White Paper

Arbitration, Procuring Cause and Commission Entitlement

November 1999
Reviewed 2017

EQUAL HOUSING OPPORTUNITY

REALTOR®

Arbitration, Procuring Cause and Commission Entitlement

INTRODUCTION

The legal definition of procuring cause would be "the cause that results in the attainment of a stated goal." In real estate, it would take on the meaning of the real estate agent or broker who, by their actions in producing a buyer, brought about the sale of a property.

Ohio courts have long favored arbitration as a means of resolving disputes between private citizens. The Ohio Supreme Court, over the course of many years, reflects the dedication of arbitration. Arbitration is favored because it provides the parties with a relatively expeditious and economical means of resolving a dispute.

REALTORS® are required to arbitrate real estate commission disputes as a condition of membership in the REALTOR® Association, rather than pursuing litigation in a court of law. Article 17 of the Code of Ethics describes those kinds of disputes that must be arbitrated.

PART ONE: PROCURING CAUSE AND ARBITRATION

A. General Law in Ohio

Ohio courts have long favored arbitration as a means of resolving disputes between private citizens. The Ohio Supreme Court has stated:

> *A number of our cases decided over the course of many years reflect this Court's dedication to the strong public policy favoring arbitration. Arbitration is favored because it provides the parties with a relatively expeditious and economical means of resolving a dispute.*

In an earlier case, the Court recognized that arbitration provides the parties with a relatively speedy and inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets. Therefore, Ohio courts are anxious to defer to the arbitration process, not only because it provides an economical and efficient means of dispute resolution, but also because the parties themselves have chosen to submit their dispute to private dispute resolution, and therefore, they are bound to accept the results of that process even though they may disagree with the decision of the arbitrator. It is an extremely rare case in Ohio where a court has substituted its opinion of the proper outcome of a private dispute for the decision of an arbitrator or an Arbitration Panel which has resolved the dispute in accordance with procedures agreed to by the parties.

Arbitration is nothing more than an alternative dispute resolution system which allows parties to present their cases to an independent, neutral party who is charged with resolving the dispute based upon the evidence that is presented. Black's Law Dictionary (6th Ed. 1990) defines arbitration as:

A process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have had an opportunity to be heard. Where arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision.

An arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense, and vexation of ordinary litigation.

Statutory provisions governing arbitration in Ohio are found in Chapter 2711 of the Ohio Revised Code. This Chapter begins by recognizing that an agreement to arbitrate is valid, irrevocable and enforceable in Ohio even if it is agreed to by the parties prior to the existence of the dispute. This differs from some states which will enforce arbitration agreements only if they are entered after the dispute arises. In other words, parties can agree to arbitrate in the future a dispute which does not yet exist. This is what REALTORS® in Ohio do. The arbitration agreement is created by the application for membership in the REALTOR® Association and the subsequent acceptance of the member into the Association. By joining the REALTOR® Association the member agrees to abide by the Code of Ethics of the National Association of REALTORS® and to submit qualified commission disputes to arbitration rather than to litigate in a court of law. The consideration for this agreement is the payment of dues by the member and the provision of services and the right to use the term REALTOR® and REALTOR®.

Chapter 2711 of the Ohio Revised Code goes on to recognize that the decisions of an Arbitration Panel can be made the equivalent of a court order. If the Respondent in an arbitration proceeding fails or refuses to pay the award, then the prevailing party is authorized to file an application to confirm the award in the court of common pleas of the county in which the arbitration took place. The Respondent has one year from the date of the entry of the award to file the application for confirmation. If the court issues an order confirming the award, then that order makes the arbitration award enforceable just as if it had been issued by a court of law in an original proceeding. Collection proceedings may be instituted against the Respondent in the same manner in which the prevailing party in judicial litigation would be permitted to collect a judgment issued by a court of law.

Moreover, the common pleas court has no choice but to issue the order of confirmation unless the non-prevailing party has filed a motion to vacate the award. If the Respondent decides to file a motion to vacate, modify or correct the award, such a motion must be filed within three months after the award is delivered to the parties. If the motion is not filed within three months, then a subsequently filed motion is untimely, and the court must ignore it.

Consistent with the long-standing policy of favoring the resolution of disputes by arbitration, a court has a very limited right to reverse the decision of an Arbitration Panel if a motion to vacate is filed. Ohio courts have repeatedly held that a court may not substitute its decision for the decision of the arbitrator even if it believes that the decision of the arbitrator is factually or legally incorrect. In fact, the only bases for setting aside the decision of an arbitrator are found in Revised Code §2711.10 which includes the following:

1. That the award was procured by corruption, fraud, or undue means.
2. There was evidence of partiality or corruption on the part of the arbitrators, or any of them.
3. The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent or material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
4. The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

In the absence of proof of any of these grounds, the award of the arbitrators must be affirmed. One court has stated:

> *The only way to give effect to the purposes of the arbitration system of conflict resolution is to give lasting effect to the decisions rendered by an arbitrator whenever possible. Therefore, a reviewing court is precluded from reviewing the merits of the arbitrator award since doing so would interfere with and/or undermine the positive attributes of the arbitration system.*

Assuming that the local Board follows the provisions specified in the NAR Code of Ethics and Arbitration Manual, it is extremely unlikely that a common pleas court will ever set aside an arbitration award by a REALTOR® panel. The arbitration procedures in the Manual are designed to provide the parties with an opportunity to challenge the independence of the arbitrators on grounds of partiality or corruption, and further provide for a limited right of appeal to the Board of Directors of the local Board in the event that there is any evidence of a denial of due process.

B. REALTOR® Arbitration System

1. The Duty to Arbitrate

As stated above, REALTORS® are required to arbitrate real estate commission disputes as a condition of membership in the REALTOR® Association, rather than pursuing litigation in a court of law. Article 17 of the Code of Ethics describes those kinds of disputes that must be arbitrated. Article 17 provides:

> 1) In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between REALTORS® associated with different firms, arising out of their relationship as REALTORS®, the REALTORS® shall submit the dispute to arbitration in accordance with the regulations of their Board or Boards rather than litigate the matter.
>
> In the event clients of REALTORS® wish to arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall arbitrate in

accordance with the regulations of their Board, provided the clients agree to be bound by the decision.

Standard of Practice 17-4 was added to the Code of Ethics in January 1997. Before this addition, there always had to be a contractual relationship between the REALTORS® before there was a duty to arbitrate or before a local Board could require arbitration. Now, Standard of Practice 17-4 adds four specific situations in which REALTORS® are obligated to submit matters to arbitration even though there is technically not a contractual relationship between the parties. The first scenario is a situation in which a listing broker compensates a cooperating broker (CB-1), believing him to be the procuring cause of the sale; and another cooperating broker (CB-2) subsequently claims to be the procuring cause of the sale. Before SOP 17-4, the cooperating broker claiming that he should have been paid (CB-2) was required to institute an arbitration proceeding against the listing broker to recover the selling share of the commission. The listing broker could then bring CB-1 into the arbitration and there was, in essence, a three-party hearing. Now, CB-2 can proceed directly against CB-1 even though there is no contractual relationship between the two cooperating brokers. The old procedure is still available, but this new procedure provides a method whereby the listing broker need not be involved in the arbitration since he has no vested interest in whether the selling share of the commission goes to either of the cooperating brokers.

The second scenario under SOP 17-4 involves a situation in which the seller compensates the buyer's broker or tenant representative directly. If the listing broker has reduced his commission to provide the funds necessary for the seller to compensate the buyer/tenant representative directly, then a new cooperating broker claiming to be the procuring cause of the transaction may bring his arbitration claim directly against the buyer/tenant representative (and need not involve the listing broker) even though there is no contract between the buyer/tenant representative and the person claiming to be the procuring cause of the sale.

The third scenario under SOP 17-4 involves a situation in which a buyer/tenant representative is compensated directly by the buyer or tenant, and, as with the two scenarios above, the listing broker reduces his commission since he no longer has a need to share the selling portion of the commission with the buyer/tenant representative. Once again, if another broker claiming to be the procuring cause of the sale initiates arbitration, he is now permitted to initiate that arbitration directly against the buyer/tenant representative even though there is no contract between him and the buyer/tenant representative.

The last scenario under SOP 17-4 involves two or more listing brokers, each claiming to be entitled to compensation from the seller pursuant to an open listing. Obviously, there is no contractual relationship between the two brokers claiming to be listing brokers; however, SOP 17-4 now recognizes that the listing broker claiming to be the procuring cause can initiate an arbitration against the listing broker who was paid the commission even though there is no contract between them.

In summary, there normally must be a contract between the two parties to the arbitration before the Arbitration Panel has jurisdiction to decide commission entitlement. There are only four exceptions, and they are discussed above. If none of these exceptions apply, then the Arbitration Panel cannot arbitrate a dispute between REALTORS® unless there is evidence of a contractual relationship between them. This is the reason, more fully discussed below, that Arbitration Panels must first focus on the contractual relationship between the parties before applying principles of procuring cause.

2. Code of Ethics and Arbitration Manual

The governing document for REALTOR® arbitration is the Code of Ethics and Arbitration Manual promulgated by the National Association of REALTORS® and periodically updated and supplemented. NAR mandates the adoption of many of the provisions in the Manual although there are a few that NAR specifies to be permissive, that is, a local Board can choose not to adopt a provision or may adopt alternatives to the provision.

