

PROCURING CAUSE FACTORS (2011 COE)

Whether a broker is the procuring cause of a sale must be factually determined on a case-by-case basis. Many factors can impact a determination of procuring cause, but no one factor is by itself determinative. Procuring cause is in fact the interplay of factors which together demonstrate that the unbroken efforts of a specific broker were responsible for the buyer making the decision to consummate the sale on terms which the seller found acceptable. In other words, a broker who is the procuring cause of a sale is a sine qua non of the sale -- the sale would not have occurred but for the broker's efforts.

When reviewing the factors listed below, it is important to note that the occurrence of any particular factor in a fact situation does not necessarily mean that procuring cause does or does not exist. This is because it is the interplay of factors that is so important in recognizing procuring cause, not the presence of any one factor alone. A specific factor can, in fact, cut either way, depending on its importance compared to the other factors in the case and depending on when it occurs in the timeline of the case.

Procuring cause factors may be grouped, for organizational purposes, into nine different categories. These categories are:

- The nature and status of the transaction
- The nature, status and terms of the listing agreement or offer to compensate
- The roles and relationships of the parties
- The initial contact with the purchaser
- The conduct of the broker* or agent
- Continuity and breaks in continuity
- The conduct of the buyer
- The conduct of the seller
- Other information

In the analysis that follows, specific procuring cause factors are grouped by the above categories. In addition, where there is supporting case law, citations and brief explanations are provided to offer examples of the interplay of that factor with other factors and to suggest outcomes. Please note that much of the case law does not resolve disputes between brokers, but between sellers and brokers. Likewise, most of the cases involve open listings rather than exclusive listings. Nevertheless, these cases focus on two issues which are relevant to fact situations involving exclusive listings and broker-broker disputes -- that is, what has the broker been promised (by either the seller or the listing broker) and what must the broker do to attain his promised commission.

PROPOSED Procuring Cause Factors:

I. The Nature and Status of the Transaction

A. What was the nature of the transaction?

B. Is or was the matter the subject of litigation?

II. The Nature, Status and Terms of the Listing Agreement or Offer to Compensate

A. What was the nature of the listing or other agreement: exclusive right to sell, exclusive agency, open or some other form of agreement?

B. Was the agreement in writing?

C. Was the agreement in effect at the time the sales contract was executed?

D. Was the property listed subject to a management agreement?

E. Is the claimant a party to whom the listing broker's offer of compensation was extended?

F. If an offer of cooperation and compensation was made, how was it communicated?

G. Were the broker's actions in accordance with the terms and conditions of the agreement or offer of cooperation and compensation (if any)?

The nature, status and terms of the listing agreement or offer to compensate are the starting points for any procuring cause analysis. For the broker to be the procuring cause, however, the agreement need not be exclusive. Farm Credit Bank of St. Louis v. Miller, 872 S.W.2d 376 (Ark. 1994); Hennessy v. Schmidt, 384 F.Supp. 1073 (N.D. Ill. 1974); Atkinson v. S.L. Nusbaum & Co., 59 S.E.2d 857 (Va. App. 1950). Neither must the agreement be written. Christo v. Ramada Inns, Inc., 609 F.2d 1058 (3d Cir. 1979); Ahrens v. Haskin, 299 S.W.2d 87 (Ark. 1957); Feeley v. Mullikin, 269 P.2d 828 (Wa. 1954); Wilson v. Sewell, 171 P.2d 647 (N.M. 1946). The critical questions are whether the agreement was in effect at the time the sales contract was executed and whether the claiming broker was a party to whom the agreement extended. Farnsworth Samuel Limited v. Grant, 470 So.2d 253 (La.App. 1985); Winograd, Inc. v. The Prudential Insurance Company of America, 476 N.Y.S.2d 854, aff'd, 472 N.E.2d 46 (1984); Mohamed v. Robbins, 531 P.2d 928 (Ariz. App. 1975); Hampton Park Corporation v. T.D. Burgess Company, Inc., 311 A.2d 35 (Md. App. 1973); Wright v. Jaegeris, 427 S.W.2d 276 (Mo. App. 1968).

For instance, in Winograd, one broker supplied information about the subject space to a second broker who finalized the transaction. 476 N.Y.S.2d at 856. Neither activity was dispositive. Id. The second broker, not the first, was the procuring cause because the listing agreement did not extend to the first broker. Id.

