



Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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What is Procuring Cause?

When REALTORS® become involved in commission disputes with other REALTORS® the issue determining the outcome is often procuring cause. What exactly is procuring cause? This is a question which frustrates many REALTORS®, including both veteran and novice agents, and many attorneys. The problem is that there is no nice black and white rule that can be applied.

If a REALTOR® asks the WRA Legal Hotline whether he or she might be the procuring cause in a given situation, the member is typically told that the issue is deciding who caused the buyer to make the offer that resulted in the sale of the property. There is no one act which determines procuring cause—it can only be answered by a full, knowledgeable consideration of all the facts of the case. If the brokers cannot negotiate an acceptable settlement, the dispute should be submitted to local board arbitration for resolution.

This *Legal Update* examines the procuring cause standard. The *Update* looks at when the procuring cause standard is applicable, what it means, and how it may be applied in specific situations.

Code of Ethics and Arbitration Manual Excerpts—Appendix II to Part Ten

The preeminent written authority explaining procuring cause, as applied in REALTOR® arbitration hearings, is the *Code of Ethics and Arbitration Manual*. The following *Update* sections quote portions of “Appendix II

to Part Ten—Arbitration Guidelines (Suggested Factors for Consideration by a Hearing Panel in Arbitration).” It is extremely important that all REALTORS® read this information and refer to it whenever confronted with a potential procuring cause issue.

The appendix begins with a background discussion of the different contracts forming the compensation framework for a real estate transaction, including the contract for cooperation and compensation between listing brokers and cooperating brokers. Next is a discussion of the meaning of “procuring cause,” followed by discussion of the factors considered by an arbitration hearing panel. The appendix concludes with an analysis of sample fact scenarios. This *Update* includes sections of discussion, REALTOR® Practice Tips, Key Definitions, and Legal Hotline questions and answers after each section of quoted appendix material.

The Contractual Background

“A key element in the practice of real estate is the contract. ... First, there is the listing contract between the seller and the listing broker. This contract creates the relationship between these parties, establishes the duties of each and the terms under which the listing broker will be deemed to have earned a commission, and frequently will authorize the listing broker to cooperate with or compensate (or both) cooperating brokers who may be sub-agents, buyer agents, or acting in some other capacity.

“Second, there is the contract between the listing broker and cooperating brokers. While this may be

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created through an offer published through a multiple listing service or through some other method of formalized cooperative effort, it need not be. Unlike the bilateral listing contract (where generally the seller agrees to pay a commission in return for the listing broker's production of a ready, willing, and able purchaser), the contract between the listing broker and the cooperating broker is unilateral in nature. This simply means that the listing broker determines the terms and conditions of the offer to potential cooperating brokers (and this offer may vary as to different potential cooperating brokers or as to cooperating brokers in different categories). This type of contract differs from a bilateral contract also in that there is no contract formed between the listing broker and the potential cooperating brokers upon receipt of the listing broker's offer. The contract is formed only when accepted by the cooperating broker, and acceptance occurs only through performance as the procuring cause of the successful transaction. (Revised 11/97)

"Third, there is the purchase contract-sometimes referred to as the purchase and sale agreement. ...

"... Fourth, there may be a buyer-broker agreement in effect between the purchaser and a broker. ...

"Another key contract is the one entered into when a real estate professional joins a local board of REALTORS® and becomes a REALTOR®. In return for the many benefits of membership, a REALTOR® promises to abide by the duties of membership including strict adherence to the Code of Ethics. Among the Code's duties is the obligation to arbitrate, established in Article 17. ... Boards and Associations of REALTORS® provide arbitration to resolve contractual issues and questions and specific non-contractual issues and questions that arise between members, between members and their

clients, and, in some cases, between parties to a transaction brought about through the efforts of REALTORS®. ... The majority of arbitration hearings conducted by Boards and Associations involve questions of contracts between REALTORS®, most frequently between listing and cooperating brokers, or between two or more cooperating brokers. These generally involve questions of procuring cause, While awards are generally for the full amount in question (which may be required by state law), in exceptional cases, awards may be split between the parties (again, except where prohibited by state law). Split awards are the exception rather than the rule and should be utilized only when hearing panels determine that the transaction would have resulted only through the combined efforts of both parties."

Discussion—Contractual Background

Compensation is offered through a multiple listing service (MLS) listing to other participants in that MLS. In an MLS the compensation system functions on an automatic basis. MLS participants accept the listing broker's offer to cooperate and compensate by performing as the procuring cause in a successful transaction (unless they affirmatively decline the offered compensation). The cooperating broker must be the procuring cause in order to earn the offered compensation. These unilateral MLS contracts form the basis for a majority of the procuring cause claims brought to REALTOR® arbitration - procuring cause is the standard of performance in MLS transactions.

