February 2014

California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

ADAMS v. KUSTOM SPAS, INC.

ADAMS v. KUSTOM SPAS, INC.

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

MALLIN, BAINES & ARTHUR

ATTORNEYS AT LAW

Midvale, Columbia

MEMORANDUM

TO: **Applicant**

FROM: **William C. Baines**

DATE: **February 25, 2014**

SUBJECT: **Brianna Adams & Associates v. Kustom Spas, Inc.**

Our client, Brianna Adams, is a licensed broker who specializes in finding buyers for small businesses for sale in Columbia. Ms. Adams entered into a six-month listing agreement with Kustom Spas, Inc. to find a buyer for the business at a 10% commission. She was unable to put a deal together within the six-month term of the agreement, but several months later she learned that Kustom Spas was sold for $1.75 million to a person whom she had introduced to the transaction and that the broker who had handled the closing of that deal was Charles Smith. Both brokers lodged demands for a commission on the sale with the escrow office where the deal was pending. The deal closed, with the escrow agency holding in trust $175,000, just enough to cover Ms. Adams's commission, pending resolution of the contending claims of Adams and Smith.

We have just concluded an arbitration hearing. The issues are: (1) whether a commission is due; (2) who, if anyone, should receive a commission; and, (3) if a commission is due, how much should the commission be.

What I need from you is a draft of a post-hearing arbitration brief that persuades the arbitrator that Ms. Adams is entitled to a commission of $175,000 because she was the procuring cause of the sale, and that her claim is superior to Smith's claim. Please follow the format and guidance specified in the attached office memorandum regarding persuasive briefs. Although you will have to apply the facts in the Argument section of the brief, there is no need for an extensive Statement of Facts. Since we have just finished the hearing, the Arbitrator is quite familiar with the facts, so a fact statement of five or six sentences will suffice.

MALLIN, BAINES & ARTHUR

ATTORNEYS AT LAW

Midvale, Columbia

MEMORANDUM

September 14, 2013

SUBJECT: Persuasive Briefs

Unless otherwise instructed, attorneys shall include in all briefs a Statement of Facts written in such a way as to persuade the tribunal that the facts support our client's position. The Statement of Facts is not an indiscriminate recitation of all the facts in the case. Although the facts must be stated accurately, careful selection of the ones pertinent to the legal arguments and that support our client is not improper.

The Argument section of the brief should contain separate segments, each labeled with carefully crafted headings that summarize the argument in the ensuing segment. Do not write a brief that contains only a single broad heading. Each heading should succinctly state the reasons why the tribunal should adopt the position you are advocating and not merely a bare legal or factual proposition.

The body of each argument should match the relevant facts to the legal authorities and argue persuasively how the facts as applied to those authorities support our client's position. Authority that favors our client should be emphasized, but contrary authority should be addressed in the argument and distinguished or explained. Do not reserve argument for reply or supplemental briefs.

You need not prepare a table of contents, a table of cases, a summary of the argument, or an index. These will be prepared after the draft is approved.

EXCERPTS FROM TRANSCRIPT OF ARBITRATION HEARING

Brianna Adams & Associates and Charles Smith, Claimants

v.

Kustom Spas, Inc.

DIRECT EXAMINATION OF CLAIMANT BRIANNA ADAMS by William C. Baines, attorney for Claimant Brianna Adams:

BAINES: Ms. Adams, please explain to the Arbitrator the nature of your business.

ADAMS: I'm the owner and principal of Brianna Adams and Associates in Midvale, Columbia. I'm a business broker. By that I mean that I represent companies or individuals who want to buy or sell a business, and I put the buyer and seller together and help them work out a satisfactory purchase and sale arrangement.

BAINES: How do you get paid for your services?

ADAMS: Usually it's by commission — a percentage of the price, varying from 5% to 10%, depending on the dollar magnitude of the deal.

BAINES: Which party to the transaction pays the commission — the buyer or the seller?

ADAMS: That depends on which side I'm representing. If my client is the buyer, the buyer usually pays, and vice versa if my client is the seller. In this case, I represented the seller, Kustom Spas, so that's who was supposed to pay me.

BAINES: At what point in the transaction do you get paid?

ADAMS: Ordinarily, it's at the time of the closing of the deal. The usual practice is to open an escrow with a bank or other fiduciary early in the process, and, as contract documents, escrow instructions, stock certificates, money, and other components of the deal are forthcoming, they are deposited in the escrow. And when the parties agree that the deal is ready to close, the escrow holder notifies everyone concerned. At that point, I file a formal written demand for my commission, and I'm paid from the proceeds of the sale.

BAINES: Okay, now, when did you undertake to represent Kustom Spas — that is, to find a buyer for that company?

ADAMS: Back in January 2013, I was in the bar at my country club, and I overheard two members talking about how one had sold his business and retired. The other one, Billy Koster — the owner of Kustom Spas — said he was trying to do the same thing but wasn't sure how to go about disposing of his business. I struck up a conversation with Billy, and one thing led to another.

BAINES: Tell us what happened after that.

ADAMS: Well, I told him that I was in the brokerage business specializing in small businesses and that maybe I could help him. We agreed to meet at his office on the next day — January 22, 2013.

BAINES: What happened then?

ADAMS: We met as planned. I asked a lot of questions, looked at his books of account, got an idea about the history of the business, and that sort of thing. He told me how much he hoped to sell for — $2.5 million cash. After we'd talked for some time, Billy — Mr. Koster — asked me what kind of arrangement I'd need in order to go forward.

BAINES: What did you tell him?

ADAMS: I said we'd need to sign my standard listing contract giving me the exclusive right to market his business for, say, six months or a year. The first thing I'd want to do after that would be to get a formal appraisal of the business. That would give both of us an idea of what the market for a spa manufacturing business would bear and what my commission range would be. He told me to go ahead and get things started.

BAINES: What did you do next?

ADAMS: First, I contacted an independent appraiser I usually work with – Martin Apple – and asked him to do an appraisal of Kustom Spas as soon as he could and to keep it confidential. He looked at comparables in the last year, examined Kustom Spas' books, made some inquiries about the company's market reputation, and came back with an appraisal of $1.75 million, including the company's good will and going-concern value. The company was debt-free except for trade creditors, so it looked like it would be a fairly clean deal without involving banks, lenders, and secured creditors.

BAINES: Why did you tell Mr. Apple to keep his work confidential?

ADAMS: Because, until the deal is made public, you don't want the news to hit the trade journals – to keep the wolves away. I mean keep other brokers from trying to horn in on the deal.

