First Blood

and other principles of

PROCURING CAUSE

To determine
which of several brokers
is entitled to the commission,
where each claims
to have found
the same purchaser,
is often a problem
of *no* little difficulty.

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Note: this course should not be used as a substitute for competent legal advice.
Note: the opinions of the author are not necessary those of the Iowa Real Estate Commission

Introduction

Black's Law Dictionary, 4th Revised Edition, defines Procuring Cause as:

> "The approximate cause; the cause originating a series of events, which, without break in their continuity, result in the accomplishment of the prime object. [many case citations]. 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. Cales vs. Pattison, 189 Okl. 160, 114 P.2d 456, 458."

The topic of procuring cause has generated many questions from my students. This course is an attempt to clarify some of the procuring cause issues which have bedeviled the relationship between fellow real estate licensees and with clients.

I believe Procuring Cause to be one of my most satisfying subjects to teach. Class discussion is robust. Many students have their own troubled transactions. Students remember, and in great detail, their vast energies to consummate the sale only to the see the commission slip away to a competitor.

Procuring cause has replaced the principle of the "Threshold Rule" in arbitration disputes at your local board of Realtors. The Threshold Rule will be explained later; it may be used effectively in joint venture agreements between real estate companies.

Part of the enjoyment of teaching this subject is the use of metaphors to explain important principles. In this course you will study the analogies of fishing, deer hunting, shaking apples from a tree, pheasant hunting[1] and maybe some others. I have gleaned these illustrations from students, lawyers and supreme court justices.

I hope this course can help in your pursuit of becoming the procuring cause.

Brad Hanes, Summer 2011

[1]In disputes over game hunting, some will use the Arkansas Arbitration Technique. Here's an example of its use. A hunter shoots a pheasant which falls just over the fence line. When the hunter attempts to retrieve the pheasant, he is stopped by the farmer who claims the pheasant for his own. "It's on my property therefore it's my pheasant," says the farmer. Arguing ensues. The farmer proclaims, "In situations like this, people in these parts of the country resort to the 'Arkansas Arbitration Technique.' When asked to explain, the farmers says that the parties to the dispute take turns kicking each other in the shins and whoever inflicts the most pain, wins, or in this case, gets the pheasant. The farmer says, "I'll go first." The farmer is ruthless and the hunter is bent over in pain. When the farmer finishes kicking the hunter, the hunter insists on his turn to kick the farmer. The farmer says, "No, that's okay. You can just go ahead and have the worthless pheasant."
This is the last time this strategy will be referenced in this program; some may see wisdom in settling disputes this way. Procuring cause takes a different approach, however.

Chapter #1: Procuring Cause: Words and Phrases

Overview: This chapter explores the meanings of words and phrases important to the agent attempting to prove procuring cause.

Learning Objectives

As a result of studying this chapter, you should be able to:

- Define the word procure.
- Describe how the phrase, "find and introduce" describes procuring cause.
- Give one synonym for the phrase approximate cause.
- State the difference between procuring cause and consummation of sale.
- List numerous words and phrases having the same meaning as procuring cause.

The following information is from a legal encyclopedia. You will find numerous words and phrases descriptive of procuring cause. Each of the 49 paragraphs that follow are from court cases, (state supreme court or court of appeals) explaining the principle of procuring cause.

By studying this information you will be better able to understand the following chapters in this course. By studying this information you will be better able to understand your endeavor of being the procuring cause of a sale.

From Words and Phrases

Procure

(1) Whether the broker is to "introduce" a customer or to "find" or to "procure" one, or whether he is to do these things combined, his duties remain practically the same, as the words "find," "procure," and "introduce" . . .are generally used synonymously in the making of brokerage contracts.

(2) Where, in an action for broker's commissions, certain instructions required that plaintiff, in order to recover, must have "secured" a purchaser for the land, etc., the word "secure" meant "to obtain," "to give," being synonymous with "get," "obtain," and "attain," one definition of which is "to procure;" . . .

Action implied

(3) "Procure" means to initiate a proceeding to cause the thing to be done, and does not mean the passive permitting of an act.

Cause

(4) Evidence held to show that plaintiff procured purchaser for certain land, though he did not consummate sale; "procure" meaning to bring about or cause.

(5) "Procuring and inducing cause", as respects recovery of agent's commissions, means the cause originating from a series of events that, without break in their continuity, results in the prime object of the agent's employment; the word "procure" meaning to prevail upon, induce, or persuade a person to do something.

(6) Word "procure" does not necessarily imply formal consummation of agreement, but means "to bring about by care and pains, effect, contrive and effect, induce or cause," and, in its broadest sense, "to prevail upon, induce or persuade person to do something."

(7) A definition of the term "procure" as applied to the recovery of commissions for procuring a purchaser for an interest in land, should contain the elements of definition describing "procuring cause" as that cause which is a natural and continued sequence, unbroken by any new independent intervening cause, and produces the event without which it would not have occurred.

Find and introduce synonymous

(8) A broker must not only "procure" or find, but "produce," that is, put in touch with seller of realty, a purchaser ready, willing, and able

to buy on seller's terms, in order to earn commission, if sale is not consummated.

(9) A broker, who "procures" purchasers of realty in [a] sense that he influences them to go to seller and make purchase, "produces" them so as to entitle him to commission, though he does not introduce them to seller.

(10) Whether a broker is to "introduce" a customer or to "find" or to "procure" one, or whether he is to do these things combined, his duties remain practically the same, as the words "find", "procure", and "introduce" are generally used synonymously in the making of brokerage contracts.. . The logical result of this rule is that the sale must be traced to the introduction of the purchaser to the owner by the agent. Of course, if after such introduction, and as a proximate result thereof, the owner makes the sale himself, either personally or by another agent, it will not exonerate such owner from the payment of commission to the agent who has initiated the negotiations, but if the causal connection between the introducing agent and the procurement of the sale be broken, the first agent is not entitled to any commission.

Procured

(11) . . . Influenced to purchase the land.

(12) . . . Is used for the purpose of expressing the idea that through the instigation of the defendant the sale had been accomplished, since "procured" is synonymous with "persuaded" or "instigated," and hence is a proper allegation, . . .

(13) In order that it may be said that a customer has been "procured" by real estate broker, the seller and the buyer must be brought together so that the seller has opportunity to sell, which is not done unless the broker has either made such a contract with the purchaser, if the purchaser's identity be not disclosed, following the terms fixed by the owner, as will bind the purchaser to payment of damages in case of breach by the purchaser, or unless seller and buyer are brought together so that the seller can deal directly with the buyer.

Procuring and Inducing Cause

(14) For broker to recover, evidence must show that his efforts were procuring cause, and not merely one in a chain of causes; "procuring and inducing cause" meaning originating from a series of events that, without break in their continuity, result in prime object of employment of the agent.

(15) . . . which means that he set in motion a chain of events, which, without break in continuity, caused vendor and purchaser to agree, and his efforts were proximate cause of agreement, but it is not enough that he contribute indirectly by imparting information tending to arouse interest.

Procuring Cause

(16) . . . When the sale is traced to his introduction of the purchaser to the owner or principal

(17) ... by seeing broker's advertisement and being shown the property by broker's agent, and there was no independent intervening cause of sale. . .

(18) . . . that without it sale would not have occurred.

(19) Broker who introduced prospective purchaser to agent of vendor, but who was unable to close sale and who did nothing further for 14 months, was not the "procuring cause of sale" which was closed entirely through the efforts of another Realtor.

(20) . . . The mere fact that seller reaps benefits from broker's labors does not of itself entitle broker to commission. . .

(21) . . . after plaintiff had begun negotiations with purchaser. . .

(22) . . . In introducing, producing, finding and interesting a purchaser and means that negotiations which eventually led to a sale must be the

result of some active effort of the procurer.

(23) . . That cause which is a natural and continued sequence, unbroken by any new independent intervening cause. . .

(24) . . Whether the activity of one of the agents was the "procuring cause" of the sale was for the jury under the evidence.

(25) . . Commences a series of events. . .

(26) In determining whether salesman was "procuring cause" of sale on which compensation is based, the test is one of fairness, and question is one of fact for jury.

(27) . . . And purchaser returned on her own accord, negotiated directly with, and bought property from, vendor, two weeks after initial inspection, broker was "procuring cause" of sale.

