

## **TEN THINGS REALTORS® SHOULD CONSIDER BEFORE STARTING A PROCURING CAUSE ARBITRATION**

An arbitration of a commission dispute to determine who was procuring cause can be a costly and time consuming process for all involved, *i.e.*, the complainant and respondent, grievance committee, arbitration hearing panel and the association administering the arbitration. Prior to making the decision to proceed with a procuring cause claim through arbitration, there are certain basic issues a Realtor® should take into consideration.

### **Preliminary Considerations.**

1. Has 180 days expired from the date of the closing of the transaction? Alternatively, has 180 days expired from the date on which the facts constituting the basis for the dispute could have been known in the exercise of reasonable diligence?
2. Does the Realtor® have a claim which is subject to mandatory arbitration? In other words, is the respondent required to arbitrate? A typical procuring cause claim involves a dispute over the cooperative portion of a commission.

### **Weighing Your Case.**

3. In determining whether to proceed with arbitration, a Realtor® must understand that there is no bright-line test by which he or she can determine in advance whether the Realtor® will win or lose. A determination as to which Realtor® was procuring cause will not turn exclusively on the agency relationships between the parties or on which Realtor® showed the property to the buyer first.
4. A Realtor® should consider the factors an arbitration panel will consider. Why did the buyer end up with another Realtor®? While the Code of Ethics and Arbitration Manual, as amended to conform with Michigan law (the “Manual”) uses the terms “abandonment” or “estrangement”; in essence, a Realtor® considering a procuring cause arbitration needs to make certain that it is not something he or she did or did not do which caused the buyer to go to another Realtor®.
5. An arbitration panel will also consider what the other cooperating Realtor® did in order to earn the commission. Does it appear that the other Realtor® initiated a separate and subsequent series of events which resulted in the buyer buying the property?

**Can the Realtor® make his/her case?**

6. How expensive does it appear it is going to be to try and prove that the Realtor® was procuring cause? Under the Manual, unlike in an ethics proceeding, in an arbitration proceeding, counsel must be a licensed attorney and cannot be a Realtor® either within or outside of the Realtors®'s firm. Can the Realtor® make his/her case without the assistance of legal counsel? If not, the expense of legal counsel should be considered in deciding whether to go forward.

7. Who are the Realtor®'s witnesses and will they be available to testify? More witnesses may now be available for arbitrations as parties and witnesses may request permission to testify via teleconference or video conferencing. Witnesses can only participate during their own testimony.

8. In proceeding with the arbitration, the Realtor® will have certain flexibility in selecting respondents, *i.e.*, the entities or persons who will be responsible for any arbitration award. It is necessary under Michigan law for the brokerage firm of the Realtor® who received the commission to be named as a respondent. The Realtor® may also name Realtor® principals of that firm as additional respondents.

**Bottom Line Items.**

9. Are the proposed respondents collectible? In other words, if the Realtor® obtains an arbitration award and the respondent fails to pay, the Realtor® will be required to proceed to the circuit court to obtain a judgment and thereafter to engage in post-judgment proceedings to try to collect the award. This involves more expense which can result in effectively no net recovery. Alternatively, the Realtor® should check to see whether the association administering the arbitration has a requirement that a respondent deposit the amount of an award within ten (10) days after transmittal of the award to the respondent. Such an escrow may ultimately serve as a source of payment for the Realtor®.

10. The Realtor® should carefully review the potential panel members. Prior to the arbitration hearing, the Realtor® will receive a list of possible arbitration panel members and will have an opportunity to challenge their qualifications or object for cause. If, after the hearing, the Realtor® tries to challenge the qualifications of a hearing panel member or argues that a panel member should have been removed for cause, it will be too late.