In Mohamed, the extension clause of an exclusive listing agreement was a key factor in establishing that the broker was the procuring cause. 531 P.2d at 930. Here the broker made contact with an appropriate representative of the ultimate purchaser during the period of the listing agreement, initiated negotiations with him and followed up after the listing agreement expired. Id. The broker took no part, however, in the final negotiations. Id. Nevertheless, the broker was the procuring cause of the ultimate sale because the listing agreement provided that a commission would be due the broker if the property was sold to any person whom the broker had negotiated with prior to the expiration of the listing. Id.

1. Were all conditions of the agreement met?

Where a condition precedent to the payment of commission is not met, the broker is not the procuring cause -- even though he has produced a buyer/lessee who is otherwise ready, willing and able and even though the seller/lessor has acted in bad faith. The Quadrant Corporation v. Spake, 504 P.2d 1162 (Wash. App. 1973). In Quadrant, the agreement provided that the broker would get a commission if he produced a lessee who would agree to the terms acceptable to the lessor and if the lessor was able to secure construction financing necessary to make improvements to the property. Id. With regard to the financing, the broker found lenders willing to take loan applications from the lessor, but the lessor refused to sign said applications. Id. at 1164. The court held that the lessor's refusal was in bad faith and constituted a breach of his agreement with the broker. Id. Nevertheless, the broker was not the procuring cause because it was factually unlikely that the lessor would have been approved for the loans and thus unlikely that the condition precedent to the payment of the broker's commission could have been met. Id. at 1166.

2. Did the final terms of the sale meet those specified in the agreement?

For a broker to be the procuring cause of a sale, the final agreed-upon price need not be the same as that specified in the listing agreement. Follman Properties Company v. Daly, 790 F.2d 57 (8th Cir. 1986); Fanning v. Maggi et al., 126 N.Y.S.2d 551 (1953); Wilson v. Sewell, 171 P.2d 647 (N.M. 1946). Courts recognize that the buyer and seller will negotiate and that the seller's agreement to a lesser price than originally asked for should not negate the broker's efforts. Wilson, 171 P.2d at 649.

It is not, however, sufficient for the broker to bring the parties to agreement only as to price. Kaelin v. Warner 267 N.E.2d 86 (N.Y. App. 1971). There must be agreement as to all essential terms for the broker to be entitled to receive the commission specified in the listing agreement. Id. For instance, in Kaelin, the listing agreement required the broker to procure a buyer at a sale price of \$100,500, "with terms to be arranged." Id. at 87. The broker procured an offer of \$100,500, but the parties could not agree as to the terms normally required for a real estate transaction, including payment terms and closing date. Id. Since there was no agreement as to all essential terms, the broker did not earn his commission. Id. at 88.

In In re Fox' Will, a broker who introduced the parties and showed the property to the buyer first was not the procuring cause where it was another broker who was able to bring the buyer to the terms specified in the listing agreement. 126 N.Y.S. 158 (1953).

III. Roles and Relationships of the Parties

A. Who was the listing agent?

B. Who was the cooperating broker or brokers?

C. Are all appropriate parties to the matter joined?

D. Were any of the parties acting as subagents? As buyer brokers? In some other capacity?

E. Did any of the cooperating brokers have an agreement, written or otherwise, to act as agent or in some other capacity on behalf of any of the parties?

F. Were any of the brokers (including the listing broker) acting as a principal in the transaction?

G. What were the brokers' relationships with respect to the seller, the purchaser, the listing broker, and any other cooperating brokers involved in the transaction?

In most instances, the broker's relationship with the parties is a straightforward one that does not in itself raise questions as to whether or not the broker is the procuring cause of a sale. At other times, however, the relationship is less straightforward and courts have had to ask additional questions in order to determine procuring cause:

1. Was the party to whom the property was ultimately sold represented by a party with whom the broker had previously dealt?

Knight v. Hicks, 505 S.W.2d 638 (Tex. App. 1974) demonstrates this kind of relationship and its effect on determining procuring cause. In Knight, the broker introduced Herschel Johnson to the seller and showed him the seller's property. Id. at 641. The broker also initiated negotiations between the parties, but was not able to finalize them. Ultimately, Mr. Johnson's son purchased the property from the seller. Id. Even though the broker had never shown the son the property or negotiated with him, the broker was the procuring cause of the sale because the parties had understood from the beginning that Mr. Johnson had been interested in the property on behalf of his son. Id. at 642.