(28) . . the sale is traced to his introduction of purchaser to owner or principal.

(29) . . provided there has been no bad faith toward another broker.

(30) Where broker finds a purchaser but contemplated purchaser and owner cannot agree on terms, and owner withdraws realty from broker's hands, and thereafter sells realty to purchaser, or to a third person acting for purchaser, broker is the "procuring cause" of sale.

(31) . . if his efforts are the foundation on which the negotiations resulting in a sale are begun.

(32) In the absence of collusion on the part of the vendor, the agent through whose instrumentality the sale was carried to successful conclusion is the "procuring cause" thereof.

(33) . . Must first call his customer's attention to the proposed transaction and start negotiations which culminate in consummation of the deal.

(34) If negotiations between parties brought together by broker are unproductive and parties in good faith withdraw. . . Broker. . . Not procuring cause.

(35) . .must be supported by evidence that broker first brought to receiver's attention the ultimate purchaser, and that sale followed in consequence.

(36) .. . Means the original discovery of the purchaser by the broker and the starting of the negotiations by him.

(37) . .acts in connection with the sale, if any, which so far contributed to bringing about sale that but for such act the sale would not have been accomplished by what was actually done by other parties to that end, was proper under the evidence which did not raise issue of a new and independent cause of the sale.

(38) When realty was listed with several brokers and first broker mentioned realty to buyer who declined to look at it and . . .first broker was not entitled to commission.

(39) . . .originating or setting in motion a series of events. . .

(40) . . . The contemplated purchaser and the owner cannot agree on terms and the owner, with a view to avoiding the payment of commissions, withdraws the property from the agent's hands without his consent and breaks off the negotiations with the prospective purchaser, but thereafter sells the property to such prospective purchaser or to a third person for him, the agent should be treated as the procuring cause of the sale. . .

(41) . . .was the first to call the buyer's attention to the property. . .was through his efforts that the sale was made; or, where the purchaser is not introduced by the broker, he must show that it was through his active negotiations that a satisfactory arrangement was finally reached; the active negotiations required being not a

single introduction of the parties, but a carrying back and forth of propositions, etc., which result in the sale.

(42) . . .as cause which is natural and continual sequence unbroken by any new independent intervening cause, . . .without which it would not have occurred, . . .

(43) . . .second broker did nothing toward bringing the parties together, but merely closed bargain at direction of the purchaser.

Approximate cause
(44) .. . phrase "procuring cause" means the approximate cause. . .

(45) . . .continuing in an unbroken chain from their inception. . .

(46) "Procuring cause" and "approximate cause" are substantially, if not quite, the same in meaning. But, admitting a shade of difference, it would be too much of a refinement to hold that the omission of the latter term in the court's charge to the jury would be error.

Efficient cause
(47) . . .is the originating of a course of action. . . Reaching the goal of the employment, ordinarily a sale or exchange of the property, and it is the efficient or effective means of bringing about the actual sale.

(48) Broker . . .had burden to show that his efforts were efficient and procuring cause of sale. . . Produces the event without which it would not have occurred.

(49). . .that broker arranged meeting between president and purchaser, and that sale was subsequently consummated. . .

Summary:
There are many words and phrases which mean the same as procuring cause. This chapter has described procuring cause as being a phrase of action and not as the passive permitting of an act.

Chapter #2: Procuring Cause: Basic Types of Listings and Compensation Requirements

Overview: This chapter explains the differences between the basic types of listings. Since procuring cause is a condition of compensation recovery, the listings are compared in this requirement. A detailed study of the phrase, "Ready, Willing and Able" is provided.

Learning Objectives

As a result of studying this chapter, you should be able to:

- Compare the three (3) basic listing contract types.
- Analyze similarities/differences between the various listing types.
- Describe the requirement of Procuring Cause in each basic listing type.
- Explain "Ready, Willing and Able."
- State the various meanings of "Able" as a requirement of compensation.
- Describe: joint listings, net listings, multiple listings and "no-deal, no-commission" listings.
- List one essential requirement for any claim of commission under procuring cause actions.

When studying Procuring Cause, it is essential to understand the three (3)different types of listings. Observe the following chart:

Types of Listings / Questions	Open (General)	Exclusive Agency	Exclusive Authorization (Exclusive Right)
How many competing companies may take this type of listing on a property?	Many	One	One
How many signs from competing companies may be placed on the property?	Many	One	One
May the owner sell/ market the property himself?	Yes	Yes	Yes
If the owner is successful in selling the property, is the owner obligated to pay commission?	No	No	Yes
Must the agents prove that they are the procuring cause to earn commission? Against whom?	Yes, against the owner and the other competing companies.	Yes, but only against the owner.	No. The agent does not need to establish procuring cause. The agent must only prove the existence of a ready, willing and able buyer.

Observation#1: The Exclusive Authorization listing requires payment of commission to the agent even if the owner procures the purchaser.

Observation #2: The Exclusive Authorization listing does not require the agent to prove that she is the procuring cause. This means that the agent and the owner of the property have agreed that the agent will receive commission regardless what person secures the purchaser.

Observation #3: There are only three (3) types of listings.
But, aren't there multiple listings and net listings

and joint listings?
No; these are not types of listings but variations within the three (3) listing types.

A *Multiple Listing* is any listing which is submitted to the local board multiple listing service. Therefore, you could have an Open multiple listing, an Exclusive Agency multiple listing or an Exclusive Right multiple listing.

A *Net listing* is any listing describing the compensation agreement as the 'net' over a certain base price. "You can have for your commission any amount of money you bring us over $250,000. If you bring us an offer for $260,000, your commission will be $10,000. If you bring us an offer for $250,000, you will receive no commission. If you bring us an offer for less than $250,000, we will not sell." (The net listing has been banned in the United States by most regulatory agencies for its strong tendency toward conflict of interest, i.e., the agent will only present offers which are favorable to the agent. All states require the presentation of *all* offers).

A *joint listing* is when two (2) or more companies share the responsibilities of being the listing broker. The seller is a well known person with many friends in real estate sales. To list with one friend would alienate his friendship with the others. The companies of the friends joins together to list the property with an exclusive type of listing.

A *"No-deal, No-commission" listing* is any listing which requires the transaction to close before the broker becomes entitled to commission. If the open listing has this contract provision, the open listing becomes a no-deal, no-commission open listing.

In summary, there are only three (3) types of listings but each of those types of listings may contain various contract provisions which further define the listing within its type.

Observation #4: The Open listing and the Exclusive Agency listing may require the agent to prove that he was the procuring cause of sale. The Exclusive Right (Authorization) will not require the agent to prove that he is the procuring cause of sale even if the seller located the ready, willing and able buyer.

Observation #5: The Open listing and the Exclusive Agency listing have more important similarities when compared to the Exclusive Authorization listing. Here's why. In the Open and Exclusive Agency listings, the seller is not obligated to pay commission to the agent when the seller is the procuring cause; with the Exclusive Authorization listing, the listing broker receives commission no matter what person or agent procures the purchaser.

Understanding Ready, Willing and Able.
Normally, the job of the agent is to produce a purchaser possessing the qualities of readiness, willingness and ability. Ready and willing mean the same thing. If a person is ready than they are willing.

Ability is more complex. Ability may mean the purchaser is legally able to purchase the property under the required terms. Legal ability refers to legal age, generally age 18. When a person reaches legal age, they are no longer a minor but a major; no longer an infant but an adult. There are a couple of exceptions. If the infant is married, they may be emancipated by marriage. If the infant commits a felony, they may be judicially emancipated to serve the sentence an adult would serve. I have been unable to determine the validity of a statement shared by one of my students working in government housing: "if the minor gives birth and retains possession of the child, the minor is emancipated; if the child is put up for and adopted, the minor retains the status of a minor." The principle sounds probable; it frustrates me to be unable to verify the truth of the statement.

Ability also means financial ability. Financial ability does not mean the buyer has the money at the seller's door in a wheelbarrow.. Financial ability does mean that the purchaser is able to "command" the money in the necessary time as agreed in the contract. Removal of financial contingencies seems difficult today compared

to the past. The lender (most likely the underwriter) appears to have an unending list of documentation that must be fulfilled up to and including the day of closing.