BAINES: Okay. What was the next step?

ADAMS: I met again with Mr. Koster. I knew he was going to be disappointed in the appraisal. It's not uncommon for sellers to overestimate the value of their businesses. Three things happened at this meeting that sent up red flags for me. First, he said he didn't want to give me an exclusive listing; second, he wouldn't agree to a one-year representation period; and third, he wouldn't budge from his $2.5 million price.

BAINES: Did Mr. Koster tell you why he didn't want to give you an exclusive listing or give you a one-year contract?

ADAMS: It was sort of vague – just that he didn't like to be tied down in case some other opportunity came along and that, if I had a one-year contract, he was concerned that I'd drag things out.

BAINES: Did you try to persuade him otherwise on any of those points?

ADAMS: No, not really. I've learned that it's not a good idea to start out the relationship by arguing with the client. Reality about the market and price range usually sets in later when the offers start coming in and negotiations start. So I said, "All right, let's go with a nonexclusive agreement for a six-month period and I'll do my best to market the company at your price."

BAINES: Let me show you a document we've marked in evidence as Exhibit A. Can you tell me what it is?

ADAMS: Yes. It's the listing contract Mr. Koster and I signed on February 1, 2013. It was for a six-month representation period ending July 31, 2013. It's my standard form, and, based on the size of the deal, we agreed to a 10% commission.

BAINES: Did Mr. Koster balk at all at the 10% commission?

ADAMS: Yes. He said he thought it was too high, but I said that is my standard commission for a deal of this size. I told him I might reduce it later if the deal didn't come in as high as he wanted. He grumbled but said okay.

BAINES: I notice that there's nothing in the contract concerning your right to receive a commission after the end of the representation period. Is that customary in the contracts you enter into?

ADAMS: No, I usually include an extension clause. That's a clause that covers the situation where a sale is made to someone I introduced to the deal after my contract is up. This time, however, I decided not to.

BAINES: Why is that?

ADAMS: Well, I sensed that Mr. Koster was going to be a hard sell – his asking price was just too high. And he was pretty clear that he didn't want to give me a contract for more than six months. He complained about the 10% commission. I was concerned that an extension clause in the contract might look to him like a back door effort to sneak in a representation period of more than six months. So I just settled for the language in paragraph 4B, which he didn't object to. It left it open-ended and I felt that I'd be in a position to claim a commission if I turned out to be the procuring cause of any sale, even if it happened after my contract expired.

BAINES: All right; how did you go about generating interest in buyers for Kustom Spas?

ADAMS: I advertised in the trade journals, you know, an ad describing the opportunity and stating, "See Brianna Adams and Associates for details." I contacted people I knew from prior deals who had expressed interest in buying a business. I also followed some leads Mr. Koster gave me – acquaintances of his who he said were hot prospects.

BAINES: Did your efforts generate any interest?

ADAMS: At first, beginning about the middle of February, there was the usual flurry of activity with maybe a dozen inquiries, but nothing very serious. The only one that seemed to hold any promise was from Artie Baylor, owner of Midvale Pool and Spa Service. In late April, a broker representing Mr. Baylor came to me and said that Mr. Baylor had been thinking about getting into the manufacturing end of the business and might be interested if the price was right. It was a fairly serious inquiry, and I really thought it was going to produce a deal.

BAINES: You said that, when you met with Mr. Koster, he gave you some leads of possible buyers. Was Mr. Baylor one of those leads?

ADAMS: No. As far as I know, Mr. Baylor and his broker responded to one of the ads I had placed in the trade journals.

BAINES: What happened next?

ADAMS: Well, I gave Mr. Baylor's broker the details about the company and the $2.5 million asking price, I introduced him to Mr. Koster, negotiated a confidentiality agreement, and made arrangements for Mr. Baylor's accountants to examine the

company's books. A few weeks later, Mr. Baylor's broker came back to me with an appraisal he obtained – that appraisal valued the business at $1.5 million. That was lower than my appraisal of $1.75 million.

BAINES: Did you keep Mr. Koster informed of what was going on?

ADAMS: Oh yes, every step of the way. We had frequent telephone conversations. I told him I was continuing to solicit offers but that, so far, the only credible prospect was from Midvale Pool and Spa. I told him about Baylor's $1.5 million appraisal, but that I was confident I could get him off that figure. So, Mr. Koster told me to keep negotiating — but he reminded me of his $2.5 million asking price and that he wasn't going to drop very much off that number, especially since my commission was so high.

BAINES: What did you do after that?

ADAMS: I got into some very intense negotiations with Mr. Baylor and his broker. I argued that my appraisal was more realistic than theirs, that their appraisal had not taken good will into account. I told them that, even if there was a bit of a premium in the $1.75 million appraisal, it was worth it to Mr. Baylor because Kustom Spas was a going concern, and he could capitalize on his existing connections in the spa industry.

BAINES: Did you make any headway?

ADAMS: Not at first. We kept talking intermittently through about mid-June. Mr. Baylor said he wasn't unalterably opposed to making an offer of $1.75 million, but the real problem was that he just couldn't get the bank financing to swing such a deal. I told him and his broker that I had some financing sources and that I might be able to help solve that problem. They told me to go ahead and see what I could do.

BAINES: Were you able to do anything?

ADAMS: Yes, I arranged for a loan broker I worked with a lot – Vinny Maniscalco Loan Company and Forcible Collection Agency – to commit to making Baylor a loan on fairly favorable terms. With that loan commitment in hand, Mr. Baylor agreed to make an offer of $1.75 million.

BAINES: Did you think there was any chance that Mr. Koster would accept such an offer?

ADAMS: Yeah, I thought there was a chance. I had kept him informed all along and told him that Baylor was the only serious prospect we had and that I didn't think he was going to meet the asking price.

BAINES: What did he say to that?

ADAMS: He was noncommittal. He said to bring him the best offer I could get and he'd consider it.

BAINES: What did you do next?

ADAMS: I helped Baylor's broker write up the offer at $1.75 million cash. I worked with Mr. Koster's attorney to draft some transfer documents, and then I took the whole package to Mr. Koster. Also, I opened an escrow at Columbia Title Company. That was about the end of June.

BAINES: What next?

ADAMS: I took the offer to Mr. Koster, and we discussed it at length. He said he wasn't happy with it and, if that was the best I could do, he was disappointed. I tried to convince him that the appraisal I had obtained was reliable and was probably the best he was going to be able to do. He told me that he was firm on his $2.5 million price and to go negotiate some more.

