



LEGAL UPDATE

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A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

Procuring Cause 101: Understanding the Basics

Establishing a REALTOR®'s right to be paid a commission if the REALTOR® successfully assists the party in obtaining the desired buyer, tenant or property is a central part of every real estate transaction. While REALTORS® recognize their responsibility to serve the best interests of their clients, customers and the public under high standards of ethics and integrity, they rightfully have concerns about being fairly compensated for their professional endeavors.

The majority of REALTOR® commission disputes are over who is entitled to receive the compensation offered by the listing firm in the MLS. When REALTORS® become involved in these disputes, the issue determining the outcome generally is procuring cause.

When asked on the WRA Legal Hotline whether a REALTOR® is procuring cause is not a question the hotline attorney can answer. Instead, the REALTOR® is provided the following: the issue is deciding who caused the buyer to make the offer that resulted in the sale of the property. There is no single act that determines procuring cause – it can only be answered by a full, knowledgeable consideration of all the facts of the case. If the firms cannot negotiate an acceptable settlement, the dispute should be submitted to local board arbitration for resolution.

This *Legal Update* examines the question that frustrates many REALTORS®, including both veteran and novice agents, and many attorneys. The problem is that there is no "black and white" rule that can be applied. This *Update* is supplemented with practice tips and a timeline to provide helpful guidance.

What is procuring cause?

Generally, procuring cause is a standard of performance to the entitlement of cooperative compensation established between firms by the Multiple Listing Service (MLS).

Procuring cause is also commonly used as the performance standard in standing policy letters between firms, compensation agreements pertaining to single transactions, or a combination of these. The real trick with procuring cause: no single act determines procuring cause. Therefore, there is not an activity "X" that always creates procuring cause.

Procuring cause is the standard by which commission offered by the listing firm through the MLS to cooperating firms is earned. Generally

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speaking, the firm that is the procuring cause was involved in the uninterrupted series of events that resulted in a successful transaction. This determination is made by reviewing many factors in the transaction. No automatic decisions can be made based on the presence or absence of any one factor, and no predetermined formula will always decide whether a firm is the procuring cause of a sale. The facts need to be weighed on a case-by-case basis.

The first and most important thing is to serve the buyer and seller by closing the transaction. Basically, licensees cannot place their commission issues and needs before the needs of the parties. There is plenty of time afterward to determine who gets what part of the commission.

Non-MLS transactions

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 a property is not listed in the MLS and regardless if the cooperating firm is an MLS participant or not, sold by another MLS participant, then the listing and cooperating firm must affirmatively agree on cooperative commission and select a performance standard whereby the cooperating firm may earn that commission. That standard of performance may or may not be procuring cause.



Who caused the sale of the property?

Determination of procuring cause is a conclusion drawn from a full, knowledgeable consideration of all of the facts of the case.

Procuring cause looks at the uninterrupted series of events that result in the sale of the property to the buyer. As previously stated, there are no black-and-white rules that determine entitlement to commission.

Therefore the privilege of automatic procuring cause is not granted to the firm and its agent who drafts the offer or the firm and its agent who first shows the property, commonly called the threshold rule.

There are no actions that in and of themselves preclude a firm from being procuring cause. For instance, the fact that no agency disclosure is given or signed, or that the agent did not inspect the property, does not necessarily mean the firm and its agent is not procuring cause. A case-by-case review of all facts and circumstances must be conducted to determine who is procuring cause.

REALTOR® Code of Ethics and Arbitration Manual

The preeminent written authority explaining procuring cause, as applied in REALTOR® arbitration hearings, is the Code of Ethics and Arbitration Manual, specifically “Appendix II to Part Ten – Arbitration Guidelines (Suggested Factors for Consideration by a Hearing Panel in Arbitration),” which can be viewed at www.nar.realtor/2004CEAM.nsf/eab2553e51d2fd9d86256818004d74ad/cf041701d377170e8625687a007875bd?OpenDocument.

If the firms cannot agree to the entitlement and/or division of the selling commission, the dispute should be submitted to the local REALTOR® association for resolution. According to Article 17 of the Code of Ethics, REALTORS® agree to arbitrate their contractual disputes arising out of their relationship as REALTORS®.

Under the circumstances and in accord with local custom and practice, arbitration panels will consider the following:

- Did the firm/agent make reasonable efforts to develop and maintain an ongoing relationship with the purchaser?
- Did the first cooperating firm/agent actively maintain ongoing contact with the purchaser?
- Did the firms’s/agent’s inactivity, or perceived inactivity, cause the purchaser to reasonably conclude that the firm/agent had lost interest or disengaged from the transaction, known as abandonment?

Is there automatic procuring cause?

No. In an analysis of procuring cause, there are no predetermination rules of entitlement to commission. A predetermination rule would provide, for example, the first agent/firm who shows the property is automatically procuring cause, or the first agent/firm is automatically procuring cause because he or she was the first one to give the buyer the data sheet or to send email through a contact management program.