The Manual has been developed over many years, and most of its provisions have been litigated in one forum or another. In essence, compliance with the Manual ensures compliance with due process of law, one of the prerequisites to valid dispute resolution in Ohio. Due process of law is a constitutional principle which requires nothing more than fundamental fairness in the resolution of disputes. Due process is flexible depending upon the right at stake. For example, in a criminal proceeding in which incarceration is a possible outcome of a judicial hearing, then the highest form of due process is required. On the other hand, when there is no risk of incarceration to the accused, and only lesser rights are involved, i.e., the right to money, the right to a license, the right to a permit (like a driver's license or a fishing license), then lesser degrees of due process are required. Suffice it to say that for purposes of this discussion, NAR has balanced the degree of due process required with the rights involved in REALTOR® arbitrations through the provisions of NAR's Manual. Minimal due process requires only that the parties have notice of what is involved in the proceeding and an opportunity to present their case. The Manual satisfies these fundamental prongs of due process, and then goes on to provide other specific due process rights. It is unnecessary for local Boards and/or Arbitration Panels to determine independently the degree and level of due process required in any case as long as they simply follow the judicially tested provisions in the Manual.

3. Due Process Rights

What due process rights do REALTORS® have in the arbitration process? First, they are entitled to notice that a claim to a real estate commission has been filed against them. This is accomplished by the Complainant filing a complaint with the local Board and the local Board then providing notice of the complaint and an opportunity to respond to the Respondent. The parties are then entitled to a hearing before an impartial, unbiased panel of arbitrators. Neutrality is assured by giving the parties an opportunity to challenge any member of the professional standard committee on forms provided by the

local Board. The Arbitration Panel is ultimately made up of only those individuals who have not been successfully challenged by any of the parties.

Next, the parties are entitled to be represented by counsel at the hearing. The parties are required to give 15 days advance notice that they will be represented by counsel; however, even if timely notice is not given, the Arbitration Panel should take all steps, including continuance of the matter, if necessary, to guarantee all parties the right to representation by counsel.

The parties are also permitted to call witnesses to testify at the hearing. As with legal counsel, the parties are required to give 15 days advance notice of the witnesses that they will be calling; however, once again, Section 30 of the Manual provides that the Hearing Panel may still permit the testimony of a witness not timely identified if the Hearing Panel believes that the testimony of that witness is essential to insure due process. In this case, the Hearing Panel must offer the adverse party a right to request that the hearing be recessed and continued for a period of not less than five days. Section 28 of the Manual specifically requires members of the REALTOR® to cooperate with the arbitration procedure and to appear as witnesses if requested by either party. The failure of a member to attend a hearing if properly requested can constitute a violation of the Code of Ethics. Moreover, Ohio law permits Arbitration Panels to issue subpoenas to witnesses to compel them to attend the hearing. A subpoena issued by Arbitration Panel is enforceable in the common pleas court in the county in which the arbitration takes place.

Additional procedural rights in arbitration hearings include the right of cross examination, the right to make opening and closing arguments and the right to a limited right of appeal to the Board of Directors if a non-prevailing party believes that his due process rights have been infringed in the course of the arbitration process. There is no right to appeal simply because the non-prevailing party disagrees with the judgment of the Arbitration Panel, but if the non-prevailing party can establish that he was not given adequate notice, an adequate opportunity to present his case, that the Arbitration Panel did not act impartially, or some other specific violation of a provision of the Manual, then the Board of Directors can set aside the award of Arbitration Panel and refer the case to a new panel for a new hearing.

4. Mandatory and Permissive Arbitrations

Just as REALTORS® are required to submit certain disputes to arbitrations, local Boards are required, by virtue of their charters, to provide arbitration facilities for the resolution of commission disputes. Three types of arbitrations are mandatory, that is, the local Board must provide arbitration facilities for these kinds of arbitrations; and three types of arbitrations are permissive, that is, that the local Board may or may not choose to provide arbitration facilities for these kinds of arbitrations.

Mandatory arbitrations include:

(1) disputes between REALTOR® principals of different firms over rights to a real estate commission,

(2) disputes between REALTORS®, other than principals, provided their principals join in the arbitration, and,

(3) disputes between clients and REALTOR® principals arising out of an agency relationship, providing that the client agrees to be bound by the arbitration.

Permissive arbitrations include:

(1) arbitrations between REALTORS® and REALTOR® associates who are or were affiliated with the same firm at the time the dispute arose, irrespective of the time the request for arbitration is made,

(2) disputes between REALTOR® (principals and non-members provided the non-members agree to be bound by the award and recognizing that it is completely optional for members to agree to arbitration, and

(3) disputes between REALTORS® and customers, provided there is a written contractual relationship created by a REALTOR® principal between a customer and a client.

5. Parties

The parties to an arbitration proceeding must include the Designated Broker of both firms, the complainant and the respondent. This is true not only because of the provisions of the Manual, but because of the provisions of Ohio law. In Ohio, only brokers are entitled to assert claims for real estate commissions, and real estate commissions can be paid only to licensed brokers. Other parties may be included in the caption of the arbitration, for example, the agent involved in the transaction, and these agents may be considered parties for purposes of participation in the hearing; however, the agent's broker must also be a party.

In Ohio, many firms have corporate broker licenses and the real estate commission in dispute is either paid to or claimed by the corporate broker. Even though membership in the REALTOR® Association is individual, that is, corporations are not members of the Boards, the Designated Broker still has a duty to participate in the arbitration process on behalf of his firm in those situations in which the disputed real estate commission has been paid to the corporate broker. The Designated Broker need not attend the hearing if he has no information regarding the transaction, and it is common to designate an office manager or other person who is more knowledgeable about the dispute to be the representative of the brokerage at the hearing.

6. Refusal to Arbitrate

There are several ways to deal with situations in which members refuse to participate in the arbitration process even though they fall within the mandatory provisions discussed above. First, the refusal to cooperate with the arbitration procedures can be deemed to be a violation of a membership obligation and subject the member to discipline pursuant to the Ethics provisions of the Code of Ethics and the Manual. Second, in the instance in which a member commences litigation against another member to recover a real estate commission, the defendant-member may file a motion to stay the arbitration in the common pleas court until the dispute is submitted to arbitration at the local board. Most often, the common pleas court will agree to stay the legal proceeding until the arbitration is completed.

Finally, in the event that a party cooperates with the arbitration procedure but then refuses to abide by the award, then this matter should be brought to the attention of Board of Directors directly, and the Board of Directors is permitted to investigate the matter and sanction the non-complying member in accordance with principles of due process of law. On some occasions, a Respondent refuses to participate in a required arbitration, and the Arbitration Panel must decide whether or not it can proceed with the arbitration in the absence of the Respondent.

The NAR Manual provides three options to local Boards depending upon what is permitted by applicable state law. The first option provides that if a Respondent will not submit a signed Response and Agreement Form and the appropriate deposit, then the Arbitration Panel cannot proceed with the arbitration. The second option provides that in the event that the Respondent fails to sign and return the Response and Agreement Form and/or fails to make the required deposit, the Arbitration Panel can proceed with the arbitration as long as the Respondent appears and takes part in the hearing. The third option provides that the Arbitration Panel may proceed with the hearing and decide the case based upon the evidence submitted even if the Respondent has not signed the Response and Agreement Form, made the deposit, and appeared at the scheduled hearing. Although there is virtually no case law in Ohio directly in point, Ohio law does suggest that Option 3 is permissible and consistent with Ohio law. In other words, an Ohio court would enforce an arbitration award issued against a Respondent who chose not to participate in any way in the arbitration as long as the Complainant could prove that the Respondent had a contractual duty to arbitrate by virtue of his membership in the REALTOR® Association.

PART TWO: PROCURING CAUSE – GENERAL INFORMATION

A strong case can be made that access to arbitration as a means of resolving commission disputes may be the most valuable right of membership in the REALTOR® (Association. Often the amount of the commission in dispute is less than five thousand dollars (i.e., the selling share of the

commission), and most likely legal fees involved in judicial litigation will exceed the amount in controversy before the case is resolved. Moreover, it is not unusual to see delays in trial dates of up to two years or more. On the contrary, arbitration provides a quick, efficient and economical method of dispute resolution before decision-makers who are familiar with the practice of real estate and the intricacies of commission disputes.

Naturally, though, the legitimacy and corresponding acceptance of the duty to arbitrate depends upon the fairness of the arbitration process. This is where due process and the obligation to decide cases in conformity with state law come into play. Obviously, an arbitration system which does not provide due process and does not produce results in accordance with applicable law cannot long survive.

This is why professional standards committees, and Arbitration Panels appointed therefrom, must understand and be prepared to apply the concept of "procuring cause." In most cases, Ohio law provides that the broker who is the procuring cause of the sale is the broker entitled to the commission. Therefore, it is the purpose of this section to discuss what procuring cause is and when it should be employed to determine a party's right to share in a real estate commission.

A. Rule of Law

"Procuring cause" is a legal concept utilized by Ohio courts when determining the rights of real estate brokers to real estate commissions. Basically, it is a judicially created doctrine which applies whenever the broker's claim to a real estate commission is based upon an arrangement other than an Exclusive Right to Sell Listing Agreement. When a listing broker seeks a real estate commission pursuant to an Exclusive Right to Sell Listing Agreement, it is not necessary for that broker to establish that he was the procuring cause of the sale. Rather, he is entitled to a commission pursuant to the seller's contractual obligation to pay a commission if the property is sold or otherwise transferred during the period of the listing or any extension period provided for in the listing agreement.

It may be obvious, but it is important to recognize that the listing broker in most cases is entitled to a commission even though he may not be the procuring cause of the sale. That is why it is important in the resolution of commission disputes for the Arbitration Panel to first determine the basis upon which the right to a commission is claimed.

There are basically four types of underlying agreements upon which a right to a commission can be claimed. First, as discussed above, is the Exclusive Right to Sell Agreement. The National Association of REALTORS®, in its Statement of Multiple Listing Policy, has defined this type of agreement as follow:

> *A contractual agreement under which the listing broker becomes the agent of the seller(s) and the seller(s) agrees to pay a commission to the listing broker <u>regardless of whether the property is sold through the efforts of listing broker</u>, the seller(s) or anyone else; and a contractual agreement under which the listing broker becomes the agent of the seller(s) and the seller(s) agrees to pay a commission to the listing broker <u>regardless</u>*

of whether the property is sold through the efforts of the listing broker, the seller(s) or anyone else, except that the seller(s) may name one or more individual or entities as exemptions in the listing agreement and if the property is sold to any exempted individual or entity, the seller(s) is not obligated to pay a commission to the listing broker. (emphasis added.)