BAINES: Did you?

ADAMS: Yes, but I didn't get anywhere. Baylor just couldn't get the financing. It looked pretty much like a dead end, and no other prospects had developed. From that point on, I kept trying to call Mr. Koster – maybe six or seven times – to see if he'd had any second thoughts, but he wouldn't return my phone calls. July 31st came and went and my contract ran out.

BAINES: Is that your last contact with the transaction?

ADAMS: For a while it was. Then, in early November 2013, I heard through the grapevine that there was a deal pending between Kustom Spas and Midvale Pool and Spa Service. I called Mr. Baylor's broker, but he wouldn't tell me anything other than that Baylor had ended up contracting to buy the company and that he would receive his commission from Mr. Baylor. I found out that Columbia Title Company still had an escrow pending and filed a written demand for my 10% commission. In fact, I was surprised to learn that the escrow number was the same one I had opened back in June 2013.

BAINES: Let me show you a document we've marked as Exhibit B. Can you tell me what that is?

ADAMS: Yes. That's the demand I filed with Columbia Title Company for my commission.

BAINES: Tell us what more you heard about how the deal had gone down.

Objection by ANDREW WELLS, attorney for Claimant, Charles Smith: Objection, Ms. Arbitrator. That calls for hearsay.

ARBITRATOR: That's correct. Mr. Baines, how do you respond?

BAINES: I'll withdraw the question for now, Ms. Arbitrator. I believe we can get in the evidence we need through Charles Smith and William Koster, who are going to be called as witnesses. No further questions of Ms. Adams.

ARBITRATOR: Mr. Wells, do you wish to cross-examine Ms. Adams?

WELLS: Just a few questions, Ms. Arbitrator.

CROSS-EXAMINATION OF CLAIMANT BRIANNA ADAMS by Andrew Wells, attorney for Claimant Charles Smith:

WELLS: Ms. Adams, you testified that Mr. Koster declined to give you a contract term of more than six months — from February 1 to July 31, 2013. Is that right?

ADAMS: Yes, that's right.

WELLS: So, that must mean that you expected and understood that your representation of Kustom Spas completely ended on July 31st. Correct?

ADAMS: Yes.

WELLS: And that, after that date, you no longer had the contractual or agency power to deal with anyone regarding the sale of Kustom Spas?

ADAMS: I guess that's correct, but there was certainly nothing to stop me from following up or referring potential buyers to Mr. Koster after July 31st.

WELLS: Well, as a matter of fact, you never did refer anyone to him after July 31st, did you?

ADAMS: Not exactly, but he ended up selling to Mr. Baylor. I had worked up the deal and referred Mr. Baylor to Mr. Koster during my representation period.

WELLS: But it's true, isn't it, that you completely lost contact with the transaction and had absolutely nothing to do with referring Mr. Baylor after July 31st ?

ADAMS: That's right, but so what?

WELLS: No further questions.

DIRECT EXAMINATION OF CLAIMANT CHARLES SMITH by Andrew Wells, attorney for Claimant Charles Smith:

WELLS: Mr. Smith, will you please explain to the Arbitrator how you became involved in the purchase and sale transaction between Midvale Pool and Spa and Kustom Spas?

SMITH: Yes. I'm old friends with Artie Baylor, the owner of Midvale Pool and Spa. Back in September 2013, we met for lunch one day, and Artie started telling me about how he had tried to buy Kustom Spas but that he couldn't meet Mr. Koster's price. He said he'd still like to buy the company but that his own broker didn't hold out much hope. Anyway, I said that I knew Billy Koster and maybe I could talk to him.

WELLS: Are you a broker?

SMITH: Well, not in the business brokerage end of things. I'm actually a licensed real estate broker, but I've done business deals before.

WELLS: Did you make any effort to contact Mr. Koster?

SMITH: Yes. I had heard that Mr. Koster's wife had been very ill and that she had died recently. I figured he might be ready to reduce his price and get out of the business. So, on September 3, 2013, I met with him and we talked about that.

WELLS: Did you tell him that you had talked to Mr. Baylor?

SMITH: No, not at first. I told him I was sorry to hear about his wife and asked him about whether he had given any more thought to selling Kustom Spas. He said yes and, now that his wife was gone, he was ready to move on. I said I could probably help him and that I'd be willing to try to market his company.

WELLS: What did he say?

SMITH: He told me he had come pretty close to a deal with Artie Baylor, the owner of Midvale Pool and Spa, but that it had fallen through because of price. Back then, he was asking $2.5 million, but Artie had offered only $1.75 million. He said he wasn't sure if Mr. Baylor was still interested but that he — Mr. Koster — was now ready to drop his price.

WELLS: Did he say what his new price would be?

SMITH: No. He was pretty cagey about it. He said only that he'd drop it by "some."

WELLS: Did you tell Mr. Koster that you had talked to Mr. Baylor?

SMITH: No, not right then. I wanted to get my representation contract signed and sealed so I could be sure of a commission. Mr. Koster agreed to sign a 30-day exclusive representation agreement with me, so I went back to my office, prepared a contract, and faxed it to Mr. Koster for signature.

WELLS: Let me show you a document that's been marked as Exhibit C. Is this your contract with Kustom Spas?

SMITH: Yes. We both signed it. It ran from September 4, 2013 through October 4, 2013. Mr. Koster said the exclusive part of the agreement was okay. My usual commission was 8%, but we negotiated a 5% commission. He said that, since he was reducing his price, he thought 5% was fair. I went along.

WELLS: What happened next?

SMITH: I went back and met with Mr. Baylor and his broker. Mr. Baylor's broker said he still had all the paperwork from the first round of negotiations with Mr. Koster and that he still had a $1.75 million loan commitment from a loan broker named Vinny Maniscalco. He said he was prepared to make the same offer he had before.

WELLS: Did you take an offer from Baylor back to Mr. Koster?

SMITH: Well, sort of. There wasn't much for me to do, so I told Mr. Baylor and his broker to set up a meeting with Mr. Koster and make the offer. Actually, around September 15th, I called Mr. Koster and left a voicemail message for him telling him that Artie Baylor's broker was going to present a $1.75 million offer.

WELLS: Did you do anything else?

SMITH: Yes. I called Columbia Title Company about opening an escrow. The escrow officer I spoke with told me there was already an open escrow.

WELLS: Did you ask who had set up that escrow?