2. Is the primary shareholder of the ultimate buyer-corporation a party with whom the broker had previously dealt?

O'Brien v. Morgan, 104 A.2d 411 (D.C. App. 1954) offers a good example of the kinds of complex relationships that can occur and the kinds of procuring cause questions that are raised when dealing with corporations. O'Brien is a case involving the sale of interstate motor carrier operating rights, rather than real estate; the principles, however, are applicable to the sale of real property as well. In O'Brien, the broker initiated negotiations between the seller and the Shoe City Corporation, the sole owner of which was a Mr. Lyons. Id. at 412. Ultimately, the negotiations broke down, though through no fault of the broker. Id. Later, a sale was finalized between the seller and Quinn Freight Lines, Inc., the controlling shareholder of which was also Mr. Lyons. Id. The court held that the broker was indeed the procuring cause of the sale to Quinn Freight Lines because his prior efforts with regard to the ultimate decision-maker had been sufficient. Id. at 413.

3. Was a prior prospect a vital link to the ultimate buyer?

Strout Realty, Inc. v. Haverstock, 555 A.2d 210 (Pa. 1989) shows how a broker's efforts with regard to one prospect may make her the procuring cause of a sale to a different prospect -- if the first prospect is the chief conduit to the ultimate buyer. In Strout, the broker first showed the seller's property to a Reverend Shafer and reached the point of discussing price and financing with him. Id. at 211. The Reverend then brought Stewardship Consultants, Inc. into the picture and the seller ultimately and directly negotiated a sale of the same property with this corporation. Id. The court held that because Reverend Shafer had conveyed critical information given to him by the broker to the corporation, the sale would not have occurred but for the introduction of the property to Reverend Shafer by the broker. Id. at 214. The broker, therefore, was the procuring cause of the sale to the corporation. Id.

IV. Initial Contact with the Purchaser

A. Who first introduced the ultimate purchaser or tenant to the property?

A broker who makes the initial contact with the purchaser does not automatically become the procuring cause of an ensuing sale. Mohamed, 531 P.2d at 931. When and how the initial contact was made can, however, be important factors

in determining procuring cause. United Farm Agency of Alabama, Inc. v. Green, 466 So.2d 118 (Ala. 1988); Mehlberg v. Redlin 96 N.W.2d 399 (S.D. 1959); Wilson v. Sewell, 171 P.2d 647 (N.M. 1946). Thus, the following factors must be considered:

B. When was the first introduction made?

1. Did the ultimate buyer find the property on his own?

Hampton Park demonstrates that where a decisionmaker/buyer discovers the subject property, arrives at his decision and negotiates the terms through means which are independent of the claiming broker's efforts, the claiming broker is not the procuring cause. 311 A.2d at 35. In this case, after negotiations arranged by the broker had broken down between the owner and one representative of the Post Office, another representative of the Post Office, who had learned of the property through his own investigations, independently negotiated a sale with the owner. Id. at 39. The claiming broker was not the procuring cause because his introduction of the property was not "the foundation" on which the sale was ultimately made. Id. at 41.

2. Was the introduction made when the buyer had an immediate need for that specific property?

Mehlberg v. Redlin establishes how important it can be for a broker to introduce a prospective buyer to the right property at the right time. 96 N.W.2d 399 (S.D. 1959). In Mehlberg, the broker told a pastor about a property which was suitable for a parsonage at the time a church was in immediate need of a parsonage. Id. at 400. The broker, however, did not show the property to the officers of the church; rather the officers viewed the property on their own from the outside, sought out the seller and negotiated a sale directly with him. Id. The court held that the broker was nevertheless the procuring cause of the sale because he had brought the parties together at a propitious moment. Id. at 402.

3. Did the buyer know about the property before the broker contacted him? Did he know it was for sale?

In Farnsworth Samuel Limited v. Grant, the buyer lived across the street from the subject property. 470 So.2d 253 (La.App. 4th Cir. 1985). Yet he did not know it was listed for sale until the broker informed him. Id. The broker initiated negotiations between the parties, but was not able to consummate the deal. Id. Subsequently, the buyer and seller entered into direct negotiations with each other. Id. Curiously, the difference between the original bid submitted via the broker and the price agreed upon by the parties in their direct negotiations equalled the broker's commission. Id. at 254. The court held that the broker was the procuring cause, listing a number of factors it considered in making its decision: "whether the prospect who ultimately purchased the property knew about the property before being contacted by the broker; the relative success of failure of the negotiations conducted by the broker, including the continuity or discontinuity of the original and final negotiations; the length of time elapsing between the broker's negotiations and the final sales agreement; development of a new, different, or independent motive for the prospect to purchase; whether or not the broker abandoned efforts to negotiate the transaction with a particular prospect; and finally, the good or bad faith of the principal and the broker." Id.