This somewhat complicated definition simply states that the right to a commission is not dependent upon a finding of procuring cause, but if the property is transferred during the term of the listing as a result of the efforts of anyone, including the seller, then a real estate commission is owed to the listing broker. Once again, it does not matter if the listing broker was the procuring cause of the sale.

The second type of listing agreement is the Exclusive Agency Agreement. It is defined as follows:

A contractual agreement under which the listing broker becomes the agent of the seller(s) and the seller(s) agrees to pay a commission to the listing broker if the property is sold through the efforts of any real estate broker. If the property is sold solely through the efforts of the seller(s), the seller(s) is not obligated to pay a commission to the listing broker.

In this type of arrangement, the seller is not obligated to pay a commission if he sells the property himself. On the other hand, if the property is sold through the efforts of the listing broker, or any other real estate broker, then the listing broker is entitled to a commission pursuant to the terms of the listing agreement. Procuring cause may become a factor in determining a right to a commission pursuant to this type of agreement in the event that there is a dispute between the seller and the listing broker as to who actually sold the property. In a dispute between the listing broker and the seller, if the broker is able to prove that he or another real estate broker was the procuring cause of the sale, then that broker is entitled to a commission. On the other hand, if the seller is able to prove that he was the procuring cause of the sale, then no commission is owed. Therefore, this type of arrangement can give rise to two types of procuring cause disputes. The first is a dispute between the seller and the listing broker as to who actually was responsible for the sale of the property. The second is between the listing broker and one or more selling brokers claiming to be the procuring cause of the sale when there is no question that the seller was not the procuring cause of the sale. Although hard to imagine, it is conceivable that there could be an arbitration between all of these parties where the seller claims he was the procuring cause of the sale, and therefore, no broker is entitled to a commission; the listing broker claims he was the procuring cause of the sale and is therefore entitled to the commission; and one or more selling brokers claim that they were the procuring cause of the sale and therefore have a right to share in the selling portion of the listing broker's commission.

The third type of listing agreement is the Open Listing Agreement. It is defined as follows:

A contractual agreement under which the listing broker becomes the agent of the seller(s) and the seller(s) agrees to pay a commission to the listing broker only if the property is sold through the efforts of the listing broker.

This is the instance in which a seller agrees to pay a real estate commission to any broker who is able to establish that he is the procuring cause of the sale. It is the type of arrangement that is discussed in the case law most often because it frequently produces lawsuits between the seller and the broker. Since sellers are not required to submit disputes to arbitration at the local Board level, these cases usually find their way into the judicial system. Much of the case law defining "procuring cause" has been developed by courts which have attempted to determine whether or not the broker was the procuring cause of the sale pursuant to an Open Listing Agreement. This is also the type of contract involved when two brokers claim to have produced the buyer pursuant to an Open Listing and they each claim a right to the commission. Pursuant to SOP 17-4, an Arbitration Panel can now hear this commission dispute even though there is no contractual relationship between the two brokers (see above).

The last type of arrangement in which procuring cause is important is the one with which real estate brokers are most often involved. It is the "cooperation" agreement. In the traditional real estate transaction, the listing broker makes an offer of cooperation to a selling broker who accepts the offer of cooperation by producing a ready, willing and able buyer on terms acceptable to the seller. If the selling broker, whether he is a subagent or buyer's agent, is the procuring cause of the sale, then he is entitled to share in the listing broker's commission. Often two or more brokers claim to be the selling broker and the procuring cause of the sale. In these situations, each selling broker attempts to prove that he was the procuring cause of the sale, and, therefore, entitled to share in the commission. This is the most common type of commission dispute that Arbitration Panels face – probably because of the role the multiple listing services plays in the creation of "cooperation" agreements. The placement of a listing in the multiple listing service constitutes a blanket uniform offer of cooperation to all other participants in the multiple listing service. It most cases it is the vehicle for the creation of the "cooperation" agreement. However, there are other ways to create a "cooperation" agreement. It can be done by letter agreement outside the MLS, either a blanket letter to all or several brokers in the area or a letter describing a specific arrangement with any particular broker.

The important point to be made in this section is that there must be some underlying contractual right to a commission before the issue of procuring cause ever arises. The underlying contract may be any one of those types of agreements discussed above, but there must be some agreement to share a commission with a broker if the broker is able to establish that he is the procuring cause of the sale.11 If there is no such agreement, even if the broker is able to prove that he is the procuring cause of the sale, he is not entitled to a commission. Rather, the courts will say that the broker performed as a "volunteer," and sellers and brokers are not required to compensate volunteers for their services, no matter how valuable.12

In Ohio it is not necessary for the underlying commission agreement to be in writing.13 It can be an oral contract since oral listing agreements and buyer agency agreements are presently enforceable in Ohio. It can also be an implied in fact contract based upon circumstantial evidence of the relationships between the parties.14 However, it is always recommended that such underlying agreements be in writing because a written contract eliminates much of the difficulty with proving the existence of the contractual relationship should the matter result in litigation.

It is also clear in Ohio that the underlying contract, although it can be an implied contract, cannot be a contract that is implied solely based upon the custom and practice in the industry.15 In some Ohio cases, brokers have attempted to prove that they had a contractual right to a commission because "everyone" is familiar with the commission sharing practices common in real estate transactions. Brokers ask the court to find that this "familiarity" is a substitute for an actual agreement to share the commission with a broker who proves that he is the procuring cause of the sale. Ohio courts have uniformly rejected this approach and required proof of the existence of an actual agreement before they will award a commission to a broker who is able to establish that he is the procuring cause of the sale.

Although, Ohio courts will not imply the existence of a contract simply because a party produces evidence of the "custom and practice" in the industry, courts will look at all the facts to determine if there has been a "meeting of the minds" with respect to the obligation to pay a real estate commission. This is what is known as an "implied in fact" contract and can be the basis for the recovery of a real estate commission even if there is no proof of an express, written agreement or a direct oral agreement.16

Most recently, courts have been asked to accept a third kind of agreement as a basis for the award of a real estate commission – an "implied in law" contract. An "implied in law" contract differs from an "implied in fact" contract in that it is really not a contract at all. It is basically a legal fiction created by the courts to produce a fair and equitable result.17 Although it appears that no court has yet accepted an "implied in law" contract argument in the context of a real estate dispute, it may be an argument that will be made to Arbitration Panels. There is enough support for "implied in law" contracts in other kinds of Ohio judicial decisions that an Arbitration Panel could, in the right case, accept this theory as a basis for awarding a commission when there does not appear to be an express or implied in fact contract. This will be unusual though, and should be accepted only when absolutely necessary to reach a fair and just result.

This message, then, for Arbitration Panels is to first determine the basis for the commission claim and then turn to the issue of procuring cause. If there is no underlying agreement, then it is unnecessary to deal with the issue of procuring cause.

B. Proposed Definitions of "Procuring Cause"

There is no single definition of procuring cause which captures all aspects of this multi-faceted concept. Indeed, courts have consistently held that what is procuring cause is any particular case depends upon the facts unique to that case. Moreover, courts are required to take into consideration all of the facts in a particular case and look at the entire course of conduct involved, as opposed to concentrating upon any single fact as determinative of the outcome. In Bauman v. Worley, 166 Ohio St. 471 (1957), the seminal case in Ohio dealing with procuring cause, the Ohio Supreme Court wrote:

It is apparent that cases of the kind under review have factual differences and that whether a broker claiming a commission for the sale of real estate was the "procuring cause" thereof depends largely on the particular facts of the individual case. 166 Ohio St. at 473.

Therefore, it may be helpful to look at several different definitions of procuring cause, all fundamentally the same, but emphasizing different factors that may have special meaning when applied to a particular set of facts. Four proposed definitions are set forth below, and procuring cause is really a combination of all four. Nevertheless, looking at each definition separately demonstrates key factors that may be important in individual cases.

1. The definition most commonly discussed in Ohio case law is that which first appeared in Bauman v. Worley, supra. In Bauman, the Ohio Supreme Court defined procuring cause as follows:

   The term 'procuring cause' as used in describing a broker's activity, refers to a cause directly originating a series of events which without break in their continuity directly result in the accomplishment of the prime objective of the employment of the broker, namely, the producing of a purchaser ready, willing and able to buy real estate on the owner's terms. 166 Ohio St. at 471.

There have been more than one hundred decisions of Ohio courts dealing with the concept of procuring cause, and the vast majority have referred to the Bauman definition. It has several aspects. It recognizes that there is no single event that is the procuring cause of a sale, but the court must look to the broker who originated the series of events which continued in motion and resulted in the production of ready, willing and able buyer. Incidentally, it also recognizes that only a broker, that is an individual holding an Ohio broker's license, is entitled to collect a commission. Salespersons affiliated with brokers are not entitled to bring an action for a commission in their own name. Finally, implicit in this definition is the recognition that the broker was actually "employed" to find a ready, willing and able buyer. This is another way of saying that there must be some underlying contractual agreement that serves as the basis for the right to a commission, or it does not matter who originated the series of events which produced the buyer.

2. A second definition, which is not found verbatim in the case law, but which captures many aspects of the Bauman definition any may incorporate a few additional concepts is as follows:

   Procuring cause is the origination and cultivation of a chain of events, which remaining unbroken, directly results in the production of a ready, willing and able buyer on the terms of the listing agreement or such other terms as are acceptable to the seller.

