about the property before the broker contacted him? Did he know it was for sale?
 - d. Were there previous dealings between the buyer and the seller?
 - e. Did the buyer find the property on his own?
3. How was the first introduction made?
 - a. Was the property introduced as an open house?
 - b. What subsequent efforts were made by the broker after the open house? (Refer to Factor #1)
 - c. Was the introduction made to a different representative of the buyer?
 - d. Was the "introduction" merely a mention that the property was listed?
 - e. What property was first introduced?

Conduct of the brokers

1. Were all required disclosures complied with?
2. Was there a faithful exercise of the duties a broker owes to his client/principal?
3. If more than one cooperating broker was involved, was either (or both) aware of the other's role in the transaction?
4. Did the broker who made the initial introduction to the property engage in conduct (or fail to take some action) which caused the purchaser or tenant to utilize the services of another broker? (Refer to Factor #4)
5. Did the cooperating broker (or second cooperating broker) initiate a separate series of events, unrelated to and not dependent on any other broker's efforts, which led to the successful transaction – that is, did the broker perform services which assisted the buyer in making his decision to purchase? (Refer to Factor #4)
 - a. Did the broker make preparations to show the property to the buyer?
 - b. Did the broker make continued efforts after showing the property?
 - c. Did the broker remove an impediment to the sale?
 - d. Did the broker make a proposal upon which the final transaction was based?
 - e. Did the broker motivate the buyer to purchase?
6. How do the efforts of one broker compare to the efforts of another?
 - a. What was the relative amount of effort by one broker compared to another?
 - b. What was the relative success or failure of negotiations conducted by one broker compared to the other?
7. If more than one cooperating broker was involved, how and when did the second cooperating broker enter the transaction?

Continuity and breaks in continuity (abandonment and estrangement)

1. What was the length of time between the broker's efforts and the final sales agreement?
2. Did the original introduction of the purchaser or tenant to the property start an uninterrupted series of events leading to the sale or lease, or was the series of events hindered or interrupted in any way?
 - a. Did the buyer terminate the relationship with the broker? Why? (Refer to Factor #4)
 - b. Did negotiations breakdown?
3. If there was an interruption or break in the original series of events, how was it caused, and by whom?
 - a. Did the seller change the listing agreement from an open listing to an

- exclusive listing agreement with another broker?
 - b. Did the purchaser's motive for purchasing change?
 - c. Was there interference in the series of events from any outside or intervening cause or party?
- 4. Did the broker who made the initial introduction to the property maintain contact with the purchaser or tenant, or could the broker's inaction have reasonably been viewed by the buyer or tenant as a withdrawal from the transaction?
- 5. Was the entry of any cooperating broker into the transaction an intrusion into an existing relationship between the purchaser and another broker, or was it the result of abandonment or estrangement of the purchaser, or at the request of the purchaser?

Conduct of the buyer

- 1. Did the buyer make the decision to buy independent of the broker's efforts/information?
- 2. Did the buyer negotiate without any aid from the broker?
- 3. Did the buyer seek to freeze out the broker?
 - a. Did the buyer seek another broker in order to get a lower price?
 - b. Did the buyer express the desire not to deal with the broker and refuse to negotiate through him?
 - c. Did the contract provide that no brokers or certain brokers had been involved?

Conduct of the seller

- 1. Did the seller act in bad faith to deprive the broker of his commission?
 - a. Was there bad faith evident from the fact that the difference between the original bid submitted and the final sales price equaled the broker's commission?
 - b. Was there bad faith evident from the fact that a sale to a third party was a straw transaction (one in which a non-involved party posed as the buyer) which was designed to avoid paying commission?
 - c. Did the seller freeze out the broker to avoid a commission dispute or to avoid paying a commission at all?
- 2. Was there bad faith evident from the fact that the seller told the broker he wouldn't sell on certain terms, but did so via another broker or via the buyer directly?

Leasing transactions

1. Did the cooperating broker have a tenant representation agreement?
2. Was the cooperating broker working with the “authorized” staff member of the tenant company?
3. Did the cooperating broker prepare a tenant needs analysis?
4. Did the cooperating broker prepare a market analysis of available properties?
5. Did the cooperating broker prepare a tour book showing alternative properties and conduct a tour?
6. Did the cooperating broker show the tenant the property leased?
7. Did the cooperating broker issue a request for proposal on behalf of the tenant for the property leased?
8. Did the cooperating broker take an active part in the lease negotiations?
9. Did the cooperating broker obtain the tenant’s signature on the lease document?
10. Did the tenant work with more than one broker; and if so, why? (Revised 11/96)

Other Information

Is there any other information that would assist the Hearing Panel in having a full, clear understanding of the transaction giving rise to the arbitration request or in reaching a fair and equitable resolution of the matter?

These questions are typical, but not all-inclusive, of the questions that may assist Hearing Panels in understanding the issues before them. The objective of a panel is to carefully and impartially weigh and analyze the whole course of conduct of the parties and render a reasoned peer judgment with respect to the issues and questions presented and to the request for award.