4. Were there previous dealings between the buyer and the seller?

A broker may be the procuring cause of a sale even if there were previous dealings between the buyer and the seller. Mohamed, 531 P.2d at 931; Chamness v. Marquis, 383 P.2d 886 (Wash. 1963). In Chamness, the prospective buyer had previously had direct, but unsuccessful dealings with the seller. Id. The broker then made substantial contributions by showing the property to the prospective buyer several times, re-initiating negotiations and attempting to secure financing. Id. at 887. Even though the buyer and seller ultimately came to terms on their own, the broker was the procuring cause because his efforts were the foundation for the final, successful negotiations between the parties. Id. at 888.

C. How was the first introduction made?

1. Was the introduction made to a different representative of the buyer?

A broker may be the procuring cause of a sale even if she introduced the property to one individual and negotiated final terms with another, so long as both individuals represented the same buyer and so long as the individual making the ultimate decision to buy did not arrive at his decision independent of the broker's efforts. Arthur H. Richland Company v. Morse, 169 F. Supp. 544 (Md.), aff'd. 272 F.2d 183 (4th Cir. 1959). Cf. Hampton Park, 311 A.2d at 35 (where ultimate decision-maker had found property through his own investigations and did not avail himself of any of broker's efforts).

2. Was the "introduction" merely a mention that the property was listed?

Merely alerting a buyer to the fact that a property is available does not usually constitute procuring cause. United Farm Agency of Alabama, Inc. v. Green, 466 So.2d 118 (Ala. 1988); Greene v. Hellman, 412 N.E.2d 1301 (N.Y. App. 1980). But See Mehlberg, 96 N.W.2d at 402 (where broker brought specific property to the attention of prospective buyer when buyer had an immediate need for that specific property, the broker was the procuring cause). For instance, in United Farm, the sellers had two properties listed with the broker. Id. at 119. The broker showed one property to the prospective buyers; he merely mentioned to the prospects that the second property was listed. Id. Shortly thereafter and without the involvement of the broker in the negotiations, the prospects purchased both properties directly from the sellers. Id. at 120. The court held that the broker was the procuring cause as to the first property. Id. With regard to the second property, however, he was not the procuring cause because he had done nothing more than mention that it was listed. Id. at 121.

3. What property was first introduced?

In Doyal & Associates, Inc. v. Wilma Southeast, Inc., the broker represented the buyer bank. 322 S.E. 24 , 25(Ga. App. 1985). He showed one property and made appropriate follow-up efforts. Id. The bank and the owner of the first property, however, eventually and directly finalized a sale of another property, which the broker had never shown the bank. Id. The broker was not the procuring cause just because he had introduced the parties. Id. The broker needed to prove that negotiations had been pending on the second property. Id.

V. CONDUCT OF THE BROKER

A. Were all disclosures mandated by law or the Code of Ethics complied with?

B. Was there faithful exercise of agency on the broker's part, or was there any breach or failure to meet the duties owed to a principal?

A broker who breaches his duty to his principal is not entitled to his commission. Haymes v. Rogers, 222 P.2d 789 (Ariz. 1950). In Haymes, the broker was alleged to have breached his duty to the seller by telling the prospective buyer how much another party had bid and what he could get the seller's property for. Id. Subsequently, the buyer and seller finalized the transaction directly with one another, bypassing the broker. Id. In determining whether the broker was nevertheless the procuring cause, the court left it to the jury to decide whether the allegation that the broker had breached his duty to his principal was true. Id. However, it noted that if such a breach was found to have occurred, the broker would not be entitled to his commission. Id. at 790.

C. If more than one cooperating broker was involved, was either (or both) aware of the other's role in the transaction?

Although it is often overshadowed by other factors, the awareness by one broker of the recent efforts of another is a factor to be considered in determining procuring cause. Wright, 427 S.W.2d at 276; Atkinson, 59 S.E.2d at 860. Where one broker is aware of another's continuing efforts and in bad faith interferes with the transaction, he will not be the procuring cause. Wright, 427 S.W.2d at 276. However, where one broker, aware that another broker's efforts have broken down, steps in and finalizes a sale, his efforts are legitimate, and he will be the procuring cause of the sale. Atkinson, 59 S.E.2d at 860.

D. Did the broker who made the initial introduction to the property engage in conduct (or fail to take some action) which caused the purchaser or tenant to utilize the services of another broker?