This definition adds to the "origination" concept in the Bauman definition the concept of "cultivation." In cases where two brokers are claiming to be the procuring cause of the sale, it is sometimes insufficient to simply "originate" a series of events. Rather, there has to be something

in addition to origination and that is referred to as cultivation. A broker claiming a commission helps his case by being able to demonstrate that, not only did he originate the series of events, but that he also continued throughout the transaction to cultivate that series of events, thereby bringing about the sale. Perhaps there are some cases in which a single event, which originated the series of events, may be enough to establish procuring cause, but the case law seems to suggest that most cases require more. How much more a broker must do to establish his right to a commission is, once again, dependent upon the particular facts of the case. Nevertheless, Arbitration Panels may be able to resolve procuring cause disputes more easily if they look not only for the originating event but also to the broker's activity subsequent to the originating event.

This definition also recognizes that a broker may be entitled to a real estate commission even if the property is not transferred. Most listing agreements and "cooperation" agreements provide that a broker is entitled to a commission if he produces a ready, willing and able buyer on the terms of the listing agreement or such other terms acceptable to the owner. Therefore, if the broker produces a buyer who is willing to buy the real estate precisely on the owner's terms as set forth in the listing agreement, then the broker is arguably entitled to a commission even if the owner changes his mind and decides not to sell. In such a situation, the owner would have no obligation to sell the property, and the buyer could not compel the owner to sell; however, the owner would still owe a commission to the broker.

3. A third proposed definition, which more specifically injects the concept of "abandonment" into the procuring cause definition, is as follows:

   Procuring cause is the initiation of an uninterrupted series of events which is directly responsible for the presentation of an offer to purchase that is accepted by the seller or accords with the terms of the listing agreement, or if the series of events is interrupted, such interruption is not the fault of the broker claiming the commission, which broker continued to act fairly and professionally to bring about the sale to the extent permitted by the circumstances.

This definition focuses more directly on the circumstances surrounding the appearance of a second selling broker in the transaction. As stated above, most commission disputes involve two brokers both of whom claim to be the procuring cause of the sale. Both brokers ask the listing broker to share his commission with them pursuant to the terms of the listing broker's offer of cooperation. In most cases, the first broker claims that he initiated the series of events resulting in the sale, and the second broker claims that he came along after the first broker's claimed origination and commenced a new series of events which was the true cause for the sale. In other words, the second broker claims that the first broker's series of events terminated because the first broker "abandoned" the prospect before the decision to purchase was made. In these situations, the Arbitration Panel, or the courts in some cases, should look at how the second broker injected himself into the transaction. Does the second broker's activity constitute an intrusion upon the services of the first broker, or, in fact, had the first broker neglected the prospect to the point of abandonment such that the second broker did commence a new chain of events.

This proposed definition also suggests that an Arbitration Panel should consider not only how the second broker became involved in the transaction, but also how the two brokers acted when the second broker's involvement became apparent. Did the two brokers, or neither one of them, continue to act professionally to bring about the sale? It must be remembered that both brokers, to the extent that they are claiming a right to share in the listing broker's commission pursuant to a "cooperation" agreement, owe to their clients a fiduciary duty to conduct themselves in the best interests of their clients. This means that the two brokers should reserve their dispute for resolution after the closing, as opposed to allowing their dispute to interfere with the seller's best interests.

As can be seen, this proposed definition, more than the others, focuses upon the behavior of the brokers at the time a controversy arises. It should bring to an arbitrator's mind the following kinds of questions:

(1) Did the second broker know of the activities of the first broker?

(2) If the second broker knew of the first broker's activities, how did the second broker communicate with the first broker about his new involvement?

(3) How did the first broker respond when he learned of the second broker's involvement?

(4) Did the brokers continue to place the seller's interests paramount, perhaps requiring one of the brokers to stop working on the transaction, even though he knows that the second broker may subsequently claim that he abandoned the prospect?

(5) What discussion did the second broker have with the prospect at the time the second broker learned that the prospect had had some contact earlier with another broker?

It is possible that the answers to some of these questions may give rise to ethical considerations. If the brokers are REALTORS®, they have pledged to conduct themselves in accordance with the Code of Ethics promulgated by the National Association of REALTORS®, and their acts, or failures to act, may give rise to an ethical complaint. However, an ethical violation, standing alone, is not conclusive of a broker's right to a commission pursuant to procuring cause concepts. This explains why the National Association of REALTORS® requires that the commission dispute be heard by an Arbitration Panel first before an ethical complaint is heard by a professional standards panel when the same transaction gives rise to both types of claims. Nevertheless, although ethical complaints are not conclusive on the issue of procuring cause, they are clearly one factor that an Arbitration Panel can take into consideration when looking at the whole course of conduct involved in the determination of procuring cause.

4. The last proposed definition is the simplest. It reads as follows:

   Procuring cause is the predominate contributing cause of the sale of real estate.

This definition recognizes that there is only one procuring cause of the sale. Therefore, in most cases, the Arbitration Panel cannot find that both brokers, claiming a right to a commission, are the procuring cause of the sale. On the contrary, the Arbitration Panel must look at the actions of both brokers and determine which of the broker's actions were the most important, or most

predominate in bringing about the sale. There need not be only one cause of the sale, but the Arbitration Panel should endeavor to find the most important cause. Stated otherwise, the Arbitration Panel should determine that act without which the sale would not have occurred, or, if there is more than one act, the act that was most important in contributing to the sale. Then it is a simple matter to determine which broker performed the key act and that broker is the procuring cause.

This is not to say that an Arbitration Panel, in some rare instance, is not entitled to split the disputed portion of the commission between two brokers claiming to be the procuring cause. Technically, it can be argued that such a result is not consistent with Ohio law, but the concept of procuring cause is sufficiently broad to permit this kind of result in an unusual case. Moreover, Ohio courts give great deference to results produced by duly constituted Arbitration Panels, and, in fact, courts consistently affirm the decision of arbitrators even if the courts have a different opinion of the facts or believe that the arbitrators misapplied Ohio law. Therefore, though not to be encouraged, in an unusual case an Arbitration Panel can find that both brokers contributed so significantly to the sale that each should be entitled to share in the commission.

C. No Predetermined Rule or Regulation

With respect to commission disputes submitted to arbitration pursuant to Article 17 of the Code of Ethics, it is absolutely clear that there should be no predetermined rule or regulation that conclusively determines procuring cause in all cases. On the contrary, the arbitrators must look at the entire course of conduct and determine procuring cause on a case by case basis depending upon the particular facts presented. No one fact should be entitled to greater weight in all cases.

Admittedly, this eliminates some degree of certainty and predictability in commission disputes, but the price for this elimination is hopefully a fair and just result in each and every case. For example, some have advocated the application of a threshold rule. If such a rule were applied, then the broker who took the prospect over the threshold would automatically be the procuring cause in all instances. In some cases this would produce a fair result, but in many cases it would produce an unfair result. Another rule advocated by some is one that would automatically award the commission to the broker who "prepared and presented the contract." Still others have advocated a rule which adopts a "protection period." Under a "protection period" rule, the broker who first meets with a prospect would have a specified period of time to bring about the sale, and if the purchase contract was executed during this period, then that broker is automatically the procuring cause of the sale, regardless of what he actually contributed to the sale or other brokers contributed to the sale.

Once again, in some cases these rules would produce a fair result and in other cases they would not. The National Association of REALTORS®, consistent with Ohio law, has determined that justice is more important that certainty and predictability. The justification for certainty and predictability, that is, that it will all even out in the end with the broker winning some he should lose and losing some he should win, has been rejected. In its place is the concept that no predetermined rule should be utilized by arbitrators, and brokers should win those that they should win and lose those that they should lose without reference to some arbitrary rule which

may not fit the particular facts in a particular case. In fact, the National Association of REALTORS® (requires local Boards to subscribe to a policy which forbids the use of predetermined rules when determining issues of procuring cause. The use of a predetermined rule is considered an inequitable limitation on REALTOR® membership. See Interpretation No. 31, Official Interpretations of Article I, Section 2, Bylaws of the National Association of REALTORS®, adopted May 8, 1973 and revised January 31, 1977. Once again, Arbitration Panels must look at the whole course of conduct and not focus as a matter of routine on any one aspect of a transaction.

D. Summary

Procuring cause is a flexible doctrine which endeavors to allocate justly and fairly rights to real estate commissions on a case by case basis in light of the particular facts presented. Its applicability requires first the presence of an underlying contractual right to a commission, and second, activities which constitute the predominate cause of bringing together a seller and a ready, willing and able buyer on terms acceptable to the seller. Clearly, the real estate broker claiming the commission need not be the sole cause of the sale, but he must be the primary cause. Moreover, procuring cause is not a question of how much work a broker does, rather a question of how effective the broker's work was in fulfilling the object of the agency.

Most importantly, there can be no predetermined rule or regulation which answers the procuring cause question in all commission disputes. To the contrary, arbitrators must look to the whole course of conduct in determining a broker's entitlement to share in a real estate commission.

PART THREE: THE EFFECT OF BUYER AGENCY ON PROCURING CAUSE

A. Procuring Cause is Still the Rule of Law

With the advent of Buyer Agency, two schools of thought developed. The first school advocated a replacement of the concept of procuring cause with buyer agency. In other words, supporters of this theory argued that a cooperating broker who had an agency relationship with the buyer or tenant should automatically be entitled to the selling share of the commission whether he was the procuring cause of the sale or not. His rights to the commission should be based upon his contract with the buyer/tenant, not based upon any contractual relationship between the listing broker and the cooperating broker.

The second school of thought argued that buyer agency was irrelevant to a determination of commission rights between a listing broker and a selling broker. The listing broker is not a party to the agreement between the buyer and the buyer's agent, and therefore, that contract should not control the listing broker's obligation to share the real estate commission. Moreover, procuring cause is a concept designed to produce equity and fairness in real estate disputes, and the elimination of procuring cause jeopardizes the likelihood of fair and equitable outcomes.