Ability may pertain to casualty insurance. If the purchaser cannot receive adequate insurance and for an affordable rate, the transaction may fail. Examples could include: obtaining replacement cost insurance on a property located in an area of non-conforming zoning (e.g., a home grandfathered in an area now restricted as industrial); a purchaser with a low FICO score not being able to get the best possible rate for insurance (FICO means: Fair Isaac Company which blends credit score numbers from Transunion, Equifax and Experion); expensive flood insurance (flood insurance to cover a $100,000 mortgage may run between $600-$800/year); a purchaser trying to receive adequate and reasonably priced insurance on a difficult-to-get-to property too far from Rural Water.

Ability may pertain to mortgage insurance. If the purchaser's downpayment is less than 20% of the value of the property, the purchaser may be required to carry mortgage insurance. Private mortgage insurance or PMI or MI indemnifies the lender for losses resulting from a foreclosure.

In this study of Procuring Cause, the agent must prove, at a minimum, that there was a Ready, Willing and Able purchaser. All attempts at procuring cause will fail until it is proven that there existed a purchaser qualified to buy the property.

Summary: this chapter identified three (3) basic listing types in respect to procuring cause actions for compensation recovery. Within the basic listing types are variations such as: net listings, joint listings, multiple listings and "no-deal, no-commission" listings. "Ready, willing and able" are the qualities required of any purchaser for whom the broker seeks compensation. Able was described as meaning: legally able, financially able, and able to command reasonable rates on property and mortgage insurance. It is essential that the broker prove that there existed a ready, willing and able purchaser in any procuring cause action.

Chapter #3: Procuring Cause: The Agent *versus* the Seller under an Open Listing

Overview: One of the possible situations surrounding procuring cause is the relation between one agent and one seller using an open listing. This chapter reveals some of the principles pertaining to procuring cause interpretation with the limits of *one* agent and *one* seller and the *open* listing.

As a result of studying this chapter, you should be able to:

- Recite one advantage in using an open listing.
- Recite one disadvantage in using an open listing.
- State the position of the National Association of Realtors regarding open listings.
- Explain the impact of abandonment on the agent's attempt to prove procuring cause.
- Give the abandonment time period necessary to contest the agent's attempt to prove procuring cause.
- Give examples of words and actions which may break the agent's open listing and rights to commission under procuring cause.
- Explain the danger of "eavesdropping" marketing and procuring cause.

When studying real estate transactions involving open listings, you will soon learn the challenges associated with open listings.

Problems arise because of the competitive nature of open listing. If the *agent* is successful at finding the buyer, the agent receives the agreed commission. If the *seller* is successful at locating a qualified purchaser, the agent receives no commission.

On the other hand, some like open listings . One of my students expressed his appreciation for open listings, "In the winter months I sell recreation property in the south (Oklahoma?). The land in my area is listed mostly using open listings. If I have a purchaser for the property, I sell the property using an open listing and don't need to split the commission with any other agent. I get it all!"

The National Association of Realtors has identified difficulties with open listings and has stated in the Preamble of the Code of Ethics: "Realizing that cooperation with other real estate professionals promotes the best interests of those utilizing their services, Realtors urge exclusive representation of clients. . ." Exclusive listings help prevent the problems caused by open listings.

First, however, let's limit our study to one agent and one seller using an open listing.

The common thread in contests between the agent and seller is very often found in the following simple story. The agent shows the seller's property to a certain buyer. The buyer mysteriously begins direct negotiations with the seller and secretly closes the transaction without the knowledge of the agent. When the agent discovers that he has been defrauded, the agent claims that he is the procuring cause of the sale.

Procuring Cause and Abandonment

In the preceding story, what would be the end result if the agent delayed taking action to begin negotiations? Problems arise when the agent discontinues his efforts to market the seller's property to a certain buyer. When this happens, the seller may step in and complete the sale without obligation to the agent for compensation.

Example: A broker showed a farm. After the farm showing, the broker confessed to the seller that he, "couldn't sell the farm." Such a statement may have the effect of not only preventing the broker from claiming he was the procuring cause but of canceling the broker's open listing. When the seller sold directly to this agent's last prospect, the broker took action against the seller and lost. Making that kind of a confession may reduce your probability of judicially collecting commission.

Other acts of abandonment may include:

—refusing to advertise the seller's property in the newspaper or other mediums.
—refusing to show the seller's property when requested.
—voicing your discouragement about the condition of the seller's property.
—forgetting to make regular communication with the seller.
—forgetting to notify the seller regarding comments made by those showing the property.
—listing other properties with similar characteristics and diverting prospects to those properties.
—failing to fulfill your promises for advertising, frequency of advertising, frequency of open houses, etc.
—disparaging the transaction to the buyer, "there are better properties for your money than this one."

Discouragement and *shyness* may hinder an agent's career in real estate. When the agent no longer "believes" in the property they are marketing ("I've received too many complaints that your home needs updating" or "the price is out of line with the competition" or "it doesn't show well") and discontinues marketing the property. This may constitute abandonment and allow the seller reason to refuse commission when sold to a contested purchaser.

> . . . the broker who was the efficient procuring cause of the sale is entitled to the commission and that this right cannot be affected because the principal in person, or by another agent, takes into his own hands and completes the transaction which the broker has inaugurated.

Example: The listing was on an entire subdivision of residential lots. The seller tried to cancel the listing using "abandonment" as the reason. The Iowa Supreme Court viewed the agent's evidence of regular newspaper advertising as proof for compensation.

When the agent becomes "shy" and does not communicate with the seller with news of progress on the marketing of the property, such could allow the seller liberty to put an end to the agent's listing. Of course, bad news (e.g., "I regret to inform you that we have had no showings of your property for the last month!") is always hard to share. The agent needs to communicate frequently even when the news is discouraging.

I once asked a close friend of mine, which, of two Realtors he liked better. He said that neither had sold his property but the better agent was, "the one which communicated frequently." Regular communication may save your reputation and your commission should there be a controversy about procuring cause.

Is there a time period for abandonment?

If there is a time period for abandonment in the context of an open listing and procuring cause, the details of the transaction and type of property may be factors used to resolve the issue. Commercial/industrial/farm properties may allow for longer periods of "lapse" between marketing efforts compared to single family residential.

A board of Realtors may establish a time period of abandonment in arbitration cases.

Other methods to establish time periods of abandonment may include:
—joint venture agreements between two competing companies.
—time periods established in the open listing between the agent and the seller.
—case law interpretation for periods of abandonment.

Studt vs. Leiweke: The question whether or not the broker is the procuring cause of the sale being ordinarily one for the jury, that issue has been held properly submitted upon evidence that the broker discovered the purchaser, showed him the property, recommended it to his consideration, and brought him to the owner, who within a week consummated a sale.

The Wyoming Supreme Court has said: "where the intervening time is comparatively short, and where there is doubt whether the negotiations were definitely and finally broken off in good faith, and where justice to the broker and to the owner are in the balance, the question as to whether or not the broker should be allowed a commission may, often at least, become a question for the jury to solve." Additionally, "The time intervening between [the customer's] offer in April and its acceptance four or five months later was not so long that we could say as a matter of law that it definitely broke the connection between the offer and the sale. . . . On the whole, therefore, while the point is not free from doubt, we are not prepared to say as a matter of law that the jury were not justified in finding that the negotiations were merely suspended in April and not definitely rejected."

In a New Jersey case, and at the *owner's request*, the broker was temporarily "laying off" until he heard from the owner and that in the meantime the owner was dealing behind the broker's back with the purchaser procured by the broker in order to save commission. Could the temporary laying off of the broker be abandonment? The question of abandonment was submitted to the jury.

The broker showed a farm to a possible purchaser who rejected the farm due to poor soil quality. Wanting to see the farm again, the broker sent the customer directly to the farmer. Later, the farmer approached the broker about canceling the listing saying he had an "opportunity to lease the farm." Accommodating the seller, the broker canceled the listing. Within two (2) weeks the seller had sold the property to the broker's customer. The seller refused to pay commission since his listing had been terminated. The court said the seller had acted in bad faith in terminating the listing. Note#1 : bad faith was evident in the prior examples. If the broker can prove the seller acted in bad faith, the broker will normally be awarded the commission. Note #2: In this example, the broker was also a school principal and was unable to show the property when the purchaser wanted and, as it says above, the purchaser was directed to the seller. It's always good to be with the purchaser whenever they view the seller's property.

