



SOUTHLAND REGIONAL
ASSOCIATION OF REALTORS®, INC.

REVISED FEBRUARY 25, 2010
PROCURING CAUSE GUIDELINES

(THESE ARE MERELY GUIDELINES, NOT RULES)

“Procuring Cause” for the purpose of this policy refers to the right to the selling portion of the commission when two or more offices claim to have been responsible for producing the buyer, but only one actually obtained the offer. It is not to be confused with the legal concept of “procuring a buyer ready, willing and able, etc.”, which would give rise to a claim for commission against a seller pursuant to a listing agreement.

I. BASIC GUIDELINE

A member who obtains an offer and deposit, and negotiates the close of a transaction is usually the sole procuring cause. However, the Professional Standards Panel sitting as arbitrators, after hearing all of the evidence, might be justified in apportioning the selling commission between the contending offices, according to their respective contributions toward achieving the sale of the property to a particular buyer. Therefore, if a transaction would not have resulted but for the efforts of another member, that member may be entitled to a share of the selling commission, even though another member concluded the transaction. Further, in some cases, the arbitrators may determine that the entire commission should be awarded to a member other than the member closing the transaction. However, as outlined below a member should ordinarily have done certain things to be entitled to all or a portion of the commission, despite the fact that the member was not the one who obtained the offer and deposit from the Buyer. Furthermore, under certain circumstances, rights may be lost, as explained below.

II. PREVENTIVE TIPS FOR PRACTITIONERS

- A. Upon first meeting a prospective buyer, always ask whether he or she is working with another broker.
- B. If you find out that a prospective buyer is working with another broker, explore whether the first broker has an exclusive contractual agreement.
- C. If you discover your client has been working with another broker on the same transaction, try to ascertain the reason why the client left the first broker and, if appropriate, make immediate contact with the broker and try to resolve the issue. Failing to address it early on may result in you working through a difficult escrow, closing the transaction and not getting paid.

- D. Give agency disclosures (C.A.R. Form AD-11) early in the transaction.
- E. Use buyer representation agreements (with or without the broker's compensations element). This will help memorialize the relationship and help prompt the discussion about other relationships. If the contract includes a buyer's commission obligation to the broker, it will also create an incentive for the buyer to come to you and terminate the contract prior to going to another broker.
- F. Never send your buyer client to other brokers with instructions to come back when the buyer is ready to write the offer.
- G. Try to accompany your clients to open houses, but if you can't, give your clients your cards and instruct them to tell the agent sitting the open house that they are already working with you and present them your card. By not accompanying them, you take the risk that this explanation may not occur.
- H. Stay in close contact with your client and be responsive during the transaction.
- I. If you are conducting an open house, keep a registry of all prospective buyers including a note of whether there was a broker with the buyer. Also, keep a record that the agent sitting the open house asked the buyer if they were working with an agent.
- J. If you have a listing where the property is being shown by brokers when you are not present, leave a sign-in sheet with buyers' names and brokers' names similar to those at a new home development. Include dates and times in the registry. This creates a record of who was shown the property and with which broker.

III. SUGGESTED PROCEDURES

Experience has shown that communication between members in procuring cause situations very often resolves problems. Therefore, the following procedures are recommended. While the failure to follow these procedures may not by itself deprive a member of commission, it may be considered by the Panel, along with all of the other evidence.

- A. Members should immediately make their Responsible Broker or Office Manager aware of any potential claim.
- B. When member "B" determines that member "A" had previously shown the subject property to the client, member "B" should then ask the client:
 1. When did you see the property?
 2. What is the reason you did not buy from member "A"?

- C. If the response from the buyer indicates any possibility of a claim by member "A", member "B" should contact "A" and discuss the situation.
- D. If member "A" is aware that he/she will be filing a claim against member "B's" office, member "A's" Responsible Broker or Office Manager should contact member "B's" Responsible Broker or Office Manager prior to the close of escrow, unless such contact could reasonably be expected to interfere with the transaction between the buyer and the seller.*
- E. Member "B," or his/her Responsible Broker, upon being informed of a potential claim, shall take no action, either individually or in concert with the buyer, to interfere with the close of escrow.
- F. Parties to a dispute should refer to Paragraph VIII B (Obligation Under Procuring Cause Guidelines) regarding the holding of funds.

