

A Legal View: Recognition of Factors Determining the Procuring Cause
of a Sale Can Assist in Obtaining the Selling Broker's Commission.

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Q: I am a new agent and I want to guard against spending a lot of time representing a buyer and then learning that I may not be entitled to receive a commission because I am not considered the procuring cause of the successful transaction. What should I be aware of in order to maximize my chances of recovering a commission when I represent the buyer?

A: An issue that can arise between brokers and agents, and even lead to an arbitration, is a dispute regarding who is the procuring cause of a sale transaction and therefore entitled to the commission as the selling broker (i.e., representing the buyer). The California Model MLS rules provide that in filing a property with the MLS, the broker participant makes a blanket unilateral contractual offer of compensation to the other MLS broker participants for their services in selling the property. The rules provide that the broker's contractual offer is accepted by the selling broker who procures a buyer that ultimately results in the creation of a sales or lease contract.

Therefore, by including the listing in the MLS, the listing broker (i.e., representing the seller) makes a unilateral contractual offer of compensation that is accepted by any selling broker that procures a buyer that results in a sales or lease contract. Although this is a relatively simple contractual arrangement, the difficulty arises when more than one broker participates with a buyer who presents an offer that is accepted by the seller. The dispute may arise when more than one broker contends that he/she was the procuring cause of the sale transaction and is entitled to the selling broker's share of the commission. If the dispute is not resolved by the brokers, it can lead to an arbitration, the outcome of which is determined by the arbitrators' consideration of various factors.

The factors are determined by the facts of the transaction and the respective involvement of the brokers, and there is not a single factor that will determine the outcome of the dispute. In fact, the National Association of Realtors policy prohibits local associations from adopting a single rule that predetermines the outcomes of such disputes. Instead, the NAR defines the procuring cause as the uninterrupted series of causal events that results in the successful transaction. In making a determination of procuring cause, an arbitration panel will consider and weigh the factors that are most relevant to the dispute and the extent that they favor each of the brokers.

When a dispute between the brokers arises, the broker who files the arbitration complaint bears the burden to prove by a preponderance of evidence that the broker is the procuring cause of the transaction and is entitled to the selling broker's commission. The broker filing the complaint is normally the broker who did not receive the commission that was paid at the close of escrow. Occasionally,

the complaining broker wrote the contract and an arbitration may be required to determine which broker should be paid by the escrow company.

One of the more important factors is whether one of the brokers entered into a written Buyer Broker Agreement with the prospective buyer. A broker should always attempt to have a buyer sign such an agreement, preferably an exclusive right to represent the buyer. A buyer who does not want to enter into a representation agreement may be signaling a reluctance to commit to a particular broker, and it may also be an indication that the buyer has been involved with other brokers. The discussion about the representation agreement may lead to a disclosure by the buyer that other brokers have been involved, and this will assist the broker in making further inquiries regarding the buyer's prior involvement with other brokers.

A broker should always make a preliminary inquiry of a prospective buyer regarding whether the buyer has entered into a Buyer Broker Agreement with another broker, and attempt to obtain the details of any such agreement. Brokers have an affirmative duty to inquire about existing relationships, and if the buyer has contacted a prior broker, the second broker should consider making reasonable inquiries to the initial broker about any relationship with the buyer. Buyers who are not experienced may not understand the nature of the broker relationship and they may not be a dependable source of such information. The initial broker will appreciate being contacted and having the possible relationship respected. If the initial broker is no longer interested in representing the buyer and/or does not have a contractual relationship with the buyer, the second broker may be able to clarify, in writing, that the initial broker has no objection to the second broker representing the buyer.

A broker should also provide the prospective buyer with an Agency Disclosure Statement at the outset of the relationship, or as early thereafter as possible. If the initial broker does not have a Buyer Broker Agreement and did not provide the buyer with an Agency Disclosure Statement, a second broker who assists the buyer in presenting an offer that leads to a sale will have a more favorable chance of being found to be the procuring cause.

Representing a buyer is a service business, and as in most service businesses, it is a good practice to remain in close contact with the client and provide timely information regarding available properties. The broker should accompany the client to open houses of potential properties or provide the client with business cards of the broker that can be presented to the broker holding the open house. This assists the initial broker in confirming the representation of the buyer even if the buyer views properties by himself.

Brokers holding the open houses should keep a register of persons attending and should attempt to clarify if prospective buyers are represented by a broker. The registry should include the respective dates so that a written history is available of the persons attending open houses or viewing the property.

Other factors that brokers should include in their regular practice include providing significant information about the specific property to the buyer in a manner that is documented, attempt to show the property to the buyer and then document the buyer's visit and any interest with a letter or email to the buyer, avoid referring the buyer to other brokers unless there is no further interest in representing the buyer, and document whether the buyer is interested in presenting an offer to purchase the subject property.

These are only some of the factors that may be relevant to determine which of the competing brokers is the procuring cause of the sale. As in most business relationships, the best practice is to be proactive and engage in good faith and ethical business practices to avoid becoming involved in a dispute about the procuring cause of a sale that may require an arbitration to resolve. Arbitrations between brokers can require large investments of time and expense and they can be avoided if the factors discussed above are considered and implemented as part of regular business practices.

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