

# **NAR Professional Standards Procedures**

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## **Procuring Cause - An Introduction**

### **Separating Ethics Complaints and Arbitration Requests**

- Arbitration hearings must be separated from ethics hearings. An arbitration hearing must be held separately from an ethics hearing that arises out of the same factual situation, and must be held first. Any award rendered in arbitration cannot be made on the basis of an alleged or actual violation of the Code of Ethics, and may not cite any violation of the Code of Ethics as the basis for rendering the arbitration award (See Professional Standards Policy Statement #35).

### **Basis for Awards in Arbitration**

- There can be no predetermined rule or standard that determines entitlement to an arbitration award.
  - no "threshold" rules
  - no "contract in hand" rules
- All awards must be based on the facts and circumstances related to a particular transaction.
- "Procuring cause" may be defined as a series of events, unbroken in their continuity, that result in the desired objective (i.e., generally, the sale of property). Black's Law Dictionary, Fifth Edition, defines procuring cause as:

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 is regarded as the "procuring cause" of a sale, so as to be entitled to commission if his or her efforts are the foundation on which negotiations resulting in a sale begin. It is the cause originating a series of events which, without break in their continuity, result in the accomplishment of the prime objective of the employment of the broker who produces a ready, willing, and able purchaser to buy real estate on the owner's terms.

### **"Suggested Factors" an Arbitration Hearing Panel May Consider**

- In response to membership requests, the National Association has, on several occasions, seriously considered the question of procuring cause, and strives to develop a consensus opinion relative to a single rule or determining factor that would clearly establish, in all cases, entitlement to a commission or to subagency compensation when questions of procuring cause arise.
- Five times since 1976 special subcommittees or working groups of the Professional Standards Committee have been appointed to study the question of procuring cause. The groups' recommendations resulted in the "Suggested Factors" now included in the Code of Ethics and Arbitration Manual [Appendix II to Part Ten].
- An arbitration worksheet has most recently been developed to assist hearing panels in identifying relevant issues and facts in determining questions of entitlement to disputed funds. The worksheet is intended to supplement, not replace, the Arbitration guidelines found in the Code of Ethics and Arbitration Manual. To view, go to, <http://realtor.org/mempolweb.nsf/pages/arbitrationworksheet>.

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### **Suggested Factors, reprinted from the Code of Ethics and Arbitration Manual [Appendix II to Part Ten]**

#### **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.

This policy is reflected in Official Interpretation No. 31 of Article I, Section 2, Bylaws, NATIONAL ASSOCIATION OF REALTORS®, which states:

A Board rule or rules 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 No. 31 goes on to provide:

In essence, this is a specific interpretation of the general rule established in Interpretation No. 6 that a Board may not have a rule which restricts or limits the REALTOR® in the conduct of his business unless it concerns ethical practice. Thus, a rule of a Board or a Multiple Listing Service which would determine a protection period in reference to a prospective purchaser is an inequitable limitation. Further, 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 a 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.

#### **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 admissible 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 the 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.

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### **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 "abandoned" 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's conduct or, alternatively, the broker's failure to act when necessary, caused the purchaser to terminate the relationship (estrangement). This can be caused, among other things, by words or actions or lack of words or actions when called for. Panels will want to consider whether such conduct, or lack thereof, 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.

### **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.

**Important Note:** The preceding factors and the following questions are typical, but not all-inclusive of the questions and factors to be considered by the Hearing Panel in arbitration.

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### **Questions That May be Considered by the Arbitration Hearing Panel in Reaching a Decision, reprinted from the Code of Ethics and Arbitration Manual [Appendix II to Part Ten]**

#### **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 buyer representation agreements**

1. What was the nature of any buyer representation agreement(s)? Was the agreement(s) exclusive or non-exclusive? What capacity(ies) was the cooperating broker(s) functioning in, e.g., agent, legally-recognized non-agent, other?
2. Was the buyer representation agreement(s) in writing? Is it enforceable?
3. What were the terms of compensation established in the buyer representation agreement(s)?
4. Was the buyer representative(s) a broker or firm to which an offer of compensation was made by the listing broker?
5. Was the buyer representative(s) actions in accordance with the terms and conditions of buyer representation agreement(s)?
6. At what point in the buying process was the buyer representation relationship established?

#### **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 brokers acting as subagents? As buyer brokers? In another legally recognized capacity?
4. Did the cooperating broker(s) have an agreement, written or otherwise, to act as agent or in another legally recognized capacity on behalf of any of the parties?
5. Were any of the brokers (including the listing broker) acting as 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 buyer 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?

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### **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 event, 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?

### **Continuity and breaks in continuity (abandonment & estrangement)**

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 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 event 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?

### **Conduct of the buyer**

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?

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### **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 wouldn't 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 party 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?

### **Sample Fact Situations with Analyses, reprinted from the 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 cooperation and 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 and cooperation 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 cooperation and 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.

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### **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 completing 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 cooperation and 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 and cooperating to buyer brokers, there was no contractual relationship between Broker L and Broker B and no contractual 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 cooperation and 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, resulting, for example, because of something Broker S said or did (or neglected to say or do but reasonably could 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.

### **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.

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### **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 brokered 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.

### **Fact Situation #11**

Broker A, acting as the subagent for an out-of-state corporation, listed for sale or lease a 100,000 square foot industrial facility. The property was marketed offering cooperation and compensation for 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 B 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.



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### **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 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.

### **Summary**

- The purpose of this outline is to provide panels with facts, issues, and relevant questions that may aid and guide them toward reaching fair, equitable, and reasoned decisions.
- Procuring cause must be determined by a careful analysis of the entire transaction. Procuring cause may be defined as a series of unbroken events that result in the desired objective (usually the sale of property).
- Procuring cause may not be determined in advance, nor may it turn on a single event or occurrence. There is no predetermined rule or standard for entitlement -- no "threshold" rule, no "contract in hand" rule.
- An arbitration award may not be based on a Hearing Panel's presumption that unethical conduct occurred. However, the entire course of conduct of all of the parties may be considered.
- Under certain circumstances, more than one party or firm may contribute in some measure to a successful transaction, and there may be two or more individuals or firms determined to be the "partial procuring cause" in a successful transaction.
- While state law controls, the general rule is that anything a Hearing Panel believes may assist it in reaching a fair, equitable, and knowledgeable decision is admissible.
- Arbitration Hearing Panels may determine whether an arbitrable matter exists and whether appropriate parties to the arbitration are named.
- An award must conform with the requirements of state law.