



Selling Smart

You've decided to put that precious painting up for auction. So you just sign the consignment agreement and hope for the best, right? Not necessarily.

By Thomas & Charles Danziger

Our firm frequently represents would-be consignors to auctions and, on occasion, auction houses themselves. In these dealings, we are often surprised to find that even the most sophisticated collectors lack a clear understanding of the dynamics of the auction process in general, and the all-important consignment agreement in particular. In this area, ignorance is definitely not bliss.

For instance, we were recently retained by an accountant who came to our office lugging a large bronze sculpture. He had been given the piece in lieu of his fee for professional services, and now wanted to put it up for auction. That was understandable, we thought, since at first glance the work looked to us like a broken umbrella stand. Fortunately, our clients rely on us for legal

advice, not connoisseurship, because the sculpture turned out to be very valuable.

It soon became clear that our client was under the impression the auction process was entirely straightforward and the consignment agreement presented by the auction house was totally nonnegotiable. He might have also believed in the Easter bunny, but we didn't ask. Instead, we spent some time educating him on how he could maximize the value of the services provided by the auction house, and discussing which elements of the consignment agreement we would focus on in our negotiations.

We started with the basics, and explained that in cases such as the important *Cristallina S.A. v. Christie, Manson & Woods*, courts have held that the auction house is the consignor's agent and, as such, has a fiduciary duty to act in the consignor's interest. The plaintiffs in the 1986 *Cristallina* case (which was settled out of court during the appeal) asserted that Christie's violated various fiduciary duties. These included the duty to provide relevant information, such as the fact that the firm's own experts disagreed about the paintings' marketability; the duty not to attempt the impossible, by trying to sell paintings when the auctioneers knew that the reserves were too high; and the duty to disclose the risks relating to a sale in which the auction house's presale estimates were unrealistic.

Significantly, a consignment agreement may modify the fiduciary duties of the auction house. For example, depending on the terms of the agreement, the auction house may not owe the consignor undivided loyalty to ensure that a sale goes through; it may also consider its own interests and the interests of the purchaser.

Our client then asked us if we knew of any recent cases addressing the issue of an auction house's fiduciary obligations to consignors. We did. In the *Mickle v. Christie's* case last year, consignors John and Diana Mickle sued the auction house for rescinding the sale of their painting after the buyer questioned its attribution and refused to pay. Although Mickle argued that Christie's had a fiduciary duty to act in their interest and compel the buyer to complete the purchase, the auction house successfully contended that it was under no such obligation because its consignment agreement with the couple had modified its duty of undivided loyalty to them. The agreement specifically permitted the firm to "rescind the sale of any lot of Property at any time if Christie's in our sole judgment determines that the offering for sale of any Property has subjected or may subject Christie's and/or Consignor to any liability."

Once our client understood the importance of the consignment agreement, we suggested ways in which the standard terms might be modified to his advantage. Auction houses are reluctant to alter their standard consignment agreements, but they will do so for very good clients or to obtain important works of art. Rather than modifying the agreement itself, they often prefer to reflect such changes in a proposal letter or an attached schedule, which is binding.

As in other areas, we said, it never hurts to ask for special treatment, especially if the auction house understands that it is dealing with a knowledgeable consignor (or attorney). We suggested that he carefully consider not only the financial aspects of the sale but also other terms that might matter to him, bearing in mind that what is important to one consignor may not be to another. For instance, while many clients simply want to obtain the highest possible price for the

work, others are especially interested in how the piece will be presented and sold. This latter situation is often found with estates, where the consignors may be concerned about the tribute paid to the decedent and want to emphasize that he or she was a great collector. As a result, they place special importance on the way the sale is marketed and titled. Alternatively, for some consignors (particularly those in financial trouble), strict confidentiality is of paramount importance. All such terms should be reflected in the consignment agreement. Our client's main concern was to sell the piece quickly because it was frightening his cats.

We further suggested that the reserve price for the sculpture (the price below which the auction house will not sell the work) be put in writing—as it customarily is, in the form of a presale advice letter—and that any changes to this reserve up to the time of the auction also be in writing to avoid possible confusion. The reserve cannot exceed the low end of the estimate, and we cautioned him not to insist on too high an estimate, which might scare off prospective bidders.

The prudent consignor should also inquire whether, and to what extent, the auction house will insure artworks taken for sale, and what such coverage costs. We told our client that in certain instances he might be better off covering the sculpture with his existing homeowner's insurance policy (or, we thought, a large blanket), if it could be extended to cover shipment of the work to, and storage at, the auction house. He should be aware that the auction house's insurance probably would not provide coverage against certain events, such as acts of terrorism. These terms should be reflected in the consignment agreement.

We suggested that he also pay particular attention to the withdrawal clause contained in the agreement. Except in limited circumstances, a consignor who pulls a work from a sale after signing an agreement is customarily charged a fee (often in the range of 20 percent of the reserve price, plus out-of-pocket costs). Depending upon how much leverage he has with the auction house, he could try to negotiate a clause permitting him to withdraw the work with no penalty should a specified event occur, such as terrorism, war or even stock market decline. One argument we have used with auction houses (admittedly, with mixed success) is that such clauses are also in the interest of the auction house because they encourage people to consign who might otherwise be hesitant to do so in uncertain political or economic times.

Our client was now starting to see the light, and asked what other modifications to the consignment agreement we could request. This largely depends, we said, upon the importance of the work and the extent to which the auction house values him as a client. Being optimists, we suggested asking for the reduction or even elimination of the usual seller's commission and for his sculpture to be reproduced prominently in the catalogue, on a full page or perhaps on the cover. (For truly extraordinary works or collections, one might negotiate for a separate catalogue entirely.) If the auction house imposes an additional charge for these special terms, the added cost could still be worth it.

In addition, he could ask that the auction house pay for shipping, insuring and photographing the work—costs that are usually charged to the consignor. Depending upon his negotiating leverage, he might insist that the agreement require that a particular specialist personally oversee all

matters relating to the sale, that the work be offered in an evening sale rather than a day sale, or that a particular auctioneer wield the gavel.

Even savvy consignors often neglect to review the terms and conditions of sale, which are customarily spelled out at the back of the auction catalogue. Though drafted to define the rights and responsibilities of the auction house and bidders, these terms may apply to the seller as well (especially the warranty), so it is important to ensure that they are consistent with the terms the consignor has agreed upon with the auction house. Just to be safe, we recommended that the consignment agreement specifically state that its terms govern and control all other agreements in the event of any inconsistency.

Finally, we told our client of certain unusual requests that are sometimes made by consignors and granted by auction houses. For example, in antiquities sales, lot 69 is often held for a “sexy” piece (don't ask us why), while in Chinese sales consignors frequently ask for lots associated with auspicious numbers, such as 8, 88 and 108. Typically, these terms are reflected in a written agreement.

Following our meeting, we managed to negotiate a favorable contract with the auction house. We would like to believe that this was entirely because of our professional expertise but, in truth, it may also have been partly due to our own good relationship with the auction house. Our client invited us to join him at the sale, where, happily, the sculpture fetched a terrific price. As we left the salesroom, we were amused to see the piece displayed at the rear—with an umbrella left beside it.

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