



## Anatomy of A Consignment Agreement

**(Art has no value until it's sold. Until then it's an obsession and a storage problem.)**

Even in the world of fine art a long-standing business relationship based on trust is simply no substitute for a solid contract. Most art dealers, galleries and auctioneers do not purchase artwork outright for their own account. Instead, they accept work “on consignment” from the artist or owner. In other words, they borrow the artwork from an artist or collector to display for sale in their gallery or showroom, and then pay the artist or collector when the piece is sold.

It is a hybrid relationship. Is it a loan? Is it a sale? When should the piece be returned? What are the conditions for sale? Under the best of circumstances, the business arrangement is rife with potential problems. But then a well drafted consignment agreement can minimize or eliminate misunderstandings, disputes, and losses. A consignment agreement, like any contract, is a risk mitigation device that provides a framework defining expectations and responsibilities of the parties involved in the transaction.

The risks of the consignment relationship were highlighted in the case of one-time major art gallery Salander O'Reilly Galleries (once cited as the best art gallery in the world by the Robb Report). By 2007 it was discovered that the gallery and its owner, Lawrence “Larry” Salander, had sold many consigned artworks without paying consignors (artists and collectors), spent the sales proceeds and ended up in bankruptcy. The bankruptcy and criminal cases wound their way through courts for years without any payments to creditors who collectively asserted claims aggregating almost \$300 million.

Central to a consignment agreement are provisions authorizing the consignee (that is the dealer, gallery, etc.) as the consignor’s (that is the owner’s) agent for the display and sale of the artworks. A good agreement can protect a consignor against the consignee’s creditors if the consignee goes out of business or files for bankruptcy. The agreement should make clear that the consignor retains ownership of the artwork until it is sold and the consignor is paid.<sup>[1]</sup> The agreement should also specify whether the appointment of the consignee is exclusive or not. And, the agreement should clearly specify which artworks are being delivered for exhibition and which are intended for sale. It should also provide a mechanism for the parties to modify or reallocate the works on the list.

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<sup>[1]</sup> Under Article 12 of New York Arts and Cultural Affairs Law (“NYACAL” or the “Statute”), art merchants are required to act as fiduciaries regarding art consigned to them by artists. The Statute, originally passed in 1966 was intended to protect the rights of artists, their estates, and their heirs in their dealings with art merchants. NYACAL has evolved since its original passage, and was strengthened in 2012 as a result of the bankruptcy of Salander O'Reilly Galleries. But not all states have analogous laws, underscoring the importance of a solid consignment agreement.

Other important provisions that should be addressed by the parties include:

- The term or duration of the consignment;
- Responsibility for shipping and delivery (i.e., Who pays for packing and shipping?);
- Responsibility for loss or damage and insurance coverage;
- A warranty of ownership and/or creation (i.e., Who owns/created the consigned artworks?);
- Fiduciary responsibilities of the consignee with respect to the consigned artworks and any resulting proceeds of sale(s);
- Notice of consignment requiring the consignee to give clear and conspicuous notice of the consignment agreement to the public;
- Prohibitions against lending out or removing the artwork from the consignee's premises or gallery should be addressed;
- Pricing, the consignee's commission and the terms of payment;
- Framing and/or mounting the artwork;
- The manner and methods of promotion and/or any restrictions;
- Reproduction (i.e., Who has the right to make reproductions or copies and/or any relevant restrictions);
- Accounting (i.e., The consignee should be required to account for all sales and resulting proceeds); and
- Termination (How, when and under what circumstances?).

Like any other agreement, a consignment agreement should address subsequent modification(s), applicable choice of law, jurisdiction and venue for disputes arising under the agreement, succession and assignment of the rights and obligations, and waiver.

Much like the unique artworks that are consigned, no two relationships or transactions are the same. It is in the interests of both parties to have a full and frank discussion of all of these issues when contemplating or entering into a consignment relationship.

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