A broker may cause a buyer to seek the services of another broker either through estrangement or abandonment. Levy Wolf Real Estate Brokerage, Inc. v. Lizza Industries, Inc., 500 N.Y.S.2d 37 (1986). In Levy Wolf, one broker did little more than bring the subject property to the attention of the prospective buyer and unsuccessfully try to set up a meeting between the parties. Id. at 38. He then in essence abandoned his efforts. Id. The prospect thus sought out the services of a second broker, who did background research and made inquiries and proposals that ultimately resulted in a sale. Id. The second broker was the procuring cause. Id.

E. Did the cooperating broker (or second cooperating broker) initiate a separate series of events, unrelated to and not dependent on any other broker's efforts, which led to the successful transaction -- that is, did the broker perform services which assisted the buyer in making his decision to purchase?

See Marathon Realty Corporation v. Gavin, 398 N.W.2d 689 (Neb. 1987); Atkinson, supra V.C.

1. Did the broker make preparations to show the property to buyer?

Courts examine the preparatory efforts a broker makes. Farm Credit Bank, 872 S.W.2d at 378 (broker sent brochure, made aerial photographs); United Farm, 466 So.2d at 119 (broker took pictures of house); Hampton Park, (broker prepared description, report).

2. Did the broker make continued efforts after showing the property?

Likewise, courts consider the continued efforts a broker makes. Farm Credit Bank, 872 S.W.2d at 378 (broker who made fifty to sixty follow-up phone calls was procuring cause); Flamingo Realty, Inc. v. Midwest Development, Inc., 879 P.2d 69 (Nev. 1994), cert. denied, 115 S.Ct. 1999 (1995)(broker who made continued efforts to secure joint venturer that was prerequisite to sale was procuring cause); Levy Wolf, 500 N.Y.S.2d at 38 (broker who abandoned efforts was not procuring cause).

3. Did the broker remove an impediment to the sale?

A broker's efforts in removing an impediment to the sale will be considered in determining procuring cause. C. Myers & Simpson Company v. Feese Real Estate, Inc., 705 S.W.2d 600 (Mo. App. 1986). For example, in Myers, one broker showed the property to the buyer first; however, another broker was responsible for satisfying a prerequisite of the buyer's, the removal of outdoor advertising signs from the property. Id. at 602. The court held that the second broker was the procuring cause. Id.

4. Did the broker make a proposal upon which the final transaction was based?

A broker's proposal may be critical in determining procuring cause. Hennessey, 348 F. Supp. at 1073. In Hennessey, the broker introduced the parties, sent numerous letters to the buyers and made numerous phone calls to the buyers. Id. at 1075. However, he did not participate in the negotiations, he did not assist in the preparation of the final papers and he did not even attend the closing. Id. He nevertheless was the procuring cause because his proposal was the one which the parties adopted in finalizing the transaction. Id.

5. Did the broker motivate the buyer to purchase?

Courts may even consider various motivational strategies a broker may employ to bring the buyer to the decision to purchase. Richland, 169 F. Supp. at 551. For instance, in Richland, the broker motivated the buyer by letting him know that he had introduced another serious prospect to the seller. Id. The court believed that this was one of several important factors in the buyer's ultimate decision to purchase and that the broker was thus the procuring cause of the sale. Id.

F. How do the efforts of one broker compare to the efforts of another?

"When more than one broker competes for a single commission, these factors have to be carefully examined by comparing each broker's activities to the activities of the other brokers involved and by evaluating them in light of the general guidelines." A.N. Associates, Inc. v. Quotron Systems, Inc., 159 Misc.2d 515 (C.C. N.Y. 1993).

1. What was the relative amount of effort by one broker compared to another?

See Levy Wolf, supra V.D., (broker who made greater efforts was procuring cause).

2. What was the relative success or failure of negotiations conducted by one broker compared to the other?

See Farnsworth, supra IV.B.3., (listing factors relevant to procuring cause: "the relative success or failure of the negotiations conducted by the broker...").

G. If more than one cooperating broker was involved, how and when did the second cooperating broker enter the transaction?

See Feeley, infra VIII.A.3 (second broker entered transaction only after seller acted in bad faith).

VI. CONTINUITY AND BREAKS IN CONTINUITY

A. What was the length of time between the broker's efforts and the final sales agreement?

A short lapse of time between a broker's efforts with regard to a particular buyer and the finalization of an agreement with that buyer is indicative that the finalization is the result of the unbroken efforts of the broker. United Farm, 466 So.2d at 120. Thus, in United Farm, where the broker had made considerable preparatory efforts, introduced the parties, and shown the property to the buyer, the court found the short lapse of time between the broker's efforts and the buyer's purchase directly from the seller significant. Id. See also Farnsworth, 470 So.2d at 254; Seckendorff v. Halsey, Stuart & Co., 182 N.E. 14 (N.Y. App. 1932).