Legal Update 02.01, "Non-MLS Cooperation & Compensation," discussed that procuring cause may also be the standard of performance in other bilateral compensation agreements where the parties have specifically agreed to that standard. Outside of the MLS, brokers may

agree to whatever performance standard they believe is appropriate. They may decide that whoever writes the offer or whoever first shows the property should be paid. They do not have to determine entitlement to compensation according to procuring cause.

 **REALTOR® Practice Tips:** A cooperating broker must have a compensation agreement with a listing broker before procuring cause or any other standard can be applied.

 **REALTOR® Practice Tips:** Procuring cause is not the universal standard of performance in all real estate transactions, as licensees often assume. Procuring cause is the automatic standard in MLS transactions. If the property was not listed in the MLS and sold by another MLS Participant, then the listing and cooperating brokers must affirmatively select a performance standard which may or may not be procuring cause.

Legal Hotline Question & Answer— Contractual Background

The following question was recently asked of the Legal Hotline regarding the standards that must be met to earn cooperative commission.

A broker had an appointment made to show a buyer—who had just backed out of another purchase the broker had arranged—another home, but the buyer ended up looking at the property with another agent who wrote the offer on the property, which also is the broker's listing. The buyer was not originally interested in the property until the broker pointed out how the office and other areas could be converted into bedrooms. This is not an MLS property. The agreed commission split is 60/40, but there is no stated standard of performance. Does the commission have to be split with the other agent? How to proceed?

It is difficult to determine how to handle the commission when there is no standard of performance - neither

broker knows what must be done to earn the commission. If procuring cause were the standard, the broker may arguably have a good case based upon her account of events, but procuring cause automatically applies only with MLS properties. The broker may wish to negotiate with the other broker to determine a fair way to deal with the commission in this case—either before or after closing, at the broker's discretion.

Arbitration Guidelines— Procuring Cause Definition

“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 are often decided in court. The reasoning relied on by the courts in resolving such claims is articulated in the 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. ...”

“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 sellers and listing brokers, procuring cause 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 to come about. ‘Successful transaction,’ as used in these Arbitration Guidelines, is defined as ‘a sale that closes or a lease that is executed.’ ... 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 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); 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 not 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 estab-

lished in the listing agreement might not be paid; and how promptly had the listing broker communicated to cooperating brokers that the commission established in the listing agreement might not be paid. (Revised 11/98)”

Discussion—Procuring Cause Definition

 **Key Definition:** Procuring cause is officially defined as the uninterrupted series of causal events that results in the successful transaction. In other words, it is what “caused” the successful transaction to come about. A successful transaction means a sale that closes or a lease that is executed.

There are, however, some other ways to look at procuring cause:

In more basic terms, procuring cause is the concept that determines who is entitled to collect the money offered by the listing broker. In the context of an arbitration hearing, procuring cause involves determining whether or not the petitioner—the broker bringing the arbitration—is procuring cause and thus entitled to the offered compensation. This is not an easy question to answer, but it is a “yes” or “no” question. The panel does not need to determine which broker is entitled to the compensation, as hearing panels are often inclined to do. They only need to decide whether the broker before them is the procuring broker.

Another way that hearing panels often further complicate their analysis is that they examine a series of events that is too long and comprehensive. They tend to look at everything that happened from the time that buyer first met any of the brokers involved in the scenario until the sale of the property to the buyer closes. After all, brokers often reason, the official definition says that procuring cause is “the uninterrupted series of causal events which results in the successful transaction,” and that certainly must encompass the whole time line of events.

Actually, that chain of events is too long. The critical time frame where the panel should focus their analysis begins at the time that the buyer is introduced to the house and ends when the seller accepts an offer to purchase. The reason is easy to understand if you “follow the money.”

The listing broker is being paid to market the property and get it sold, in other words, to tell potential buyers about the property until one of them writes an offer to purchase that the seller accepts. The listing broker, in turn, usually offers compensation to other brokers if they can assist in accomplishing this task.

The WB-1 Residential Listing Contract provides that the listing broker earns his or her commission when the seller sells the property or accepts an offer that creates an enforceable contract; or when a purchaser is procured by the listing broker, the seller or any other person (like a cooperating broker) at the price and on substantially the same terms and conditions as stated in the listing contract and in the standard provisions of an offer to purchase form. The WB-1 also provides that the listing broker will work with and cooperate with other brokers in marketing the property. It should come as no surprise, then, that the job the listing broker is paying the cooperating broker to do runs from marketing a property to a buyer to the point where the buyer writes an offer to purchase that is accepted. See the transaction time line on page 13 of this *Update*.

