

Ten Ways to Avoid Procuring Cause Disputes

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“Dismiss all the myths you have held to be gospel for years, such as: “he who writes the contract is the procuring cause of the transaction” or “he who shows the house is the procuring cause of the transaction.”

It's probable that most of the time the one who writes the contract IS the procuring cause. However, *when there is a competing claim for the commission*, all rules and probabilities are out and the merits of the particular situation determine the outcome. The only “rules” about procuring cause that are relevant is that there are “no rules” about predetermined entitlements to compensation.”

Many people say, “It isn't the way it used to be; the rules have changed about procuring cause.” Actually, they haven't. What has happened is that REALTORS® are learning what procuring cause is and isn't. Its definition has been around for a long time –



Learn and understand *basic procuring cause definitions.*

Procuring cause is defined legally and in the NAR Code of Ethics and Arbitration Manual as: 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.



Don't ignore your buyers or make them angry. Avoid those “breaks” in the transaction by providing your buyers with good service. For example, accompany them when they look at property -- always.

Do you know what “**abandonment**” and “**estrangement**” mean? If you do, you will likely do what's necessary to prevent them from happening. Each is a major “break” in the transactional process which could change who the procuring cause could be. The Code of Ethics and Arbitration Manual says:

“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 engaged in conduct which caused the purchaser to terminate the relationship (estrangement). This can be caused, among other things, by words or actions.

Have you abandoned or estranged a buyer lately? If you have and you are expecting a commission in that situation, you will probably not have earned it.



Review the NAR fact scenarios and arbitration guidelines (Code of Ethics and Arbitration Manual, and at <http://www.aaronline.com/documents/NarArbGuide.aspx> for examples of common situations which often lead to disputes. Recognize any similarities to ascertain the probable outcome in your transactions and take steps to avoid mistakes that could lead to an unfavorable result in your own situation.



Make sure you have been offered a commission by procuring the buyer in the first place. This normally happens through MLS, wherein the listing broker offers cooperation and compensation to any MLS Participant who is the procuring cause of the sale. If the property isn't listed in your MLS, then you need to obtain permission from the listing broker to show it and to ascertain whether and how much you'll be paid if you are the procuring cause. Do this before you show it!! Get it in writing.



Talk to your buyers about how commissions are generally paid. If they know that you may not be paid a commission under certain circumstances, they may be more inclined to stick with you.



Understand that your agency relationship with a buyer (whether exclusive or not) does not affect procuring cause. Procuring cause is "property specific", not "agent-specific". If you think that merely because you have an agency relationship with the buyer it guarantees that you will or should be paid the cooperating compensation from the listing broker, think again. Again, you must have taken the necessary steps to be identified as the broker who was responsible for the buyer buying that property without a break in the process.



Encourage your buyers to enter into an **exclusive buyer broker employment agreement** with you. While this will not guarantee you to be identified as the procuring cause of a transaction, it may help your buyer to understand the benefits of working with just one agent and will give you an option to collect compensation from the buyer should you not be the procuring cause.



COMMUNICATE!! ... with the other agents involved, your buyer, the seller, anyone who is involved in the transaction or potential transaction with regard to compensation. If you see there may be a potential problem or you have a "live" problem, get on the phone (usually to the listing agent or the other cooperating agent) and discuss the problem. Be prepared to share the commission if it appears it's appropriate. *Solve the problem before it becomes one.*

The typical situation arises when you discover that "your" buyers have seen the property you are ready to write an offer on with another agent. You knew nothing about that showing and have followed all the "rules" about educating your buyers, etc., etc. But, your buyers go off and do something many buyers do – they don't want to "bother" you and stop at an open house or a new home subdivision or call on a sign, JUST to see what they think of the property. They don't think that

will affect the relationship between you and them. The agent at the open house tells them all kinds of neat things about the house plus a couple of things no one else knew about. They are ready to buy and come to you to write the contract. This is the time for you to call the listing agent and say, "What can we do about this?" It won't always prevent a future dispute, but it usually goes a long way to doing so.



10 ***MEDIATE!!*** If all of the suggestions above have not been successful and you find yourself involved in a formal dispute, give mediation a try before you go to a formal hearing. Mediation is a win-win method of dispute resolution. You may not get everything you think you're entitled to, but you may get more than you might receive through the hearing process. And, most importantly, you have resolved the dispute relatively amicably as opposed to the more adversarial arbitration option. You have a definite voice in a mediation resolution whereas in arbitration, you have none. If the mediation results in a resolution, you will share the commission; if you lose in an arbitration hearing, you get nothing. And, if you don't like how a mediation conference is progressing, you can stop and go on to arbitration. Mediation doesn't result in a binding resolution unless EVERYONE agrees.