

Procuring Cause Revisited

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Questions of procuring cause in real estate brokerage transactions will always be hotly debated because they are ultimately questions about money, and who will get it and who will not. The debate has grown hotter of late because our changing agency rules have confused some of our more traditional notions of procuring cause. This article will explain the basic principles of procuring cause and provide some guidance on how to approach procuring cause problems in light of our revised agency laws.

Definition of Procuring Cause

The National Association of REALTORS® Code of Ethics and Arbitration Manual cites an Arizona case for the definition “procuring cause”. In that case, the court ruled that “a broker will be regarded as the procuring cause of a sale, so as to be entitled to a commission, if his efforts are the foundation on which the negotiations resulting in a sale are begun.” The court went on to state that procuring cause was a “cause originating a series of events which, without a break in their continuity, result in the accomplishment of the 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.” The Georgia courts have tended to express the definition of procuring cause in terms of whether the broker initiated the key uninterrupted series of events which resulted in the sale of the property.

The problem with these types of legalistic definitions is that they provide little practical guidance in determining who is the procuring cause of the sale in the myriad of real world transactions in which brokers find themselves. This is particularly the case when two or more brokers are involved in a transaction and decisions have to be made regarding their respective roles in procuring the sale.

REALTORS® serving on arbitration panels and struggling with procuring cause questions regularly ask whether there is a minimum standard that should be met before a broker can rightfully claim all or part of a commission, and how to divide commissions when the relative contributions of the two brokers are unequal. The National Association of REALTORS® tries to give guidance to arbitration panels by including in its Code of Ethics and Arbitration Manual a list of factors to consider and questions to ask in evaluating issues of procuring cause. Examples of such questions include the following:

1. Who first introduced the buyer to the property?
2. When was the first introduction made?
3. How was the first introduction made?
4. Did the broker who made the initial introduction to the property engage in conduct (or fail to take some action) that caused the buyer to utilize the services of another broker?
5. How do the efforts of one broker compare to the efforts of another?
6. If more than one cooperating broker was involved, how and when did the second cooperating broker enter into the transaction?
7. What was the length of time, between the broker’s efforts and the final sales agreement?
8. Did the broker who made the initial introduction to the property maintain contact with the buyer?
9. Did the buyer make the decision to buy independent of the broker’s efforts/information?
10. Did the buyer seek to freeze out the broker?

While the Arbitration Manual includes suggested questions, it does not give direction on how to evaluate the answers to these questions or whether some questions should be given greater weight than others. The list of questions in the Arbitration Manual is also not intended to be exhaustive and panel members are free to ask any other questions they believe are relevant. Panel members are given broad discretion in making decisions with regards to procuring cause because each decision requires a fact intensive investigation by the arbitration panel. No two cases are exactly alike and arbitration panels must carefully review the entire transaction and the credibility of the witnesses in reaching their decisions. While there are not many hard and fast rules regarding procuring cause, there are a few suggestions that, if considered, should avoid any confusion in this area caused by changes in our agency law. They are as set forth below.

Suggestion #1

Just because a broker has a signed buyer brokerage agreement, does not automatically make the broker the procuring cause when the buyer purchases property.

A signed buyer brokerage agreement means that the buyer has entered into a written agency contract with a broker. It does not mean that the buyer's broker is the procuring cause of the sale or is entitled to be paid a commission from the seller of any property purchased by the buyer. Let's look at the example below to see why this is the case.

Example

Mr. and Mrs. Chen see an advertisement in the Sunday newspaper for a new subdivision. The style of the homes and the floor plans they see match perfectly with what they always said they wanted in a house. Over the next several weeks, the Chens visit the subdivision six times trying to pick out just the right lot. All of the lots are listed in the local MLS. The Chens register with the subdivision agent who walks all of the available lots with them. The night before they are to sign a contract, they run into their old friend, Broker J. They excitedly tell him about their find. J asks them if they are represented by a broker and when he learns they are not, he offers to help them write the contract. They gladly accept his offer. When J meets the Chens the next morning, he has them sign an exclusive buyer brokerage agreement. Does this entitle J to a commission from the sellers?

