



## RE54R06: ALTERNATIVE DISPUTE RESOLUTION (ADR) AND PROCURING CAUSE

### A Description of Dispute Resolution and Procuring

The objectives of this course provide a comprehensive overview of Alternative Dispute Resolution ("ADR") as well as the concept and legal basis for Procuring Cause. Massachusetts Licensing Laws do not mandate ADR of business disputes, but there is federal and state law as well as growing use in myriad commercial transactions, real estate transactions in many other states as well as many multiple listing services and local real estate boards. The Code of Ethics of the National Association of REALTORS® contain arbitration clauses.

In the absence of a mutually agreed process for ADR, real estate licensees or their clients and customers involved in any dispute must, in most cases, litigate these matters.

The course will integrate some case law regarding the "procuring cause" doctrine.

#### 1. ADR

##### a. Definition

- Alternative Dispute Resolution is an alternative method to resolving legal disputes as opposed to filing lawsuits and submitting to a court forum.

##### b. Advantages

- Savings of costs related to dispute resolution
- Speedier timeframe for resolution
- Confidentiality
- Opportunity for creative resolution
- Option for mediation or arbitration
- More direct participation by the disputants
- Tends to generate less escalation and ill-will between disputing parties

##### c. Disadvantages

- Critics question legitimacy - no judicial resolution
- Critics feel outcomes are more cooperative and less definitive
- Critics believe ADR encourages compromise
- Proceedings and results are private

##### d. Mediation

An alternative process of dispute resolution in which one or more impartial and independent third parties intervene in a conflict or dispute with the consent of the disputing parties to assist them in negotiating a consensual and informed agreement. In mediation, the decision-making authority remains with the participants themselves and the mediator does not have the authority to make a binding decision.

- Advantages

1. Usually less costly

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2. Speedier timeframe for resolution
  3. Confidentiality
  4. Usually results in compromise
  5. Opportunity for creative resolution
  6. Opportunity for direct role of principals in resolution
- Disadvantages
    1. Small claims court may be more practical
    2. Discovery may be limited
    3. Usually results in compromise
    4. No limits on evidentiary submissions
    5. Possibility of no resolution
- e. Arbitration
- The non-judicial submission of a dispute to one or more independent and impartial parties for a final and usually binding decision of the matter (may be non-binding by agreement of the parties).
- Disadvantages
    1. Small claims court may be more practical
    2. Discovery may be limited
    3. Generally binding and therefore lacking the right of appeal
    4. No limits on evidentiary submissions
    5. May provide decision without explanation or rationale
    6. May result in compromise
    7. Confidentiality
    8. Fees may be far more costly than court fees
    9. Undermines constitutional right to use legal system
  - Advantages
    1. Usually less costly
    2. Speedier timeframe for resolution
    3. Confidentiality
    4. Opportunity for creative resolution
- f. History of ADR
- Mediation goes back hundreds of years
  - 1922 - Arbitration Society of America founded (predecessor of American Arbitration Association ("AAA"))
  - 1938 - NYU Law School offers first course ever in arbitration law
  - 1944 - 75% of collective bargaining agreements provide for arbitration as final step in grievance process.
  - 1947 - Federal Mediation and Conciliation Service (FMCS) created for labor disputes
  - Alternative Dispute Resolution has grown rapidly in the United States since the political and civil conflicts of the 1960's.
  - Community Mediation Groups started appearing in the 1970's
  - A significant increase in the number of lawsuits being filed in U.S. courts.

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- The judicial system became overloaded with cases resulting in long delays.
  - Processes like mediation and arbitration soon became popular ways to deal with a variety of conflicts.
- g. State and Federal Law
- New York State Arbitration Law - the first modern arbitration statute in the USA
  - Federal Arbitration Act of 1925 and as amended in 1970, 1988 and 1990
  - 1982 - President Reagan signs bill authorizing arbitration in patent disputes.
  - 1990 - Florida becomes the first state to require brokers to provide customers option of taking cases to AAA rather than industry sponsored forum.
  - Alternative Dispute Resolution Act of 1996
  - Alternative Dispute Resolution Act of 1998 - Federal Courts
  - Executive Order 12988 - 1996
  - MGL c 251 § 1 through § 13
    1. Uniform Arbitration Act, M.G.L. c. 251. provides for the legality of arbitration in commercial disputes in Massachusetts and the legal parameters related to the use of arbitration.
    2. MGL c 251 § 12 (a) - Provides for the basis that may allow a court to overturn an arbitration decision.
      - § The award was procured by corruption, fraud or other undue means.
      - § There was evident partiality by the arbitrators.
      - § The arbitrators exceeded their powers.
      - § The arbitrators refused to postpone a hearing or grant an extension when one was reasonable requested.
      - § There was no arbitration agreement and the party did not participate in the hearing.
- h. National business practices and trends
- ADR trends in real estate transactions in other state
  - ADR resources offered by NAR
  - ADR trends in all business
- i. ADR in real estate in Massachusetts
- As a prelude to litigation
  - Purchase and Sale Agreements
  - Level playing field for both disputing parties
  - Commission disputes
  - Use by MLS services
  - Use by local real estate boards

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- Requirement of NAR Code of Ethics
- j. Sources of Arbitrators and Mediators
  - AAA
  - Other ADR resources
  - Local ADR options
- 2. PROCURING CAUSE
  - a. What is a Procuring Cause?

The effort that brings about the desired result or the licensee who clearly originated a chain of events that resulted in a sale or lease within a timely manner. When more than one real estate broker or salesperson from different firms work with the same potential buyer, regarding the same property, the Seller, Landlord and Listing Broker expect to pay a single commission. Regardless of the efforts expended, only one of the brokers or salespersons whose efforts brought about the transaction may claim the commission.

*"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 or her efforts are the foundation on which the negotiations resulting from the 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 procure 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"*

- Black's Law Dictionary, Sixth Edition definition
  - b. Procuring Cause scenarios
    - Licensee refers a prospective buyer to a property but does not accompany the prospect.
    - Licensee had no authority to show the property.
    - Requirement of follow-through of Procuring Cause claimant or consequences of abandonment of prospective buyer.
    - Mere introduction of buyer and seller by licensee.
    - Circumstances requiring more than full commission.
    - Parties to a Procuring Cause dispute.
    - Licensee shows property to a prospective buyer and seller concludes the transaction
    - Listing agent shows property to prospective buyer then buyer engages a Buyer's Agent to conclude sale.
  - c. Review of actual case studies - Procuring Cause Sources, Materials and Handouts (materials are suggested to assist instructors and students which may be covered by the copyright laws.

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- Black's Law Dictionary (West Publishing)
- National Association of REALTORS® Code of Ethics and Arbitration Manual (Copyright National Association of REALTORS®, Chicago Ill)
- Code of Ethics of the National Association of REALTORS® (Copyright National Association of REALTORS®)
- The Real Estate Legal Desk Book, A Broker's Guide to Consumer Protection, Procuring Cause and Commissions, (Copyright Greater Boston Real Estate Board)
- M.G.L. c. 251, Uniform Arbitration Act § 1 through § 13
- ADR Act of 1990
- The Language of Real Estate by John W. Reilly, published by Dearborn Real Estate Education
- American Arbitration association website: <http://www.adr.org/>
- Actual case studies available from Department of registration, Real Estate Brokers & Salespersons

Feedback

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