



Procuring Cause

“Show me the money!!”

3 Hours CE – Ethics

**Procuring Cause –
“Show me the money!!”**

Course Overview: The basis for this course – **Procuring Cause and Arbitration under the Nevada Uniform Arbitration Act (hereafter referred to as UAA)** – is outlined in **NEVADA Statute** under N.R.S. 38.015 TO 38.205 for cases other than for CIC disputes. CIC Arbitrations are covered under N.R.S. 38.300-38.360. The course will begin by covering the **LEGAL** definition of Procuring Cause.

Several Court Cases will be referenced from several professions.

Evidentiary Standards will be reviewed.

N.R.S. 645.252 – the “Reasonable Skill and Care” portion of the statute will be discussed as it relates to Client/Customer representation *especially* in regards to Procuring Cause.

We will then turn to “Case Studies” to determine the “Most Right” course of action under each scenario.

We will conduct a short review of some of the National Association of REALTORS® Arbitration Manual guidelines for determining Procuring Cause. The N.A.R. Code of Ethics will be referenced as to specific actions required under the Code of an Agent working with a *Prospect*.

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Session Objectives:

As a result of this course – participants will:

- 1) Understand that “Procuring Cause” is **NOT** a REALTOR® ISSUE – but, rather one of contractual and compensation disputes.**
- 2) Look at N.R.S. 38 – Arbitration under NEVADA law.**
- 3) Compare State and Federal Laws to determine the underlying basis for Procuring Cause issue resolution. Federal Standards, or “Guidelines”, for Procuring Cause issues will be discussed using actual State & Supreme Court decisions.
Students will discuss *Reference* sources for further study including the American Arbitration Association and web sites such as ‘findlaw.com’.**
- 4) Review NRS 645.252 and brainstorm to identify current Procuring Cause and Agency issues facing Consumers, Brokers and Agents in today’s market.**
- 5) Identify “Evidentiary Standards”.**
- 6) Role Play a “Procuring Cause” case and arrive at a determination.**

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Ground rules – No cell phones, no laptops.

No beepers, buzzers, blasters, egg timers or alarm clock watches. Also, if you have any of that hard candy that is wrapped in cellophane that when opened annoys everyone around you – please either open it now and put it in our purse or pocket or wait until the break to indulge your sweet tooth.

Students must be “engaged” during the course and remain in the class for the entire time to receive CE credits.

Course Overview:

Today’s session is broken down into four parts:

- 1) Understanding the “Basic Elements” of a Procuring Cause AND Arbitration issues starting with the Blacks Law Text Book definition and amplifying from there.
- 2) Examining 3 “Case Studies” to learn what evidence is considered and how much ‘weight’ is placed on each ‘piece of the evidence’.
- 3) A discussion of a Hearing Process and a “Moot Court” scenario to actually participate and/or watch a “Hearing” play out.
- 4) Finally, we will reference Codes of Ethics and Codes of Conduct from several professions with emphasis on the REALTOR® Code.

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The Definition of “Procuring Cause”

From Blacks Law:

Procuring Cause disputes between **sellers** and **listing brokers** are often decided in court. The reasoning relied on **by the courts** in resolving such claims is articulated in *Black's Law Dictionary*, Fifth Edition, definition of procuring cause:

*The proximate cause; the cause **originating** a series of events which, without break in their continuity, **result** in the accomplishment of the prime object. The inducing cause; the direct or proximate cause. Substantially synonymous with "efficient cause."*

*A broker will be regarded as the "procuring cause" of a sale, so as to be entitled to commission, if his efforts are the **foundation** on which the negotiations resulting in a sale are begun. A cause originating a series of events which, without break in their continuity, result in accomplishment of prime objective of the employment of the broker who is producing a purchaser ready, willing, and able to buy real estate on the owner's terms. Mohamed v. Robbins, 23 Ariz. App. 195, 531 p.2d 928, 930.*

Procuring cause is **NOT** a REALTOR® issue.

Arbitration is simply **one way** to resolve compensation issues – which **may be** over real estate commissions.

With a Partner - Question: If YOU PERSONALLY were asked to define – **“without break in their continuity...”** – how would you respond?

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A “**Dilemma**” is when there is _____ one right answer and you have to determine _____ is _____.

American Arbitration Association: www.adr.org



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NAM NEWS

Jan. 17, 2007 - NAM adds Judges Albert and Polizzi to their exclusive list of Hearing Officers

Nov. 2, 2006 - NAM President and CEO selected as a Presenter by Suffolk County Bar Association for its CLE Series on Arbitration

Oct. 24, 2006 - Disputes over contracts containing Arbitration Clauses must first be heard by Arbitrators, not Courts

Jun. 2, 2006 - NAM Names New Chief Operating Officer

Apr. 4, 2006 - Nassau County Bar Association asks NAM to conduct CLE Program on ADR

Mar. 30, 2006 - Appellate Division Upholds Powerful Court Order on Public Education by Panel of Judicial Referees including NAM Hearing Officer William C. Thompson

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NEWS - Press Release

OCTOBER 24, 2006 - DISPUTES OVER CONTRACTS CONTAINING ARBITRATION CLAUSES MUST FIRST BE HEARD BY ARBITRATORS, NOT COURTS

The U.S. Supreme court has ruled that legal challenges to contracts containing arbitration clauses must initially be heard by arbitrators, unless the challenge is to the validity of the arbitration clause itself.