Abandonment and Emergency Time Periods.

Other factors may influence the jury about the broker's abandonment. Certain real estate transactions have special time emergencies. Examples of emergency time periods may include the following:

—1031(a) Tax Deferred exchanges must be completed in a timely fashion according to IRS statutes.

—The seller may need a transaction completed before the first day of the subsequent year to have recognized gains or losses for IRS income tax purposes.

—The seller must close on their *relinquished* property in order to close on their *replacement* property.

—Any contract containing the phrase: "time is of the essence" such as:

-time dated contingencies pertaining to financing.

-time dated contingencies pertaining to preliminary zoning applications.

-time dated inspections, environmental "Phase" studies, septic systems inspections.

-surveying necessary for removal of property from flood plain maps.

-due-diligence studies with any dated deadlines.

-exercise of option deadlines for contract renewal or purchase of property.

-deadline notifications for pre-emption contracts.

If the agent appears uninterested in solving the time-crisis issues stated above, the seller may be justified in directing the transaction without the agent's help and, of course, refuse payment of commission. The jury may conclude that:

- the agent had abandoned his efforts, plus
- endangered the seller's transaction and, consequently,

- was not the procuring cause.

In concluding this chapter, I want to share with you a transaction dealing with one agent and one seller using an open listing. Let me read between the lines a little here and please forgive me taking such liberty. But imagine the agent was in a modern store (grocery store?) and visiting with a prospective purchaser (aisle #5?). Unbeknownst to the agent, a person is eavesdropping on the agent's comments (in aisle #6?), likes the agent's description of the seller's property and goes directly to the seller. The seller and "eavesdropping" buyer close the transaction without the broker.

Now read the following story and see the opinion of the Iowa Supreme Court.

Monson vs. Carlstrom
Feb. 1909, Iowa Supreme Court

The court instructed the jury that the broker must prove that the person to whom the sale was made "was so procured, and induced to enter into negotiations and make such purchase, by and through the efforts and influence of plaintiff," and that it would not be sufficient for plaintiff merely to show that such person became aware that the property was for sale by overhearing some negotiations between the plaintiff and another person, to whom the plaintiff was endeavoring to make a sale.

We are justified, therefore, in assuming that there was evidence tending to show that the only connection between plaintiff's act and the sale which was in fact made by defendant was that the person who became the purchaser, without any solicitation from the plaintiff or communication between him and the plaintiff on the subject, ascertained by overhearing plaintiff's conversation with another, that defendant's property was for sale, and then proceeded on his own motion to enter into negotiations with defendant for its purchase. We are clear that under such a state of facts plaintiff would not be entitled to recover a commission for procuring a purchaser, and the instructions of the court were in this respect correct. The cases relied upon for appellant are not in point. In no one of them is it suggested that there had been no solicitation of the purchaser by the agent, or communication by the agent to the purchaser of the fact that the property was for sale. In the case before us we must presume there was evidence tending to show that nothing which was done by the plaintiff had any proximate connection with the purchase of the property.
(end of case)

Could it be said of procuring cause that: "the agent who claims to be the procuring cause must know that he was the procuring cause."? The agent in the above case had no idea who was listening to his attempts to market the seller's property.

Conclusion: This chapter included procuring cause information pertaining to *one* agent and *one* seller and an *open* listing. Open listings have advantages and disadvantages. Agent's have lost procuring cause attempts for compensation recovery by abandoning their marketing attempts to prospective agents. Abandonment time periods may vary depending on the type of real estate transaction.

Chapter #4: Procuring Cause: Agent vs. Agent

Overview: This chapter covers two (2) procuring cause situations. The first situation is when the seller has given open listings to multiple companies, each claiming to be the procuring cause. The second situation is similar. The seller has given an exclusive right (authorization) listing to only one company and the property is sold. However, the listing broker must make a procuring cause decision between feuding agents regarding commission.

Learning Objectives

As a result of studying this chapter, you should be able to:

- Recite key issues in agent vs. agent procuring cause issues.
- List important factors in making decisions within the perceived guidelines of procuring cause settlements.
- Analyze the Iowa Supreme Court ruling in Tokheim vs. Miller.
- List alternative rules/principles of compensation settlements other than procuring cause.
- Compare advantages and disadvantages of compensation settlements other than procuring cause.

Review an earlier chapter about the three types of listings: Open, Exclusive Agency and Exclusive Authorization.

In this chapter, we will discuss the dilemma when two agents, working with the same buyer, claim the sales commission.
1). When the seller has given an open listing to different real estate companies, a procuring cause decision must be made when both companies lay stake to the same purchaser.
2). When the seller has given an exclusive listing to only one company, the listing broker must make a procuring cause decision when more than one salesperson/company is working with the same purchaser who consummates the sale.

A subtle difference

At first examination, this topic appears the same as the chapter titled: **The Agent *versus* the Seller under an Open Listing.**

It is different and the difference is difficult to explain. The difference appears when the agent loses the purchaser to the seller (open listing) *compared to when* the purchaser is lost to a competitor. Maybe the difference is one of favoritism. The courts may favor the efforts of a second broker who tries to consummate the sale for the seller compared to the seller, engaged in the same activities, who appears to be working behind the agent's back.

Situations notorious for initiating Procuring Cause disputes.

There are numerous situations which can bring procuring cause feuds. Examples include:

1. When a property has been shown by more than one agent to the same buyer.
2. When a property has been shown by one agent, and later, a different agent writes the offer without showing the property.
3. When a certain purchaser is solicited by two different agents for the same property, neither agent having shown the property, and the sale is negotiated through one of those agents.
4. When a property is first shown as an "open house" and later by a different agent.
5. When the property is first shown as an "open house" and later, a different agent writes the offer without having shown the property.
6. When the agent provides the owner with the name of a potential buyer.
7. When a buyer learns of a listing through the efforts of an agent. (e.g., sees the agent's signs or advertisements) but contacts the seller directly. (See an earlier chapter)
8. When a buyer learns of a listing through the efforts of an agent (e.g., sees the agent's signs or advertisements) but contacts a different agent.
9. The property is shown by the listing agent; the buyer purchases through a second agent (who claims to be able to give better representation through single agency).

10. The purchaser views the property through one agent but feels "*more comfortable*" working through a different agent.

"Where two or more brokers are employed, there is no implied contract to pay more than one commission, and it therefore becomes necessary to lay down a rule for determining which one of different possible claimants is entitled to be paid. Where several brokers have each endeavored to bring about a sale which is finally consummated, it may happen that each has contributed something without which the result would not have been reached. One may have found the customer, who otherwise would not have been found, and yet the customer may refuse to conclude the bargain through his agency; and another broker may succeed where the first has failed. In such a case, in the absence of any express contract, the one only is entitled to a commission who can show that his services were the really effective means of bringing about the sale, or 'the predominating efficient cause.' "
Robert W. Seminow, Questions and Answers on Real Estate, 8th Edition

Please read the following case study and respond to the following questions:

1. Can a purchaser be "owned" by an agent?
2. An agent is the first to bring a property to the attention of a purchaser. Does this give the agent certain rights compared to other agents?
3. Could a seller become liable for more than one commission under certain circumstances?
4. Could a purchaser require to have certain needs fulfilled before becoming, "ready, willing and able?"

Case Study
Tokheim vs. Miller (Supreme Court of Iowa. Sept. 19, 1922)

The plaintiff **(Broker #1)** was engaged in the real estate business. The defendant, Dr. Miller, was the owner of a quarter section of land, which he put upon the market in the fall of 1919 at $2 per acre commission to the successful agent. The plaintiff was one of such agents. Ben Jacobson **(Broker #2)**, was another. Each of them devoted considerable time and effort in attempting to procure a satisfactory purchaser. No terms of sale were specified by the seller except the price thereof.

On March 27th the land was actually sold to one Hanna.

The one disputed question in the case upon the trial was which agent was the efficient procuring cause of the sale to Hanna.