 **REALTOR® Practice Tips:** In deciding a procuring cause issue in an arbitration case, the panel need only decide whether or not the petitioning broker was the procuring cause. The panel should focus on those events occurring from the time the buyer was introduced to the property until the time when the buyer’s offer to purchase was accepted. REALTORS® may follow the same guidelines when evaluating their own potential commission arbitration matters.

Legal Hotline Questions & Answers—Procuring Cause Definition

The following questions were recently asked of the Legal Hotline regarding arbitration standards.

A broker is going to be arbitrating for a commission. However, it is a transaction that the broker is not sure will close at this point. She showed a condo unit to a buyer who has now made an offer through the listing broker. The offer is contingent upon sale of the buyer's property. Should the broker file for arbitration now or should she wait and see if it closed?

Unless the transaction closes, the broker will not be entitled to commission because a successful transaction (i.e., a transaction that successfully closes) is a prerequisite to any awards of compensation based upon MLS procuring cause.

In February, the buyers looked at an FSBO house and negotiated on price, but no offer was accepted. The house was later listed. The agent was out showing the same buyers some properties when they drove by it. The agent called the listing office and asked if these buyers were exceptions. He was told that they had been for two weeks, but that time had elapsed, so he showed the buyers the house. The buyers talked to the seller directly and wrote an offer after the listing expired. The offer closed. Is the agent procuring cause?

In determining procuring cause, only events occurring during the term of the listing contract (and any extensions for protected buyers) come into play. Thus, the negotiations that occurred between the seller and the buyer before the house was listed are irrelevant to an analysis of procuring cause.

The listing broker's claim that there was a verbal agreement between the listing broker and the seller to waive commission if that buyer purchased the property has no bearing. When

the agent called to ask if the buyers were exceptions, they were told that the buyers had been exceptions only for the first two weeks of the listing (and that time had already elapsed). The agent was never told about any other commission agreement concerning the buyer. The agent showed the property while it was listed on the MLS, believing all along that he had accepted the MLS offer of cooperation and compensation.

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 pre-determinants 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)"

Discussion—No Predetermined Rule

Some REALTORS® believe that there are automatic rules that can be used to determine procuring cause.

Automatic entitlement rules cannot lawfully be used in any REALTOR® arbitration of procuring cause issues in Wisconsin. Entitlement to commission cannot be decided simply based upon which agent writes the offer to purchase, which agent first shows the property to the buyer (the so-called threshold rule), or which agent shows the property and then writes the offer within an appropriate time period (the so-called threshold with protection period rule). Litigation in the 1970s made it clear that the courts and the United States Justice Department were concerned that such industry rules would violate the antitrust laws. Although these rules were intended to protect the public from undignified competition, any industry rules that predetermine entitlement to commissions are viewed as stifling rather than promoting competition. Thus, any rule automatically determining procuring cause will be viewed as anti-competitive and illegal under antitrust law.

Legal Hotline Questions & Answers—No Predetermined Rule

The following questions were recently asked of the Legal Hotline regarding procuring cause rules.

A broker talked to a couple last week about a home they wanted to see on Saturday. She got back to them several times during the week and spent over an hour at the property with them on Saturday. She called the buyers again today with answers to some of their questions. In the meantime, they wrote an offer with an agent who never showed them the property. The other agent is saying that he is procuring cause because he wrote the offer and has worked with the buyer for a long time. Is the broker procuring cause?

The analysis for procuring cause entitlement is primarily concerned with what actions were taken to create an interest in writing an offer on the subject property during the term of the listing contract. There is no such thing as an automatic rule that who-

ever writes the offer becomes procuring cause. Previous activities with the buyer on other properties are not relevant.

A listing agent is working with a buyer who disclosed that he has a buyer's agent after she showed a property to him. The buyer had gotten a flyer out of a box and had called the listing agent asking for a showing. She showed the property to the buyer and at the end of the showing the buyer said he signed a buyer agency with another agent who was then in Florida. The buyer was talking about writing an offer at that point. The buyer's agent now wants to write the offer and wants to be paid a commission.

Buyer agency does not trump procuring cause. The buyer's agent is not procuring cause just because he has a buyer agency relationship. The buyer's agent can draft the offer and the buyer may pay the buyer's broker's fee directly to the buyer.

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.

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)"

Legal Hotline Questions & Answers—Relevancy

The following questions were recently asked of the Legal Hotline regarding the relevancy of rule violations in procuring cause matters.

An agent showed a property to a customer. The customer had contacted the agent because they had seen his marketing materials and advertisements. The agent had several discussions with customer over the last four to five days. Now the customer wants to hire a buyer's agent. The buyer's agent is preparing to write an offer and even though he has never seen the property, is not familiar with the area, and has not seen an MLS sheet. Can the buyer's agent write an offer without ever seeing the property?