In the case of *Buckeye Checking, Inc. v. Cardegna et.al*, respondents John Cardegna and Donna Reuter entered into various deferred-payment transactions with petitioner Buckeye Check Cashing, in which they received cash in exchange for a personal check in the amount of the cash plus a finance charge. For each separate transaction they signed a "Deferred Deposit and Disclosure Agreement" which contained a provision requiring binding arbitration in the event of a dispute.

The respondents subsequently brought a class action suit in a Florida state court, alleging that Buckeye charged usurious interest rates and that the Agreement violated various lending and consumer-protection laws, rendering it criminal. Buckeye moved to compel arbitration. The trial court denied the motion, holding that a court rather than an arbitrator should initially resolve a claim that a contract is illegal and void.

The District Court of Appeal of Florida for the Forth District reversed the decision, holding that because the respondents did not challenge the arbitration provision itself, but instead claimed that the entire contract was void, the agreement to arbitrate was enforceable and the question of the contract's legality should go to the arbitrator.

The respondents appealed and the Florida Supreme Court reversed, reasoning that to enforce an agreement to arbitrate in a contract challenged as unlawful "could breathe life into a contract that not only violates state law, but also is criminal in nature."

10/24/2006

Court decision reversed by Florida State Supreme Court – then reversed back by appeal to the U.S. Supreme Court!

N.R.S. 38 – Arbitration under State Law

Court cases in NEVADA, between \$10,000 and \$50,000 fall under the Alternative Dispute Resolution rule and WILL go through a court sponsored Arbitration prior to going before a Judge and/or Jury. (Proposed increase to \$60,000.) When *one* of the theories is NOT money e.g. Specific Performance, the Arbitration step can be thrown out.

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N.R.S.645.252 – Reasonable skill and care: Excerpts

Duties of Licensee NRS 645.252

A licensee who acts as an agent in a real estate transaction:

1. Shall disclose to each party to the real estate transaction as soon as is practicable:
 - a. Any material and relevant facts, data or information which he knows, **or which by the exercise of reasonable care and diligence he should have known**, relating to the property which is the subject of the transaction.
2. Shall exercise reasonable skill and care with respect to **all parties** to the real estate transaction.

What IS “reasonable”?

TEST: Someone is walking by a lake – and someone is clearly drowning in the lake – but they are 20 yards out...

Would it be reasonable to expect the person walking by to jump in and save the drowning person?

What if the person walking by could not swim?

What if the person walking by had 3 years experience as a Navy Seal?

What if the Navy Seal experience was 35 years ago?

Moral

“Reasonable” is subjective.

For our classroom purposes – we will define “Reasonable” as what a person with _____ background would do under _____ circumstances.

No Predetermined Rule:

Based on the above definition – before a decision could be made as to Procuring cause – an Arbitrator or Panel would have to consider the “background” of the parties. A member of the Public would not be held to the same standard as a licensee. A licensed Broker would, most likely, be held to a higher standard than a Salesperson.

Evidentiary Standards:

A Preponderance of the Evidence (51%)

Used in Arbitration, or *Money* cases.

Clear Strong & Convincing (75%)

Used in Ethics, or *Moral* cases.

Beyond a *Reasonable* Doubt (99%)

Civil, Criminal or Capital Crimes cases...

Case Study #1

Mary is holding an Open House on Joe’s Listing (because she is new – she doesn’t have any of her own listings yet).

A prospect comes in and Mary shows them through the home.

That night – the prospect makes an offer on the property through Larry (to Joe).

Mary discovers this was her prospect and files an Arbitration against Larry’s Broker.

What factors would you consider if you were asked to determine who was Procuring Cause?

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The “Right” questions:

As a result of your discussion of Case Study #1 – in small groups – identify 3 or 4 questions you would want to ask if you were Arbitrating:

Case Study #2

Bob is on “Floor Time” and gets a call on Susie’s listing. Bob shows the property to the prospect. They love it and want to write an offer. The prospect tells Bob that they have no money for closing costs and disclose that they had a bankruptcy (due to medical bills) 14 months ago. Bob explains that they need to speak with a lender and get a “Pre-Approval” letter if they want to be in a good bargaining position. The lender says they cannot qualify.

Five days later – the prospect makes an offer through Marsha – the transaction closes.

Bob files an Arbitration.

What factors would you consider?