SMITH: No. I assumed that Artie Baylor's broker had done it.

WELLS: Did you stay in contact with the parties?

SMITH: Not really. I just assumed that Mr. Baylor or his broker would keep me in the loop. Besides, I was very busy with other deals.

WELLS: All right. Did there come a time when you learned that a sale had taken place between Midvale Pool and Spa and Kustom Spas?

SMITH: Yes. About October 24th I ran into Artie Baylor, and he told me Mr. Koster had accepted his offer of $1.75 million just the day before, October 23rd, and that they were about to close the deal. He said Mr. Koster had dragged out the negotiations and had told him he didn't want to close until after mid-October.

WELLS: What did you do next?

SMITH: Tried to get hold of Mr. Koster, but he wouldn't return my phone calls and I couldn't find him at his home. I got hold of the escrow officer at Columbia Title Company; found out the escrow number. The escrow officer told me that the escrow instructions didn't say anything about a commission being due me. So, I filed my demand for my 5% commission anyway.

WELLS: Is this document that's been marked as Exhibit D the demand you filed?

SMITH: Yes.

WELLS: No further questions.

ARBITRATOR: Cross-examination, Mr. Baines?

BAINES: Thank you. Yes, Ms. Arbitrator.

CROSS-EXAMINATION OF CLAIMANT CHARLES SMITH by William C. Baines, attorney for Claimant Brianna Adams:

BAINES: Mr. Smith, from the time in September 2013 when you first talked to Mr. Baylor about his continuing interest in buying Kustom Spas to the time in late October 2013 when you learned that he had in fact bought the company, did you do anything, other than the steps you described in your direct examination, to bring the parties together and aid in the consummation of the transaction?

SMITH: No. I've told you everything I did. I was the person who referred Mr. Baylor to Mr. Koster.

BAINES: How many times did you meet with Mr. Koster over the course of your representation of him and his company?

SMITH: Just the one time – September 3rd.

BAINES: And how long did that meeting last?

SMITH: Forty-five minutes to an hour.

BAINES: Did there ever come a time when you learned that my client, Ms. Adams, had represented Mr. Koster and Kustom Spas in an earlier effort to sell the company?

SMITH: Only when I learned that we had both filed demands with Columbia Title Company.

BAINES: In other words, you never asked anyone, correct?

SMITH: That's right. And no one ever told me, either. I mean, I assumed that the only other broker in the picture was Mr. Baylor's broker, and I knew he was being paid by Mr. Baylor. I also assume that Mr. Koster would have told me about Ms. Adams's involvement in the earlier failed deal if he thought it was important.

BAINES: As I understand your direct testimony, the offer that Mr. Baylor made in September or October of 2013 was exactly the same offer he had made back in June 2013 — $1.75 million — using the same documentation and with the same loan commitment he had obtained earlier. Is that right?

SMITH: I guess they had to update the documentation, but, yes, that's the way I understand it.

BAINES: So, your claim for a commission is based on the following facts: number one, you learned from Mr. Baylor that he had earlier tried to buy Kustom Spas; number two, Mr. Koster, without knowing you had talked to Mr. Baylor, told you the same thing and asked you to see if you could renew Mr. Baylor's interest; and number three, you told Mr. Baylor's broker to set up a meeting with Mr. Koster and renew his $1.75 million offer. Is that right?

SMITH: Yes, that's pretty much it. But don't forget -- If it hadn't been for my personal contacts and my reenergizing Mr. Baylor's interest and referring him to Mr. Koster, there would never have been a deal.

BAINES: In fact, Mr. Smith, the deal didn't happened during the period of your contract with Kustom Spas, did it?

SMITH: No, but I don't see what difference that makes. The extension clause in my contract gave me the right to a commission because the buyer turned out to be someone I had referred to Kustom Spas. I'm the one who referred Mr. Baylor, and the sale happened within a couple of weeks after the end of my contract. So, I don't see why there's any question about it.

BAINES: No further questions.

EXAMINATION OF RESPONDENT WILLIAM A. KOSTER by William C. Baines, attorney for Claimant Brianna Adams:

BAINES: Mr. Koster, when did you and Mr. Baylor actually come to an agreement regarding the sale of your business to Midvale Pool and Spa?

KOSTER: On October 23, 2013.

BAINES: When did he first make the offer that you ended up accepting?

KOSTER: Well, I can't be sure. We did a lot of negotiating when his broker first brought me the offer, but it was sometime in the last half of September 2013.

BAINES: And, isn't it correct that the offer he had submitted to you and that you accepted was exactly the offer he had submitted back in June 2013 through Ms. Adams? That is, $1.75 million and based on the same documentation?

KOSTER: Well, we had to update the paperwork, but, yeah, it was pretty much identical.

BAINES: Now, you have refused to authorize the title company to disburse any of the $175,000 the title company is holding in escrow to either one of the claimants – Ms. Adams and Mr. Smith – correct?

KOSTER: Absolutely. Neither one of them did me any good at all. Ms. Adams couldn't produce a buyer at my asking price because she wasn't a very effective negotiator. I should have just fired her, but she saved me the trouble when she just lost interest and let her contract run out. As for Mr. Smith, he didn't do anything other than send me someone I told him about. And, even then, all he did was send me an offer I had already rejected.

BAINES: You never told Mr. Smith that Ms. Adams worked on and presented Mr. Baylor's offer to you, did you?

KOSTER: No, I didn't see why that mattered, and Smith never asked.

BAINES: Regarding Ms. Adams, you knew, didn't you, that she's the one who found Mr. Baylor as an interested buyer, that she had done all the work to put the deal together, and negotiated on your behalf?

KOSTER: Well, I heard her testimony about all the work she says she did to put together the offer, and I have no reason to doubt any of it. All I know is that she didn't make it happen.

BAINES: In the final analysis, however, you ended up selling to a person she had referred to you and done all the work on and for the same price she had gotten for you, right?

KOSTER: Yeah, but no thanks to her. And it was under totally different circumstances. My wife had died in the meantime, so I was more motivated to take a lower price and get out of the business.

BAINES: No further questions.

EXHIBIT A

SELLER/BROKER AGREEMENT – NONEXCLUSIVE

Right to Represent

1. **Nonexclusive Right to Represent:** Kustom Spas, Inc. and William A. Koster ("Seller") grant to Brianna Adams & Associates ("Broker") for the representation period beginning on February 1, 2013 and ending at 11:59 p.m. on July 31, 2013 the nonexclusive irrevocable right to represent Seller in selling all corporate stock, assets and liabilities, including but not limited to land, buildings, equipment, accounts, and good will of the manufacturing business known as Kustom Spas, Inc. located at 1422 E. Industrial Parkway, Midvale, Columbia (hereinafter, "the property").

