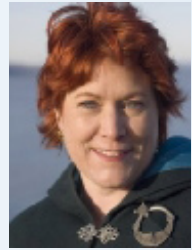


# Art Brokers Revisited:

*Why Brokers, Too, Need to Get it in Writing*

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**A**n art broker from a big city recently contacted me after seeing my Fine Art Registry™ column cautioning art sellers and purchasers to get clear terms in writing to protect their interests in broker transactions. “What about us art brokers?” he asked. While art sellers and purchasers need the protection of clear, written agreements in their transactions, brokers are also not immune to being ripped off in the roar and rush of complex, multi-layered art sale arrangements.

## **A Broker is an Agent**

I’d previously written that an art broker is a matchmaker connecting art owners – be they artists, collectors, or investors – with art purchasers; and that like real estate brokers, art brokers frequently get up to their elbows in art investments, managing assets, liquidating estate holdings, and other related functions – but without the licensing and contract regulations which control real estate transactions. In days past, before real estate sales became a heavily regulated field, real estate brokers often found themselves unscrupulously squeezed out of their commissions. They’d work to spruce up a house, advertise it, conduct house tours or open-house events, only to have the owners pull the sale contract and sell it directly to the purchaser, benefiting from the real estate agent’s hard work while avoiding paying the commission.

Art brokers today, working in a virtually unregulated field, can find themselves in the same boat. And with art sales, the costs and damages incurred by the jilted broker can be even more difficult to prove,

since marketing an artwork often comes down to a long process of subtle, word-of-mouth positioning of the piece within a geographically wide-spread and culturally amorphous art-collecting community. A broker who agrees to see what interest he can generate in a piece by placing a few carefully thought out comments around an audience gathered for a show or auction can hardly demonstrate his out-of-pocket costs for doing so; and yet, as Abe Lincoln said of lawyers, an art broker’s time and advice – and experience – is his or her stock-in-trade, and surely ought to be worth some measurable monetary return.

I previously suggested that art purchasers and sellers make sure they are clear on the concept of an ‘agent’ and the fact that an art broker, as an ‘agent,’ can only be representing the interests of one party or the other, but not both. Legally, an ‘agent’ is a person who is authorized to engage in another party’s business for that party’s benefit. While understanding which party the art broker represents is important for the parties, it is also important for the broker.

## **Today’s Art Investments**

**U**pper-end artworks, like racehorses, are increasingly owned by a consortium of people who pony up money to ‘buy in’ on a joint investment. While large sums of money are often involved, these arrangements are usually frighteningly informal.

Over beers after golf, business associates Sport, Bob, and Jenny will get talked into buying into a painting that Marilyn’s

*“Art brokers are not immune to being ripped off.”*

nephew has placed in a gallery. The nephew's partner wanders over from the tennis court to assure them all that the painting is certainly a genuine lost Brueghel or the work of an artist certain to be the Next Big Thing, and there are already several buyers sniffing around who he is sure he could turn around and unload the picture on for twice its present price tag. Everyone pulls out checkbooks and hands Marilyn chits for several tens of thousands of dollars to buy into this cool quick investment. There are no written documents, no agreement as to how the costs and profits, if any, will be divided, and certainly no thought as to what will occur if there's a loss. Common sense might lead us to think that they've each bought a quarter of the painting, and get a quarter of the profit after expenses, and consequently might suffer one quarter of any loss on it. But would it be unreasonable for some of the purchasers to assume that Marilyn is taking all the risk and absorbing

the expenses since she talked them into it? And if loss exceeds the money put in – the painting turns out to be fake, and there are fraud charges levied, or it sells for so little that there's still money owed for the gallery's full-color brochures – who has to pay it?

The next morning, the nephew/art broker receives four checks each for one-quarter of the stated purchase price of the artwork, along with verbal instructions from Marilyn to turn around and sell it again for as much as he can. His face turns ashen. Turns out he had been talking up the painting to his aunt on the hopes she'd buy the ugly worthless thing and get it out of there, never thinking she'd turn it around like this. But, in for a dime in for a dollar, he takes their cash and sinks it into brochures, ads, publicity articles planted in art collector magazines, loaning the work out to shows in other venues to try to spark interest.

Months pass, and Sport and Bob start

*“And if loss exceeds the money put in, who has to pay it?”*



*“The agreement should clearly set out what steps are to be taken in regards to the condition of the work pending sale.”*

calling incessantly. “How is my painting doing?” they want to know. “Have you gotten any offers on it?” “When is it selling? I need my cash back to go to Bermuda for my anniversary.” Interest is building and the nephew is sure that given another year, he’ll be able to secure a substantial offer on the painting. But Bob loses patience and shows up when someone else is on shift at the gallery, and removes the painting after showing a receipt that lists his name as one of the owners. He sells it to his corporate headquarters for their lobby, as their acquisitions director had read some articles about the artist (placed by the nephew art broker) and the four investors get back slightly less than they’d invested in the thing – without paying the nephew-broker a cent for the year of work on the sale. Sport is just happy to have most of his cash back to take his wife on a trip; Jenny and Marilyn are ballistic, both at the nephew for stalling on selling the painting and possibly misrepresenting what it was worth, and then for letting Bob remove it, and then at Bob for selling it for less than they felt it was worth. Lawsuits are threatened in every direction.