Answer

No. In listing the lots in MLS the listing broker has agreed to pay cooperating brokers a commission if they are a procuring cause of the sale. In this case, the buyers found the property without the assistance of J, and made their decision to purchase the property before J became involved in the transaction. J will therefore have a difficult time establishing that he is the procuring cause of the sale. While he may be entitled to be paid a commission from the buyer, he will likely not be able to collect a commission from a seller.

Suggestion #2

Buyers are entitled to be represented by a broker whenever they would like representation.

Buyers can hire a real estate broker to represent their interests any time they desire. This includes right up to the very last minute before the buyer submits an offer. While there is absolutely nothing a listing agent can do to prevent the buyer from hiring a broker, the listing broker is not required to pay for such representation. As discussed previously, the listing broker only has to share its commission when the buyer's broker is the procuring cause of the sale.

Example

Mr. and Mrs. Gutierrez enter into an exclusive buyer brokerage agreement (using the GAR form) with REALTOR® D. The agreement provides that D will be entitled to a commission on all property purchased by the buyers during the term of the agreement. Mr. and Mrs. Gutierrez spend the next several weekends looking without success for a new home with D. One Sunday afternoon, Mr. and Mrs. Gutierrez go looking on their own and find a home being sold by owner that meets their needs. They put the property under contract without giving their buyer brokerage agreement a second thought. Is D entitled to a commission in this transaction even though she is clearly not the procuring cause of the sale?

Answer

Yes. D is entitled to a commission under the terms of the buyer brokerage agreement with the buyers because that agreement provides that the buyers will pay the broker a commission on all property purchased by the buyers during the term of the agreement (where the seller does not pay D a commission). In this case, D is not the procuring cause of the sale and should therefore not be able to collect a commission from the seller.

Suggestion #3

Written buyer brokerage agreements can contractually eliminate the need to establish procuring cause.

With the advent of written buyer brokerage agreements, it is possible to be legally entitled to a commission without being the procuring cause of the sale. This is because the buyer brokerage agreement can contractually eliminate the requirement for any showing of procuring cause. As can be seen in the example #2 above, D was entitled to receive a commission even though she was not the procuring cause of the sale because she entered into a contract that created a commission obligation absent a showing of procuring cause. This principle has already been tested and upheld by an Appellate Court in Georgia.

Suggestion #4

Being the procuring cause of the sale alone is not always enough to be entitled to a commission.

A broker can be the procuring cause of the sale but not be entitled to a commission if the broker has not entered into a contractual agreement to be paid a commission. Listing property in an MLS constitutes a contractual offer to cooperate with all members of the MLS and to pay them a specified commission if they are the procuring cause of the sale. However, if the property is not listed in an MLS, the financial basis upon which the selling broker will be compensated needs to be worked out in advance. Let's look at the example below to see how this works.

Example

REALTOR® KC sees a for sale by owner that she believes her buyer client would be interested in purchasing. She calls the seller and asks if she can bring her client by to see the property. The seller says that would be fine. The parties do not discuss whether KC will be paid a commission by the seller. The buyer loves the house and makes an offer to purchase it. A contract is entered into by the buyer and seller that does not include a commission being paid by the seller. Can the seller refuse to pay a commission?

Answer

Unfortunately, the answer to this question will in most cases be "yes". KC is clearly the procuring cause of the sale. However, the selling broker did not protect herself by entering into a contract with the seller to be paid a commission. Therefore, she may not be able to collect a commission from the seller, and may be limited to pursuing the buyer for a commission. REALTORS® should always establish the contractual terms of cooperation before showing property not listed in the MLS to which the REALTOR® belongs.

Suggestion #5

Subdivision disclaimers may not always bar a cooperating Broker from seeking a commission.

Many subdivision sales centers have signs like the following, "No commission paid unless Broker accompanies Buyer to subdivision on first visit." Is this type of disclaimer enforceable? The answer likely depends on whether the lots in the subdivision have been listed in an MLS.