B. Did the original introduction of the purchaser or tenant to the property start an uninterrupted series of events leading to the sale (or to any other intended objective of the transaction), or was the series of events hindered or interrupted in any way?

1. Did the buyer terminate the relationship with the broker? Was such termination in good faith?

A buyer or lessee's good faith termination of his relationship with a broker will defeat that broker's claim of procuring cause, provided the termination occurs before successful negotiations are achieved. Aegis Property Services Corp. v. Hotel Empire Corp., 484 N.Y.S.2d 555 (1985). In Aegis, one broker introduced the parties and showed the space to a potential lessee. Id. After the broker followed up with the lessee, but before negotiations were successful, the prospect terminated its relationship with the broker, refusing to authorize the broker to negotiate on its behalf. Id. at 558. The prospect subsequently retained the services of another broker, who was able to successfully negotiate a lease. Id. The court found there to be no bad faith on the part of lessee; its termination of the first broker was not motivated by a desire to escape payment of a commission. Id. at 559. The court reasoned that absent bad faith, a prospect's termination of a broker's efforts is absolute, and held that the second broker, not the first, was the procuring cause of the transaction. Id.

2. Did negotiations break down?

Hecht Realty, Inc. v. Whisnant demonstrates that the breakdown of negotiations is a significant factor in determining procuring cause. 255 S.E.2d 647 (N.C. Ct. App. 1979). In Hecht, the broker introduced the parties and showed the subject property to the ultimate buyers. Id. Later, after the broker's exclusive listing agreement had expired, the prospects decided they wanted the property and made an offer. Id. The sellers made changes to the contract, but the prospects refused to accept the counteroffer. Id. Negotiations broke down and the broker was not able to finalize a transaction. Id. Later, a second broker was able to re-initiate negotiations and ultimately finalize a sale. Id. The court held that the second broker was the procuring cause of the sale. Id. at 648. See also Christo v. Ramada Inns, Inc., 609 F.2d at 1058.

C. If there was an interruption or break in the original series of events, how was it caused, and by whom?

1. Did the seller change the listing agreement from an open listing to an exclusive listing agreement with another broker?

An example of this situation is Belleau v. Hopewell, 411 A.2d 456 (N.H. 1980). Here, a broker had a non-exclusive listing agreement. Id. at 458. After he had shown the property to a prospective buyer and had made continued efforts, the seller gave an exclusive agreement to another broker, unbeknownst to the first broker. Id. The buyer then sought the services of the second broker who finalized the transaction. Id. The new, exclusive agreement did not break the continuity of the first broker's efforts, and, the court held, the first broker was the procuring cause of the sale. Id. at 460.

2. Was there the development of a new, different or independent motive behind the purchase?

See Farnsworth supra IV.B.3., (listing factors relevant to procuring cause: "development of a new, different, or independent motive for the prospect to purchase").

3. Was there interference in the series of events from any outside or intervening cause or party?

See VIII. CONDUCT OF THE SELLER

D. Did the broker making the initial introduction to the property maintain contact with the purchaser or tenant, or could the broker's inaction have reasonably been viewed by the buyer or tenant as a withdrawal from the transaction?

See Levy Wolf, supra V.D.

E. Was the entry of any cooperating broker into the transaction an intrusion into an existing relationship

between the purchaser and another broker, or was it the result of abandonment or estrangement of the purchaser, or at the request of the purchaser?

See Nestle, *infra* VIII.A.4; Levy Wolf, *supra* V.D., Aegis, *supra* VI.B.1.

VII. Conduct of Buyer

A. Did the buyer make the decision to buy independent of the broker's efforts/information?

See Hampton Park, *supra* IV.B.1.

B. Did the buyer negotiate without any aid from the broker?

See Hampton Park, *supra* IV.B.1.

