

Georgia Association of REALTORS®

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Point Clear, Alabama • February 8-11



Education Session J

Procuring Cause: How to Find and Keep Your Prospects

David Collins

Thursday, February 9, 2012

You must attend three (3) mini-sessions in order to earn three (3) hours Georgia C.E. credit, six (6) sessions for six (6) hours credit. Partial credit is not available. The mini-session course codes are 62153 and/or 62154.

Due to seating capacities dictated by local fire code ordinances, seating for all education sessions will be based on a first come-first serve basis. GAR will not be allowed to have attendees sitting on the floor or standing up once the room's seating is full.

In order to foster a spirit of camaraderie and to avoid the appearance of recruitment, no nametags or clothing with a company logo will be allowed in the education courses. Should an attendee have one on at the time of entering an education course, the facilitators will kindly ask you to remove the name badge or place a blank nametag over the company logo. We appreciate your cooperation in regards to this matter!

Procuring Cause

By David Collins

One of the most heartbreaking events that can possibly happen is to spend time with a buyer only to discover they have purchased a home from another agent. And it is even more heartbreaking to find out the buyer purchase a home that you showed. How could this happen?

At this point “procuring cause” becomes the real question. Procuring cause is defined in Black’s Law Dictionary as “the approximate cause; the cause originating a series of events which, without break in their continuity, results in the accomplishment of the prime objective. In addition, the courts have defined procuring cause as “a ‘broker’s efforts’ which ‘directly and proximately’ generate ‘the chain of circumstances that bring the parties together in an amicable frame of mind’ to ‘consummate a mutually agreed upon transaction.’”

In order to get to the real truths of procuring cause, a review of related contracts must be explored. First, there is the listing contract between the seller and the listing broker. This contract creates the relationship between these parties, establish the duties of each and the terms under which the listing broker will be deemed to have earned a commission, and frequently will authorize the listing broker to cooperate with or compensate (or both) cooperating brokers who may be subagents, buyer agents, or acting in some other capacity, such as a transaction broker.

The next thing is to review and understand the contract between the listing broker and cooperating brokers. While this may be created through an offer published through a multiple listing service or through some other method of formalized cooperative efforts, it need not be. Unlike the listing contract, the contract between the listing contract and the cooperating broker is unilateral in nature.

There may be a buyer-broker agreement in effect between the purchaser and a broker that could impact a procuring cause issue. Most buyer-broker contracts protect brokers for properties shown and within a specified time.

Many brokers in Florida are not members of the REALTOR® Associations, therefore, must rely on the courts for resolution of procuring cause issues. Hiring lawyers and proceeding to trial can be costly. Generally speaking, the amount of commission determined through litigation is an option. In many cases the brokers reach a compromise. But in some cases litigation is the only method of resolution.

For most brokers Boards and Associations of REALTORS® provide arbitration to resolve contractual issues and questions and specific non-contractual issues and question that arise between members, between parties to a transaction brought about through the efforts of REALTORS®. Disputes arising out of any of the four above-referenced contractual relationships may be arbitrated, and procedures of Boards and Associations of REALTORS® required that certain types of disputes must be arbitrated if either party so requests.

The National Association REALTORS® has established a Code of Ethics that participating REALTORS® are required to abide by. Article 3 addresses the obligation that brokers have to cooperate in a transaction. The concept of cooperation and compensation should be distinguished. Cooperating brokers may not assume that cooperation includes compensation. In Article 17, REALTORS® are required to arbitrate certain monetary disputes rather than litigate them. The conditions on mandatory arbitration are that the dispute must be a contractual or specific non-contractual dispute between REALTORS®.

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

It is not uncommon for procuring cause disputes to arise out of offers by listing brokers to compensate cooperating brokers made through a multiple listing service. It is important to note that compensation is unconditional except where local MLS rules permit listing brokers to reserve the right to reduce compensation offers to cooperating brokers in the event that the commission established in a listing contract is reduced by court actions or by actions of a lender.