If the lots have not been listed, the disclaimer is likely enforceable as an offer of cooperation conditioned upon the happening of a specific event (i.e. – the broker accompanying the buyer on his or her first visit to the subdivision).

If the lots are listed, the provision may not prevent a selling broker from receiving a commission if the selling broker truly is the procuring cause of the sale. This is because the rules of the MLS require that the listing broker share its commission with any cooperating broker who is the procuring cause of the sale. This would not normally be a rule that could be modified by a seller posting a sign in a sales center. Let's look at the example below to see how this works.

Example

Mr. and Mrs. Jones sign a buyer brokerage agreement with REALTOR® B. B shows them about two-dozen houses mostly in new subdivisions. The Jones' like many of the houses but none of them are just right. B then does research on other new subdivisions and comes across a home at Mulberry Mews that she thinks will meet their needs. B normally speaks to the listing agent before taking clients to a subdivision but she is unexpectedly called out of town on a personal emergency. Before leaving, B tells the Jones' how to get to the house and the subdivision. They go to see the house that day, fall in love with it and immediately put the house under contract. The Jones' mention to the listing agent that they are working with B but the listing agent merely points to the sign saying buyer agents must accompany their buyers on their first visit to receive a commission. If the property is listed in MLS, will the subdivision disclaimer prevent B from being paid a commission?

Answer

While questions of procuring cause are always for arbitration panels to decide, B should be able to present a strong case for being the procuring cause of the sale. While the subdivision disclaimer would likely be a factor considered by most panels, B's actions in finding the buyers the property will likely be more compelling to most arbitration panels.

Suggestion #6

Sometimes two commissions should be paid in a transaction rather than one commission being shared.

Some arbitration panels mistakenly believe that only one commission can be paid in a transaction. As a result, the panel splits a commission that rightfully belongs to only one broker. Let's see how this can happen.

Example

The O'Haras enter into an exclusive buyer brokerage agreement with Broker CC. The agreement provides that CC is to be paid a commission on all property purchased by the O'Haras during the term of the agreement. One weekend, the O'Haras go and look for property without CC. They find a house completely on their own without any help from CC and enter into a purchase contract. CC is not included in the contract for a commission. After closing, CC files a request to arbitrate against the listing broker arguing that she had shown the O'Haras numerous other properties even though she did not show or find them the house they ultimately purchased. Is CC entitled to a share of the listing broker's commission?

Answer

No. The listing broker should be paid the entire commission because CC was not the procuring cause of the sale. However, CC should be able to pursue the O'Haras for a full commission based upon the buyer brokerage agreement. In other words, rather than splitting the commission paid by the seller, the entire commission offered by the seller should go to the listing broker and a second commission should be paid by the buyer.

Suggestion #7

Registering the buyer on the front end is the best way for a listing broker to establish that he or she was the sole procuring cause of the sale in transactions where a broker attempts to "parachute" into the transaction.

Registering buyers is something that every listing broker should consider doing when a buyer starts to express a serious interest in a property. Registering a buyer does not have to be done in an overly technical fashion. Getting the buyer to answer in writing two basic questions is usually enough to protect the listing broker. They are as follows:

1. I am _____ or am not _____ working with another real estate agent or broker.
2. I found the property at _____ in the following way. (Check all that apply)
 - a. _____ Saw "for sale" sign on the property.
 - b. _____ Saw an ad in a newspaper or magazine.
 - c. _____ Found the property on the Internet.
 - d. _____ A friend told me about the property.
 - e. _____ Another real estate agent or broker found or told me about the property.

If the buyer indicates on a registration form that he or she was not working with another broker, and found the property as a result of the efforts of the listing broker, it will be hard for a "parachuting" real estate agent to argue later that he or she was the procuring cause of the sale. Conversely, if the listing broker does not register the buyer, there is little way for the listing broker to later protect himself or herself in arbitration hearings against unscrupulous buyer agents and buyers who may have an economic incentive to distort the true extent of involvement by the "parachuting" agent.