C. Did the buyer seek to freeze out the broker?

Neither the buyer nor the seller may act in bad faith so as to deprive a broker of his commission which he has otherwise rightfully earned. Sanders et al. v. Devereux, 189 A.2d 604 (Md. App. 1963). Sanders demonstrates how a buyer may attempt, for her own gain, to freeze out a particular broker. Id. In this case, a broker introduced the parties, showed the property, followed up and brought the negotiations to a point where success seemed likely. Id. One of the buyers, a broker herself, then conspired with the seller to temporarily take the property off the market, place it back on the market shortly thereafter, and consummate a sale so that she and a broker with whom her agency had a business association would receive the commission. Id. at 605. In holding that the first broker was the procuring cause of the subsequent sale, the court asserted: "Although it is not sufficient that the broker has merely planted the seed from which the harvest was reaped, on the other hand the owner [or buyer] cannot take advantage of a broker's services and make the sale himself, or through another broker, so as to deprive the broker of his commission when he has introduced a prospective buyer to the seller and negotiations have progressed to a point where success seems imminent." Id. at 607.

1. Did the buyer seek another broker in order to get a lower price?

A buyer may not freeze out a broker who has sufficiently performed by seeking the services of a broker whom she believes may be able to get a lower price on the subject property. Wright, 427 S.W.2d at 276. In Wright, a broker introduced the buyers to the seller, showed them the property and properly followed up with them. Id. at 278. The buyers, however, believed that another broker, with whom they had a long-time acquaintance, could get them the property at a lower price. Id. at 279. They thus contacted the second broker and finalized the sale via him. Id. The court held that they could not circumvent the first broker and thereby deprive him of his commission in this way. Id. at 281.

2. Did the buyer express the desire not to deal with the broker and refuse to negotiate through him?

A buyer may decide not to negotiate through a broker and unless the broker has an exclusive right to sell agreement, the broker will not be the procuring cause of a subsequent sale. Walker v. David Davies Inc., 296 N.E.2d 691 (Oh. App. 1973). In Walker, the broker had no direct negotiations with the buyer; in fact the buyer expressed a desire not to deal through the broker. Id. at 695. Thus, the court held that the broker was not the procuring cause even though he had incurred expense and spent time trying to sell the property. Id.

3. Did the contract provide that no brokers or certain brokers had been involved?

Buyer and seller may contractually provide that no broker was involved in their transaction. However, where there is evidence that the parties have not been truthful and that a broker has performed sufficiently so that he is the procuring cause, the broker will be entitled to the commission. Risser v. Hirshhorn, 199 F.2d 917 (2nd Cir. 1952).

D. Did the buyer divulge to the seller that a certain broker had brought him to the transaction?

Where a broker has been instrumental in bringing the buyer to the subject property, the buyer must reveal this to the seller. Risser, 199 F.2d at 917. Indeed, even where the buyer fails to divulge this information to the seller, the seller is responsible for paying a commission to the broker if the seller could have ascertained by reasonable diligence that the broker's role was sufficient. Id. For instance, the buyer in Risser discovered the subject property when he was given a brochure the broker had prepared and forwarded to an associate of the buyer's. Id. at 918. Because the buyer at first wished to remain anonymous, the broker reported to the seller that the associate was interested in the property; he did

not mention the ultimate buyer himself. Id. The buyer, however, eventually negotiated directly with the seller and the two inserted a statement in the contract which asserted that no broker had been involved in the transaction. Id. at 919. The court determined that the purpose of this provision was to avoid paying the broker a commission. Id. The court noted that the buyer had a duty to divulge the broker's role to the seller and that even if he failed to do so, the seller would be liable for the broker's commission if the seller could have ascertained the broker's role by reasonable diligence. Id. at 920.

VIII. CONDUCT OF THE SELLER

A. Did the Seller act in bad faith to deprive the broker of his commission?

The following scenarios demonstrate that courts will not allow the bad faith of the seller to negate the efforts of a broker who would otherwise be the procuring cause of a sale. In most instances, the same would prove true if it were the listing broker who acted in bad faith to deprive a subagent or cooperating broker of her commission.

1. Was there bad faith evident from the fact that the difference between the original bid submitted and the final sales price equalled the broker's commission?

See Farnsworth, supra IV.B.3.

2. Was there bad faith evident from the fact that a sale to a third party was a straw transaction which was designed to avoid paying commission?

Farm Credit Bank demonstrates that courts will not allow straw transactions to deprive a broker of her commission. 872 S.W. at 379. In Farm Credit, the brokers registered both the U.S. Fish and Wildlife Service and the Nature Conservancy with the seller bank under their non-exclusive listing agreement. Id. at 378. The brokers made extensive efforts to interest the Fish and Wildlife Service in the subject property. Id. They wrote letters, made fifty or sixty telephone calls, had aerial photographs made, advised the agency of the flood plain and kept the agency informed as to potential buyers. Id. Although the agency wanted to acquire the property, it did not have such an appropriation in its budget that year. Id. Ultimately, however, a sale was consummated to a corporation which had been set up to resell the land to the Nature Conservancy which resold the land to the Fish and Wildlife Service when it could afford to make the purchase. Id. at 379. The court refused to let such straw transactions deprive the brokers of the commission they had earned. Id. See also Flamingo Realty, 879 P.2d at 70 (where seller sold property to corporation which in turn immediately sold property to broker's prospect).