Very shortly after these two schools of thought began competing for the approval of NAR, NAR came out strongly endorsing, even mandating, the second school of thought. Procuring cause has not been replaced by buyer agency. Procuring cause is still the rule of law that must be used in determining commission disputes. Buyer agency may be one factor the Arbitration Panel needs to take into consideration, but it is just that – one factor that may or may not have relevance to the determination of procuring cause.

The best examples of the interplay between buyer agency and procuring cause are found at Appendix 1 and II to Part Ten of NAR's Code of Ethics and Arbitration Manual which is attached hereto and incorporated into this paper. Appendix I and II contain an excellent discussion of procuring cause, guidelines for the determination of procuring cause, and examples of how commission disputes might be decided when procuring cause runs head long into claims of buyer agency.

Buyer agency has brought many changes to the practice of real estate. For example, NAR substantially revised its Code of Ethics, reorganizing, eliminating and rewriting many of the Articles – perhaps the first substantial revision since the Code was originally enacted in 1913. Moreover, Multiple Listing Service rules and regulations have been modified to recognize that the placement of a listing in the multiple listing service can now constitute an offer of cooperation to both subagents and buyer's agents, not just subagents as formerly the case. Furthermore, listing brokers no longer need to offer sub-agency; they can limit their offer of compensation to buyer's representatives. An offshoot of these changes and other changes is to preserve procuring cause as the rule of law in resolving commission disputes.

In addition to the examples discussed in Appendix I and II to Part Ten of the Manual, there are a couple of fact patterns that commonly find their way into commission disputes before local Boards in Ohio. Perhaps the most common is the open house situation.

B. Open Houses

In the typical open house situation, a listing broker schedules an open house which is attended by potential buyers. Those buyers may or may not be accompanied by the real estate licensee with whom they are working. Moreover, their real estate licensee may or may not be a buyers' agent, that is, he may or may not have entered a contractual relationship, express or implied, with the buyers. Furthermore, the potential buyers may have found the open house with the effort and assistance of the licensee with whom they are working, or they may have found the open house on their own. In those situations in which the potential buyers actually purchase the property, often both the listing broker, who was present at the open house and showed the property to the buyers initially, and the broker with whom buyers had been working, claim a right to the real estate commission. It has been estimated that well over one-half of the commission disputes coming before Arbitration Panels fall somewhere within this fact pattern. Whereas no Arbitration Panel is bound by the suggestions in this paper as to how these commission disputes should be handled (since there can be no predetermined rule), reasonable theories for dealing with these situations are set forth below.

First, consider the situation in which the buyers' agent does not accompany the buyers to the open house. Furthermore, the buyers' agent did not assist the buyers in finding the open house; the buyers located the open house by driving by the for sale sign or seeing an advertisement by the listing broker in the newspaper. The buyers then toured the open house with the listing broker and immediately become interested. They call the listing broker subsequently to see the property again, and the listing broker answers their questions and provides them with property-specific information. The listing broker asks the buyers if they are represented by another real estate licensee, and the buyers say that they are not. Buyers then ask the listing broker to prepare a purchase contract which he does after disclosing that he is the agent of the seller, not their agent. The contract is presented and accepted, and the listing broker receives both the listing share of the commission and the selling share of the commission. The cooperating broker learns that "his" buyers have purchased the property and files a complaint with the local Board claiming a right to the selling share of the commission. In this scenario, it would be fairly easy for the Arbitration Panel to determine that the buyers' agent was not entitled to the selling share of the commission. Clearly, he was not the procuring cause of the sale; in fact, he had very little to do with "his" buyers' decision to purchase the property. The fact that he had a buyers' agency agreement with the buyers does not replace the applicability of principles of procuring cause, and the Arbitration Panel should award the disputed commission to the listing broker.

Changing this scenario slightly, the buyers' agent does not accompany his clients to the open house, but he does locate the property, discuss the property with the buyers prior to the open house and calls the listing broker and tells him that these buyers will be attending the open house without him. The buyers become interested in the property and return to their broker after the open house to discuss the property with him. They then ask their broker to prepare a purchase contract. Their broker prepares a purchase contract, submits it to the listing broker, and it is ultimately accepted by the seller. The cooperating broker receives the selling share of the commission, and the listing broker files a request for arbitration with the local Board claiming that he first showed the buyers the property, and therefore, he is entitled to the selling share of the commission. In this scenario, it should be fairly easy for the Arbitration Panel to decide that the buyers' broker was the procuring cause of the sale and deny the listing broker's claim for the selling share of the commission.

Obviously, there are a myriad of possible fact patterns that fall between the two examples discussed above – examples that exist at one end of the continuum or the other. In the middle are cases where one or more facts may change, and this change can be determinative of the outcome. It has been suggested that certain open house guidelines be published which will provide some degree of certainty in the resolution of open house/commission disputes. There are some such guidelines in existence although no Arbitration Panel can be bound to apply the guidelines without examining the entire course of conduct and looking at all the facts. In other words, open house guidelines may be instructive in reducing the number of disputes that are brought to arbitration; however, once the disputes are presented to an Arbitration Panel, the Arbitration Panel must decide the dispute based on concepts of procuring cause, not open house guidelines – even open house guidelines that have been disseminated by the local Board.

With this in mind, there are a few rules of thumb that seem prudent. Clearly, if the listing broker who is present at the open house makes a good faith effort to determine if the prospective buyers are separately represented by a buyer agent, then many potential disputes may be eliminated. If the prospective buyers indicate that they are working, or have been working with a buyer's agent, then the listing broker should deal cooperatively with the buyers' agent and recognize that the buyers' agent will most likely be entitled to the selling share of the commission. On the other hand, if the prospective buyers indicate that they are not working with their own agent, and they ask the listing agent to help them with the purchase, either as the agent of the seller or as a dual agent, then the listing broker is more likely entitled to the selling share of the commission.

Furthermore, it is incumbent upon a buyers' agent to take reasonable steps to notify the listing broker that "his" buyers may be attending the open house. He can do this by accompanying his buyers to the open house or at least notifying the listing broker in advance that his buyers will be attending the open house. This significantly increases the likelihood that he will be awarded the selling share of the commission.

There can be no substitute for communication. When brokers talk to each other openly and in good faith, the likelihood of a subsequent commission dispute is significantly reduced.

C. Abandonment and Estrangement

The other fact pattern with which Arbitration Panels are often confronted falls within the broad categories of abandonment and estrangement. Abandonment is the concept that recognizes that the real estate licensee who was working with the prospect does something that is responsible for severing the relationship between that licensee and the prospect. He can fail to return telephone calls; he can fail to give appropriate attention to the prospects, he can fail to give answers to questions asked or give wrong answers; or engage in any other conduct which causes the prospect to decide justifiably to cease working with that licensee.

On the other hand, estrangement involves the situation in which the prospect abandons the licensee through no fault of the licensee. The licensee has been diligent in providing real estate services to the prospect, but for some unjustified reason, the prospect, on his own, decides to begin working with another licensee. That licensee may be a relative, friend, or may have some other relationship with the prospect that causes the prospect to want to benefit that licensee with the selling share of the commission.

In the abandonment situation, the second licensee working with the prospects most often is entitled to the real estate commission. On the other hand, in the estrangement situation, the first licensee working with the prospects is most often entitled to the commission. Naturally, these are general principles and must be analyzed in the context of every commission dispute. However, experience teaches us that most real estate commission disputes can be resolved by determining how the second broker came into the transaction. The first broker is the broker who begins working with the prospect. He either abandons the prospect or he is estranged from the prospect. The second broker then assumes representation of the prospect. Focusing on how

this second broker came into the transaction, and why he became involved, will give guidance to Arbitration Panels as to who is the procuring cause of the transaction.

CONCLUSION

The REALTOR® arbitration system is still driven by the concept of procuring cause. Buyer agency has brought several changes to the practice of real estate in Ohio, but it has not eliminated the concept of procuring cause in commission disputes. Procuring cause continues to be the guiding principle of law which must be applied by Arbitration Panels when determining commission entitlement.

The information presented in this White Paper is not intended to be--and should not be construed as--legal advice. Before applying this information to a specific legal problem, readers are urged to seek advice from their own legal counsel.

Endnotes

1. Schaefer v. Allstate Ins. Co., 63 Ohio St. 3d 708 (1992); Brennan v. Brennan, 164 Ohio St. 2d 2 (1955); Mahoning Cty. Bd. Of Mental Retardation v. Mahoning Cty. TMR Ed. Assn., 22 Ohio St. 3d 80 (1986); Findley City. School Dist. v. Findley Ed. Assn., 49 Ohio St. 129 3d (1990); Ohio Council of AFSCME v. Ohio Dept. of Mental Health, 9 Ohio St. 3d 139 (1984); Campbell v. Automotive Oil and Pret. Co., 162 Ohio St. 321 (1955), and Corrigan v. Rockefeller, 67 Ohio St. 354 (1902).
2. Schaefer, id. at 711.
3. Mahoning Cty., id. at 83.
4. R.C. §2711.01(A)
5. 5 R.C. §2711.09
6. R.C. §2711.09
7. R.C. §2711.13, Beck Suppliers, Inc. v. Dean Witter Reynolds, 53 Ohio App. 3d 98 (Sandusky 1988)
8. Sparks v. Barnett, 78 Ohio App. 3d 448 (Huron 1992), Cleveland v. Fraternal Order of Police, Lodge 8, 76 Ohio App 3d. 755 (Cuy. 1991); Ohio Office of Collective Bargaining v. Ohio Civil Service Employees Assn., 73 Ohio App. 3d 392 (Franklin 1992); Russo v. Chiltick, 48 Ohio App. 3d 101 (Cuy. 1988); Cleveland v. Assn. Of Cleveland Firefrighters, 20 Ohio App. 3d 249 (Cuy. 1984)
9. University Mednet v. Blue Cross & Blue Shield, 126 Ohio App. 3d 219, 230-31 (Cuy. 1997)
10. R.C. §2711.02, Smith v. Dugan & Meyers Construction Co., 18 Ohio Misc. 2d 5 (Clermont 1984)
11. Ostendorf -Morris Company v. Slyman, 6 Ohio App. 3d 46 (Cuy. 1982); McShane v. Kaiser, 108 Ohio App. 514 (Ham. 1958)
12. Ostendorf-Morris, supra.
13. Lint-Hellmuth, Inc. v. Carey, 101 Ohio App. 3d 604 (Clark 1995)
14. Legos v. Tarr, 44 Ohio St. 3d 1 (1989); Stepp v. Freeman, 119 Ohio App. 3d 68 (Greene 1997); Pont East Condominium v. Cedar House Associates, Co., 104 Ohio App. 3d 704 (Cuy. 1995)
15. Ostendorf-Morris v. Slyman, 6 Ohio App. 3d 46 (Cuy. 1982)
16. See, footnote 14, above
17. Stepp, supra, at 73-74