A real estate licensee is not prohibited from drafting an offer to purchase without first seeing the property. Administrative Code rules provide the licensee has the duty to inspect the property unless not given access for a showing. See § RL 24.07(1)(c). In addition, the agent is required to provide competent services when engag-

ing in the practice of real estate per § RL 24.03 and Article 11 of the Code of Ethics. An arbitration panel would consider any rule violations as factors in the procuring cause analysis. However, license law violations and Code of Ethics violations do not necessarily determine the outcome of a procuring cause deliberation. These violations may not be relevant unless they contribute to an abandonment or estrangement situation.

A buyer's agent has a relationship with the buyers who had looked at a home privately with the cooperating broker's agent a couple of times. The cooperating broker's agent did not have the disclosure of agency signed by the buyer in advance of the first showing. Based on this, the buyer's agent is claiming that he is procuring cause.

An arbitration panel would consider the agent's failure to have agency disclosure notice signed as one factor in the procuring cause analysis. Many REALTORS® assume that a failure to give timely notice of agency relationships automatically results in a loss in the arbitration arena. This simply is not true. The real issue will be whether the agent's neglect with respect to the agency disclosure notice was relevant in the procuring cause analysis. It may not be relevant because it falls outside of the critical time period beginning with the buyer's introduction to the property and ending with the seller's acceptance of the buyer's offer to purchase. On the other hand, it may be crucial because one agent's failure to explain agency relationships may be instrumental in causing the buyers to seek a different broker to represent them - it may cause an estrangement. For an example, see Fact Situation #9 appearing on page 14 of this *Update*.

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)

Discussion—Abandonment and Estrangement

Abandonment and estrangement are crucial concepts in a procuring cause analysis because they are the factors that can cause a broker who initially was procuring cause to lose that status.

In a procuring cause situation, the broker who caused the buyer's introduction to the property that he or she ultimately buys will start out as procuring cause. That broker may not end up as procuring cause because different considerations—namely abandonment and estrangement—may change that. Other brokers cannot take the broker's status as procuring cause away from the broker. The broker, however, can lose procuring cause if the broker abandons or estranges the buyer.

In a case of abandonment, a broker typically does not stay in contact with the buyer and doesn't follow up with the buyer to answer questions and check on the buyer's status. The frequency of contact needed to avoid an abandonment situation will depend upon the circumstances. In estrangement situations, the broker either does something wrong or does not do something that should have been done. The broker's failings leave buyers feeling that they must go to another broker in order to receive the services they deserve.

Sometimes a broker may abandon a buyer without even knowing it. For example, a buyer may drive by a property and see the listing broker's sign in the yard. At that point, the listing broker is the procuring cause but he or she probably doesn't even know it. The listing broker cannot follow up if they don't know about the potential buyer. However, if the listing broker doesn't follow through with this buyer, abandonment will occur. If the buyer goes to another broker and asks that broker to schedule a showing and work with him, the second broker becomes procuring cause. The listing broker lost his or her status as procuring cause because the buyer was abandoned, albeit unintentionally.

Legal Hotline Questions & Answers—Abandonment and Estrangement

The following questions were recently asked of the Legal Hotline regarding abandonment and estrangement in procuring cause matters.

A sales associate from another company had shown a home to a buyer about one month ago. That sales associate has left that company and is no longer in real estate. Last weekend an agent from a second company showed that home, along with several others, to the same buyer who now has sold his home. The seller happened to be home when the second agent showed the house and recognized the buyer. Does the first agent's company have procuring cause, even though the agent is no longer there?

While the other company apparently had procuring cause in the beginning, the issue appears to be whether that company followed up with the buyer or whether the buyer was abandoned. If the buyer was abandoned, the second agent may have initiated a second series of events, independent of the first series initiated by the first agent. Consequently, the second agent would become procuring cause.

An agent with Company A wrote an offer to purchase for the buyer. Since then, the agent has transferred to Company B. If the agent writes another offer for the buyer on the same property, does Company B get the selling commission, or would it go to Company A?

The issue in this question is procuring cause, which can only be determined by a full, knowledgeable consideration of all the facts of the case. If the brokers cannot negotiate an acceptable settlement, the dispute should be submitted to local board arbitration for resolution.

The agent, while working for Company A, was working on behalf of her broker. Consequently, Company A started out as the procuring cause. However, once the agent left Company A and went to Company B, the procuring cause may have shifted to Company B. If Company A did not maintain contact with the buyer, there appears to have been abandonment. The agent could begin a new series of events which

could result in procuring cause on behalf of Company B, but the mere fact that the agent moved to Company B does not mean that she automatically carried procuring cause with her.

