

## Memorandum 89-68

Subject: Study L-1061 - Brokers' Commissions for Sale of Estate Property (Limited Exclusive Listing Contract)

The Commission has made several attempts at providing rules for determining the compensation of brokers where the personal representative makes an exclusive listing contract to sell estate property and the contract provides that no commission is due to the exclusive listing broker if the property is sold to a particular person named in the contract. We revised our first draft at the urging of a representative of the California Association of Realtors. A second draft was amended into Assembly Bill 158 following the April meeting, but was removed from the bill because of concerns expressed by the State Bar. Lloyd Homer, who analyzed this material concluded that, while the draft covered the situation, it was too complicated to understand and would not achieve its purpose in practice. Mr. Homer suggested a simpler approach and the staff has developed draft Section 10162.6 in response. (See Exhibit 1.) The staff believes that this draft should satisfy the concerns of both the realtors, since it fills the gap in existing law, and the State Bar, since the rule is relatively simple to apply.

Draft Section 10162.6 incorporates the other rules concerning brokers' commissions in Sections 10160-10167, depending on whether or not the property is sold to the person named in the exclusive listing contract (Bidder X). This avoids the need to master a third set of rules governing brokers' commissions. If the sale is made to Bidder X, the rules governing situations where no broker has an exclusive listing contract are applicable. Consequently, the broker with the limited exclusive listing contract (Broker A) is not entitled to any commission and the commissions of any other brokers are determined as if Broker A were not involved in the sale. If the sale is not made to Bidder X, the rules governing situations where a broker has an exclusive listing contract are applicable. Consequently, the

limitation in the exclusive listing contract is ignored and the normal rules applicable where a broker has an exclusive listing contract are used to determine the compensation of Broker A and any other brokers involved in the sale. The application of the new rule is discussed in more detail in the Comment to draft Section 10162.6 in Exhibit 1.

The staff proposes to amend draft Section 10162.6 into AB 759 (the new Probate Code), replacing the earlier, more complicated version of Section 10162.6, and to make the conforming revisions noted in Exhibit 1, when we next amend AB 759.

Respectfully submitted,

Stan G. Ulrich  
Staff Counsel

EXHIBIT 1

Probate Code § 10162.6 (added). Exclusive contract providing that no compensation payable if sale confirmed to particular purchaser named in contract

10162.6. (a) This section applies if both of the following circumstances exist:

(1) An agent or broker holds a contract under Section 10150 granting the exclusive right to sell the property.

(2) The contract provides that no compensation is payable to the agent or broker holding the contract if sale is confirmed to a particular purchaser named in the contract.

(b) If the court confirms the sale to the purchaser named in the contract, whether on an original bid returned to the court or on an increased bid made at the time of the hearing on the petition for confirmation:

(1) No compensation is payable to the agent or broker holding the contract.

(2) The compensation of any other agents or brokers involved in the sale is determined as if there is no agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property and as if the agent or broker holding the contract is not involved in the sale. For this purpose, where the agent or broker holding the contract produced the original bid, the compensation of any other agents or brokers is determined as if the original bid was made by a purchaser who is not represented by an agent or broker.

(c) If the court confirms the sale to a purchaser other than the person named in the contract, the compensation of the agent or broker holding the contract, and of any other agents or brokers involved in the sale, is determined as if the limitation in the contract did not exist.

Comment. Section 10162.6 is new, and deals with the situation where the personal representative makes an exclusive listing contract with a broker (Broker A) to sell estate property, but the contract provides that no commission is payable to Broker A if sale is confirmed to a particular purchaser named in the contract. See subdivision (a). Special rules apply in this situation, as provided in subdivisions (b) and (c).

Subdivision (b) applies to the situation where the sale is made to the purchaser named in the contract. In this case, Broker A is not entitled to any commission, even if Broker A produced the original bid returned to the court. Under subdivision (b), if sale is confirmed to the named person, Broker A is ignored and the compensation due any other brokers involved in the sale is determined as if Broker A had not been involved in any way and as if no broker was holding an exclusive listing contract. For example, if the person named in the contract (Bidder X) makes the original bid returned to court, and Broker A (who holds the contract) produces an increased bid at the confirmation hearing, but sale is confirmed to Bidder X on a further increased bid, Broker A is not entitled to a commission. If the sale in this case had been confirmed to the bidder produced by Broker A, the compensation would be governed by subdivision (c).

The last sentence of subdivision (b) provides guidance in applying the other rules of this article in a case where Broker A produced the original bidder but sale was made to the person named in the contract. See, e.g., Example 4 in the Comment to Section 10161.

Subdivision (c) makes clear that the limitation in the exclusive listing contract does not affect the compensation of the broker holding the contract or any other brokers in a case where the sale is not made to the person named in the exclusive listing contract. In such case, the rules governing compensation where there is an exclusive listing contract apply and the limitation concerning the person named in the contract is ignored. Thus, for example, if the person named in the contract (Bidder X) makes the original bid returned to court and is not represented by a broker, but sale is confirmed to another bidder produced by Broker C on an increased bid made at the confirmation hearing, Broker A is entitled to half of the commission on the original bid and Broker C is entitled to the other half of the commission on the original bid plus all of the commission on the overbid. This result is the same as Example 13 in the Comment to Section 10161.

#### Conforming Revisions

(1) The introductory language of Section 10162.5 should be "Subject to Section 10162.6, . . . ."

(2) The introductory language of Section 10162.7 should be "Subject to Section 10162.6, . . . ."

(3) The introductory language of Section 10163 should be "Subject to Sections 10162 and 10162.6, . . . ."

(4) The introductory language of Section 10165 should be "Subject to Section 10162.6, . . . ."