The Definition of “Procuring Cause”

Procuring cause is _____ by your _____, based on a _____ of _____.

There is _____ rule!

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Case Study #3 **Hearing Exercise:**

For this case study – we will select a Hearing Panel – 2 Panelists + a Chair. We will have one “actor” play the part of the Agent “Alice” one play the part of “Diligent Doug” – and one play the part of “Larry Lister” who had the listing and appears as a witness in the hearing.

Doug has a prospect that he works with for 3 weeks. He has shown them property on 4 occasions and has kept very good notes. Doug **did** ask the prospect to sign a Buyer Broker agreement but the prospect explained that they did not want to be tied to any specific agent and that they **were** working with other agents. The last property Doug showed them – 320 Maple street, they end up buying with “Alice” (who does, by the way, have a Buyers Brokerage).

What evidence would you bring if you were **Doug** to make your case – remember the burden of proof is on the **complainant**.

What evidence would you want to have if you were **Alice**.

As a member of the panel – what **questions** would you want to make sure get asked during the hearing to ascertain the truth in this matter?

Do NOT go ahead in the Outline:

With a partner:

Participant one: Differentiate “Client” and “Customer”

Participant two: If you break the Code of Ethics – you are also violating N.A.C. 645.600 – True or False?

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****NAC 645.600

1. Every broker shall teach his salesmen and broker-salesmen the fundamentals of real estate or timeshare practice, or both, and the ethics of the profession. He shall supervise their activities and the operation of his business.

Page 119 & 120 of the “Code of Ethics and Arbitration Manual” of the National Association of REALTORS®

The **obligation** to participate in Arbitration is a requirement of Article 17 of the Code of Ethics.

Question: Can you define “CLIENT” ?

Article 1

When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to **protect and promote** the interests of their client. This obligation to the client is primary, but it does not relieve REALTORS® of their obligation to **treat all parties honestly**. When serving a buyer, seller, landlord, tenant or other party **in a non-agency capacity**, REALTORS® remain obligated to treat all parties honestly. (*Amended 1/01*)

• Standard of Practice 1-1

REALTORS®, when acting as **principals** in a real estate transaction, remain obligated by the duties imposed by the Code of Ethics. (*Amended 1/93*)

• Standard of Practice 1-2

The duties imposed by the Code of Ethics encompass all real estate-related activities and transactions whether conducted in person, **electronically**, or through any other means.

The duties the Code of Ethics imposes are applicable whether REALTORS® are acting as agents or in legally recognized non-agency capacities except that any duty imposed exclusively on agents by law or regulation shall not be imposed by this Code of Ethics on REALTORS® acting in non-agency capacities.

As used in this Code of Ethics, **“client” means the person(s) or entity(ies) with whom a REALTOR® or a REALTOR®’s firm has an agency** or legally recognized non-agency relationship; **“customer”** means a party to a real estate transaction who receives information, services, or benefits **but has no contractual relationship with the REALTOR® or the REALTOR®’s firm**; “prospect”

means a purchaser, seller, tenant, or landlord who is not subject to a representation relationship with the REALTOR® or REALTOR®'s firm; "agent" means a real estate licensee (including brokers and sales associates) acting in an agency relationship as defined by state law or regulation; and "broker" means a real estate licensee (including brokers and sales associates) acting as an agent or in a legally recognized non-agency capacity. *(Adopted 1/95, Amended 1/07)*

What is your Dharma - your Purpose? I've got more than one!

Article 16

REALTORS® shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other REALTORS® have with clients. *(Amended 1/04)*

• Standard of Practice 16-9

REALTORS®, prior to entering into a representation agreement, **have an affirmative obligation** to make reasonable efforts to determine whether the prospect is subject to a current, valid exclusive agreement to provide the same type of real estate service. *(Amended 1/04)*

In YOUR opinion – what would you consider to be **“reasonable efforts”** to determine...? **Whether the prospect is subject to a valid EXCLUSIVE agreement**

****Handout pg. 119 & 120 from Manual**

Article 17

In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between REALTORS® (principals) associated with different firms, arising out of their relationship as

REALTORS®, the REALTORS® **shall** submit the dispute to arbitration in accordance with the regulations of their Board or Boards rather than litigate the matter.

In the event clients of REALTORS® wish to arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall arbitrate those disputes in accordance with the regulations of their Board, provided the clients agree to be bound by the decision.

The obligation to participate in arbitration contemplated by this Article includes the obligation of REALTORS® (principals) to cause their firms to arbitrate and be bound by any award. (Amended 1/01)

Article 17 provides that REALTORS® **shall** arbitrate rather than _____.

When a dispute arises between _____
(**principals**) associated with _____
_____...

****What if two agents FROM THE SAME FIRM want to arbitrate?**

When a _____ wishes to Arbitrate, the REALTOR®
_____ arbitrate **provided that** the _____ agrees
to be _____ by the decision.