Hanna was not a stranger either to the seller or to the agents. He had formerly owned part of the land and lived near thereto. Tokheim (**BROKER #1**) had solicited him a number of times to make the purchase, but he had never assented thereto. He had been the subject of conversation between Tokheim (**BROKER #1**)and the defendant as a prospective purchaser. Tokheim (**BROKER #1**)first solicited him in February, 1920. He had at that time declined to consider any purchase until after March 1st, on which date he was to have a settlement on a farm sale made by himself.

This settlement, if carried through, would result in having on his hands a third mortgage for a part of his purchase money, which mortgage would amount to something over $15,000. He was desirous of negotiating this mortgage as a part of any trade he might make in the purchase of another farm. According to Tokheim (**BROKER #1**)'s testimony, he disclosed this fact to Dr. Miller. He was unable, however, to state the amount of the mortgage, or any facts with reference thereto which would enable Miller to decide whether he would accept the mortgage in such a trade or not. Miller as a witness denies that Tokheim (**BROKER #1**) had ever mentioned the mortgage to him.

No apparent progress was made with Hanna as a proposed purchaser prior to March 26th. On

that day Jacobson **(Broker #2)**, having posted himself as to the amount and character of the third mortgage held by Hanna, had procured the consent of Miller to accept the same as a part of the selling price of the land in the event that Hanna would buy. This occurred in Humboldt. Hanna was a resident of another town. Having obtained this concession from Miller, Jacobson **(Broker #2)** at 1p.m. phoned to Hanna, advising him that he could give him a "good deal," and asking him to appear at Humboldt the next day for the purpose of making a purchase. On the same day Tokheim (**BROKER #1**) visited Miller, and advised him of his belief that he could make a sale to Hanna. Miller advised him to bring in his purchaser "tomorrow." Tokheim (**BROKER #1**) in reply said that he himself would not be able to come to Humboldt on the following day, but would, if possible, send his customer there. He also phoned to Hanna between 2 and 3 p.m., requesting him to be at Humboldt on the following day. Hanna came on the following day, and went to the office of Dr. Miller, but did not find Miller there. He thereupon left. Later he met Jacobson **(Broker #2)** who at once undertook to induce him to make the purchase. At Jacobson's request Hanna went with him to the office of Dr. Miller and a sale of the farm was accomplished then and there at the price of $325.

- . .the only issue made was: To which agent was Miller liable for the commission?

Each accordingly understood that he must work in competition with the other agents, and that he would not be entitled to a commission unless he became the final procuring cause of the sale to a purchaser.

. .trial court held, in substance, and so instructed, that the defendant was presumptively liable to Jacobson, and that the burden was upon the plaintiff to prove by a preponderance of the evidence that he himself, and not Jacobson, was the procuring cause of the sale.

"So the only question for you to decide in this case is whether the plaintiff was the efficient and procuring cause of this sale, or whether Ben Jacobson was the efficient and procuring cause of the sale. If you find that the plaintiff has shown by the preponderance of the evidence that he himself was the procuring cause of the sale, your verdict should be for him, but if you find that he has failed to prove that he is the procuring cause of the sale, your verdict should be for the defendant."

Inasmuch as under the undisputed facts, Miller could be liable for only one commission. It would necessarily follow that if plaintiff was entitled to it, Jacobson was not, and vice versa. . .The jury could not intelligently find that one agent was entitled to the commission without also finding that the other was not.

[Tokheim (**BROKER #1**)'s] only claim is that he had requested Hanna on the previous day to go to Miller's office to negotiate with him; but Jacobson had done the same thing, and had made his request to Hanna one or two hours previous to that made by Tokheim (**BROKER #1**). The connection of Jacobson with the final procurement of the customer was visible, and necessarily known to Miller. We see therefore no escape from the proposition that Miller was presumptively liable to Jacobson rather than to Tokheim (**BROKER #1**).

If back of the final transaction in Miller's office there were peculiar facts or circumstances as between Jacobson **(Broker #2)** and Tokheim (**BROKER #1**)which would give Tokheim (**BROKER #1**)priority of right over Jacobson **(Broker #2)**, the burden of proving them would necessarily be upon Tokheim (**BROKER #1**). Granting that Tokheim (**BROKER #1**)first solicited Hanna as a purchaser (and even that is in dispute) that fact did not give to Tokheim (**BROKER #1**)a lien on or a proprietary interest in Hanna as a customer, although such is the assumption that often obtains in the minds of agents. Granting that Tokheim (**BROKER #1**)was influential and instrumental in directing the mind of Hanna to the purchase and in holding it there, this of itself entitled him to nothing. This could have been true as to all of the agents. It

was a part of their competition. The rule remains that the winning agent must be the one who first procures the consent of the purchaser to enter into contract on terms satisfactory to the seller.

Taking a view of the evidence most favorable to the plaintiff, the most that can be said for it is that it tended to show that the plaintiff first solicited Hanna, and that he solicited him diligently and frequently, and that he was thereby instrumental and influential in inducing Hanna to a favorable decision. But, this could be true of all competing agents with whom an owner has listed his land. If the owner were to become liable for a commission because of such influence and assistance, he would become doubly and trebly liable to every agent that had made an effort to sell to the particular customer. We think therefore that there was no error in the noted instructions of the court on the question of burden of proof.
[conclusion: seller won against Broker 1]

Talking Points:
— 1) The purchaser was wanting to use a third mortgage obtained in a prior transaction as part of his purchase money.

— 2) Tokheim (**BROKER #1**) was unable to state the amount of the (Hanna's) mortgage, or any facts with reference thereto which would enable Miller to decide whether he would accept the mortgage in such a trade or not.

— 3) Ben Jacobsen **(Broker #2)**, having posted himself as to the amount and character of the third mortgage held by Hanna, had procured the consent of Miller to accept the same as a part of the selling price.

— 4) Granting that Tokheim (**BROKER #1**) first solicited Hanna as a purchaser (and even that is in dispute) that fact did not give to Tokheim (**BROKER #1**) a lien on or a proprietary interest in Hanna as a customer, although such is the assumption that often obtains in the minds of agents.

— 5) If the owner were to become liable for a commission because of such influence and assistance, he would become doubly and trebly liable to every agent that had made an effort to sell to the particular customer.

— 6) The jury could not intelligently find that one agent was entitled to the commission without also finding that the other was not.

Other rules which may fall outside of procuring cause rule:
The most comfortable rule:
This rule allows the purchaser to work through an agent other than the agent who showed the property to the purchaser. As the rule implies, if the buyer feels more comfortable with a different agent, the other agent may receive the commission.

Some agents may validate the rule by saying, "in the end it should all work out equal." I think this means that, over a long period of time, I will have an equal number of people feel more comfortable working with me (even though you did most of the work finding them the property) as what you will have had working with you (even though I did most of the work finding them the property).

I have some problems with this rule.
1. The buyer needs to explain his lack of comfort with one agent compared to another. If the discomfort is for some good business reason, (he lied to me about…; he asked me to misstate my income on the loan application. . .; he asked me to forge my spouse's signature. . .) then the discomfort is understandable. But there must be some good reason for the customer's discomfort. If it is because of the agent's car (although older but clean and road worthy) the purchaser may not have good cause to jump ship and work with another agent.
2. Most Comfortable Rule vs. Procuring Cause Rule. Procuring Cause Rule has been around for a long time. Much has been studied about it. The case law inter-

pretation is huge. It doesn't appear that the Most Comfortable Rule has come of age; I can't find anything written about it anywhere, not in legal dictionaries, legal encyclopedias, local board of Realtors, not anywhere. Why rely on a rule which has no such basis?

3. Arbitrary, Temperamental and Capricious. Real estate brokerage is a business based on contracts, joint ventures, mortgages, etc. As a business it requires its players to act in good faith. The Most Comfortable Rule appears to allow purchasers to act arbitrarily, temperamentally and capriciously. What could be more opposite compared to good faith.

The Threshold Rule

This rule resolves commission disputes by giving the selling side of the commission to the first person who shows the property. Even though a different agent writes the offer or makes the purchaser ready, willing and able, the person first showing the property receives the commission.

The Threshold Rule is not all bad. It provides for an easy solution to the difficulties presented in compensation resolutions. There is usually an abandonment period: if the person showing the property does not contact the prospective purchasers within a stated period of time (e.g., ten days) the purchasers may view and purchase the property through a different agent with no commission to the first agent.

