



Lawyers for the
Creative Arts

Nourishing the Creative Spark![®]

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Dealing with Dealers:

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Artists and dealers have long enjoyed an important symbiotic relationship. Dealers support artists personally and professionally. Dealers often counsel artists on their careers, and generally mentor and look after them. Artists benefit greatly from such an arrangement. The great majority of dealers are honest, professional and help artists in many ways. But as in any other relationship, things can go wrong. At Lawyers for the Creative Arts we are often contacted by artists who have not been paid for their work, cannot recover their work or their work has been damaged. Galleries can suddenly close without notice, leaving artists in the lurch. Also, most artists are in an unequal and disadvantageous bargaining position with galleries. Artists are often reluctant to assert their rights, fearing the gallery will not accept and show their work.

Artists simply have to understand they are part of the business world. Everyone they deal with certainly knows this, and artists are disadvantaged by not behaving in a mature, business-like manner. Rather than being hurt by acting professionally, artists will be more respected if they are business-like in their dealings. What can artists do to protect themselves?

The Illinois Consignment of Art Act.

Over 30 states, including Illinois, provide legal protection in the form of statutes. They vary in their terms, but all, in some way, give aid to artists. In 1985 the Illinois Consignment of Art Act became law. It affords strong protection to artists. The Act comes into play when an artist delivers a work of art to an Illinois dealer to be sold or exhibited on commission. This arrangement is called a “consignment.” (Caveat: the Act has many technical provisions and definitions, and this article cannot present a detailed account of all of them. Obtain competent legal advice if you have questions). The Act requires dealers to provide a written agreement to the artist. The old “handshake deal” leaves too many issues open, and is not usually followed in other areas of commerce. This is not a matter of trust. If two parties do not trust one another, there will probably be trouble in spite of a written agreement. Don’t deal with people you don’t trust. But even between people who have mutual trust, a written contract will prevent problems of differing memories, will clarify and record the entire agreement reached and will survive in the event one of the people involved is not available later. Having a written consignment agreement is simply the way business is conducted; plus, in Illinois, it is the law.

The Act requires the written agreement to contain, at a minimum, four provisions (later we will discuss many more): 1. the *value* (which is different from sale price) of the work of fine art; 2. the time within which the dealer must pay the artist from the proceeds of a sale; 3. the amount of commission due the gallery when a work is sold; and 4. the minimum sale price of each work and any discounts the dealer can give. A failure of the dealer to provide a written agreement containing these minimum terms is itself a violation of the Act. The artist can sue, and a court may free the artist of her obligations, such as the obligation to pay a commission, furnish more work to the gallery or refrain from showing her work at a competing gallery. The artist may recover provable damages, and, very significantly, may recover attorney's fees. As further protection, even if there is no written agreement, the Act's provisions still apply to the relationship between artist and dealer.

Let's look more closely at terms that may be included in a consignment agreement.

Payment – The Act requires the written agreement to provide the time within which the gallery will pay the artist. If no period is set, the Act provides for payment in 30 days after the gallery is paid.

Injury or Loss of Work – A very important protection is that once a work has been delivered to the gallery on consignment, the dealer is strictly liable for all damage or loss. No matter how the damage or loss occurred, and no matter what degree of care was exercised by the dealer, the dealer is fully liable. The artist does not have to show that the gallery was negligent. The amount the artist can receive is the value of the work which the artist and gallery agreed to, in

writing, at the time the art was delivered. That is why the value of the work is one of the required parts of the agreement. (There should be a separate inventory sheet, with a complete description of each work delivered, its value in case of damage and its sale price which could be different from value). The amount reimbursed to the artist is the amount the artist would have received if the work had been sold (that is, less the gallery's commission,) IF AND ONLY IF they had a sufficient written agreement. If the gallery failed to provide a written agreement there is a strong argument that the artist receives full value without reduction for commission. (This is presently just an argument, no Illinois court has so decided).

Insurance – A major gap in the Act is that it does not require the gallery to insure the artist's work while in the gallery's possession. Many galleries do. It is absolutely essential that at the time the artist and gallery get together, there is an understanding as to which party has insured the work, if indeed either has. Don't assume the gallery has insurance - ask, and ask the dealer to provide a certificate of insurance from the gallery's insurance company. The artist may have her own insurance covering her work, but do not rely on your homeowner's or renter's insurance; it probably does not provide such coverage. One vital point to keep in mind: the gallery is strictly liable for all loss whether or not there is insurance! The only difference is that an insured gallery has an insurance company backing it up to pay for losses while an uninsured gallery will have to pay itself. The artist is at risk that the uninsured gallery may not be able to pay for the loss, but it is legally responsible nevertheless.

Trust Property – The Act provides that the work delivered is “trust property” and the dealer is a trustee for the benefit of the artist until the work is sold or returned to the artist. Once the work is sold, the proceeds of sale become trust property. This is an important protection for the artist. The work, and even the money received from the sale, do NOT belong to the gallery, but to the artist. The gallery’s creditors cannot legally seize the art, and the artist has a priority claim to the cash. (The artist cannot recover the artwork from a good faith buyer). If a gallery actually declares bankruptcy, rather than just closing its door and walking away, the procedures to recover the work or cash proceeds are very technical and the artist will need legal advice.