3. Was there bad faith evident from the fact that the seller told the broker he wouldn't sell under certain conditions, but did so via another broker?

In Feeley v. Mullikin, the broker introduced the buyers to the seller, showed them the property, initiated negotiations and properly followed up. 269 P.2d at 828-29. When he attempted to finalize the sale, however, the seller told him that he had decided not to sell the property before June 1. Id. On May 1, nevertheless, a sale was consummated between the buyers and the seller via another broker who accepted a lesser commission than that stated in the first broker's listing agreement. Id. The court held that the seller had acted in bad faith by attempting to deprive the first broker of his earned commission. Id. at 831. The first broker, not the second, was the procuring cause. Id.

4. Did the owner freeze out the broker to avoid a commission dispute?

Where a broker showed the property and would have finalized negotiations but for the interference of the owner, he is the procuring cause of the transaction -- even though another broker did in fact finalize the negotiations. Nestle Company, Inc. v. J.H. Ewing & Sons, 265 S.E.2d 61 (Ga. App. 1980). In June of 1976, agents from J.H. Ewing & Sons brokerage showed the subject property to the potential lessee, Scripto, whom they represented. Id. at 63. Scripto, however, was not interested in the property at that time. Id. Subsequently, in August of 1977, a second brokerage, Coldwell Banker, showed the same property to Scripto. Id. Less than six weeks later, one of the Ewing agents informed the lessor, Nestle, that Scripto was now a "hot prospect" and initiated negotiations which appeared to be moving towards completion. Id. at 64. Nestle, realizing that a commission dispute was imminent, stopped the Ewing agent from going further and placed the transaction in the hands of Coldwell Banker. Id. The court held that Ewing was the procuring cause. . .that Nestle should not have interfered with Ewing's imminently successful negotiations. Id.

5. Did the seller freeze out the broker to avoid paying a commission at all?

Even where there is a non-exclusive listing agreement, a seller may not avoid paying a deserved commission by negotiating directly with a buyer. Richland, 169 F. Supp. at 549-50. In Richland, the broker did everything possible -- he

introduced the parties, began negotiations and followed up. Id. at 546-47. The seller, however, froze him out of important meetings and finalizing negotiations. Id. at 548. The court nevertheless held that the broker was the procuring cause, saying: ". . .it is not requisite, where the [broker's] evidence is otherwise sufficient, that the broker should have been present at the final consummation of the sale, or to have directly and immediately have been the final negotiator therefor. Thus, where the broker has introduced to the seller a prospective interested buyer and negotiations have progressed to a point where success seems imminent, the broker cannot be deprived of his commissions because the seller in effect bypasses the broker by direct negotiations with the buyer, in effect freezing the broker out of the case." Id. at 549-50.

B. Did the seller not authorize the broker to accept an amount the seller ultimately accepted?

A seller may not deny a broker his commission where the broker could have finalized the transaction but for the seller's refusal to authorize the broker to settle for an amount that he himself ultimately accepted. Ahrens, 299 S.W.2d at 48. In Ahrens, the broker introduced the parties, showed the property and began negotiations. Id. at 47. He was prepared to pursue the transaction to its conclusion; however, the seller refused to authorize him to offer the property at the price that the seller in later direct negotiations accepted. Id. at 48. The court held that the broker was nevertheless the procuring cause. Id.

IX. OTHER INFORMATION: Is there any other information that would assist the Hearing Panel in having a full, clear understanding of the transaction giving rise to the arbitration request or in reaching a fair and equitable resolution of the matter?

NON-CONCLUSIONS:

As the cases summarized above demonstrate, there are a great number of factors to consider when determining procuring cause. However, it is just as important to remember that no automatic conclusions should be drawn from the presence or absence of any one factor. Procuring cause is not always achieved by introducing the parties. It is not always achieved by finalizing the transaction. No preconceived formula or rule should be used to determine procuring cause. Rather each factor should be weighed in conjunction with the other factors relevant to the case. In short, arbitration panels must remember that the above factors are simply considerations, not conclusions.