APPENDICES

A. Article 17, SOP 17-4
B. Section 43 and 44, Code of Ethics and Arbitration Manual
C. Representative Procuring Cause Cases
D. NAR Suggested questions for Procuring Cause
E. Appendix I and II to Part Ten of the Code of Ethics and Arbitration Manual

NAR CODE OF ETHICS
ARTICLE 17

In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between REALTORS® associated with different firms, arising out of their relationship as REALTORS®, the REALTORS® shall submit the dispute to arbitration in accordance with the regulations of their Board or Boards rather than litigate the matter.
In the event clients of REALTORS® wish to arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall arbitrate those disputes in accordance with the regulations of their Board, provided the clients agree to be bound by the decision.
(Amended 1/97)

Standard of Practice 17-4

Specific non-contractual disputes that are subject to arbitration pursuant to Article 17 are:

1) 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)

2) Where a buyer or tenant representative is compensated by the seller or landlord, and not by the listing broker, and the listing broker, as a result, reduces the commission owed by the seller or landlord and, subsequent to such actions, another cooperating broker claims to be the procuring cause of 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)

3) Where a buyer or tenant representative is compensated by the buyer or tenant and, as a result, the listing broker reduces the commission owed by the seller or landlord and, subsequent to such actions, another cooperating broker claims to be the procuring cause of 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)

4) Where two or more listing brokers claim entitlement to compensation pursuant to open listings with a seller or landlord who agrees to participate in arbitration (or who requests arbitration) and who agrees to be bound by the decision. In cases where one of the listing brokers has been compensated by the seller or landlord, the other listing broker, as complainant, may name the first listing broker as respondent and arbitration may proceed between the brokers. (Adopted 1/97)

CODE OF ETHICS AND ARBITRATION MANUAL

SECTION 44. DUTY AND PRIVLEDGE TO ARBITRATE*

(a) By becoming and remaining a member and by signing or having signed the agreement to abide by the Bylaws of the Board, every member, where consistent with applicable law, binds himself or herself and agrees to submit to arbitration by the Board's facilities all disputes as defined by Article 17 of the Code of Ethics and as set forth in the provisions of this Manual, all disputes with any other member, as defined, under the following conditions. In addition, REALTOR® principals who participate in a Board's MLS where they do not hold Board membership, or nonmember brokers and nonmember licensed or certified appraisers who participate in the Board's MLS, having signed the agreement to abide by the Board's Multiple Listing Service Rules and Regulations binds himself or herself and agrees to submit to arbitration by the Board's facilities. (Amended 11/95)

(1) Every REALTOR® of the Board who is a REALTOR® principal, every REALTOR® principal who participates in a Board's MLS Where they do not hold Board membership and every nonmember broker or licensed or certified appraiser who is a Participant in the Board's MLS shall have the right to invoke the Board's arbitration facilities in any dispute arising out of the real estate business with a REALTOR® principal in another real estate firm, or nonmember broker/appraiser who is a Participant in the Board's MLS.

(2) A REALTOR® other than a principal or a REALTOR®-ASSOCIATE shall have the right to invoke the arbitration facilities of the Board in a business dispute with a REALTOR®, or REALTOR®-ASSOCIATE, in another firm, whether in the same or different Board, provided the REALTOR® principal with whom he is associated joins in the arbitration request, and requests the arbitration with the REALTOR® principal of the other firm. Arbitration in such cases shall be between the REALTOR® principals. REALTOR® non-principals and REALTOR®-ASSOCIATES who invoke arbitration in this manner, or who are affiliated with a respondent and have a vested financial interest in the outcome, have the right to be present throughout the proceedings and to participate but are not considered to be parties. (Amended 11/95)

(3) A client of a REALTOR® principal may invoke the arbitration facilities of the Board in a business dispute with a REALTOR® principal arising out of an agency relationship, provided the client agrees to be bound by the arbitration. In the event of such request and agreement, the Board will arbitrate the subject to the provisions of Part Ten, Section 45. A REALTOR® principal may also invoke arbitration against his client but no arbitration may be held without the client's voluntary agreement to arbitrate and to be bound by the decision. (Amended 11/96)

(4) REALTORS®, REALTOR®-ASSOCIATES, who are or were affiliated with the same firm shall have the same right to invoke the arbitration facilities of the Board, provided

each party voluntarily agrees to the arbitration in writing and the Board finds the matter properly subject to arbitration in accordance with the provisions of Part Ten Section 45 of this Manual. This privilege as stated applies to disputes arising when the parties are or were affiliated with the same firm, irrespective of the time request is made for such arbitration. (Amended 11/95)

(5) A REALTOR® principal may invoke the arbitration facilities of his Board with a nonmember broker, provided each party agrees in writing to the arbitration and provided the Board finds the matter properly subject to arbitration in accordance with the provisions of Part Ten Section 45 of this Manual. However, it shall be optional with the member as to whether he will submit to a claim to arbitration with a nonmember broker who is not an MLS participant. A nonmember broker who is not an MLS participant or nonmember salesperson shall not be entitled to invoke the arbitration facilities of the Board of REALTORS®. (Amended 11/95)

(6) Business disputes between a REALTOR® principal and a customer of the REALTOR® principal may be arbitrated by the Board if a written contractual relationship has been created by a REALTOR® principal between a customer and a client and provided all parties to the dispute (i.e., the customer and the REALTOR(S) ® agree in writing to arbitrate the dispute. (Amended 11/95)

(b) Where mandatory arbitration is consistent with applicable state law, the Code of Ethics, Article 17, requires only that disputes arising out of the real estate business between REALTORS® "…associated with different firms…" be arbitrated. The various provisions of this Section represent the interpretations of the Professional Standards Committee with approval of the Board of Directors of the National Association as to appropriate policy of a Member Board in the matter of providing arbitration facilities by the Board. Thus, Member Boards must provide arbitration facilities for Board Members in the types of arbitration described in the preceding paragraphs (1), (2), and (3). Member Boards may provide arbitration facilities for the additional types of arbitration described in the preceding paragraphs (4), (5), and (6). However, Member Boards shall not establish any mandatory requirement of its Board Members to arbitrate in the circumstances described in paragraphs (4), (5), and (6). No arbitration shall be initiated by the Board and no arbitration shall be undertaken by the Board unless it determines the dispute is properly arbitrable in accordance with the provisions of Part Ten, Section 45 of this manual.
(Revised 11/96)

REPRESENTATIVE CASES
(Procuring Cause)

1. Mars v. Miclau, 168 Ohio St. 144 (1958)

2. Bauman v. Worley, 166 Ohio St. 471 (1957)

3. Bell v. Dimmerling, 149 Ohio St. 165 (1948)

4. Stanson, Inc. v. McDonald, 147 Ohio St. 191 (1946)

5. Dohner v. Bailey, 20 Ohio App. 3d 1981 (Clark 1984)

6. Sulphur Springs Realty v. Blackstone, 7 Ohio App. 3d 27 (Wood 1982)

7. Ostendorf-Morris Company v. Slyman, 6 Ohio App. 3d 46 (Cuy. 1982)

8. Walker v. Davies, Inc., 34 Ohio App. 3d 139 (Frank. 1793)

9. Thomas Reap Realty v. Hadlock, 88 Ohio Law Abs. 100 (Geauga 1961)

10. Eberle v. Bertle, 86 Ohio Law Abs. 289 (Tus. 1961)

11. McShane v. Keiser, 108 Ohio App. 514 (Ham. 1958)

12. Kalna v. Fialko, 102 Ohio App. 442 (Cuy. 1955)

13. Yarma v. Griffiths, 104 Ohio App. 3d 545 (Cuy. 1995)

14. Corkin v. Smith, 104 Ohio App. 3d 274 (Clark 1957)

15. Harley E. Rouda & Co. v. Springtime, 49 Ohio App. 2d 49 (Frank. 1975)

16. Wertz Realty, Inc. v. Parden, 79 Ohio App. 3d 462 (Mont. 1992)

17. Scott v. Cravaak, 53 Ohio App. 2d 248 (Ham. 1977)

18. Hoke v. E.J. Hoke Realty Co., 71 Ohio Law Abs. 354 (Cuy. 1955)

19. Maschuk v. Maxam, 70 Ohio Law Abs. 308 (Cuy. 1955)

20. Vincent v. Weber, 13 Ohio Misc. 280 (1965)

NAR Suggested Questions

Who is the listing agent?

Was there a written listing agreement between the property owner and the listing agent? Were both of the parties to the dispute authorized to as agent of the principal or subagent of the listing broker?

Who first introduced the customer to the property and how was such an introduction made?

Did the first or original introduction to the property actually originate an uninterrupted series of events leading to the sale (or objective of the transaction), or was the series of events originated by the first introduction to the property hindered or terminated at any point for cause such as abandonment or estrangement of the customer by the agent or subagent?

