

Putting the Color into Black and White: Artists, Dealers and Agreements

By Robyn Freedman

Artists and art dealers have a special relationship. Inherently personal, emotionally driven and bound by a mutual love for art, it can appear to have little to do with business per se. It is one that requires a quiet understanding and a harmonious connection between the two parties, not necessarily required in other business relationships.

Often, it begins as a courtship. This is particularly so for the emerging artist, when the relationship is forged early in the artist's career and the art dealer, ideally, is there to guide the artist toward success. Together they are a team, pushing each other's careers forward into the exciting and complex world of fine art.

In other cases, the relationship is not as romantic and viewed more as a necessary evil; the artist needs the dealer for greater and more diverse exposure than the artist could achieve alone, yet at the cost of a substantial commission paid to the dealer from the proceeds of the artist's sales.

In either case there has been and continues to be a traditional reluctance by both artists and art dealers to memorialize their unique relationship — their *business relationship* — in the form of a written agreement. The honor system, or handshake agreement, is typically relied on by dealers and artists alike. It is well known that the famous New York art dealer, Leo Castelli, who represented the likes of Jasper Johns and Andy Warhol, never used written agreements with his artists.

However, as the growing number of legal cases demonstrate, not all business relationships, even those in the arts, can survive on a handshake alone. And it is typically not until a legal dispute arises that the artist and art dealer realize how much they value their respective rights and interests in the relationship, in the art

and in all the logistical and proprietary issues triggered once that relationship is formed.

It is the law in California and in many states that an agency relationship arises when an artist gives an art dealer an original piece of art to exhibit or sell on consignment.¹ If the dealer purchases the art outright from

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the artist for full value, no such consignment relationship exists. But typically, the relationship between galleries and artists is one where the artist (the consignor) gives the art dealer (the consignee) art to sell on consignment. As a result, the art dealer becomes the artist's agent and holds the art as trust property in trust for the artist.² The art dealer is responsible for any loss or damage to the art and for all proceeds from the sale of the art until the artist is fully paid his or her portion of the sale price.³

Notwithstanding the protection these statutes afford artists, it is limited and there are many aspects of the artist-art dealer relationship that they do not address. That is where a written agreement is helpful between the parties and it can be one that is concise, flexible and easy to understand.

Despite the tendency to forgo a written document, some galleries and artists are finding ways to use contracts without jeopardizing their personal and art-centric relationship. The following excerpts are from interviews with three prominent West Coast art dealers who own galleries

in San Francisco. Lisa Chadwick, of the Dolby Chadwick Gallery, has owned her business for six years and sells art by emerging and mid-career artists; Charles Hespe, of the Hespe Gallery, has owned his gallery for 10 years, also focusing on emerging and mid-career artists; and Tracy Freedman (no relation to the author) is the co-owner of the Hackett Freedman Gallery, which has been in business for 17 years and sells blue-chip art.

They share their thoughts and experiences relating to the use of written consignment agreements with the artists represented by their galleries.

E&SL: Do you use formal written consignment agreements in your business?

Hespe: I do. It was prepared by a lawyer when I first opened the gallery 10 years ago. Several years before I started my own business, I was a director of a gallery where the owners turned out to be rather unscrupulous and a lot of the artists' work was unprotected because they didn't have very good consignment agreements. As a result, I thought that a written contract should be the foundation for my relationship with artists when I started my own gallery. Over time, we have fine-tuned it to make it more specific to our industry.

Freedman: Yes, in the majority of cases. We also have a full contract we often sign with artists, though we do not have it in every case. This contract covers more situations and intangibles, such as, an understanding of the gallery's role in the case of an artist's untimely death. The heirs or estate have a clear indication of where the work is and the gallery has an opportunity to represent the work in the interim following the death or to forge a continuing agreement with the estate. In the case of an artist withdrawing, we have an agreement that the gallery has the right to continue selling the artist's work for a period following written notice of withdrawal. This allows us to conclude sales and settle accounts before the work is returned. The right to reproduce the artist's work is also stated in this contract, which again

reduces the risk of misunderstanding and tension over the course of a long relationship and is very helpful if the artist and gallery part ways.

Chadwick: With every piece of artwork that we take into our inventory, we have a fairly informal consignment that lists what the title is, what the value is, what the medium is, who the artist is and that we're responsible for it during the time we have it and basic terms such as what the percentage the artist would be paid if something is sold. When I first started the gallery, I was a little bit more in survival mode and tended to do the bare minimum. As time has progressed, I've thought about more formal contractual arrangements, but this is really a business that is based on trust, as much as the artists trusting me as me trusting the artists. My approach has been to not limit the options for the artist — because I opened this business to support artists — but to actually keep an open dialogue with them. If I take something on consignment and the artist needs it back, then they can have it back at any time. If we enter into an exhibit, then it's in good faith that we will have the art work for as long as we need to have it on consignment. It's always open to conversation — if the artist needs the work, then they can ask for it. I never want to limit their opportunities.