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 (see Professional Standards Policy Statement 26). 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? (the matter is not arbitrable unless there is a successful transaction)

d. Did the listing broker receive a commission? If not, why not? (if the listing broker cannot collect neither can the cooperating broker)”

The 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?”

Discussion—Nature and Status of the Transaction

The nature, status and terms of the listing agreement or offer to compensate are the starting points for any procuring cause analysis. For the broker to be the procuring cause, however, the agreement need not be exclusive, or even necessarily in writing. The critical questions are whether the

listing or compensation agreement was in effect at the time the offer to purchase was accepted or the property was sold, and whether the claiming broker was a party to whom the agreement applied.

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?

Discussion—Roles and Relationships

In most instances, the broker’s relationship with the parties is a straightforward one that does not in itself raise questions as to whether or not the broker is the procuring cause of a sale. At other times, however, the relationship is less straightforward and hearing panels have had to ask additional questions in order to determine

procuring cause. For example, a broker might have introduced a buyer's father to a seller, showed him the seller's property, and attempted to negotiate an offer. The broker may still be the procuring cause of a later sale to the buyer if the parties understood that the buyer's father had been interested in the property on behalf of his son.

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?
 - 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?

Discussion—Initial Contact with Buyer

A broker who makes the initial contact with the purchaser does not auto-

matically become the procuring cause of any ensuing sale to that buyer. However, the broker who is responsible for introducing the buyer to the property does start out as procuring cause. Procuring cause is his or hers to lose.

For example, a broker who worked with an associate of the buyer, unbeknownst to the buyer, was not the procuring cause. The ultimate buyer found the property and negotiated his own purchase. The broker's introduction of the property to the associate was not the foundation on which the sale was made. A broker may be the procuring cause of a sale even if she introduced the property to one individual and negotiated final terms with another, as long as both individuals represented the same buyer and the individual making the ultimate decision to buy did not arrive at his decision independent of the broker's efforts.

Legal Hotline Questions & Answers— Initial Contact with Buyer

The following questions were recently asked of the Legal Hotline regarding introducing buyers to properties in procuring cause matters.

A buyer went to a garage sale and saw that the house was for sale. The buyer toured the house with the seller. The buyer came back later and saw a moving van. The seller had the buyer call the listing agent to set up an appointment for a showing. The next day the buyer contacted an agent the buyer worked with before and she wrote up an offer before going to the showing appointment. The listing agent, the cooperating agent and the buyer all attended the showing. The cooperating agent submitted the offer, which was accepted. The transaction closed and the cooperating broker is paid the commission. The listing broker later filed arbitration to get the money back, claiming that the listing office was procuring cause instead of the cooperating broker. Does the fact that listing broker has a contract with the seller give them automatic right to the commission?

An arbitration hearing panel could conclude that the seller was the procuring cause and that neither broker was procuring cause. The actions of the seller are not attributed to the listing broker to make the listing broker procuring cause. The outcome may be determined by how the request for arbitration is worded. Here it may be easier to prove that someone (the cooperating broker) was not procuring cause than to prove who was procuring cause. If arbitration was requested to determine whether the petitioner—the listing office—was procuring cause, the panel must answer only that question when deciding what the award should be.

A buyer came through an open house and expressed a strong interest in the home. The buyer was encouraged to write an offer and the agent hosting the open house was given the buyer's telephone number. The buyer said that she could not write an offer because she had a contract with a buyer's agent. The hosting agent was not contacted by the buyer's agent regarding the buyer's attendance at the open house, and the buyer didn't give the agent the name of the buyer's agent. The following day, the buyer's agent set up an appointment to show the home. While at the showing, the buyer's agent submitted an offer for the buyer. Does the buyer agency agreement supercede procuring cause?

No, buyer agency and other agency relationships do not determine procuring cause. Agency representation and entitlement to compensation are separate issues. Either the buyer will pay the buyer's broker's fee per the WB-36 Buyer Agency Agreement or the listing broker will pay the buyer's broker if the buyer's agent can meet the burden of proof and show that he is procuring cause. It is not clear, based upon this account of events, which agent is responsible for introducing the buyer to the property. If the buyer's agent sent the buyer to

the open house, it appears that the buyer's agent may have a valid claim as procuring cause, but there does not appear to be any abandonment or estrangement in this scenario.

A buyer attended an open house in response to the listing agent's ad in the newspaper. The listing agent spent 20 minutes touring the home with the buyer and answering many questions. The buyer never mentioned working with a buyer's agent, but a buyer's agent ended up writing the offer. Who is procuring cause?

Based upon this account of events, it appears that the listing broker is procuring cause. The buyer apparently was ready to write an offer before the buyer's agent ever became involved. The buyer's agent, of course, will have his own version of the story that possibly would alter this conclusion. It is never really possible to accurately assess these situations without hearing all sides of the story.