* * *

4. **Compensation to Broker:** Broker's compensation shall be on the following terms:
   - **A. Amount:** Broker shall be entitled to a commission of 10% of the gross sale price of the property.
   - **B. Broker Right to Compensation:** Broker shall be entitled to compensation specified in paragraph 4A if Seller enters into a binding agreement to sell the property for the $2.5 million cash asking price or on other terms agreeable to the Seller and the Buyer, if the Buyer of the property is a person or entity secured through the efforts of Broker.
   - **C. Payment of Compensation:** Compensation shall be payable upon completion of any transaction described in paragraph B and upon close of the escrow relating to said transaction.

* * *

9. **Dispute Resolution:** Seller and Broker agree that any dispute or claim arising between them and relating to this Agreement shall be resolved by final and binding arbitration pursuant to the Rules of the Columbia Association of Commissioned Brokers.

EXHIBIT B

Brianna Adams & Associates
Small Business Brokers
224 Fremont Place, Suite 129
Midvale, Columbia

November 4, 2013

Columbia Title Company
Attn: Harold Fraser, Escrow Officer
1465 Norden Street
Midvale, Columbia

RE: Escrow No. 421-344B-13
Midvale Pool and Spa/Kustom Spas

RE: Escrow # 421-344B-06
Midvale Pool and Spa/Kustom Spas

To whom it may concern:

The undersigned, on behalf of Brianna Adams & Associates, files this demand in the above-referenced escrow for a commission of 10% of the gross sale price in the purchase and sale transaction between Midvale Pool and Spa and Kustom Spas. I attach a copy of the Seller/Broker Agreement I entered into for the sale of Kustom Spas and represent to you that I was the procuring cause of the sale to Midvale Pool and Spa.

I hereby notify you that I have authorized my attorneys to file suit against Columbia Title Company if you close the escrow and disburse the proceeds without paying my commission or setting aside the required 10% pending settlement of any dispute.

Very truly yours,
Brianna Adams & Associates

By___*Brianna Adams* _____
Brianna Adams, Owner/Principal

EXHIBIT C

SELLER/BROKER AGREEMENT –EXCLUSIVE

Right to Represent

1. **Exclusive Right to Represent:** Kustom Spas, Inc. and William A. Koster ("Seller") grant to Charles Smith ("Broker") for the representation period beginning on September 4, 2013 and ending at 11:59 p.m. on October 4, 2013 the exclusive irrevocable right to represent Seller in selling Kustom Spas, Inc., including its corporate stock, assets, liabilities, land, buildings, equipment, accounts, and good will. Kustom Spas, Inc. is located at 1422 E. Industrial Parkway, Midvale, Columbia (hereinafter, "the property").

* * *

4. **Compensation to Broker:** Broker's compensation shall be on the following terms:
   - **A. Amount:** Broker shall be entitled to a commission of 5% of the gross sale price of the property.
   - **B. Broker Right to Compensation:** Broker shall be entitled to compensation specified in paragraph 4A if Seller enters into a binding agreement during the representation period or within 180 days thereafter to sell the property on other terms agreeable to the Seller and the Buyer, if the Buyer of the property is a person or entity referred to Seller by Broker.
   - **C. Payment of Compensation:** Compensation shall be payable upon completion of any transaction described in paragraph B and upon close of the escrow relating to said transaction.

* * *

10. **Dispute Resolution:** Seller and Broker agree that any dispute or claim arising between them and relating to this Agreement shall be resolved by final and binding arbitration pursuant to the Rules of the Columbia Association of Brokers.

EXHIBIT D

Charles Smith
Broker/Realtor
42 Empire Place
Midvale, Columbia

October 24, 2013

Columbia Title Company
Attn: Harold Fraser, Escrow Officer
1465 Norden Street
Midvale, Columbia

RE: Escrow No. 421-344B-13
Midvale Pool and Spa/Kustom Spas

RE: Escrow # 421-344B-06
Midvale Pool and Spa/Kustom Spas

Dear Mr. Fraser:

This is to advise you that I am entitled to a commission of 5% of the gross sale price in the above-referenced transaction. I enclose a copy of my representation contract with Kustom Spas; that contract is the basis of my claim. I hereby demand that you disburse said sum to me upon the close of escrow.

Sincerely,

Charles Smith

February 2014

California Bar Examination

Performance Test A

LIBRARY

ADAMS v. KUSTOM SPAS, INC.

LIBRARY

Quincy Sales v. North America Machinery Corp.
Columbia Court of Appeal (2004)……..…..……

Ellis Realty, Inc. v. Gable Holdings, LLC
United States Court of Appeals, 15th Circuit (2005)..……

AAA Business Brokers v. Wicks
Columbia Supreme Court (2004)…….…….

Columbia Association of Commissioned Brokers
Guidelines for Arbitrators in Commission Disputes
Between and Among Brokers...……..…….

QUINCY SALES v. NORTH AMERICA MACHINERY CORP.

Columbia Court of Appeal (2004)

Defendant, North America Machinery Corp. (NAM), appeals the entry of summary judgment in favor of Quincy Sales (Quincy). The case involves a dispute over unpaid post-termination commissions.

NAM manufactures industrial equipment to its customers' specifications. Quincy, an independent sales representative, acts as agent for various manufacturers to sell the manufacturers' products to third parties. In December 1994, NAM, through its vice president Richard Sears, and Quincy, through its owner James Quincy, entered into an oral agency agreement terminable at the will of either party. The parties agree that the only terms of the agency contract concerning payment were that Quincy's standard commission would be 5% and that Quincy would not get paid until NAM got paid. They also agree that, in making their oral agreement, the issue of post-termination commissions never came up.

During the agency relationship, Quincy approached Dorco, a Columbia company, and got Dorco interested in purchasing three machines from NAM. Quincy consulted with NAM, assisted Dorco in drawing up the specifications for the machinery, and negotiated a price and a delivery schedule. Because the machinery required by Dorco was expensive and technologically complicated, NAM was reluctant to commit to three machines at once. NAM's concern was that the machines might not perform as expected by Dorco.