E&SL: What, in your opinion, is most beneficial about having a written agreement with your artists?

Hespe: I would say that it's fundamental to being in the art business; that it's the bedrock to your relationship with a painter and the ultimate point of reference. I have found that it's there even though you don't really need to use it often, but if you ever do, it's just the ultimate arbiter. It allows the artists to see that I have expectations of them and that we conduct ourselves in a professional manner and that things are done in a timely manner. It sets the tone for the relationship, that yes, we are working together and it's not terribly structured, but there is a level of expectation.

Freedman: I believe it regularly avoids the risk of serious problems

developing with artists. It reduces anxiety on both sides: Work is catalogued, with its condition noted at intake; records kept of any cleaning or other conservation the work might require; insurance is clearly invoked and the financial terms of the relationship are, in the main, described. Consignment agreements don't cover all the financial and emotional components of the gallery-artist relationship, but they do affect a lot of the day-to-day management issues that most artists would prefer not to visit frequently.

Chadwick: I've only had the gallery for six years, but as the stakes get higher and as the gallery provides more advertising and publishes catalogs, the more pertinent contracts will be to protect the investment I've made as I progress and as the bar gets raised higher. Contracts will be an

absolute necessity concerning the expectations between the gallery and artists regarding issues such as access to work and first priority to see the work when the gallery has invested a lot in that artist.

E&SL: What are some of the reasons behind not using a written agreement?

Freedman: Generally, if it is the artist's express wish *not* to have a written agreement, we will not issue one. Only a few artists feel that this is preferable, though many artists are more comfortable with a letter of agreement followed by consignment forms listing the works we will try to sell and represent. Additionally, some fine art dealers prefer not to sign consignment agreements for reasons ranging from "tradition" to sloppy bookkeeping, to personal preference

Key Provisions of the Gallery-Artist Consignment Agreement

These are some key provisions to consider when preparing a consignment agreement between galleries and artists.

Scope of representation — The scope of representation should address the extent of the gallery's *exclusivity to represent* the artist, which may be limited to certain geographical territories and whether the representation extends to those territories in which the gallery opens future gallery sites or to trade shows outside the general territory of representation. This provision should also address whether the gallery has the *sole power to sell* the artist's artwork (which is different from the issue of exclusive representation) and whether or not the artist is permitted to make studio sales and if so, the commission to be paid to the gallery, if any, from such sales.

Record of consignment — All artwork received by the gallery should be documented as artwork consigned by the artist to the gallery, in the form of an attachment to the agreement, listing the retail price of the artwork, its dimensions, media, etc. Any subsequent changes made to the *record of consignment* should be initialed by the parties.

Term and termination. The agreement should address whether the gallery's rights extend beyond the artist's death and what happens to the artwork on termination of the agreement.

Exhibitions — This provision can set forth whether or not the gallery is agreeing to provide the artist with a solo exhibit or inclusion in a group show. Often, it is appropriate to allow for this term to be decided at a later date, subject to a separate written agreement, since many galleries need to see how they do with an artist before committing to any exhibits.

Commissions — This should set forth the commission split between the gallery and the artist, which may be revised from time to time as the parties see fit, following a written amendment to the agreement.

Prices/discounts — Galleries often require the flexibility to be able to make discounts to the trade and important collectors; such authority to make discounts should be set forth in the agreement.

Payments — This provision should address the timing of payments to

and business practice. But we treat verbal agreements as binding and in the case where the artist wants no documentation of terms, we hold to the verbal agreement. This is backed up by our inventory records and artists' payables, which will list agreed-on discounts, etc. We will also check with the artist by phone prior to the conclusion of a sale where the terms are potentially other than that artist's established norm.

E&SL: In your experience, have you found that artists, over the years, have become savvier when it comes to the written consignment agreement or do you find that they are still insecure about entering a written agreement?

Chadwick: Generally, there is a mutual respect and trust with most of the artists that I work with and there

hasn't been a problem with the informal nature of our consignment agreement. It's more a record to keep track of what we have as opposed to holding me accountable if something goes wrong. It's more a form of keeping track of what we have than it is tying either one of us down to any contractual obligations. And certainly there have been times where the artist has required a more formal contract and at that time I ask them to provide me with the contract that they're comfortable with and if it's in line with the way that I see things and the way that I want to operate, then I am happy to honor that contract.