Here's the problem: the Threshold Rule may transform the agent into a shower of properties as opposed to a procurer of purchasers.

The purchasers are interest in some property priced about $250,000. "So, what is the price of this property?" they ask the agent. "$500,000." says the agent. Purchaser: "But we can't afford that much." The agent shows them another property. Purchaser: "How much is this property?" Agent: "$100,000." Purchaser: "But this doesn't include the amenities we are needing." It appears the agent is showing them every available property in town; should they try and purchase through another agent, that agent will discover that they have already been introduced to all properties.

Because of the simplicity of the Threshold Rule, it could be included in joint venture agreements between two competing companies. In resolving the dispute, the companies would answer the simple questions: "who showed the property first?" and "did that agent abandon the purchasers?"

The First Agency Agreement Rule

This rule gives the commission to the first agent which has an agency relationship with the purchaser.

First, the agency agreement may be a simple disclosure about agency relationships without including any contractual agreements. Or, it may be an elaborate disclosure including "exclusivity" of representation and a compensation agreement should the purchaser default and purchase through another agent.

Can a purchaser be listed similar to listing a seller? Yes.
Just as a seller could be listed with an open listing, so also the purchaser (the purchaser could view and purchase the property through various agents).
Just as a seller could be listed with an exclusive authorization listing, so also the purchaser (the purchaser would owe the agent a commission when purchasing through a different agent).

Remember: The National Association of Realtors has stated in the Preamble of the Code of Ethics: ". . . Realizing that cooperation with other real estate professionals promotes the best interests of those who utilize their services, Realtors urge exclusive representation of clients, . . ." Notice here that it does not say: "exclusive representation of sellers." Buyers can receive exclusive representation and enter compensation agreements just like sellers.

The Unfair Advantage Rule

Another phrase in the Realtor's Code of Ethics

Preamble is: ". . . Does not attempt to gain any unfair advantage over their competitors. . ." Please notice the word "unfair." It certainly is part of the competitive nature of real estate brokerage and business in general to gain an advantage over your competitors. The problem originates when I seek an "unfair" advantage over you. The unfair advantage may be brought about through unscrupulous practices, showing a customer a regulatory agency disciplinary action against you ($1,000 fine for not having E&O insurance for one day) or by unjustly defaming your character.

Here is one of my favorite stories showing one agent trying to gain an unfair advantage over another agent.
The listing broker shows the home to Mr. and Mrs. Prospect. This is the first showing of this property in six weeks. They love the property and go to their hotel to spend the night. The listing agent is in great anticipation they will write an offer.

The next day, the listing agent receives a phone call from a competitor, Agent 2, from another office: "I have Mr. & Mrs. Prospect in my office and would like to present their offer on a property located at (same property the listing agent showed them earlier!).

The listing agent took liberty to call Mr. & Mrs. Prospect to ask them why they wrote the offer through the competitor. Their response was this: "According to Agent 2, he would be representing us under single agency compared to you who would be representing both parties using dual agency. We think we can get better representation under single agency."

Here is why I think Agent 2 attempted to gain an unfair advantage.

1) It isn't fair to predict how another agent will represent the parties to a transaction. How was Agent 2 so certain of the listing agents methods of representation? Iowa agency rules and regulations allow for *potential* dual agency in the above situation but either seller or purchaser can refuse *actual* dual agency before signing new agency disclosures.
2) I certainly believe that representation under single agency is a stronger bargaining position compared to dual agency. But there is at least one exception. When the listing agent is representing both parties, the listing agent has more commission to "cut" to convince the seller to take the buyer's low offering price for the property. In our story above, the purchaser maybe got better representation but also may have had to pay a higher price for the property. Note: I am not suggesting that you should ever diminish your commission by any amount to accommodate the parties to a transaction. But knowledgeable buyers and sellers know the commission structure and its dynamics in similar situations.

Suppose, in fact, that the listing agent did represent the seller and purchaser using a dual agency. Is it possible the listing agent, using dual agency, could have performed more legally and ethically compared to the behavior of Agent 2 using a single agency? It is possible.

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Chapter #5: Procuring Cause, the local Board of Realtors, Professional Standards Committee and Arbitration

Overview: This chapter gives guidelines for actions taken through the Board of Realtors professional standards/arbitration committee. Article 17 of the Realtor Code of Ethics is the main tenet of the Code of Ethics dealing with procuring cause.

Learning Objectives

As a result of studying this chapter you should be able to:

- State the key question answered by the grievance committee allowing arbitration of compensation disputes.
- State the only fact or detail which is allowable going into arbitration.
- Recite key details about the enforcement of the arbitration professional standards committees' final decision.
- List key issues, which, cannot in themselves, become sole determiners in procuring cause issues.
- Recognize that the arbitration professional standards committee functions to conduct a full "due process" hearing with sworn testimony, counsel, witnesses and documentary evidence.

The Arbitration Process

When a request for arbitration is filed, arbitration is conducted under Article 17 of the Code of Ethics plus state arbitration statute (if any).

Article 17 provides that arbitration occurs under the following circumstances:

A. Contractual disputes or specific non-contractual disputes (see Standard of Practice 17-4);
B. Between Realtors (principals) associated with different firms;
C. Arising out of their relationship as Realtors.

The Grievance Committee performs a screening function similar to review of ethics complaints. The key question for the Grievance Committee is: "If the allegations 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?"

Mediation follows. Mediation is a voluntary process in which disputing parties meet with a mediator appointed by the Association to create a mutually acceptable resolution of the dispute, rather than having a decision imposed by an arbitration hearing panel. Mediation can occur before or after the Grievance Committee review requests for arbitration, depending on local Association policy. If a dispute is resolved in mediation, the parties sign an agreement spelling out the terms of the settlement, and no arbitration hearing is held.

The Professional Standards Hearing Panel functions to conduct a full "due process" hearing with sworn testimony, counsel, witnesses and documentary evidence. The Hearing Panel consists of members of the Professional Standards. After the hearing, the Hearing Panel decides which Realtor is entitled to the award (typically a disputed commission in a transaction, proven by a preponderance of the evidence.

Payment of the Award

Generally, the award of the Panel in an arbitration case can be judicially enforced if not paid by the non-prevailing party. Some associations have procedures requiring that awards be deposited with the Association pending review of the hearing process or during legal challenge.

NAR's Arbitration Guidelines

The National Association of Realtors guidelines for dispute resolution regarding commission controversies is found in the Code of Ethics Arbitration Manual. Guidance to Hearing

Panels suggest methods of determining procuring cause in arbitration hearings. This also referred to as "Suggested Factors for Consideration by a Hearing Panel in Arbitration." These Guidelines focus on "procuring cause" as the basis for resolving most commission disputes between brokers.

Key Factors in a Procuring Cause Dispute

There is no predetermined rule of entitlement that may be established by an association of Realtors. The Hearing Panels should consider the entire course of events before making a determination. Matters such as the first showing of the property, the writing of the successful offer or the existence of an agency relationship with the buyer are not, in themselves, exclusive determiners of procuring cause/ entitlement. The key concepts of procuring cause are referenced in this definition from Black's Law Dictionary, Fifth Edition: "The proximate cause; the cause originating a series of events which, without break in their continuity, result in the accomplishment of the prime object."

Pertinent Sections: 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 (principals) 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.

The obligation to participate in arbitration contemplated by this Article includes the obligation of Realtors (principals) to cause their firms to arbitrate and be bound by any award.

Standard of Practice 17-1

The filing of litigation and refusal to withdraw from it by Realtors in an arbitrable matter constitutes a refusal to arbitrate.

Standard of Practice 17-2
Article 17 does not require Realtors to arbitrate in those circumstances when all parties to the dispute advise the Board in writing that they choose not to arbitrate before the Board.

Standard of Practice 17-3
Realtors, when acting solely as principals in a real estate transaction, are not obligated to arbitrate disputes with other Realtors absent a specific written agreement to the contrary.

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.
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 the 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.

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.
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.

Summary: This chapter includes important information used by the local board of Realtors in resolving commission disputes between licensees. Arbitration has been described as due process including witnesses, testimony, counsel and the professional standards committee (jury). Mediation may be included as a means of resolving the dispute. The decision of the professional standards committee may be judicially enforced.

