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A primer on commercial real estate brokerage commissions disputes

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Disputes over broker's commissions arise daily in the commercial real estate marketplace. For more than 20 years, I've handled a multitude of these cases, sometimes representing the broker and, other times, representing the owner. Under the relevant standard, the broker is entitled to a commission if the broker was the "procuring cause" of the sale or lease transaction. However, whether that standard has been satisfied is not always clear. The facts of each case are unique and the courts have sometimes made inconsistent general rulings about what it means to be the procuring cause.

You'd think that in order for a broker to prove that he or she was the procuring cause, the broker would have to prove that the owner actually signed a contract or lease with a third party, but that's not even the case. In fact, in the absence of a provision expressly stating otherwise, a commission is earned by a broker when the broker submits a ready, willing and able purchaser or tenant — regardless of whether a contract or lease is consummated and regardless of whether the owner or another broker procures another buyer or tenant who ultimately closes on the transaction.

Therefore, the obvious starting point in a procuring cause analysis is the agreement between the owner and broker. That agreement may have terms and conditions that speak directly to the issue and, consequently, put the dispute to rest. However, often times these agreements fail to account for the particular factual scenario that gives rise to the dispute.

Moreover, there is not always a written brokerage agreement. However, that does not mean the broker is out of luck. Courts will find an implied contract where a broker finds a ready, willing and able purchaser or tenant, and the owner said or did something establishing that the owner had accepted the broker as the owner's agent.

In trying to define what it means to be the "procuring cause," courts have *attempted* to describe the requisite the level of involvement the broker must have on the transaction in order to qualify for a commission. However, this is easier said than done. In many instances, these definitions raise more questions than they answer. For example, courts have ruled that to be the procuring cause, the broker must show a "*direct and proximate link*" between the broker's actions and the consummation of the sale or lease. In other cases, courts have held that the broker must show that he or she "*generated the chain of circumstances that proximately led*" to the completed transaction.

What do these terms mean? I can tell you from experience that when you use these phrases with brokers and owners, all you get back are blank stares and more questions: "Enough lawyer talk," they

say. "Am I going to get my commission?" Or, alternatively, "Do I have to pay the commission?"

In addition, sometimes the court cases seem inconsistent with each other. Some courts have ruled that to be the procuring cause, the broker must bring the parties together initially and do more than just alert the buyer to the availability of the property. There must be evidence that the broker actually initiated negotiations that ultimately led to the making of a deal. Other cases have reached seemingly irreconcilable holdings, for example that a broker may be the procuring cause where the transaction is effectuated through information which the broker merely disseminates to the marketplace, even if the broker did not personally introduce the buyer or tenant to the owner, communicate with the prospective purchaser or tenant, or show the property. How does an owner, a broker or their counsel predict the outcome of a dispute if the court cases seem to espouse contradicting rules?

One thing is certain: In court, it is the broker's burden to prove that he or she was the procuring cause of the transaction. Typically, brokers will attempt to satisfy the procuring cause standard with evidence like correspondence between the broker and the owner, advertising and marketing materials for the property, and testimony establishing the broker showed the property to the prospective tenant or purchaser and/or negotiated the transaction. Conversations between the broker and the parties to the transaction are often critical in these cases. A broker may also prove that he or she was the procuring cause of a transaction with evidence that the broker provided the eventual buyer or tenant with information such as zoning regulations, tax information, and construction details.

A broker will not be considered the procuring cause of a transaction where the court rules that the broker's influence on the transaction was only "slight," the broker was initially involved for a short period of time, but another broker actually induced the buyer or tenant to enter into the transaction, or where the contract actually signed differs so greatly from the contract the broker originally was authorized to negotiate that the actual contract was beyond the parties' original contemplation.

Particularly challenging is the case where the owner consummates a transaction directly with a buyer or tenant whose status as a broker's prospect was not known to the owner, and the transaction is done at a reduced price — based on the assumption that there is no brokerage commission to pay. Also difficult is the case where the transaction is affected by one of several brokers. A broker who first finds or contacts the purchaser or tenant, but who abandons the transaction is not entitled to a commission just because a subsequent broker then successfully brings together the owner and buyer or tenant.

Commercial brokerage commission disputes are difficult. They are expensive to prosecute and defend. They are fact intensive. No two cases are the same and, at times, the cases appear to reach inconsistent results. For all of the reasons, in our experience 90% of these disputes will settle before trial.

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