### **Legal Aspects**

**I**f the nephew had been present when Bob showed up to claim the painting, could he have prevented him from taking it? The art broker doesn’t own the painting – but he certainly has an economic interest in it. If he ran to court to try to get an injunction, would he have won? Without a written agreement indicating the art broker’s interest, he’d have a hard time demonstrating that he should keep possession of the work – and in a worst case scenario, it might wind up stuck in a court evidence locker for years (then again, the publicity might produce a quick buyer).

And whom is the nephew an agent for – Bob? Bob, Sport, Marilyn, and Jenny individually? Or only the group as a whole? Which of them should he have been talking to, and who among them was authorized to speak and act for the group?

The answer is that it all comes down to the contracts entered into by the parties – and in the absence of clear, written contracts, a situation like this is, technically speaking, a legal disaster.

### **Put it in Writing!**

**I**f I were an art broker and a collective-ownership work came my way, I’d want to either have an initial meeting with all the part-owners in which their full contact information and the terms of the part-ownership of each was laid out clearly in writing, or at least a document recording a meeting of all the part-owners and their voting and designating an individual to be the contact person regarding the transaction. In legal practice, I have faced a similar situation on many occasions, when an informal group of neighbors gets together to hire a lawyer to sue about an encroaching development, for example. I am insistent that someone be designated the contact person, and get it signed in writing that the other interested parties agree to designate that person. And I ensure that someone signs on as being responsible for the costs and fees that will be incurred in the action. A broker is in the same situation – as an agent, he or she must be the agent of either a person, or an entity. If the group of collective owners is not willing to form a legal partnership or limited liability company for the purposes of their art business venture, in which case the broker can represent the entity, then there simply has to be a party designated as the legally responsible owner to whom the broker is answerable as agent.

A written contract between the broker and the art owner is also the opportunity for both broker and owner to set out the logistical terms of their engagement. For example, as with real estate, the parties can, and probably should, agree that their arrangement is only valid for a certain period of time. The art broker should have some sense of whether this is going to be a quick turn-around or whether it’s

going to be the type of sale that will take years of seeding the market to come to fruition. Including a termination date on the agreement, and stating specifically the location at which the artwork will be returned to the owner, to whom it may be released, and its required condition at that time, protects the broker from early removal of the piece by the owner, but also protects the owner by allowing her to retrieve the painting and make other plans at some certain date. It also gives the owner a realistic sense that this might take a while, which will alleviate the anxiety of waiting daily for news of a sale.

The agreement should clearly set out what steps are to be taken in regards to the condition of the work pending sale. For example, will it be reframed, cleaned, or repaired in any way, and if so, who is responsible for that cost, and does the owner reserve the right to pre-approve both work done and the selection of the person doing the work, or is that left to the discretion of the broker? Some owners may want to be intimately involved in this. Others don't want to be bothered about the artwork until a check arrives in their mailbox.

The agreement should indicate whether authentication and provenance of the work are secure, such as when the work is by a known original artist and has been registered by the original artist or first owner in a public recordation such as Fine Art Registry, or whether the broker is going to engage in authentication and provenance research prior to marketing the work. If the latter, the agreement should clearly state whether the agreement is voided if authentication proves impossible or negative. For example, a broker may agree to take on a work which is possibly a Miró, and state in the agreement the steps which will be taken to secure authentication, who will pay for those steps, and that the agreement to represent the owner on this work is void if two examination sources indicate that it is not in fact a Miró or work of similar proven market value.

Drafting a contract is really a matter of asking yourself, What if? What if the painting turns out to be a fake? What if in fact it turns out to be worth much more than originally anticipated? What if three years elapse and no one has bought it? What if the owner gets three other people to buy into his or her interest? An experienced broker is in a good position to think through all these eventualities, and draw up a set of contract terms that reads like a checklist addressing any of these eventualities likely to come up regarding any particular artwork. Getting those terms into writing will ultimately help not only the art broker, but the art seller and purchaser as well, by fostering clarity and transparency in art transactions. A broker might be afraid if he or she starts waving thick piles of paper around, insisting that clients sign them before taking on their artwork, that he will lose business. As years of law practice and the horror stories of my own early days as well as those of many of my colleagues have demonstrated, setting out the terms of your agreement with your client in writing may cost you clients – but it will only cost you the clients who would have been a huge headache.

I can see where it might be highly tempting to take on that painting that 'me and a couple other guys went in on' which looks like it's a quick high-profit turnaround. But taking a deep breath first and ensuring that everyone is clear on the terms of the deal will, in the long run, go far in securing the broker's reputation as trustworthy and fair, which can only be good for business. And when that business involves our cultural heritage of works of fine art, that's good for all of us. ✍️

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