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? (estrangement)
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? (abandonment or estrangement)

- 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?
 - b. Did negotiations break down?
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?”

Discussion—Continuity

A broker may cause a buyer to seek the services of another broker either through estrangement or abandonment. In one case, one broker did little more than bring the subject property to the attention of the prospective buyer and unsuccessfully try to set up a meeting between the parties. He then in essence abandoned his efforts, so the prospect sought out a second broker who did background research and made inquiries and proposals that ultimately resulted in a sale. The second broker was the procuring cause.

A short lapse of time between a broker's efforts with regard to a particular buyer and the finalization of an agreement with that buyer is indicative that the finalization is the result of the unbroken efforts of the broker.

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?"

Discussion—Buyer Conduct

Neither the buyer nor the seller may act in bad faith so as to deprive a broker of his commission that he has otherwise rightfully earned. The court in a Maryland court case remarked: "Although it is not sufficient that the broker has merely planted the seed from which the harvest was reaped, on the other hand the owner [or buyer] cannot take advantage of a broker's services and make the sale himself, or through another broker, so as to deprive the broker of his commission when he has introduced a prospective buyer to the seller and negotiations have progressed to a point where success seems imminent."

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 would not sell on certain terms, but did so via another broker or via the buyer directly?"

Discussion—Seller Conduct

Where a broker showed the property and would have finalized negotiations but for the interference of the owner, he is the procuring cause of the transaction—even though another broker did in fact finalize the negotiations. Where the broker has introduced to the seller a prospective interested buyer and negotiations have progressed to a point where success seems imminent, the broker cannot be deprived of his commissions because the seller in effect bypasses the broker by direct negotiations with the buyer, in effect freezing the broker out of the case

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."

Sample Fact Situation Analysis

"The National Association's Professional Standards Committee has consistently taken the position that arbitration awards should not include findings of fact or rationale for the arbitrators' award. Among the reasons for this are the fact that arbitration awards are not appealable on the merits but generally only on the limited procedural bases established in the governing state arbitration statute; that the issues considered by Hearing Panels are often myriad and complex, and the reasoning for an award may be equally complex and difficult to reduce to writing; and that the inclusion of written findings of fact or rationale (or both) would conceivably result in attempts to use such detail as 'precedent' in subsequent hearings which might or might not involve similar facts. The end result might be elimination of the careful consideration of the entire course of events and conduct contemplated by these procedures and establishment of local, differing arbitration 'templates' or predeterminants of entitlement inconsistent with these procedures and Interpretation 31.

"Weighed against these concerns, however, was the desire to provide some model or sample applications of the factors, questions, and issues set forth in these Arbitration Guidelines. The following 'fact situations' and analyses are provided for informational purposes and are not intended to carry precedential weight in any hearing.

Fact Situation #1

“Listing Broker L placed a listing in the MLS and offered compensation to subagents and to buyer agents. Broker Z, not a participant in the MLS, called to arrange an appointment to show the property to a prospective purchaser. There was no discussion of compensation. Broker Z presented Broker L with a signed purchase agreement, which was accepted by the seller. Subsequently, Broker Z requested arbitration with Broker L, claiming to be the procuring cause of sale.

Analysis

“While Broker Z may have been the procuring cause of sale, Broker L’s offer of compensation was made only to members of the MLS. Broker L never offered cooperation and compensation to Broker Z, nor did Broker Z request compensation at any time prior to instituting the arbitration request. There was no contractual relationship between them, and therefore no issue to arbitrate.

Fact Situation #2

“Same as #1, except Broker Z is the buyer’s agent.

Analysis

“Same result, since there was no contractual relationship between Broker L and Broker Z and no issue to arbitrate.

Fact Situation #3

“Broker L placed a listing in the MLS and offered compensation to subagents and to buyer agents. Broker S (a subagent) showed the property to Buyer #1 on Sunday and again on Tuesday. On Wednesday, Broker A (a subagent) wrote an offer to purchase on behalf of Buyer #1 which was presented to the seller by Broker L and which was accepted. At closing, subagency compensation is paid to Broker A. Broker S subsequently filed an arbitration request against Broker A, claiming to be the procuring cause of sale.

Analysis

“Broker S’s claim could have been brought against Broker A (pursuant

to Standard of Practice 17-4) or against Broker L (the listing broker), who had promised to compensate the procuring cause of sale, thus arguably creating a contractual relationship between Broker L and Broker S. (Amended 11/96)

Code of Ethics Provision

“Standard of Practice 17-4(1) provides that “Specific non-contractual disputes that are subject to arbitration pursuant to Article 17 are where a listing broker has compensated a cooperating broker and another cooperating broker subsequently claims to be the procuring cause of the sale or lease. In such cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. (Adopted 1/97)”

Fact Situation #4

“Same as #3, except Broker S filed the arbitration request against Broker L (the listing broker).