As a result, in June 1998, Quincy negotiated the following arrangement: Dorco would purchase one machine, lease a second one with the option to purchase or return it if it did not perform well, and have the option to purchase a third machine. As an incentive to Dorco to exercise the options to purchase the second and third machines, Quincy offered with NAM's approval to sell those machines at discounted prices. Quincy prepared the necessary purchase, sale, and lease documents, caused Dorco to execute them, and delivered them to NAM. As part of the negotiation, Quincy agreed to reduce his sales commission on all three machines from the customary 5% to 4%. The first two machines were delivered to Dorco during 1999; it paid cash for the first one and commenced making payments on the second machine on which the lease was to run through March 2001. In December 2000, Quincy terminated his agency relationship with NAM, citing "bad blood" between him and certain NAM personnel. In April 2001, Dorco purchased the second machine, thus ending the lease, and, in

January 2002, Dorco exercised its option and purchased the third machine. NAM paid Quincy the commissions on the sale of the first machine and on the lease payments through December 2000, which was when Quincy quit, but refused to pay commissions on the lease payments and sales that occurred after that. Quincy filed suit seeking to recover the commissions for the remaining lease payments and for the sales of the second and third machines.

Quincy's theory of recovery rests on the procuring cause rule. The procuring cause rule allows a salesperson, in whatever field of endeavor, to recover commissions on sales made after the termination of the agency relationship if the salesperson procured the sales through his or her activities prior to the termination of the relationship. It is a common law, equitable doctrine designed to protect a salesperson who, although no longer an agent or employee when the sale is made, has done substantially everything necessary to effect the sale. The procuring cause rule does not apply, however, when the contract between the parties specifies whether and when post-termination commissions are earned, which is not the case here.

NAM argues that Quincy cannot avail himself of the procuring cause doctrine because Quincy, not NAM, terminated the agency relationship. NAM's theory is that the procuring cause doctrine is designed to protect salespeople who are discharged by their employers to avoid paying them a commission. We find little support for this proposition either in the authorities or in logic. Once the agent has put in motion the chain of events that lead to a sale and has done everything within his power and authority to bring about that result, it is irrelevant which party terminated the relationship.

NAM next contends that Quincy was not the *efficient* cause of the sale but, rather, that it was NAM's efforts that brought about the sales of the second and third machines. That is, NAM continued to provide services to Dorco after it had bought the first machine and leased the second, and it was through those services and the attention given by NAM, not by Quincy, that Dorco ended up buying the second and third machines.

We do not find that argument persuasive. First, Quincy's job was to sell NAM's machines, not to become engaged in post-sale service. Sears' deposition testimony established clearly that post-sales customer relations and service were the responsibility of NAM, not Quincy. Moreover, Sears could not identify anything that Quincy failed to do to bring about the sale. Also, it must be remembered that Quincy brought to NAM a buyer that was ready, willing, and able to buy three machines at the inception but that it was NAM who, albeit for legitimate reasons, declined to sell the three machines at once. Quincy negotiated the

sale-option-lease terms, prepared the documentation to conform to the altered transaction, and caused Dorco to execute all the necessary papers. The structure of the deal, by which Quincy agreed to reduce his commission to 4% on all three machines, clearly contemplated that Quincy would receive commissions on the second and third machines.

Thus, we conclude that Quincy was the procuring cause of the sales to Dorco, and we affirm the lower court's judgment.

ELLIS REALTY, INC. v. GABLE HOLDINGS, LLC

United States Court of Appeals, 15th Circuit (2005)

Ellis Realty (Ellis) agreed to be the exclusive broker for Gable Holdings, LLC (Gable) in trying to lease the Highland Tower Office Building (the Tower), a commercial property owned by Gable in Bay City, Columbia. Their written brokerage agreement provided that Ellis would receive a commission on all leases signed *during* the term of the agreement and that Ellis would receive a commission on all leases signed *after* the termination of the agreement so long as within 90 days of termination "negotiations continue or resume leading to the execution of a lease with any person or entity with whom Ellis negotiated."

Barry Farley, a broker employed by Ellis, served as Gable's primary brokerage agent and, in the fall of 2001, was in negotiations with Firebridge Tire Co. (Firebridge), a potential tenant of the Tower. When Farley left his employment with Ellis in December 2001, Gable terminated its agreement with Ellis. Nine months later, Gable signed a lease with Firebridge, prompting Ellis to demand a commission under the terms of the brokerage contract.

The district court, applying its interpretation of Columbia law in this diversity case, granted summary judgment in favor of Gable, concluding that Columbia common law required Ellis to show that it was the "procuring cause" of the lease and that this tenet of Columbia law trumped any contrary terms in the brokerage contract, including the continuation-of-negotiations-within-90-days-of-termination provision. In our view, Columbia law places no such constraint on the rights of contracting parties to determine whether a commission is or is not due under a brokerage agreement, and, accordingly, we reverse.

On March 29, 2001, Gable signed an exclusive-brokerage agreement with Ellis to negotiate and consummate leases for office space in the Tower. Among other provisions, the agreement contained the following terms:

6. *Agreement to Refer Offers and Inquiries*. During the term of this agreement, Gable agrees to refer to Ellis any and all offers and inquiries by prospective tenants, and Ellis agrees to investigate and develop such offers and inquiries and to employ its best efforts to lease space in the Tower.

7. *Owner's Reservation to Preempt Broker*. Gable reserves the right to preempt Ellis and deal directly with the prospective tenant with the understanding that, should

Gable exercise such right, any commission otherwise payable under this agreement shall remain payable.

8. *Broker's Commission*. Gable agrees to pay Ellis a commission if, within 90 days after the expiration or termination of this agreement, the property is leased or negotiations continue or resume leading to the execution of a lease with any person or entity with whom Ellis has negotiated or to whom the property has been introduced prior to the expiration or termination of this agreement.

In October 2001, Firebridge, a tenant of another property owned by Gable, made a proposal to Gable to rent space in the Tower. In accordance with section 6 of the agreement, Gable referred the inquiry to Barry Farley. Later that month, Firebridge's broker, Joseph Cherry, contacted Gable and requested that Gable negotiate directly with Firebridge because of their existing relationship. Gable agreed and informed Farley that Gable would be exercising its right under section 7 of the Ellis/Gable agreement to negotiate directly with Firebridge but that Gable would need Farley to "work behind the scenes" to bring the deal to a conclusion.

