

NOTES FROM THE LEGAL HOTLINE

Massachusetts Association of Realtors®

September 2020

Q. Is the agent who first showed the property to the buyer entitled to compensation?

- A.** Maybe. For transactions involving properties listed in the MLS, the agent who is the procuring cause is entitled to compensation once the transaction has closed. A broker is regarded as the procuring cause if it was his or her efforts that laid the foundation on which negotiations resulting in the sale began. The broker's efforts cannot be interrupted by a break in continuity.

Determining procuring cause requires a nuanced analysis of several factors and must be determined on a case-by-case basis. No one factor alone is determinative. Furthermore, there is no "threshold rule" that dictates that the agent who first showed the property is the procuring cause.

Disputes related to procuring cause that brokers are unable to resolve themselves must be submitted to REALTOR® sponsored arbitration. Procuring cause disputes submitted to arbitration will be resolved by a panel of REALTOR® members who will consider some of the following questions:

- Were any agency disclosures made? When?
- Was there any buyer representation agreement? Was it an exclusive agreement?
- How was the first introduction to the property made?
- When was the first introduction to the property made?
- What subsequent efforts were made by the broker/agent?
- Was contact with the buyer maintained by the original broker/agent?
- Did the original introduction of the buyer to the property start an uninterrupted series of events leading to the sale?
- Were there any interruptions?
- Did the buyer terminate the relationship with the agent? Why?
- Was there interference in the relationship?
- Did the buyer seek to freeze out the buyer agent?
- Did the seller act in bad faith to deprive the agent of the commission?

The full Arbitration Worksheet from NAR can be found [here](#).

REALTORS® must always remember to never let a compensation dispute interfere with the transaction. Disrupting an otherwise successful transaction with a commission dispute may lead to both an ethics complaint and a licensing complaint.

Q. My seller has received multiple offers on their home, and one has an escalation clause – how does that work?

- A.** Escalation clauses are sometimes used by buyers to make their offer more appealing to the seller, especially in a competitive market. An escalation clause is a provision that is added to a buyer’s offer that allows the offer price to increase by specified increments if there is a competing offer. Escalation clauses can be helpful in multiple offer situations, but prior to using one a buyer should be carefully counseled on the pros and cons.

As a REALTOR®, it is critical to understand the components of an escalation clause regardless of whether you are representing a buyer or a seller. The components include the original offer, the amount by which the buyer is willing to escalate his or her offer, the total amount that the buyer is willing to offer (the “cap”), and information about how the buyer will cover the cost differential in the escalated offer. To trigger the escalation clause, the seller must have received a higher *bona fide* offer from a competing buyer. A *bona fide* offer is an offer that is made in good faith and is legitimate and enforceable. At the buyer’s request, the seller must provide documentation to the buyer of the other offer.

A seller may refuse to accept an offer that contains an escalation clause and may instead counteroffer, asking the buyer for their “highest and best.” A buyer should also be aware that using an escalation clause reveals more information to a seller than a traditional offer. The seller will know the buyer’s “cap” and may use that information to their advantage in negotiations.

The MAR Escalation Form (#520), requires a seller who accepts the buyer’s offer as escalated to deliver a signed copy of the Offer to Purchase with the purchase price modified to the escalated amount within 48-hours. The buyer would then sign the counteroffer. Once accepted, the parties have a binding contract and the escalation provisions terminate.

REALTORS® and buyer clients using an escalation clause should work closely with an attorney to ensure proper understanding and use of the escalation clause.

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