Analysis

“This is an arbitrable matter, since Broker L promised to compensate the procuring cause of sale. Broker L, to avoid the possibility of having to pay two cooperating brokers in the same transaction, should join Broker A in arbitration so that all competing claims can be resolved in a single hearing. The Hearing Panel will consider, among other things, why Buyer #1 made the offer to purchase through Broker A instead of Broker S. If it is determined that Broker S initiated a series of events which were unbroken in their continuity and which resulted in the sale, Broker S will likely prevail.

Fact Situation #5

“Same as #3, except Broker L offered compensation only to subagents. Broker B (a buyer agent) requested permission to show the property to Buyer #1, wrote an offer which was accepted, and subsequently claimed to be the procuring cause of sale.

Analysis

“Since Broker L did not make an offer of compensation to buyer brokers, there was no contractual relationship between Broker L and Broker B and no arbitrable issue to resolve.

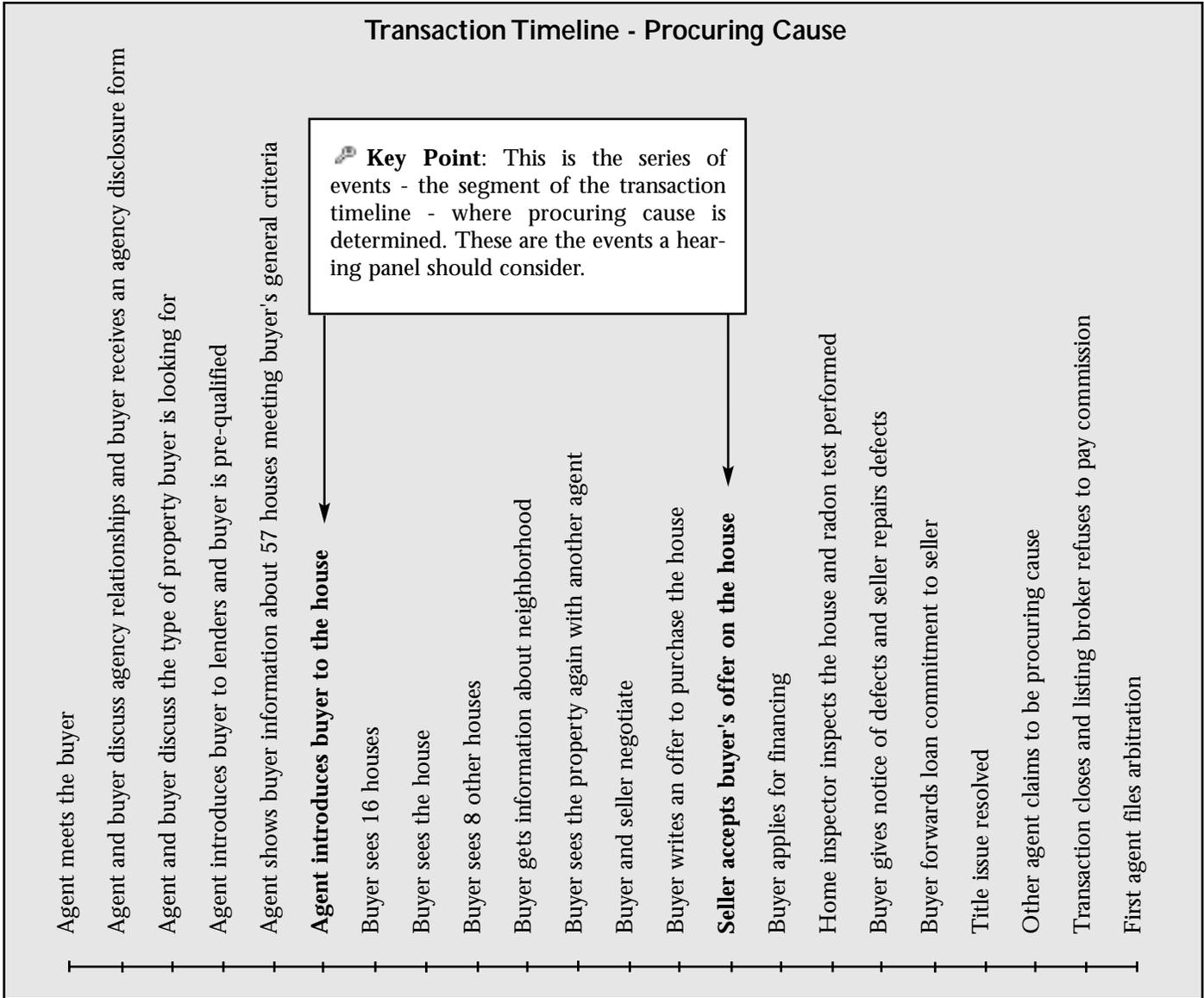
“If, on the other hand, Broker L had offered compensation to buyer brokers either through MLS or otherwise and had paid Broker A, then arbitration could have been conducted between Broker B and Broker A pursuant to Standard of Practice 17-4. Alternatively, arbitration could occur between Broker B and Broker L.