Hespe: As the gallery has progressed, I've been attracting more experienced painters who've had representation elsewhere and I would think that they would be more savvy and more likely to really review the

document, but what I found is that they're just as eager to sign it or rather less likely to really review the document. You know, they take a leap of faith without really reviewing the document. Before I begin work with artists, I do ask them to talk to other painters that I represent and want them to have a feel for how I do business and have some first-hand knowledge, not just from me. So, perhaps that has alleviated any concerns they have, but it seems that even the more experienced painters are eagerly willing to jump right in.

Freedman: I think most younger artists are less romantic than their predecessors. They seek clarity and know their rights and so do we.

E&SL: Have you ever found that a written consignment agreement avoided – or could have avoided – a serious conflict with an artist?

Hespe: What it did once was prolong a relationship with an artist who was a little disappointed with our results up to a specific time and I was stressing that they be patient. ... I knew things would eventually happen and I had them refer back to the agreement that stated that I needed the necessary time to get their work selling. So, what it did was it enabled me to have more time with the artist's work to prove that we could sell the work. It turned out to be a good thing for me, and it was a good thing for them because I still have a relationship with them.

Chadwick: Only once, in the sense that it would have protected me more. There was a situation where I gave an artist a show, it went very well and we sold a lot of work and after the exhibit was over, he took all of his work back because he pretty much got out of it what he wanted; he got the exhibit and he got the resume-building element and didn't feel a need to continue to support the gallery in the way that we had supported him. But, contract or no contract, I don't really want to have an artist there who doesn't want to be there. It's a very, very personal relationship and if an artist is only staying with me because of a contract, I'm not sure I want to continue to help their career and help their sales any-

artists when the gallery is paid for artwork in one lump sum and when it is paid according to an installment plan.

Damage to artwork — The gallery should agree to obtain the artist's consent before undertaking restoration of damaged artwork, including the artist's approval of the party responsible for such restoration.

Insurance — The gallery should carry sufficient insurance to cover the retail prices of the artwork as set forth in the *record of consignment* or at a minimum, the commissions that would have been paid to the artist on the sale of the artwork, while the artwork is in the gallery's custody or in transit between the gallery and purchasers. Conversely, the artist should be made responsible for loss and damage to artwork any time prior to when the gallery receives it.

Shipping costs — Shipping costs may be the artist's or the gallery's obligation depending on where the art is being shipped from and for what purpose. For example, the artist will typically pay for all shipping costs of artwork that is shipped to the gallery from the artist to be taken on consignment, returned to the artist at the artist's request, on the artist's termination of the agreement or required by the artist to be shipped to another gallery or third party. A gallery will usually pay for all shipping costs for artwork that is shipped to purchasers on the artist's behalf, returned to the artist in the event of the gallery's termination of the consignment agreement or returned to the artist on the gallery's decision to no longer hold certain artwork on consignment.

Guaranty and indemnification — The agreement should include the artist's guarantee that the artwork is original and created solely by the artist. The artist may further agree to indemnify and hold the gallery harmless against any and all claims, causes of action, demands and lawsuits for damages that arise from or relate to third-party claims, including any infringement claims or any claims that refer or relate to the use of the artist's materials.

Copyright ownership and right to use — This provision acknowledges that the artist is the author and copyright owner of the artwork with sole authority to grant use of the artwork for any purpose. The artist may agree to grant the gallery the right to use images of the artwork on the gallery's Web site, in gallery brochures, advertisements and announcements and in or on any other marketing tools as needed in furtherance of the gallery's representation of the artist.

— *Robyn Freedman*

way. Now we do send out a more formal contract before exhibits that lays out what we expect of the artists and what they can expect of us. It definitely has been helpful because we all are very busy and it outlines upfront what we expect and what they can expect from us — both sides. It's more a statement of expectations than it is contractual.

E&SL: Whom do you think the written consignment agreement benefits more, the artist or the gallery?

Freedman: I think the artist benefits more, as they are dependent on the gallery (or several galleries) for income and sales. The loss of their work is income taken away from them or their heirs. From a legal and practical standpoint, the artist is best protected by good records, but the gallery needs these as well. As the

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artist's work is unique (we do not sell prints or limited editions), the whereabouts and safety of their work is best protected by consignment agreements. We have heard occasional stories of artists whose work "disappeared" from a gallery with no record of its whereabouts — no sales proceeds ever made it to the artist. Insurance did not reimburse once the loss was noted, nor was there much legal recourse when the artist tried to sue.

Hespe: I perceive the document more for the artist's protection because they're sending me the art work, which is much more valuable than what I'm providing them in return, as I perceive it. I mean, obviously the ability for me to make them a livelihood is very important, but they're giving me their property, so I guess for me what's most important is that I'm allowed to have and market this art work for a specific period of time.

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Endnotes

1. California Civil Code §§ 1738.5
2. California Civil Code §1738.6 (a)(b)
3. California Civil Code §1738.6 (c)(d)