The parties agree on the following chronology of events: On November 19, 2001, Cherry sent Gable a lease proposal which contemplated that Firebridge would lease 140,000 square feet in the Tower and renew its existing lease in the other Gable property. Gable sent the proposal to Farley for his "input." On November 25, 2001, Farley submitted to Gable a "proposal" that he recommended and said should be presented to Firebridge. On November 30, 2001, Farley announced his intention to leave Ellis, and he became essentially *incommunicado* over the course of the next month, failing to respond to e-mails and phone calls. Gable continued to negotiate with Cherry and Firebridge during this period. Gable sent a letter to Ellis properly exercising its right to terminate their brokerage agreement effective as of February 3, 2002.

At this point, the parties part ways over what happened next. Gable claims that negotiations between Gable and Firebridge regarding the two-pronged lease proposal ended on March 20, 2002 and that the 90-day period during which negotiations must have resumed in order for Ellis to obtain a commission ended on May 3, 2002. Gable asserts that it did not resume negotiations with Firebridge until May 15, 2002, and that these new negotiations "took on a materially different character from the prior negotiations," i.e., that Firebridge would lease

65,000 square feet in the Tower and sublease additional space from the Columbia Redevelopment Agency, one of Gable's existing tenants. On September 6, 2002, Gable and Firebridge signed a lease on these new terms.

Ellis, on the other hand, asserts that negotiations between Gable and Firebridge "continued unabated from November 2001 until the deal was formalized by a June 5, 2002 letter of intent" and that the final lease was consistent with a proposal that Barry Farley had prepared and submitted to Gable in November 2001.

Without reference to the parties' differing presentations of the events or to the 90-day provision of the agreement, the district court held that Columbia law "establishes that a real estate broker earns a commission by actually consummating the transaction or by showing that his or her efforts were the procuring cause of the transaction." It then determined that Ellis was not the procuring cause of the Firebridge lease and granted Gable's motion for summary judgment.

Columbia common law clearly incorporates the doctrine that a contractually retained real estate agent is entitled to a commission if he or she is the "proximate, efficient, and procuring cause of the sale or lease." But it is not a sword that property owners may use to deprive brokers of a contractually guaranteed commission. Rather, it is a shield designed to protect brokers from being stripped of their commissions by sharp-elbowed property owners who fraudulently or in bad faith delay the consummation of a real estate transaction until after a brokerage agreement has ended.

The opposing contentions of the parties are these. Ellis argues that the district court erred by failing to appreciate the difference between Ellis's *contractual* commission claim and a common law claim. That is, asserts Ellis, the district court gratuitously wrote a procuring cause requirement into an unambiguously worded contract.

Gable, on the other hand, argues that, under Columbia law, a procuring cause requirement overshadows all brokerage contracts and prohibits a commission from being awarded unless the claiming broker was the procuring cause.

The relevant terms of the contract at issue in this case leave little room for interpretation regarding the right to a commission after the agreement has ended. Section 8 states that:

> Gable agrees to pay Ellis a commission if, within 90 days after the expiration or termination of this agreement, the property is leased or negotiations continue or resume leading to the execution of a lease with any person or entity with whom Ellis has

negotiated [directly or through another broker] . . . prior to the expiration or termination of this agreement.

By its terms, this provision gives Ellis the right to a commission so long as "within 90 days after the . . . termination . . . negotiations continue[d] or resume[d] leading to the execution of a lease . . ." There is nothing in the agreement that requires Ellis to establish that it was the procuring cause of the signed lease. To the contrary, Section 7 of the agreement requires Gable to pay a commission even if Gable itself "preempted" Ellis and conducted all the negotiations itself.

Thus, the factual issues inherent in the differing chronologies argued by the parties must be resolved. If the trier of fact finds that the negotiations that resumed after Ellis's contract expired on May 3, 2002 were, as Gable contends, new and of "a materially different character from the prior negotiations," then Gable would prevail. On the other hand, if the trier of fact found, as Ellis contends, that they were merely a continuation of the same negotiations that Ellis had commenced, then Ellis would prevail.

The proper forum for such a resolution is the district court, to which we remand with instructions to proceed in accordance with this opinion.

AAA BUSINESS BROKERS v. WICKS

Columbia Supreme Court (2004)

AAA Business Brokers (AAA) provides brokerage services to buyers and sellers of businesses, similar to the services of a real estate broker. Arnold Wicks, a Belmont, Columbia businessman, owned Homeguard Security Services (Homeguard), a company that provided antitheft and antiburglary security services for homes and businesses.

David Green, the general manager of Electronic Systems, Inc., a competitor of Homeguard, learned through an acquaintance that Wicks wanted to retire from business and was putting Homeguard up for sale. Green got in touch with Joy Jones, a broker employed by AAA and told her that he was interested in buying a home security business and that he understood that Homeguard was for sale. Based on the tip from Green, Jones contacted Wicks, confirmed that, indeed, he wanted to sell his company, and offered to assist him with the sale.

On behalf of AAA, Jones executed a listing agreement with Wicks for the sale of Homeguard. The contract was a nonexclusive agreement, the term of which was January 25, 2002 through March 24, 2002. It provided that, if Jones produced a ready, willing, and able buyer at $600,000, Wicks would pay AAA a commission of 10% of the sale price. The agreement also contained an "extension clause" that stated, "Seller agrees to pay the full commission to Broker in the event the property is within one year after termination of this agreement sold, traded, or otherwise conveyed to anyone referred to Seller by Broker and with whom Seller negotiated during the term of this agreement."

On January 26, 2002, Jones told Green she had confirmed that Wicks wanted to sell Homeguard – a fact that Green already knew – and directed Green to get in touch with Wicks and negotiate the deal. Green began negotiations with Wicks, but, because of a non-competition agreement in Green's employment contract with Electronic Systems, Inc., Green was constrained to consummate a sale until the end of his non-compete period. Green and Wicks eventually entered into a contract of sale, which closed on July 14, 2002.

Jones's involvement in the transaction consisted of spending about 45 minutes with Wicks on January 25, the day they executed the AAA listing agreement, exchanging two letters regarding the "confidentiality" terms of the transaction, telling two potential buyers, including

Green, by telephone that Homeguard was for sale for $600,000, and encouraging them to bid on the property.

Shortly before the close of escrow, AAA submitted a demand in the escrow for a 10% commission. Wicks refused to pay it, asserting that AAA had no right to a commission because AAA was not the procuring cause of the sale. AAA sued for breach of contract, and the trial court, holding that the inquiry began and ended with the "extension clause," entered judgment for AAA.