IV. PRIOR TO FILING A COMPLAINT, CONSIDER THESE FACTORS

- A. Who first introduced the property to the buyer?
- B. Who showed the property?
- C. Who provided the details of the property?
- D. Who finally wrote the offer?
- E. Did negotiations ever fail?
- F. Why did the negotiations fail?
- G. Was a break in the negotiations due to interference from another agent, or due to the initial agent's inability to work with the parties and consummate the sale?
- H. Did the first agent abandon his agency?
- I. Would the transaction ever have occurred if the second agent had not assisted?
- J. Whose activities were the most predominate in bringing about the sale?

V. IT IS HELPFUL TO KNOW WHAT MAY NOT BE PROCURING CAUSE

- A. The agent who first introduces the property is not necessarily the procuring cause.
- B. It is not necessary that a broker physically show the property to be the procuring cause.
- C. The broker who writes the transaction or fills out the purchase agreement is not necessarily the procuring cause.

* The SRAR Board of Directors recommends that, to the extent possible, any agreement reached by the parties be reduced to writing.

VI. POSSIBLE LOSS OF COMMISSION

YOU MIGHT NOT RECEIVE A COMMISSION IF ALL OR ANY OF THE FOLLOWING SITUATIONS EXIST

- A. The member does not accompany a prospect to the property.
 - 1. The member refers a prospect to a property or open house with or without a business card.
 - 2. The member has not made arrangements in advance with the member at the property or open house.
 - 3. The office claiming the commission has never shown the property to the buyer.
- B. The office claiming a commission did not maintain any contact, or “follow-through” with the buyer for a period of 14 days or longer, barring extenuating circumstances.

VII. GENERAL GUIDELINES

- A. A member claiming any portion of the selling commission should establish that he has physically shown the property, diligently followed through, consistently communicated with the buyer, urged purchase of the specific property, and has offered affirmative service toward such purchase.
- B. The amount of time and effort expended for a particular buyer on various other properties does not necessarily entitle you to a commission.
- C. All of the foregoing factors are important but none alone determines the outcome.

VIII. OBLIGATION UNDER PROCURING CAUSE GUIDELINES

- A. The obligation of a member to recognize a claim of procuring cause does not terminate when a particular listing ends.
- B. Although the expressed wishes of a buyer must be respected, they cannot be the basis to divest a member of that member’s rights to a commission. The Association believes that through communication or arbitration, the rights of members can be resolved without harm to the principals, and immediate dialogue between members can avert a dispute. The interest of the Seller and Buyer must not be jeopardized by a procuring cause dispute. The disputed commission should be held in trust until the dispute is resolved.

- C. Procedures employed in the marketing of Investment Real Estate, out-of-area or unusual properties, may vary considerably from those procedures employed in the marketing of separate family residences. In disputes and/or situations where such properties, or any properties other than single family residences, are involved, these variables should be taken into consideration.

IX. CONCLUSION

- A. Procuring Cause disputes should, if at all possible, be resolved between the offices involved. It is not the purpose of these guidelines to reward members for unsuccessful efforts. Yet The Association has recognized that there are transactions made possible by members who, for reasons other than incompetence, did not “close the sale”. It is hoped that these guidelines will be helpful to those offices, but will also serve as a guideline to the office which “gets the check”, to the end that they will understand and, therefore, respect the rights of the other REALTOR®.
- B. If a member believes he or she has been subjected to illegal or unethical conduct, he/she may file a complaint with the Grievance Committee for arbitration and/or disciplinary action.

SAMPLE FACT SITUATION ANALYSIS

The following are revised excerpts from the National Association of REALTORS® Code of Ethics and Arbitration Manual, Appendix II to Part Ten:

Fact Situation #1

Listing Broker L placed a listing in the MLS and offered compensation to buyer agents. Broker Z, not a participant in any 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

Broker L placed a listing in the MLS and offered compensation to buyer agents. Broker S showed the property to Buyer #1 on Sunday and again on Tuesday. On Wednesday, Broker A 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, 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 #3

Listing Broker L placed a listing in the MLS and made an offer of compensation to buyer agents. Broker S 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.

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 #4

Same as #3, except that Broker S 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, resulting, for example, because of something Broker S said or did (or neglected to say or do but reasonably should have), Broker S will likely prevail. Agency relationships are not synonymous with nor determinative of procuring cause. Representation and entitlement to compensation are separate issues. (Amended 11/99)

Fact Situation #5

Listing Broker L placed a property on the market for sale or lease and offered compensation to brokers inquiring about the property. Broker A showed the property on two separate occasions to the vice president of manufacturing for ABC Corporation. Broker B 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, 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. 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)