One issue not addressed is if a buyer, through their broker, makes a low offer that is acceptable to the seller provided the listing broker take a lower commission. The seller has agreed to pay a commission based on an acceptable offer. Any offer less than the list price may be subject to negotiations. The question is who has the right to make the decision to accept the lower commission to get the deal done. It would be assumed that only the listing broker can make that call. Brokers then should refer back to Article 3.

Most procuring cause issues involve buyers jumping from one broker to another. There are a number of reasons this happens. The buyer thinks they can get a better deal by negotiating directly with the seller via the listing broker or their broker has neglected them are two common reasons. Another that is hard to swallow is when a buyer simply does not get along with the broker they are working with. Regardless, buyers are less likely to be loyal than sellers.

The standard of proof in Board-conducted arbitrations is a preponderance of the evidence and the initial burden of proof rests with the party requesting arbitration. Panel members must have a clear understanding of the events that led to the transaction and to the request for arbitration which may require quizzing involved parties. It should be remembered that each transaction is uniquely different therefore, a blueprint to cover all situations is impossible.

Panel members are advised to consider the following which are representative of the issues and questions frequently involved in arbitration hearings.

- A. The nature and status of the transaction
- B. The nature, status and terms of the listing agreement
- C. The nature, status and terms of the offer to compensate
- D. Roles and relationships of the parties
- E. Initial contact with the purchaser
- F. Conduct of the brokers
- G. Continuity and breaks in continuity (abandonment/estrangement)
- H. Conduct of the buyer
- I. Conduct of the seller

The following are two types of procuring cause issues.

1. Broker Bob places a listing in the MLS and offered cooperation and compensation to single agents, transaction brokers, and those brokers acting in a non-representative position. Broker Sam showed the property to Betty Buyer on Saturday then again on Monday. On Thursday, Broker Angie wrote an offer to purchase the property on behalf of Betty which was presented to the seller by Broker Bob and which was accepted. At closing, compensation is paid to Broker Angie. Broker Sam subsequently filed an arbitration request against Broker Angie, claiming to be the procuring cause of sale.

How should this be handled?

Using the same information above, except Broker Angie wrote the offer fifteen days after Broker Sam's last showing to Betty, How should this be handled?

2. Broker Dave has listed a commercial property as a single agent that includes an 8% commission. Dave placed the listing in the MLS and offered cooperation and compensation to single agents, transaction brokers, and other brokers acting in a non representative position. Broker Jan presented a written offer on behalf of Billy Buyer that was substantially lower than the asking price. The seller agreed to accept the offer provided the Dave reduce his commission to 4%.

If Broker Dave agrees, how should this be handled to prevent arbitration?

Brokers can better protect themselves as procuring cause by doing things that can link the relationship. The following should be considered:

1. When showing specific property, register the buyer with the listing broker/agent.
2. Inter into a buyer broker agreement.
3. Have a heart-to-heart with the buyer what is expected and how the process works.
4. Stay in contact with the buyer. Follow-up is critical.

Although these steps will not guarantee procuring cause, they will certainly make your passion known.

Q&A Time

Procuring Cause Case Study

Broker A listed a home at 3560 Sycamore Lane and is acting as a single agent for the seller.

On June 5th Buyer Beth contacted Broker B to show homes. Broker B agreed to show a number of properties which included the listing on Sycamore Lane.

On June 8th Beth indicated she liked the home on Sycamore Lane but decided to make an offer on one of the other homes. The seller, however, accepted another offer that had better price and terms. This upset Beth.

Broker B called Buyer Beth two or three times but never was able to make contact.

On June 12nd Beth contacted Broker C to show properties that included the property on Sycamore Lane. Broker C provide a written disclosure that she was operating in a No Brokerage relationship which complied with Florida law. Beth never mentioned she had seen the home earlier with Broker B. Beth made an offer on the home on Sycamore Lane through Broker C which was accepted.

Broker B discovered the situation three days prior to closing and filed a claim on the commission with the Professional Standards Committee and the listing Broker.

All three brokers were active members of the local Association of REALTORS and were provided with an agreement of cooperation.

How should this commission dispute be resolved?