Fact Situation #6

“Listing Broker L placed a listing in the MLS and made an offer of compensation to subagents and to buyer agents. Broker S (a subagent) showed the property to Buyer #1, who appeared uninterested. Broker S made no effort to further contact Buyer #1. Six weeks later, Broker B (a buyer broker) wrote an offer on the property on behalf of Buyer #1, presented it to Broker L, and it was accepted. Broker S subsequently filed for arbitration against Broker L, claiming to be the procuring cause. Broker L joined Broker B in the request so that all competing claims could be resolved in one hearing.

Analysis

“The hearing panel will consider Broker S’s initial introduction of the buyer to the property, the period of time between Broker S’s last contact with the buyer and the time that Broker B wrote the offer, and the reason Buyer #1 did not ask Broker S to write the offer. Given the length of time between Broker S’s last contact with the buyer, the fact that Broker S had made no subsequent effort to



contact the buyer, and the length of time that transpired before the offer was written, abandonment of the buyer may have occurred. If this is the case, the hearing panel may conclude that Broker B instituted a second, separate series of events that was directly responsible for the successful transaction.

Fact Situation #7

“Same as #6, except that Broker S (a subagent) showed Buyer #1 the property several times, most recently two days before the successful offer to purchase was written by Broker B (a buyer broker). At the arbitration hear-

ing, Buyer #1 testified she was not dissatisfied in any way with Broker S but simply decided that “I needed a buyer agent to be sure that I got the best deal.”

Analysis

“The hearing panel should consider Broker S’s initial introduction of the buyer to the property; that Broker S had remained in contact with the buyer on an ongoing basis; and whether Broker S’s efforts were primarily responsible for bringing about the successful transaction. Unless abandonment or estrangement can be demonstrated, resulting, for example,

because of something Broker S said or did (or neglected to say or do but reasonably should have), Broker S will likely prevail. Agency relationships are not synonymous with nor determinative of procuring cause. Representation and entitlement to compensation are separate issues. (Amended 11/99)

Fact Situation #8

“Similar to #6, except Buyer #1 asked Broker S for a comparative market analysis as the basis for making a purchase offer. Broker S reminded Buyer #1 that he (Broker S) had clearly disclosed his status as subagent, and that

he could not counsel Buyer #1 as to the property's market value. Broker B based his claim to entitlement on the grounds that he had provided Buyer #1 with information that Broker S could not or would not provide.

Analysis

"The hearing panel should consider Broker S's initial introduction of the buyer to the property; that Broker S had made early and timely disclosure of his status as a subagent; whether adequate alternative market information was available to enable Buyer #1 to make an informed purchase decision; and whether Broker S's inability to provide a comparative market analysis of the property had clearly broken the chain of events leading to the sale. If the panel determines that the buyer did not have cause to leave Broker S for Broker B, they may conclude that the series of events initiated by Broker S remained unbroken, and Broker S will likely prevail.

Fact Situation #9

"Similar to #6, except Broker S made no disclosure of his status as subagent (or its implications) until faced with Buyer #1's request for a comparative market analysis.

Analysis

"The hearing panel should consider Broker S's initial introduction of the buyer to the property; Broker S's failure to clearly disclose his agency status on a timely basis; whether adequate alternative market information was available to enable Buyer #1 to make an informed purchase decision; and whether Broker S's belated disclosure of his agency status (and its implications) clearly broke the chain of events leading to the sale. If the panel determines that Broker S's failure to disclose his agency status was a reasonable basis for Buyer #1's decision to engage the services of Broker B, they may conclude that the series of events initiated by Broker S had been broken, and Broker B will likely prevail.

Additional fact situations are included in the "Appendix II to Part Ten " sec-

tion of the *Code of Ethics and Arbitration Manual*. The appendix is available online at the NAR Web site www.realtor.org/CEAM.nsf/eab2553e51d2fd9d86256818004d74ad/cf041701d377170e8625687a007875bd

Conclusion

Procuring cause is the uninterrupted series of events that results in a successful transaction. Brokers must have a compensation agreement before procuring cause or any other performance standard can apply. There are no predetermined rules of entitlement to commission. Rather, all facts and circumstances, starting with the buyer's first introduction to the property and continuing until the buyer's offer to purchase is accepted, must be examined.

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