Was there a faithful exercise of agency or sub-agency on the part of the individual making the first introduction of the property to the customer, or conversely, was there fault or deficiency on the part of said agent or subagent either in the interest of the client or in fairness to the customer?

How did the second agent or subagent enter the transaction?

Was the second agent or subagent to enter the transaction aware of the prior introduction and/or negotiation on the property with the customer by the first agent or subagent?

If the second agent or subagent was aware of prior introduction of the property and/or negotiation on the property with the customer by the first agent or subagent, what did he do to serve the interest of the client and yet be fair to all parties, avoiding action inconsistent with the agency of the other agent or subagent?

Was the entry of the second agent or subagent into the transaction an intrusion upon agency or was it innocent exercise of agency or sub-agency in the interest of the client and pursuit of a customer?

Did the second agent or subagent, by the second introduction, start a second or separate series of events which were not dependent upon the first introduction and/or negotiation on the property, with said second introduction and series of events flowing therefrom, leading to the successful transaction?

Appendix I to Part Ten
Arbitrable Issues

Article 17 of the Code of Ethics provides:

> In the event of contractual disputes or specific non-contractual disputes as defined by Standard of Practice 17-4 between REALTORS® associated with different firms, arising out of their relationship as REALTORS®, the REALTORS® shall submit the dispute to arbitration in accordance with the regulations of their Board or Boards rather than litigate the matter.
>
> In the event clients of REALTORS® wish to arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall arbitrate those disputes in accordance with the regulations of their Board, provided the clients agree to be bound by the decision. (Revised 1/97)

Part Ten, Section 43, Arbitrable Issues, in this Manual provides in part:

> As used in Article 17 of the Code of Ethics and in Part Ten of this Manual, the terms "dispute" and "arbitrable matter" refer to contractual issues and questions, and certain specific non-contractual issues and questions outlined in Standard of Practice 17-4, including entitlement to commissions and compensation in cooperative transactions, that arise out of the business relationships between REALTORS®, and between REALTORS® and their clients and customers, as specified in Part Ten, Section 44, Duty and Privilege to Arbitrate. (Revised 11/96)

Part Nine, Section 42, Grievance Committee's Review and Analysis of a Request for Arbitration provides, in part, in subsection (b):

> If the facts alleged in the request for arbitration were taken as true on their face, is the matter at issue related to a real estate transaction and is it properly arbitrable – i.e., is there some basis on which an award could be based?

Despite the guidance provided in the above-referenced sections of the Code of Ethics and Arbitration Manual, questions continue to arise as to what constitutes an arbitrable issue, who are the appropriate parties to arbitration requests, etc. To provide guidance to Board Grievance Committees in their review of arbitration requests, the Professional Standards Committee of the National Association provides the following information.

Arbitration by Boards of REALTORS® is a process authorized by law in virtually every state. Arbitration is an economical, efficient, and expeditious alternative to civil litigation. Jurists, including the former U.S. Supreme Court Chief Justice Warren Burger, have endorsed arbitration as a method of reducing the litigation backlog in the civil courts.

To conduct arbitration hearings, Boards of REALTORS®, acting through their Grievance Committees and Professional Standards Committees, must have a clear understanding of what constitutes an arbitrable issue. An arbitrable issue includes a contractual question arising out of a transaction between parties to a contract in addition to certain specified non-contractual issues set forth in Standard of Practice 17-4. Many arbitrations conducted by Boards of REALTORS® involve entitlement to compensation offered by listing brokers through a multiple listing service or otherwise to cooperating brokers acting as subagents, as agents of purchasers, or in some other recognized agency or non-agency capacity. Frequently, at closing, the listing broker will be paid out of the proceeds of the sale and will direct that a disbursement be made to the cooperating broker who the listing broker believes was the procuring cause of the sale. Subsequently, another broker who may have been previously involved in the transaction will file an arbitration request claiming to have been the procuring cause of sale, and the question arises as to who is the proper respondent. (Revised 11/96)

In our example, assume that the listing broker is Broker A, the cooperating broker who was paid is Broker B, and the cooperating broker who was not paid, but who claims to be the procuring cause of sale, is Broker C. It is not unusual for arbitration requests filed by one cooperating broker to name another cooperating broker as the respondent. This is based on the assumption that the monies the listing broker paid to Broker B are unique and that the listing broker's obligation to compensate any other broker is extinguished by the payment to Broker B, irrespective of whether Broker B was the procuring cause of sale or not. However, the mere fact that the listing broker paid Broker B in error does not diminish or extinguish the listing broker's obligation to compensate Broker C if a Hearing Panel determines that Broker C was, in fact, the procuring cause of sale. (Revised 11/96)

Does this mean that a listing broker is always potentially obligated to pay multiple commissions if a property was shown by more than one cooperating broker? Not necessarily. When faced with Broker C's arbitration request, the listing broker could have initiated arbitration against Broker B, requesting that the Hearing Panel consider and resolve all of the competing claims arising from the transaction at the same time. Professional Standards Policy Statement 27, Consolidation of arbitration claims arising out of the same transaction, provides:

> Upon review by the Grievance Committee, or upon motion by either the complainant or the respondent, an arbitration request may be amended to include any additional appropriate parties so that all related claims arising out of the same transaction can be resolved at the same time.

A listing broker may realize, prior to the closing of a transaction, that there may be more than one cooperating broker claiming compensation as the procuring cause of sale. In such instances, to avoid potential liability for multiple compensation claims, the listing broker, after the transaction has closed, can initiate an arbitration request naming all of the potential claimants (cooperating brokers) as respondents. In this way, all of the potential competing claims that might arise can be resolved through a single arbitration hearing. (Revised 11/96)

There is also an alternative avenue of arbitration available to REALTORS® involved in disputes arising out of cooperative real estate transactions. Standard of Practice 17-4 recognizes that in

some situations where a cooperating broker claims entitlement to compensation arising out of a cooperative transaction, a listing broker will already have compensated another cooperating broker or may have reduced the commission payable under a listing contract because a cooperating broker has expressly sought and/or chosen to accept compensation from another source, e.g., the seller, the purchaser, etc. Under the circumstances specified in Standard of Practice 17-4, the cooperating brokers may arbitrate between themselves without naming the listing broker as a party. If this is done, all claims between the parties, and claims they might otherwise have against the listing broker, are extinguished by the award of the arbitrators. (Adopted 11/96)

In reviewing requests for arbitration, it is important that Grievance Committees not take actions that could be construed as rendering decisions on the merits. For example, a Grievance Committee should not dismiss an otherwise arbitrable claim simply because Grievance Committee members believe the respondent would undoubtedly prevail in a hearing. On the other hand, an arbitration request that cites no factual basis on which a Hearing Panel could conceivably base an award should not be referred for hearing. A party requesting arbitration must clearly articulate, in the request for arbitration, facts that demonstrate a contractual relationship between the complainant and the respondent, or a relationship described in Standard of Practice 17-4, and an issue that could be the basis on which an arbitration award could be founded.

(Revised 11/96)

Another question that frequently arises with respect to arbitration requests is whether the fact that the listing broker was paid out of the proceeds of the closing is determinative of whether a dispute will be considered by a Hearing Panel. Initially, it should be noted that the Arbitration Guidelines (Appendix II to Part Ten) provide that an arbitrable issue involving procuring cause requires that there have been a "successful transaction." A "successful transaction" is defined as "a sale that closes or a lease that is executed." Some argue that if the listing broker is not paid, or if the listing broker waives entitlement to the commission established in the listing contract, then there is nothing to pay to the cooperating broker and, thus, no issue that can be arbitrated. This is an improper analysis of the issue. While the listing broker needs the consent of the seller/client to appoint subagents and to compensate subagents, buyer agents, or brokers acting in some other recognized agency or non-agency capacity, the offer to compensate such individuals, whether made through the multiple listing service or otherwise, results in a separate contractual relationship accepted through performance by the cooperating broker. Thus, if the cooperating broker performs on the terms and conditions established by the listing broker, the fact that the listing broker finds it difficult to be paid or, alternatively, waives the right to be paid, has no bearing on whether the matter can be arbitrated but may have a direct impact on the outcome. Many cooperative relationships are established through MLS and the definition of the MLS provides, in part: (Revised 11/97)

While offers of compensation made by listing brokers to cooperating brokers through MLS are unconditional,* 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 established 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. (Amended 11/98)

* Compensation is unconditional except where local MLS rules permit listing brokers to reserve the right to reduce compensation offers to cooperating brokers in the event that the commission established in a listing contract is reduced by court action or by actions of a lender. Refer to Multiple Listing Policy Statement 7.23, Information Specifying the Compensation on Each Listing Filed with a Multiple Listing Service of a Board of REALTORS®, Handbook on Multiple Listing Policy. (Adopted 11/98)

The foregoing are by no means all-inclusive of the consideration that must be taken into account by a Grievance Committee in determining whether a matter will be arbitrated. However, they are some of the common questions raised with respect to arbitrable issues, and this discussion is provided to assist Grievance Committees in their important role in evaluating arbitration requests. (Adopted 4/91)

Appendix II to Part Ten

Arbitration Guidelines
(Suggested Factors for Consideration by a Hearing Panel in Arbitration)

A key element in the practice of real estate is the contract. Experienced practitioners quickly become conversant with the elements of contract formation. Inquiry, invitation, offer, counteroffer, contingency, waiver, acceptance, rejection, execution, breach, rescission, reformation, and other words of art become integral parts of the broker's vocabulary.

Given the significant degree to which Article 3's mandate for cooperation – coupled with everyday practicality, feasibility, and expediency – make cooperative transactions facts of life, it quickly becomes apparent that in virtually every real estate transaction there are actually several contracts which come into play. Setting aside ancillary but still important contracts for things such as mortgages, appraisals, inspections, title insurance, etc., in a typical residential transaction (and the same will be true in many commercial transactions as well) there are at least three (and often four) contracts involved, and each, while established independently of the others, soon appears to be inextricably intertwined with the others.