REALTOR® Practice Tips

The second firm that has stumbled into a potential procuring cause situation has several choices for how to proceed.

Option 1: If the firm and its agent elect to move forward with this buyer, the agent could enter into buyer agency, having the buyer pay the firm's commission and not make any claims for the MLS offer of compensation.

Option 2: The firm/agent could reach out to the managing broker of the listing firm and negotiate for cooperative commission. A compensation agreement between the firms may be entered into, acknowledging the participation of the listing agent and documenting commission to avoid a procuring cause claim between companies.

Option 3: The firm/agent could enter into buyer agency and request the MLS offer of compensation; claiming the first firm's conduct resulted in estrangement.

What is a “successful transaction”?

According to the terms and conditions of an offer of compensation made through the MLS, a successful transaction is required to earn the commission as the procuring cause of the sale. A successful transaction is defined as a sale that closes or a lease that is executed. The cooperating firm was instrumental in procuring the offer that triggered the listing firm's right to commission according to the procurement provisions of the listing contract. However, there is no transaction between the buyer and the seller, so the cooperating firm is not entitled to the selling commission.

What is meant by uninterrupted?

If a buyer turns to another agent to purchase a property, the arbitration hearing panel will consider why the buyer chose to work with the second firm/agent. Any demonstrable break in the continuity of events, such as abandonment or estrangement, will lead an arbitration panel to most likely find in favor of the other agent.

The key is: Did the first agent actively maintain ongoing contact with the consumers? Or, did the agent's absence, inactivity or perceived inactivity cause the buyer to reasonably conclude that the first agent lost interest or disengaged from the transaction? Given the amount of time that lapsed between the first agent's negotiations and the time of the accepted offer, and the fact that the first agent was not available due to his vacation, there may have been abandonment.

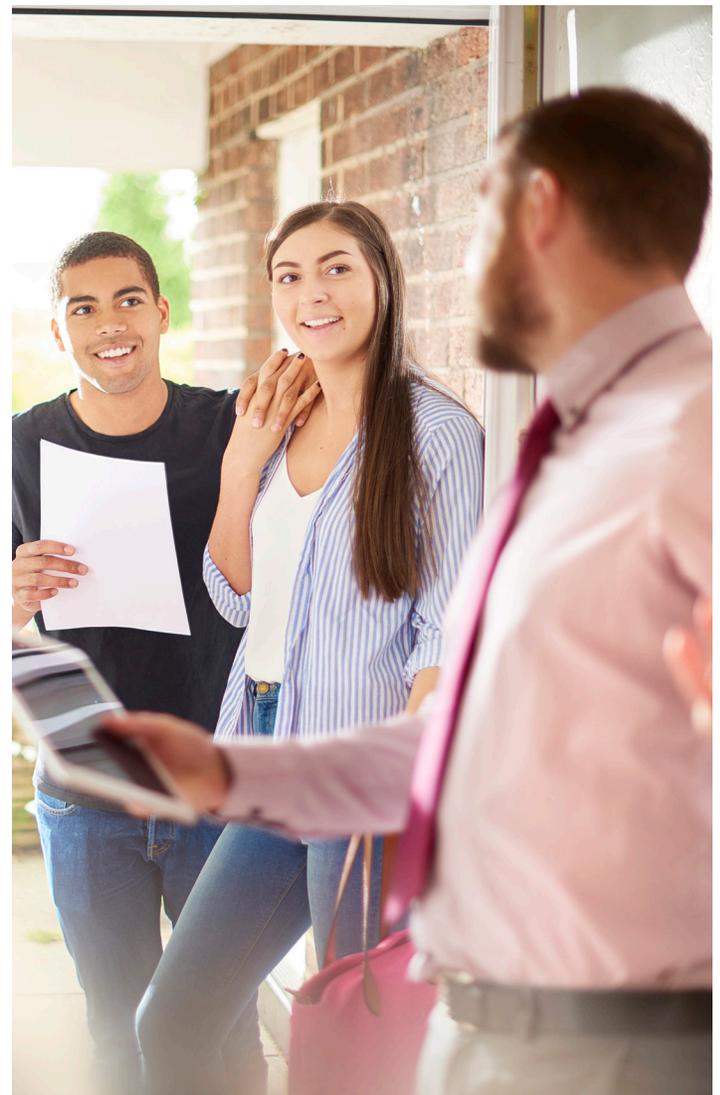
Estrangement: In other instances, a purchaser, despite reasonable efforts by the firm to maintain ongoing contact, may seek assistance from another firm. The panel will consider why the buyer chose to work with the second firm. Estrangement results if the first firm engaged in conduct that caused the purchaser to terminate the relationship. If the buyer was estranged due to the first firm's actions, the second firm's actions can create a second series of events resulting in procuring cause for the second firm.

If the buyer was estranged due to the first firm's actions, the second firm's actions can create a second series of events resulting in procuring cause for the second firm. The panel will look at the continuity or discontinuity of the original and final negotiations, which resulted in

the successful transaction. The hearing panel may consider whether the transaction would have occurred without the actions of the second firm. The second firm's encouragement to consider the subject property and drafting of the accepted offer supports the second firm's claim for procuring cause.