Chapter #6: Procuring Cause: Parables, Analogies, Metaphors and Picture Stories

Overview: This chapter introduces the use of parables, analogies and metaphors as a method of explaining procuring cause.

Learning Objectives:

As a result of studying this chapter, you should be able to:

- List details of the "apple tree" metaphor.
- Recite questions that should be asked of a purchaser before writing an offer.
- State the importance of establishing "firstness" with a purchaser.
- List reasons to maintain contact with a purchaser even if they appear disinterested in the property.
- Explain what is meant by "*bumping into*" difficult topics with a prospective purchaser as an attempt to prevent future compensation difficulties.
- Explain "abandonment" and its relevance to procuring cause and "fishing."

Procuring Cause: Parables, Analogies, Metaphors and Picture Stories

One of the best ways to explain procuring cause is the use of parables. However, a story, parable or illustration is only good to certain limits. Over analyzing the story, parable, etc., eventually causes it to break down and become less applicable to the problem it was created to solve.

Here are some parables that may help to understand the principles of procuring cause.

#1: The Apple Tree Parable of Procuring Cause.

"It is the broker who shakes the tree and not the one who runs up and gathers the apples, who is entitled to the commission."

Instructor's comments. This short but graphic illustration was cited by an attorney/ law instructor named Semenow in a discussion of Nichols vs. Pendley. (Semenow wrote one of the first books used by persons studying to pass their real estate examination: Questions and Answers on Real Estate.)

Notice again the phrase, ". . .and not the one who runs up and gathers the apples. . ." I think many of the battles between feuding real estate agents could be avoided if an agent would make inquiry of the buyer regarding such matters as:

—"Have you seen this property through any one else?"

—"Have you signed any type of paper work agreeing to work exclusively with that agent?"

— "If you have seen the property through another agent, why are you wanting me to draft the offer?" . . . plus other pertinent questions.

One of my students made an appointment to write an offer on a certain property. "Meet me at the office in two hours and we'll write the offer" were the words of the agent.

Unfortunately, the buyers arrived early and were intercepted by another agent in the office who wrote the offer, pocketed the commission , . . .all without ever showing the property.

Asking appropriate questions of the purchaser may avert commission disputes and difficulties. Asking appropriate questions of the purchaser may prevent you from being the one who *runs up and gathers the apples without shaking the tree.*

#2: The First-Blood Parable of Procuring Cause.
If you are a hunter, you may know this principle.

If a judge or game warden is asked to make a determination of ownership of the trophy deer, it may be said, "Whoever can prove first-blood gets the animal." The hunter inflicting the first wound gets the animal, using this rule.

Instructor's comments:
This principle may prove the importance of being first in time. You were the first person to get an agency disclosure signed or the first person to show the property or first to introduce the purchaser to the seller.

The first-blood principle has its limitations when applied to real estate marketing. The problem with applying this principle to real estate sales is that the agent may be great at showing properties but not so good at getting acceptable offers from purchasers. Nevertheless, this idea of "firstness" has been applied by courts and juries in some procuring cause cases.

#3: The Deer Hunting Parable of Procuring Cause (A)
This story has more humor than principle.

My student and his brother were hunting and shot a deer. They attached the deer tag. To their astonishment, the deer resuscitated, got on its feet and bounded over the hill.

They heard gun shots.

The same deer was shot by a third hunter on the other side of the hill.

Who gets the deer? The third hunter, noticing the deer tag said, "if you can tag a live deer *on the run*, you deserve to have this deer—it's yours!"

Instructor's Comments:
I questioned whether to include this story in your course but couldn't resist.

Purchasers may appear to be disinterested in the property you have shown them . But their interest may pique. And you don't find this out until discovering they have purchased the property from a competitor.

Stay with your purchasers. Don't let them out of your sight until you are certain they have no interest in the property. Take the purchasers to lunch; call the listing agent and speak of their interest in the property; make immediate phone calls to the purchaser; have a quick discussion about *loyalty* with the purchasers, etc.

One of my students believed in "bumping into" a problem area before it became an issue. Take the problem of buyer loyalty. He would sit with the purchasers before showing them property, and say, "Now, I need to share something with you or else I'm going to have real *skinny* children."

He would proceed to tell them that if they bought the property from someone else, he wouldn't get paid. What a great way to inform customers and clients of your method of compensation, which is:— *all or nothing, a feast or a famine!*

Another student uses the "Home-Buyer Passport" to educate his clients on this important issue. The Passport is a small, pocket size book with a durable cover. Inside the Passport are numerous pages for recording properties being viewed, important phone numbers plus, in the fly-leaf, a pocket-card for the agent's business cards.

When his clients go to an open house, they show the Passport to the hosting agent at the front door; the Passport says to call the agent should there be an issue allowing the purchasers to view the open house.

#4: The Deer Hunting Parable of Procuring Cause (B)

The hunter shoots a trophy buck. Although the hunter has strategically lodged a shell in the vital region of the deer's abdomen, the deer darts off through the thicket. The hunter follows the blood trail which leads him to a public highway.

The deer is laying dead in the middle of the highway. On the side of the road is a state trooper with safety lights flashing. On top of the deer are the two front wheels of a pickup truck (no damage to the truck; it appears the driver rolled his front tires onto the deer).

An argument ensues between the hunter and the truck driver about the deer, the rack, etc. The trooper settles the argument by awarding the deer to the truck driver.

Instructor's Comments: This parable reflects the reality of many disputed real estate commissions. The hunter strategically lodges a shell. . . (the agent finds the "perfect" property for the purchaser); the deer darts off through the thicket leaving a blood trail . . . (the purchaser wants to think it over); on top of the deer are the two front wheels of . . . (the purchaser has wandered into the control of another real estate agent); no damage to the truck . . . (the purchaser writes an offer through the new agent who didn't even show the property to the purchaser); the trooper awards the deer to the truck driver . . . (the second agent claims the commission stating that he wrote the successful offer).

Surveys conducted in my classroom reveal that some students have hit an average of two (2) to three (3) deer! (especially in North East and Southern Iowa). They answer "*NO!*" when I ask if their front wheels stopped on top of the deer.

In our parable, the driver's wheels were on the deer because the deer was already dead.

The same may be true of purchasers. You did your job in locating the perfect property for their needs but they were found in the arms of a competitor. Take precautions to prevent this from happening.

#5: The Fish Story Parable of Procuring Cause

Two fisherman went down to the river to fish. One fisherman expends a large quantity of time, energy and bait to raise a certain fish above the level of the water to identify the fish. But the line is broken and the fish returns to its native habitat.

A second fisherman, in a short period of time, lands the same fish on dry ground.

Which fisherman gets the fish?

Instructor's comments: This parable is a very graphic picture of real estate brokerage. One agent shows the prospect 50 properties; another agent shows a single property and makes the sale.

Notice in the parable the phrase, "But the line is broken."

This is a very important part of the story. Should communication with the purchaser be abandoned by the agent (e.g., the agent is part-time and is busy running another business; the agent goes on vacation; the agent doesn't recognize the buyer's attraction for the property; the agent doesn't take steps to make the purchaser qualified) the agent will be viewed as "breaking the line" with the buyer and not be deemed the procuring cause.

If *the line is broken* for reasons such as bad faith or deceitfulness on the part of the purchaser or wrongful interference by a competing agent, the agent may be the procuring cause.

Summary: Parables may be useful in explaining procuring cause. Parables can make a point but have limits to their use. By using parables, agents may learn special skills necessary to prevent the sale from slipping away to a competitor.

Appendix

From Corbin: Proximate Cause (from Index)

}1019 The defendant had insured the plaintiff against loss by fire. A fire underneath a freight car loaded with explosives causes an explosion. This explosion caused another fire, which, in turn, caused a much greater explosion of a large quantity of dynamite stored nearby. The plaintiff's ship, about one thousand feet distant, was injured by the concussion of the air caused by the second explosion. The vessel was not touched by any fire. In an action on the policy of insurance, the court held that the injury to the plaintiff's ship was not caused by fire. The court treated the case as one of mere interpretation of the contract. The court said: "Precedents are not lacking for the recognition of the space element as a factor in causation. This is true even in the law of torts where there is a tendency to go farther back in the search for causes than there is in the law of contracts. . . . The rule is based, it is said, on the intention of the parties. But even in tort, where responsibility is less dependent on intention, space may break the chain of causes. The wrongdoer who negligently sets fire to a building is not liable without limit for the spread of the flames. . . The wrongdoer may be charged with those consequences and those only with in the range of prudent foresight. It is not enough that what happens is in the course of nature. It must be in the probable course of nature."