Wicks appealed, contending that the trial court erred in ruling for AAA because AAA did not establish that it was the efficient procuring cause of the sale. AAA's response is that it was not required to prove that it was the procuring cause because, under the "extension clause" of its contract with Wicks, the evidence established clearly that a sale to a person who AAA had "referred" to Wicks closed within a year after the end of the contract term.

The general rule, adopted by the courts of Columbia, is that the parties to a listing contract are free to frame their agreement in whatever terms they see fit, including a term that makes a broker's right to a commission conditional upon the occurrence of a particular set of circumstances even if the broker is not the procurer of the purchaser. The common law "procuring cause" doctrine – i.e., *a cause originating with a series of events, which, without break in continuity, result in procuring a purchaser ready, willing, and able to buy on the owner's terms* – applies only if the contract between the parties is silent on the issue of consummation of a sale after the expiration of the listing agreement. In other words, "procuring cause" is the default rule.

We agree with the general rule and hold that, because the listing agreement contained an extension clause, AAA need not prove that it was the efficient procuring cause. But that does not end the inquiry. The question remains whether AAA complied with the requirement in the listing agreement that the purchaser be a person who was "*referred* to Seller by Broker."

The term "referred" is nowhere defined in the contract, and the contract does not set out the conditions under which the broker will be deemed to have referred the buyer to the seller. The majority of the authorities in Columbia and other jurisdictions interpreting vague terms in listing agreements such as "refer," "solicit," or "introduce," and similar words have found that such terms necessarily incorporate an unexpressed but inferentially essential requirement that the broker do more than merely send or direct a potential purchaser to a seller. In other words, the majority rule is that, even with the existence of an extension clause, the broker must show

that there was at least a *minimal causal connection* between him and the ultimate sale before the broker becomes entitled to a commission.

We adopt the majority rule and hold that a broker seeking to recover under an extension clause must establish some causal connection between the broker's efforts and the eventual sale. This might include negotiations between the parties, facilitating the flow of information, or actual assistance with the closing of the sale. It is not necessary that the broker seeking the commission dominate the transaction, but the broker's participation must be palpable and something more than a mere incidental or contributing influence. A rule that would allow recovery for merely soliciting a buyer without a causal connection with the sale would burden the owner's right to dispose of the property, and we also believe it would be poor public policy to reward brokers with substantial commissions for merely notifying potential buyers of the possibility of a sale without requiring them to exert diligent efforts toward conclusion of the sale.[1]

In the present case, AAA's involvement through Jones was at best tangential. She was not involved in any negotiations or the closing of the sale. All she did was tell Green what he already knew and left the rest up to him. Although valid, the extension clause in the AAA contract cannot be interpreted to confer upon a broker a windfall commission so that the broker could simply content herself with sitting back and letting the other parties to the transaction do all the work.

We reverse and remand.

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[1] AAA alludes in its briefs to the Guidelines for Arbitrators promulgated by the Columbia Association of Commissioned Brokers and argues that AAA should not be completely foreclosed from claiming at least a portion of the commission for having had *some* involvement in the transaction. The court is cognizant of those Guidelines. They are inapposite here for two reasons: First, this case does not arise in the context of an arbitration. Second, those guidelines deal with disputes *between* brokers competing for the same commission, which is not the case here. An arbitrator has broad discretion under the Guidelines to invoke the equities to apportion the commission between the competing brokers, and the court's holding in this case is not to be read as a rule that infringes upon that discretion. The facts of this case do not lend themselves to apportionment of the commission.

COLUMBIA ASSOCIATION OF COMMISSIONED BROKERS

Guidelines for Arbitrators in Commission Disputes Between and Among Brokers

It is not uncommon in brokerage transactions that disputes arise between a broker who initiated the series of events leading to consummation of the transaction ("Introducing Broker") and another broker who entered the transaction later and closed the transaction ("Closing Broker"). The Columbia Association of Commissioned Brokers ("CACB"), by whose rules all licensed brokers in the State of Columbia agree to be bound, has promulgated the following guidelines for use by Arbitrators in such disputes. There is no predetermined rule or standard that prescribes which of the brokers is entitled to an arbitration award. All awards are based on the facts of a particular transaction. It often turns on the precise terms of the brokerage contract between the broker and the client. It frequently involves the principles of procuring cause, a doctrine defined and recognized by the courts of Columbia. The following factors reflect common characteristics that arise during the course of such disputes and are intended to serve as guidance to Arbitrators to aid them in reaching their decisions. Not all factors are applicable to all cases, but those that are applicable are to be considered as a whole. The factors are not necessarily weighted equally, nor is the outcome necessarily determined by a simple numerical weighting of the factors in favor of one or the other of the brokers. The Arbitrator has broad discretion, based on the law and the equities, in deciding which broker should prevail or whether the brokers should share in the commission.

GUIDELINES FOR ARBITRATORS IN PROCURING CAUSE CASES

Relevant Factor	Favors Intro Broker	Favors Closing Broker	Comments
1. Buyer is first introduced to the property by the Intro Broker.	Yes		
2. Closing Broker never showed the property.	Yes		
3. Closing Broker wrote and submitted an offer on the property on behalf of the client that was substantially similar to an offer written by Intro Broker within the short period of time.			If the two offers are close in substance or time, this factor moves to neutral.
4. A significant amount of time elapsed between the time Intro Broker showed the property and Closing Broker wrote an offer on the same property.		Yes	
5. Intro Broker provided significant information about the specific property, the neighborhood, value of the property, and other characteristics over a period of time.	Yes		Amount of time spent is not the determining factor; rather, it is the nature and usefulness of the information furnished in inducing the buyer's interest in the property.
6. Intro Broker fails to maintain contact with the client.		Yes	Consideration should be given to whether Intro Broker tried to maintain contact but the client did not respond.
7. Client expresses dissatisfaction with Intro Broker's professional abilities or conduct.		Yes	Where client's dissatisfaction does not rise to the level of "just cause" to end the relationship, the arbitrator can consider

Relevant Factor	Favors Intro Broker	Favors Closing Broker	Comments
For example: misrepresentations, lack of disclosure, lack of knowledge of the area and the property, nonresponsiveness to client's inquiries, self-dealing, lack of negotiating skills.			awarding the Intro Broker an amount in the nature of a "referral fee."
8. Closing Broker asked about client's relationship with another broker early in the process and determined that there was no existing contractual or exclusive relationship between client and any other broker.		Yes	Brokers failing to inquire about existing relationship do so at the risk of losing the commission. If Closing Broker asked about client's relationship with other broker late in the process, this factor would then favor Intro Broker.