Abandonment: In a case of abandonment, a firm typically does not stay in contact with the buyer and does not 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. If the buyer was abandoned due to the first firm's inaction, the second firm's actions can create a second series of events resulting in a successful procuring cause claim for the second firm.

The buyer may have been abandoned by the agent even if a firm maintains contact with the buyer about properties in general. Additionally, abandonment may occur with regard to a property if the firm does not maintain a series of events regarding that property. The firms may consider whether the first agent's conduct caused a break in the series of events leading to the rejection of the first offer, and whether the successful transaction was actually brought about through the initiation of a separate, subsequent series of events by the listing firm.



REALTOR® Practice Tips

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Examples of actions that could be estrangement include:

- Refusal to draft an offer.
- Antagonistic behavior toward the buyer.
- Acting without the consent of the buyer.
- Acting in a manner contradictory to the buyer's direction.
- Other bad faith actions, possibly the failure to properly disclose and obtain consent regarding the immediate family relationship.

Does buyer agency with a buyer automatically make the buyer's agent procuring cause?

No. The buyer agency agreement authorizes the buyer's agent to provide brokerage services to the buyer. Unless specific properties are excluded from the buyer agency agreement, the buyer's agent may draft the offer for the buyer. The WB-36 Buyer Agency/Tenant Representation Agreement may be negotiated to allow the firm to accept compensation from an owner or an owner's agent, reducing the compensation owed by the buyer. However, whether the buyer's agent is procuring cause is a different matter.

Buyer agency does not equal procuring cause. The question is whether the relationship with the firm has broken down due to abandonment or estrangement. The buyer's agent enters into the transaction knowing full well that his efforts to finalize a sale between the buyer and seller are not necessarily enough to earn the compensation offered by the listing firm.

Procuring cause vs. listing protection

A common point of confusion for REALTORS® is the difference between procuring cause and listing firm, better known as protected buyers.

First, the discussion has to be framed in the context of the MLS offer of compensation – not the listing contract context of protected buyers. Listing protection is created by the listing contract and relates to protecting the listing firm's commission under the listing contract. Therefore, if a listing expires and the buyer who wrote an offer during the term of the listing with another agent now comes back within a year of expiration of the listing, the listing firm now doesn't just have the authority to represent the seller in that transaction – the listing firm also may enforce its listing contract against the seller. The firm that wrote the offer during the original term of the listing contract for that buyer may make a claim for the MLS offer of compensation, the standard of performance of which is procuring cause, even if the buyer wrote his or her second offer with the another firm.

For the first cooperating firm to earn the MLS offer of compensation, the cooperating firm would need to show an uninterrupted series of

events that resulted in the sale of the property to the buyer. The drafting of the original offer does not assure procuring cause for the cooperating firm. If the cooperating firm did not maintain the series of events resulting in the sale of the property to the buyer, its procuring cause claim would be unsuccessful.

Procuring cause resources

• April 2010 *Legal Update*, "Cooperative Commissions and Procuring Cause" at www.wra.org/LU1004.

• April 2002 *Legal Update*, "What is Procuring Cause?" at www.wra.org/LU0204.

• "Uncovering the Truth: Procuring Cause," in the April 2012 issue of *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Apr12/ProcuringCause.

How Can REALTORS® Avoid Procuring Cause Disputes?

1. When procuring cause is involved, understand and appreciate that there are no predetermined entitlements to compensation.
2. Understand the basics of procuring cause.
3. Don't forget about your buyers; avoid an abandonment or estrangement argument.
4. Confirm you were offered compensation either in the MLS where procuring cause is the standard, or via a compensation agreement where procuring cause is stated as the standard.
5. Educate your buyers!
6. Communicate with the listing agent! Try to head off any dispute.
7. The transaction must successfully close. A successful transaction is a prerequisite to any award of compensation.

Transaction Timeline – Procuring Cause

Agent #1 meets the buyer
 Agent #1 and buyer discuss agency relationships and buyer received an agency disclosure form
 Agent #1 and buyer discuss the type of property buyer is looking for
 Agent #1 shows buyer information about 57 houses meeting buyer’s general criteria

Agent #1 introduces buyer to the house

Buyer sees 16 houses
 Buyer sees *the house*
 Buyer sees 8 other houses
 Buyer gets information about neighborhood
 Buyer sees *the house* again with agent #2
 Buyer and seller negotiate
 Agent #1 drafts buyer’s offer to purchase on the house

Seller accepts the offer

The transaction moves forward and contingencies are satisfied or fulfilled
 Before closing, agent #2 and their firm claim to be procuring cause
 Transaction closes. Listing firm refuses to pay commission because of the procuring cause claim

This is a series of events – the segment of the transaction timeline – where procuring cause is determined. These are the events a hearing panel should consider.

Watch the associated LegalTalks video:



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