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 subagents, buyer agents, or acting in some other capacity.

Second, there is the contract between the listing broker and cooperating brokers. While this may be 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. This bilateral contract between the seller and the buyer establishes their respective promises and obligations to each other, which may also impact on third parties. The fact that someone other than the seller or buyer is referenced in the purchase contract does not make him/her a party to that contract, though it may create rights or entitlements which may be enforceable against a party (the buyer or seller).

Fourth, there may be a buyer-broker agreement in effect between the purchaser and a broker. Similar in many ways to the listing contract, this bilateral contract establishes the duties of the purchaser and the broker as well as the terms and conditions of the broker's compensation.

These contracts are similar in that they are created through offer and acceptance. They vary in that acceptance of a bilateral contract is through a reciprocal promise (e.g., the purchaser's promise to pay the agreed price in return for the seller's promise to convey good title), while acceptance of a unilateral contract is through performance (e.g., in producing or procuring a ready, willing, and able purchaser).

Each of these contracts is subject to similar hazards in formation and afterward. The maker's (offeror's) offer in any of these scenarios may be accepted or rejected. The intended recipient of the offer (or offeree) may counteroffer. There may be questions as to whether a contract was formed – e.g., was there an offer, was it accepted, was the acceptance on the terms and conditions specified by the maker of the offer – or was the "acceptance" actually a counteroffer (which, by definition, rejects the first offer). A contract, once formed, may be breached. These and other questions of contract formation arise on a daily basis. There are several methods by which contractual questions (or "issues" or "disputes") are resolved. These include civil lawsuits, arbitration, and mediation.

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. Article 17 is interpreted through four Standards of Practice among which is Standard of Practice 17-4 which enumerates four situations under which REALTORS® agree to arbitrate specified non-contractual disputes. (Adopted 11/96)

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®. Disputes arising out of any of the four above-referenced contractual relationships may be arbitrated, and the rules and procedures of Boards and Associations of REALTORS® require that certain types of disputes must be arbitrated if either party so requests. (Information on "mandatory" and "voluntary" arbitration is found elsewhere in the Code of Ethics and Arbitration Manual.) (Revised 11/96)

While issues between REALTORS® and their clients – e.g., listing broker/seller (or landlord) or buyer broker/buyer (or tenant) – are subject to mandatory arbitration (subject to the client's agreement to arbitrate), and issues between sellers and buyers may be arbitrated at their mutual agreement, in many cases such issues are resolved in the courts or in other alternative dispute resolution forums (which may also be administered by Boards or Associations 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, where the panel is called on to determine which of the contesting parties is entitled to the funds in dispute. 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. It should also be considered that questions of representation and entitlement to compensation are separate issues. (Revised 11/98)

In the mid-1970s, the National Association of REALTORS® established the Arbitration Guidelines to assist Boards and Associations in reaching fair and equitable decisions in arbitration; to prevent the establishment of any one, single rule or standard by which arbitrable issues would be decided; and to ensure that arbitrable questions would be decided by knowledgeable panels taking into careful consideration all relevant facts and circumstances.

The Arbitration Guidelines have served the industry well for nearly two decades. But, as broker-to-broker cooperation has increasingly involved contracts between listing brokers and buyer brokers and between listing brokers and brokers acting in nonagency capacities, the time came to update the Guidelines so they remained relevant and useful. It is to this end that the following is intended.

Procuring Cause

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 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. See also Producing cause; Proximate cause.

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." Many REALTORS®, Executive Officers, lawyers, and others have tried, albeit unsuccessfully, to develop a single, comprehensive template that could be used in all procuring cause disputes to determine entitlement to the sought-after award without the need for a comprehensive analysis of all relevant details of the underlying transaction. Such efforts, while well-intentioned, were doomed to failure in view of the fact that there is no "typical" real estate transaction any more than there is "typical" real estate or a "typical" REALTOR®. 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:

> …The 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); is a means by which information is accumulated and disseminated to enable authorized Participants to prepare appraisals and other valuations of real property; and is a means by which Participants engaging in real estate appraisal contribute to common databases. 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 established 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)

* Compensation is unconditional except where local MLS rules permit listing brokers to reserve the right to reduce compensation offers to cooperating brokers in the event that the commission established in a listing contract is reduced by court action or by actions of a lender. Refer to Multiple Listing Policy Statement 7.23, Information Specifying the Compensation on Each Listing Filed with a Multiple Listing Service of a Board of REALTORS®, Handbook on Multiple Listing Policy. (Adopted 11/98)

Procuring Cause 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 predeterminants 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)

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. A detailed discussion of these questions can be found in Appendix I to Part Ten, Arbitrable Issues.

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)

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 engaged in conduct which caused the purchaser to terminate the relationship (estrangement). This can be caused, among other things, by words or actions. Panels will want to consider whether such conduct 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 4/95)

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? (Refer to Appendix I to Part Ten, Arbitrable Issues)
    d. Did the listing broker receive a commission? If not, why not? (Refer to Appendix I to Part Ten, Arbitrable Issues)

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)?
    a. Were all conditions of the agreement met?

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?

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? (Refer to Factor #1)
    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?

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? (Refer to Factor #4)
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? (Refer to Factor #4)

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?

<u>Continuity and breaks in continuity (abandonment and estrangement)</u>

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? (Refer to Factor #4)
    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?

<u>Conduct of the buyer</u>

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?

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?

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)

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 hearing, 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, Broker S will likely prevail. Agency relationships are not synonymous with nor determinative of procuring cause. Representation and entitlement to compensation are separate issues.

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.

Fact Situation #10

Listing Broker L placed a property on the market for sale or lease and offered compensation to brokers inquiring about the property. Broker A, acting as a subagent, showed the property on two separate occasions to the vice president of manufacturing for ABC Corporation. Broker B, also acting as a subagent but independent of Broker A, showed the same property to the chairman of ABC Corporation, whom he had known for more than fifteen (15) years. The chairman liked the property and instructed Broker B to draft and present a lease on behalf of ABC Corporation to Broker L, which was accepted by the owner/landlord. Subsequent to the commencement of the lease, Broker A requested arbitration with Broker L, claiming to be the procuring cause.

Analysis:
This is an arbitrable matter as Broker L offered compensation to the procuring cause of the sale or lease. To avoid the possibility of having to pay two commissions, Broker L joined Broker B in arbitration so that all competing claims could be resolved in a single hearing. The Hearing Panel considered both brokers' introductions of the property to ABC Corporation. Should the Hearing Panel conclude that both brokers were acting independently and through separate series of events, the Hearing Panel may conclude that Broker B was directly responsible for the lease and should be entitled to the cooperating broker's portion of the commission. (Adopted 11/96)

Fact Situation #11

Broker A, acting as the agent for an out-of-state corporation, listed for sale or lease a 100,000 square foot industrial facility. The property was marketed offering compensation to both subagents and buyer/tenant agents. Over a period of several months, Broker A made the availability of the property known to XYZ Company and, on three (3) separate occasions, showed the property to various operational staff of XYZ Company. After the third showing, the vice president of finance asked Broker A to draft a lease for his review with the president of XYZ Company and its in-house counsel. The president, upon learning that Broker A was the listing agent for the property, instructed the vice president of finance to secure a tenant representative to ensure that XYZ Company was getting "the best deal." One week later, tenant representative Broker T presented

Broker A with the same lease that Broker A had previously drafted and the president of XYZ Company had signed. The lease was accepted by the out-of-state corporation. Upon payment of the lease commission to Broker A, Broker A denied compensation to Broker T and Broker T immediately requested arbitration claiming to be the procuring cause.

Analysis:
The Hearing Panel should consider Broker A's initial introduction of XYZ Company to the property, Broker A's contact with XYZ on an on-going basis, and whether Broker A initiated the series of events which led to the successful lease. Given the above facts, Broker A will likely prevail. Agency relationships are not synonymous with nor determinative of procuring cause. Representation and entitlement to compensation are separate issues.

Fact Situation #12

Broker A has had a long-standing relationship with Client B, the real estate manager of a large, diversified company. Broker A has acquired or disposed of twelve (12) properties for Client B over a five (5) year period. Client B asks Broker A to locate a large warehouse property to consolidate inventories from three local plants. Broker A conducts a careful evaluation of the operational and logistical needs of the plants, prepares a report of his findings for Client B, and identifies four (4) possible properties that seem to meet most of Client B's needs. At Client B's request, he arranges and conducts inspections of each of these properties with several operations level individuals. Two (2) of the properties were listed for sale exclusively by Broker C. After the inspections, Broker A sends Broker C a written registration letter in which he identifies Client B's company and outlines his expectation to be paid half of any commission that might arise from a transaction on either of the properties. Broker C responds with a written denial of registration, but agrees to share any commission that results from a transaction procured by Broker A on either of the properties. Six (6) weeks after the inspections, Client B selects one of the properties and instructs Broker A to initiate negotiations with Broker C. After several weeks the negotiations reach an impasse. Two (2) weeks later, Broker A learns that Broker C has presented a proposal directly to Client B for the other property that was previously inspected. Broker A then contacts Broker C, and demands to be included in the negotiations. Broker C refuses, telling Broker A that he has "lost control of his prospect," and will not be recognized if a transaction takes place on the second property. The negotiations proceed, ultimately resulting in a sale of the second property. Broker A files a request for arbitration against Broker C.

Analysis:
This would be an arbitrable dispute as a compensation agreement existed between Broker A and Broker C. The Hearing Panel will consider Broker A's introduction of the property to Client B, the property reports prepared by Broker A, and the time between the impasse in negotiations on the first property and the sale of the second property. If the Hearing Panel determines that Broker A initiated the series of events that led to the successful sale, Broker A will likely prevail. (Adopted 11/96)

OHIO

REALTORS®