

Protecting Yourself from Arbitration Highlighting “Procuring Cause”

These tips come to the REALTOR® Association of NorthWest Chicagoland from the California Association of REALTORS® Professional Standards Committee Working Group’s proposal for more specific guidelines to address procuring cause disputes.

1. Always ask a prospective buyer if he or she is working with another agent.
2. If you find out that a prospective buyer is working with another broker, explore whether the first broker has an exclusive contractual agreement.
3. If you discover your client has been working with another broker on the same transaction, try to ascertain the reason why the client left the first broker and, if appropriate, make immediate contact with the broker and try to resolve the issue. Failing to address it early on may result in you working through a difficult closing and not getting paid.
4. Give agency disclosures early in the transaction.
5. Use buyer representation agreements (with or without the broker’s compensation element). This will help memorialize the relationship and help prompt the discussion about other relationships. If the contract includes a buyer’s commission obligation to the broker, it will also create an incentive for the buyer to come to you and terminate the contract prior to going to another broker.
6. Never send your buyer client to other brokers with instructions to come back when the buyer is ready to write an offer.
7. Try to accompany your clients to open houses, but if you can’t, give your clients your cards and instruct them to tell the agent sitting the open house that they are already working with you and present them with your card. By not accompanying them, you take the risk that this explanation may not occur.
8. Stay in close contact with your client and be responsive during the transaction.
9. If you are conducting an open house, keep a registry of all prospective buyers including a note of whether there was a broker with the buyer. Also, keep a record that the agent sitting the open house asked the buyer if they were working with an agent.
10. If you have a listing where the property is being shown by brokers when you are not present, leave a sign in sheet with buyers’ names and brokers’ names similar to those at new home developments. Include dates and times in the registry. This creates a record of who was shown the property and with which broker.

FAQs (Frequently Asked Questions)

Q. Does the arbitration always result in an “all or nothing” award or may arbitrators split the award between two disputing brokers?

A. In most cases, sound analysis will lead arbitrators to conclude that only one broker was the procuring cause, and that broker should get the entire commission. Further, arbitrators should not avoid the “all or nothing” decision, just because it is a hard one to make. Nonetheless, after all factors have been weighed, under some fact patterns, arbitrators may decide to split the commission.

Q. Must a listing broker be named as a party to an arbitration complaint when he or she has contractually offered the commission to brokers through the MLS?

A. Although the listing broker offered the compensation, generally, only the disputing cooperating are parties to the arbitration. A listing broker can be named, however, and it is up to the complainant to determine the proper parties to the complaint.

Q. Must the respective responsible brokers for the agents for a commission dispute be named in the arbitration complaint?

A. The Code of Ethics and Arbitration Manual requires that the responsible broker be named as a complainant to an arbitration complaint. There is no similar requirement for the respondent, but it is advisable to have the responsible brokers on both sides of the dispute.

Q. Does a broker with an exclusive buyer broker compensation agreement with the buyer need to go through arbitration?

A. Yes. There are factors, which when taken together, can outweigh the exclusive buyer broker contract.

Q. Are these guidelines a “predetermination of entitlement” to a commission, which is prohibited under NAR policy?

A. No. The guidelines are merely factors to be considered in light of built-in presumptions.