

# evaluation risks

an art *expert* gives you bum *advice*  
that ends up costing you *dearly*.  
do you have any recourse?

By Thomas & Charles Danziger

Lawyers are good for many things—or so we have been told—but in our experience, they often make terrible clients. Such was the case with a young attorney who came to us for advice on a possible lawsuit against an auction house specialist who, he claimed, had incorrectly valued a painting he owned.

The lawyer's complaint arose from a large landscape that his parents had given him as a gift for having passed the bar exam (on his third try). He took the painting to the specialist for evaluation, an acquaintance of his whose expertise seemed appropriate.

Because the painting was so big, the lawyer brought the specialist a black-and-white photograph of the work. Before giving his assessment, the specialist cautioned that he could not render a definitive opinion based solely on a reproduction. He also said that his opinion was only for the collector's personal information and should not be used in connection with any commercial transaction. The evaluation was not done as part of any formal appraisal process, no contract was signed and the specialist offered his opinion at no charge, which pleased our client—at the time.

After examining the photograph, the specialist said that the painting was probably by a minor Dutch artist, and that it had little value. Based on this information, our client soon sold the work to a private dealer for a modest sum. Some months later he happened to show the same photograph to another expert, who convinced him that the auction house specialist was wrong, and that the work was indeed quite valuable. The lawyer, outraged, came to us wanting to sue both the specialist and the auction house for the difference between the price at which he had sold the work and what he now believed to be its true market value.

Our client had a number of theories for his proposed suit. His initial position was that this should have been an easy-to-win case of "negligent misrepresentation." We weren't so sure. Negligent misrepresentation basically involves providing information to someone else without a reasonable basis for believing that it is true. In order to demonstrate negligent misrepresentation, our client would have to prove that a special relationship existed between him and the expert (such as a relationship of trust and confidence), and this did not seem to be the case.

We pointed out that just two years ago, in *Ravenna v. Christie's Inc.*, a New York State appeals court dismissed a similar action brought against Christie's and one of its specialists in Old Master paintings. In that case, the plaintiff's wife had visited Christie's New York offices and presented a photograph of a painting to the specialist, who identified the work as belonging to the studio of the 17th-century Italian artist Nuvolone and estimated its value at \$10,000 to \$15,000. The evaluation was done at no charge and not pursuant to a contract. The plaintiff decided against having the work formally appraised by Christie's and sold it to a dealer for \$40,000. The same dealer later sold the painting through Christie's as a work by the famous master Ludovico Caracci for more than \$5.2 million. In denying plaintiff's request for damages in the amount of \$5,187,500, the court held that since the parties had not entered into an agreement creating a special relationship or duty between the parties, Christie's would not be liable.

Our lawyer client then argued that the very fact that the specialist made a judgment based on a photograph rather than examining the work firsthand or conducting any scientific tests on it, such as X-ray analysis, was a clear indication of professional malfeasance. We explained that art experts commonly rely on photographs and that they are even used by the curators, dealers and other specialists who serve on the advisory panel of the U.S. Internal Revenue Service.

The lawyer next suggested an action based on "fraudulent appraisal." But this case did not sound like fraud to us. Fraud would have meant that the auction house specialist had made an incorrect representation with knowledge that it was false in order to have the collector act on it.

Undaunted, he proposed an alternate theory: "What about product disparagement?" Not wanting to sound too discouraging, we told him that it was an interesting theory, if difficult to prove. (He cheered up slightly.) Product disparagement involves making a derogatory comment about property. But this probably would not apply, since the specialist's comments were intended only for the lawyer's personal use. Moreover, the plaintiff in such a case generally has the difficult burden of proving that the disparaging opinion is not honestly expressed or that it is untrue.

In a famous case in this area, *Kirby v. Wildenstein*, the plaintiff had consigned a 19th-century painting by Jean Béraud to Christie's. But it was withdrawn after dealer Daniel Wildenstein, head of the Fondation Wildenstein in Paris and a specialist in the artist's works, determined it was either a copy or had been "skinned" (meaning that paint had been removed through overcleaning). Later the gallery that had sold the work to the plaintiff provided documents showing that it was authentic. As a result, the Fondation Wildenstein stated that it would include the painting in the catalogue raisonné it was preparing, with a note that the work had been damaged by "an abusive restoration and cleaning." When the painting was offered for sale in 1988 at Christie's, there were no bidders. The plaintiff then sued Wildenstein and the foundation in U.S. district court for \$250,000 in damages, alleging product disparagement. But the court dismissed the suit, reasoning in part that the plaintiff did not identify potential buyers who would have purchased the painting were it not for Wildenstein's allegedly disparaging statements.

Returning to our case, we heard our client's next surefire theory. "Defamation!" he declared triumphantly. Unfortunately, this

approach was as flawed as the others. Defamation involves a false statement that harms a person's reputation. To be defamatory, a comment must be communicated to someone other than the plaintiff, which was not the case here.

We explained that, in our experience, a good faith appraisal rarely rises to the level of defamation. In the unusual instance in which a defamation claim has been used persuasively, the circumstances were very different. For example, in *McNally v. Yarnall*, Sean and Janet McNally brought a defamation action against the art historian James Yarnall, who was a research associate at the Metropolitan Museum of Art, and against the museum. The McNallys alleged that Yarnall's statements lowered the value of their collection of works by the 19th-century American artist John La Farge and impugned Sean McNally's professional reputation both as an expert on La Farge and as a collector of his works. In 1989, Yarnall wrote a letter on museum stationery stating that McNally "has the history of many works that he owns muddled, rendering anything he says about them suspect." The federal district court in Manhattan ultimately dismissed the case, but it found that Yarnall's statement, because it implicitly impugned McNally's professional competence, might be legally actionable.

Our client finally asked somewhat plaintively if he couldn't at least bring an action against the auction house expert to have his license revoked. We explained that in the U.S., so-called art experts (a term that has no precise professional or legal definition) are generally not required to undergo a licensing procedure or other governmental control, so there was nothing to revoke. The lawyer insisted that since the specialist did not have a Ph.D. in art history, had not worked in a museum and did not

belong to an appraisal organization, he was obviously not qualified to evaluate art. We explained that having a formal art history education or curatorial experience is not necessary to be considered an art expert, although some are certified by appraisal organizations. In France, by contrast, art experts generally must belong to a professional association with published statements of conduct, such as the Union des Experts près de la Cour d'Appel de Paris, a group that advises the courts exclusively.

Near the end of our meeting, our client let slip that the second "expert" who had concluded that his painting was actually quite valuable was none other than his high school art teacher. With this in mind, we cautioned him against the legal risk he might run in bringing a possibly frivolous action against the auction house specialist. Three years ago, a plaintiff who owned a painting that he believed to be by Jackson Pollock sued the Pollock-Krasner Authentication Board for determining that his painting was not authentic, and the court dismissed the claim as frivolous and a "laughable and clumsy attempt at fraud." The court noted that Pollock's name had been misspelled on the back of the painting as "Pollack," and the examiner whom the plaintiff used to authenticate the signature had an expertise apparently limited to sports memorabilia. In that case, the court took the unusual step of granting sanctions on both the plaintiff and his attorney. We did not wish to run into the same problem with our client.

As we finished our discussion, the lawyer decided not to pursue the matter. Bidding him farewell, we asked what he planned to do now that he had finally passed the bar. To our surprise, he responded that he was opening his own practice, with a subspecialty in art law. We politely wished him the very best of luck.