

It's Not Who Showed the House (Procuring Cause)

I. Introductory Comments: The Impact of New Procuring Cause Guidelines

“Disputes concerning who is the Procuring Cause of a sale are the greatest source of arbitration requests submitted to the Professional Standards Committee of most real estate boards.”

A. Past History of Procuring Cause

B. What will we learn today?

1. Demonstrate how procuring cause issues have changed
2. Define procuring cause and illustrate why it is such a major concern for real estate brokerage industry today
3. Evaluate how procuring cause disputes arise and are settled
4. Interpret how the Code of Ethics affects Procuring Cause
5. Illustrate how Procuring Cause has been affected by Buyer Representation
6. Summarize factors relating to a hearing panel's evaluation of Procuring Cause controversies and interpreting the guidelines they must follow
7. Apply case studies in group discussions to solve Procuring Cause problems
8. Compose risk reduction techniques for avoiding Procuring Cause situations

C. Identify the importance when a REALTOR interacts with

1. Customers
2. Clients
3. Competitors and CO-Brokers
4. Grievance and Professional Standards Committee

II. Introduction to Procuring Cause

A. Pair off with other seminar participants. With them jointly determine what you believe would lead to a procuring cause dispute with

1. Realtor and customers
2. Realtor and buyer clients
3. Realtor and co-op broker
4. Realtor and other selling brokers

Be prepared to give an example of the one assigned to your group

- B. Why is procuring cause such a major concern for the real estate brokerage industry? How has the industry changed to affect procuring cause issues?
- C. What is the definition of Procuring Cause?

Black's Law Dictionary, Fifth Edition: "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. Mohammed v Robbins, 23 Ariz App. 195,531 P 2d 928, 930.

Arbitration Manual: "a broker will be regarded as the 'procuring cause of a sale if his efforts are the foundation on which 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."

NAR: "the uninterrupted series of casual events which results in the successful transaction. In other words, what caused the transaction to close?"

- 1. Possible factors that determine Procuring Cause are:

- a. Who First introduced the buyer to the property
- b. Were negotiations continuous after the first showing
- c. What related services were given
- d. What were the terms of the sale
- e. How did the second broker get involved

- D. When do Procuring Cause disputes arise?

- 1. Where a property is listed on an open basis, two brokers claim full commission
- 2. Where a listing is exclusive, two brokers may claim to be the selling broker, entitled to part of the commission

- E. What are the contracts that affect Procuring Cause? In a typical residential or commercial transaction there are at least 3 and often times 4 contracts involved.

- 1. Listing contract between the seller and listing broker
- 2. Contract between listing broker and co-op brokers
- 3. Purchase or sales contract between seller and buyer

4. Buyer Broker agreement between buyer and their broker

F. What are some of the ramifications to the REALTOR/Broker regarding procuring cause disputes

G. In general NAR discourages the practice of split awards, why?

III. Specific Code of Ethics Provision (Have a current copy of Code)

The Code of Ethics and Arbitration Manual is quite specific in that entitlement of commission through procuring cause and contractual compensation through representation agreements are quite distinct and separate issues.

1. When the buyer agent is reviewing the buyer representation agreement with the buyer, it is important to explain to the buyer the importance of the exclusivity of the agreement as well as his responsibilities and liabilities under the agreement.

IV. 6 Factors for Consideration by Arbitration Hearing Panels

Query: Is there a foolproof guide that can be used to determine procuring cause in all transactions?

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| A. Factor #1 | No predetermined rule of entitlement |
| B. Factor #2 | Arbitrability and appropriate parties |
| C. Factor #3 | Relevance and admissibility |
| D. Factor #4 | Communication and contact – Abandonment and Estrangement |
| E. Factor #5 | Conformity with state law |
| F. Factor #6 | Consideration of the entire course of events through the use of attached 32 questions |

V. Case Study Workshop

VI. Guidelines for a Hearing Panel

A. NAR Professional Standards Committee has consistently taken the position that the arbitration awards should not include the findings of fact or rationale for the arbitrator's award. Why?

B. Rights of the Parties – Each party has the right to testify before a panel of neutral third parties drawn from the board's professional standards committee. The parties can present evidence, call witnesses, and cross-examine the other side's witnesses. Each party can also bring legal counsel.

- C. After the hearing, the panel decides which party prevails and its decision is legally binding
 - D. How does a party seek recourse?
 - 1. Discuss the problem with the other broker
 - 2. Consider nonbonding mediation
 - 3. Regrets an arbitration hearing through your broker
 - E. NAR limits the amount that members pay for arbitration.
- VII. Risk reduction techniques to protect your commission
- A. Get the seller to sign an exclusive right to sell agreement
 - B. As a selling broker or broker working with an open listing, keep detailed written records of all showings
 - C. Keep a telephone log of all phone calls with customers
 - D. As a cooperating broker, if a customer has seen any house through another office, evaluate the customer's relationship with the other broker... attempt to avoid controversies.
 - E. Keep the communication lines open between you and the buyers you work with and other sales associates
 - F. Always ask a buyer if they have already seen this property with another sales associate
 - G. Explain to the buyers when doing the agency disclosure, how changing to a buyer's agent might affect their paying a fee.

Query: Do buyers have the unilateral right to cut off the earlier co-operating subagents and to prevent that agent from receiving the selling portion of the commission by presenting the offer through a different agent?

Remember: The Code of Ethics is based on the Golden Rule: If the work of the subagent clearly indicates that he is the procuring cause, it might be appropriate to redirect the buyer back to the agent who is the procuring cause to allow the subagent an opportunity to enter into an agency agreement with the buyer or to work with the subagent to reach a mutually acceptable resolution.

IX. The National Association of REALTOR's Arbitration Guidelines have been rewritten to assist Boards in reaching fair and equitable decisions in arbitration cases. The new standards clarify the relevant factors and the proper analysis which should be involved in each procuring cause decision.

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