The problem in this case is not one of causation. It is one of extent of responsibility, to be determined either by interpretation of the terms of agreement, according to the most enlightening rules applicable to that process, or by the prevailing notions of public policy with respect to insurance. In this case "space" did not "break the chain of causes;" by practical hindsight, the chain was continuous and unbroken.

Corbin }997

It is clear that mere remoteness in time or space is not in itself sufficient to prevent the recovery of damages for an injury. If the defendant in fact foresaw the injury and his conduct was planned to induce it, the fact that the train laid by him was a long one is immaterial. The extent of time or distance between the breach and the injury is to be considered in determining whether the latter could have been, or ought to have been, or was in fact foreseen by the defendant. The same is true of the number of intervening events. The last of these events preceding the injury is the nearest or "proximate" one; but causation and legal responsibility extend far back of this. The more remote the injury is from the breach and the larger the number of events occurring between them, the less likely it is that such a sequence would recur or that it could have been foreseen either when the contract was made or when the breach was committed. But no particular degree of remoteness in time or space, and no maximum number of intervening events, has ever been established as a dead line beyond which damages are not recoverable. . . At all events, we know that a limit must be set; the "sky" is not the limit.

". . . In doubtful situations a jury must say where the line is to be drawn." Bird vs. St. Paul F. & M. Ins. Co., 120 N.E. 86

The rule *causa proxima non remota spectator* "does not mean that the cause or condition which is nearest in time or space to the result is necessarily to be deemed the proximate cause. It means that the law will not go farther back in the line of causation than to find the active, efficient, procuring cause, of which the event under consideration is a natural and probable consequence, in view of the existing circumstances and conditions. The law does not consider the cause of causes beyond seeking the efficient predominant cause which, following it no farther than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect." Freeman vs. Mercantile Acc. Co. 30 NE 1013 This has been quoted in many other cases. It is an accumulation of the following adjectives: active, efficient, procuring, natural, probable, and predominant.

Causa Proxima. The immediate, nearest, or latest cause. The efficient cause; the one that necessarily sets the other causes in operation.

Causa Proxima Non Remota Spectatur. An efficient adequate cause being found, it must be considered the true cause unless some other independent cause is shown to have intervened between it and the result. . . The immediate (or direct), not the remote, cause, is looked at, or considered. . .

McCulloch Investment Company vs. Spencer
Supreme Court of Iowa Jan. 12, 1955

During the month of November, 1952, Plaintiff's agent Harry O. Huddleston contacted the defendants in regard to the sale of their residence property at 3406 Rollins Street, Des Moines, and was given permission to show it to prospective purchasers, but was refused an exclusive listing. Whatever agency contract there was between plaintiff and defendants was entirely oral.

On December 7th Huddleston took Lee R. Carlson and Pearl C. Carlson, who were husband and wife, to look at defendants' property. A few days later the Carlsons submitted through Huddleston a written offer to purchase. This offer was promptly declined by defendants, and they at the same time refused to submit a counter-proposition.

It appears that no further attention was given to the matter by plaintiff or its agents.

About January 4, 1953, a neighbor of the defendants who had a residence property in Des Moines which he wished to sell called the Carlsons, apparently at the sug-

gestion of the defendants, to discover whether they would be interested in purchasing it. The location and perhaps other features of this property did not meet the Carlsons' requirements. Upon being advised of this, the neighbor told them that the defendants' property was still for sale. This led to a further call upon defendants by the Carlsons.

At this time one Trickey, another Des Moines realtor with whom defendants had listed their property for sale, was at their home. Trickey took charge of the negotiations and shortly procured an offer satisfactory to defendants, and the sale was completed.

The terms of the second Carlson offer were substantially different from those proposed through plaintiff's agency, although the principal amount was the same. Defendants paid Trickey a commission for making the sale. Plaintiff learned of this sale when it contacted the Carlsons with a view to selling them another property. . . .

The broker who attempts to collect his claim for a commission by legal process must show, in order to make a prima facie case, these things: (1), the contract between himself and his alleged principal which evidences an agreement, express or implied, to pay him a commission for his services; (2), that he produced a purchaser who was ready, willing and able to buy on terms satisfactory to the vendor; and (3), that the purchaser was induced to enter into the negotiations and to make the purchase through efforts of the broker as agent. . . . The second and third requirements above set forth are to some extent similar and may be considered together for the purposes of the case at bar. One who produces a purchaser ready, willing and able to buy on terms satisfactory to the seller will generally be held to be the efficient moving cause of the sale, if one is made to the purchaser so produced. In the instant case, there is no question but that the plaintiff, through its agent Huddleston, first brought the defendants into contact with the eventual purchasers, the Carlsons. This occurred, however, through no original design on the part of Huddleston. When the defendants, after telling him he might show their property, refused to give him an exclusive listing, so far as the record shows, he abandoned the project and gave it no further thought. The plaintiff advertised certain properties for sale, but defendants' was not among them.

The broker Trickey was at the same time advertising defendants' property. The Carlsons saw both advertisements. They contacted the plaintiff firm, and Huddleston took them out to show them certain properties. He did not show them defendants' property or mention it until, Carlsons having seen nothing that interested them, they asked him about the house at 3406 Rollins Street, of which they had learned through the Trickey advertisement. Huddleston thereupon took them to inspect it, and a few days later presented defendants with a written offer from Carlsons, which was at once rejected. Huddleston says he did not think it was such an offer as defendants would accept but he expected them to make a counter-proposition. This they refused to do.

After this rejection, which occurred about December 14th or 15th, plaintiff and its agents gave no more attention to the defendants' property. No further efforts were made to sell it. It appears the plaintiff was a member of the Multiple Listing Bureau, and the rules of this organization prohibited advertisement of properties not exclusively listed. It is evident that Plaintiff's claim here must rest upon the fact that Huddleston first brought the defendants and the Carlsons—the ultimate purchasers—together. But it does not necessarily follow that plaintiff was the efficient procuring cause of the sale. . . .

The agent must do something more than introduce the parties. He must find a purchaser willing and able to buy on satisfactory terms. The plaintiff here had no apparent thought of showing defendant's house to the Carlsons until they asked Huddleston if he could do so. It was Trickey's advertisement which called the place to their attention. Having shown them the house and secured an offer which Huddleston himself did not think was a satisfactory one—it was on terms which would have required forty years to complete the payments—he abandoned the defendants and their property for some weeks, and became interested again only when it was learned through the Carlsons that it had been sold to them. This contact with the Carlsons was not for the purpose of getting a further offer or of again interesting them in the defendants' house, but to attempt to show them other properties.

Generally, if the broker has introduced a customer to the seller as a prospective buyer, the vendor may not defeat the right to a commission by dealing directly with the prospect so produced. But this is not so if there has been a good faith abandonment of negotiations. . . . Whether there has been an abandonment in fact and in good faith is generally a jury question. . . . There seems, in fact, some basis for the defendants' suggestion that plaintiff devoted more effort to the Carlsons' interest than to defendants'. In any event, plaintiff evidently paid no further attention to the Spencer property. The reopening of the negotiations between defendants and the Carlsons seems to plaintiff to be a badge of fraud; but again we do not agree.

Defendants remembered the Carlsons only when a neighbor who had an East Des Moines property he wished to sell talked with them about it. They then gave him the names of the Carlsons as possible prospects. When the Carlsons advised him they were not interested in that location, he then told them the Spencer property was still unsold, and they got in touch with the defendants. This is the version given by the Carlsons, and it is uncontradicted. We see nothing inherently unbelievable in their testimony, and nothing that casts any implication of bad faith upon the defendants.

. .Our conclusion is that the great weight of the evidence denies that plaintiff was the efficient moving or procuring cause of the sale finally made. Consequently it is not entitled to recover a commission from the defendants.
Reversed.
All Justices concur.