No Waiver of Protections - The Act’s provisions cannot be waived. The Act states that “any portion of an agreement which waives any provision of this Act is void.” Thus any provision, even if the artist signs it, that says, for example, the gallery is not liable for loss or damage, is void.

Parties – Be sure the correct parties sign the agreement. If the gallery is a corporation, the agreement must be with the corporation not an individual employee.

Exclusivity – What is the extent of the agency relationship being established? Is the Dealer an “exclusive agent,” that is, the only dealer you are working with? Or does the dealer have an “exclusive power to sell” meaning even you cannot sell work yourself from your home or studio without paying a commission? Can the artist barter her art or give it to family or friends without incurring a commission? What territory is exclusive to this gallery – can you have other dealers in other areas?

Duration – For what period of time does your agreement run?

Inventory – There should be an attachment describing each piece of work, signed by both parties, and containing the information re value and sales price mentioned above. Items can be removed from the list as sold and new pieces added without writing an entire new agreement. It should be kept current, so there is no disagreement about what pieces are still at the gallery.

Commission – This is discussed above. Sometimes, but not often, artists with particularly high costs, such as sculptors, may be able to recover their out of pocket expenses first, before the gallery's commission applies. Also, if the gallery arranges for the artist to do a work on commission, there should be a non-returnable payment up front of a portion of the sale price, in case the client has a change of mind.

Payments to Artist – This is discussed above as well. In addition to payment, the artist should get a report, about monthly or quarterly, as to what work has been sold, and what remains in inventory. It is a good idea for artists to visit the gallery regularly, to see what work has been sold and what remains. Some galleries have failed to report sales and pay the artist. If the gallery is out of town, have a friend stop in to check.

Identity of Buyers – There is no set custom as to whether the gallery will give the artist the name and address of buyers – clarify with the gallery whether this will be done.

Crating and Shipping – Who pays? This should be agreed upon ahead of time. If there are particular needs or problems in crating, agree in advance. The

artist may want to do her own packing when it is time to recover the art. If there are particular shipping needs, agree upon those as well.

Loans of Work to Clients – If the gallery may be lending work to potential buyers, provide for costs and risks of damage and loss. There should be some time limit on the loan as well.

Exhibits and Framing – Will the artist have input regarding exhibits? There should be agreement regarding one-person shows, group shows, how long any exhibit will last, and how long the work will remain in the gallery. If the work is to be framed – who decides on the framing, and who pays? Usually the gallery decides placement of work within the gallery.

Promotion and Advertising – What will the gallery do and who pays? Will there be a catalog? What use can be made of photos of the work? The Act provides that the dealer can only use or display the work or a photo of the work, if notice is given of the artists' name, so be sure your name is mentioned in all materials. In this day and age, you may want to consider if, and how, the work is shown on the internet, as it can be permanently stored and easily copied.

Copyright – The artist retains all copyrights in her work, even after it is sold to a buyer. The copyright is distinct from the physical work itself. So be sure you have a copyright notice on the work and on all promotional materials. The gallery should be given all rights needed for promotional activities. In this connection, the artist should represent and warrant to the gallery that she has full title, ownership and rights, including copyright, in the work, to protect the gallery from any third party claims.

No Assignment – Because the artist is relying on the abilities of a particular dealer, the agreement should provide that the dealer may not assign the agreement to any other person without prior written consent of the artist.

Termination - When does the consignment terminate? The gallery will not always want to continue holding your work as it is responsible in full for it, so there should be a specific time when the art is returned to the artist.

Disputes – All disputes should be mediated first (Lawyers for the Creative Arts has a mediation service) and then arbitrated, to save the time and expense that court fights can incur

This is a long list, and we are not suggesting you need all these provisions in every agreement. However, these points should be considered as we have seen problems arise in the areas covered by every one of them. Some things are clear though - there must be a written agreement with at least the minimum provisions.

The Artist's Obligations – This is not a one-way relationship, the artist has obligations as well. Many are mentioned above, but there are more.

The artist should provide a bio, an artist's statement and resume, and keep them up to date. Let the gallery know where you can be reached at all times, certainly if you move. The work must be delivered in good condition, and on time. If you are going to insure your work – be sure it's done. Keep the inventory up to date. Show interest, be available to meet with clients and attend openings. Abide by your obligations in the agreement.

One particular matter. We have had cases in which artists have prematurely withdrawn their work from a gallery. The gallery had done

promotional work, held exhibitions and incurred substantial expense but the artist wanted to withdraw the work because there was another show or gallery elsewhere she preferred. That was very unfair to the dealer. The gallery is entitled to adequate time to sell the work to clients who return weeks or months after a show. That is why the written agreement should provide that the work will remain in the gallery for a definite period of time.

The relationship between artists and dealers is a mutually beneficial one. These suggestions should strengthen the relationship and make it more professional. Help the dealer help you.

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