Suggestion #8

Never let questions of procuring cause interfere with the best interests of our clients and customers.

Article 1 of the REALTORS® Code of Ethics provides that "...REALTORS® pledge themselves to protect and promote the interests of their client. This obligation to the client is primary..." REALTORS® are also required to submit commission disputes to arbitration under Article 17. These two sections of the Code of Ethics establish a duty not to let a dispute over procuring cause interfere with the best interests of a client. Let's look at the following example to better understand this duty.

Example

REALTOR® DD and REALTOR® AJ are having a dispute over whether AJ is entitled to a commission in a real estate transaction. AJ's client is considering the purchase of DD's listing. DD argues that AJ "parachuted" into the transaction at the eleventh hour and will not be the procuring cause of the sale if AJ's client purchases the property. AJ argues that if the buyers purchase the property, it will be because of his efforts in representing the buyer. Finally, in frustration, AJ says that unless he is included in the contract for a commission, he will take his buyers to a different subdivision. DD tells AJ to go right ahead and do that. After much persuasion AJ convinces the buyers to look elsewhere and the deal falls apart. Are the actions of the two agents in keeping with the Code of Ethics?

Answer

While the ultimate answer to a question like this is for an ethics panel to decide, it does not appear that the actions of the brokers are in keeping with the Code of Ethics.

The agents put their own financial interests ahead of those of their respective clients. As a result, both clients suffered. The agents should have agreed to submit their dispute to arbitration after the transaction had closed.

Suggestion #9

Changes in offers of compensation should be timely made.

Standard of Practice 3-2 of the NAR Code of Ethics provides that "REALTORS® shall, with respect to offers of compensation to another REALTOR®, timely communicate any change of compensation for cooperative services to the other REALTOR® prior to the time such REALTOR® produces an offer to purchase/lease the property."

With the amount of the real estate commission no longer being included in the GAR purchase and sale agreement, disputes are starting to arise over listing brokers reducing an offer of compensation specified in an MLS. As a general principle, the listing broker cannot do this without the consent of the selling broker once the parties have entered into a contract. Let's look at the following example to understand why this is the case.

Example

Listing broker offers in the MLS a commission of 3½% of the purchase price of property to the selling broker in the transaction. Selling broker finds a buyer for the property and the parties enter into a contract. Prior to closing, the listing broker announces that he had to reduce the selling side of the commission to 2½% to keep the seller happy. Can such a unilateral change be made in the commission being offered without the consent of the Selling Broker?

Answer

Generally, the answer to this question should be "No". The listing broker's offer to pay the selling broker a commission of 3½% of the purchase price was a contractual offer that was accepted through the performance of the selling broker in procuring the buyer for the property. Once the offer was accepted through the performance of the selling broker, the amount of the commission should not be able to be changed unilaterally by the listing broker.

This issue becomes much harder when the listing broker reduces the compensation for the selling broker prior to an offer to purchase the property being made. Clearly, a listing broker should be able to reduce a commission prior to the selling broker showing the property for the first time (if the change is plainly shown in an MLS and/or communicated to the selling broker).

It is less clear whether the listing broker can unilaterally reduce its offer to pay a commission once the selling broker has shown the property to his or her client but prior to the client making a written offer to purchase the property. The listing broker can point to the language in Standard of Practice 3-2 to support any reduction in compensation made prior to an offer being made. However, the selling broker can argue that he or she acted in reliance on the offer of compensation set forth in the MLS in showing the buyer the property, and should therefore be entitled to receive the higher commission originally offered by the listing broker.

While there are no hard and fast rules in this area, the key questions for arbitration panels to consider will likely be: 1) At what stage in the negotiations was the reduction in the commission made? 2) Why was the commission reduced? and 3) How the reduction in commission was communicated to the selling broker. In light of the uncertainty in this area, selling brokers should regularly check the MLS for changes in the compensation offered by the listing broker to avoid unnecessary disputes.

Following the above suggestions should help to prevent confusion about procuring cause in light of our new agency laws.