



By Thomas & Charles Danziger

“I tried to sell a Chinese antique, but I may have bought a lawsuit instead!” Arabelle cried, as she sat in our conference room early one morning. Litigation doesn’t particularly scare us, so we asked her to calm down and explain.

Her problem involved an imperial Ming Dynasty vase that she had bought at a junk shop years ago, and which turned out to be quite valuable. Mr. James, the dealer who had appraised the piece, asked if he could try to sell it through his gallery in exchange for a 50 percent commission on the sale. Arabelle agreed, and the gallery immediately sent out a flier to potential buyers. “After our second meeting over dim sum, Mr. James never returned my calls,” our client continued. “I ended up working with his assistant, Mr. Wong. A few months ago, Mr. Wong called to say that he had found a buyer for the vase. He also said that he was leaving James’s gallery to go into business with his brother and told me that if I wanted to work the sale directly through

them, they’d charge me only a 10 percent commission.”

Although we have a soft spot for brothers who work together, cutting Mr. James out of the deal didn’t sound like a good idea to us. Apparently, Arabelle was less scrupulous. She agreed to the proposal, the piece was quickly sold and the Wongs got their 10 percent. But within days, she received a certified letter from Mr. James, which she now handed to us. It was short and to the point. “My gallery is the broker for the sale of your vase. Pay me the 50 percent commission immediately, or I will sue you.”

When we asked if Arabelle had ever signed an agreement with Mr. James or his gallery, she said no. This was fortunate, since the gallery would have an uphill fight claiming a commission without a written contract. Generally in New York State, for example, an agreement to pay compensation for services in negotiating a business opportunity must be in writing to be enforceable. In a 1999 New York case, *Ghaffari v. Rima Investors Corp.*, a jewelry

salesperson sued her former employers, alleging they had breached an oral agreement to pay her a 20 percent commission on sales to customers she had referred to them. The court dismissed her claim because the agreement was not in writing.

“That’s a relief,” Arabelle said. “And it’s not as though a little napkin could ever be considered a contract.”

“What napkin?” we asked.

Apparently, during their lunch together, Mr. James had jotted down the briefest terms of the consignment agreement. We told her that a contract scrawled on a napkin might not be professional (or hygienic), but it could still be legally binding.

Consider, for example, *Rosenfeld v. Basquiat*. In 1995 New York dealer Michelle Rosenfeld sued the estate of the late artist Jean-Michel Basquiat in U.S. District Court for breach of contract. Rosenfeld testified that she visited Basquiat’s apartment in 1982 and that the artist agreed to sell her three paintings for \$4,000 each, with a \$1,000 deposit. According to Rosenfeld, when she asked Basquiat for a receipt, he got down on the floor and scrawled on a large piece of paper in crayon the words: \$12,000—\$1,000 deposit—oct 25 82. Basquiat persuaded Rosenfeld to wait at least two years before delivery so that he could exhibit the paintings, but they were never delivered to her. The court ruled that Basquiat’s writing was a contract, a finding that was challenged on appeal by Gerard Basquiat, the artist’s father and administrator of the estate. The Court of Appeals upheld the ruling and sent the case back to the U.S. District Court, which then dismissed it in 1997 on the

grounds that the statute of limitations had expired.

“So do you think James’s gallery has a valid claim against me for its commission?” Arabelle asked nervously.

We couldn’t say for sure without seeing the napkin contract, which James now had, but we did advise her that a broker isn’t usually entitled to a commission simply by making a possible purchaser aware of a property—in this case, sending out a flier.

A commission is generally earned only if the broker is the “procuring cause” of the transaction, that is, the person who sets into motion the events actually leading to a sale. Courts have typically addressed the “procuring cause” issue in cases involving real estate brokerage commissions, but the underlying principle is the same in the art world. If the broker (or dealer) wasn’t the “direct and proximate” cause of the sale, no commission is usually owed.

That was the good news. However, the situation was complicated by Arabelle’s agreeing to work with Mr. Wong while knowing full well that he was using information obtained during his employment with Mr. James. “Let’s worry about that later,” she said. “I have a more immediate concern: Might I owe a commission to both the Wong brothers and James?”

Given the facts, that was also hard to determine. Generally, when several brokers are involved, the one entitled to a commission is the person who brought about a meeting of the concerned parties allowing the sale to be made, even though more than one party may have been instrumental. But again, since one of the Wong brothers was an employee during much of the transaction,

a court might find that only the gallery was entitled to the full commission.

Arabelle left our office somewhat relieved, but returned the next day—with both brothers in tow. “I just received my own threatening letter from James’s gallery,” said the younger one. “James claims that I breached my duties as an employee. Since I never told him that I wouldn’t compete with him, he doesn’t have a case, right?”

Wrong. In our view, the gallery would have a claim against Mr. Wong (and possibly his brother) for theft of corporate opportunity in improperly using information obtained during the course of employment for personal gain. The obligation of loyalty to one’s employer is implicit in an employment relationship, regardless of whether the employee signed a noncompete agreement.

An employee can take preliminary steps to enter into a rival business, so long as he doesn’t steal business secrets. But the younger Mr. Wong shouldn’t have solicited Arabelle as a client for a competing business before leaving Mr. James’s gallery. “How about after leaving the gallery?” asked the older dealer. “Wasn’t my brother free to use the skills and knowledge he had acquired there?”

The short answer was yes, as long as he didn’t compete with the gallery by using confidential information gathered during his employment. We explained that customer lists are usually considered protected confidential information when the clients’ identities are unknown in the trade or can be discovered only through extraordinary means. If the information can easily be procured from sources outside the gallery, it’s less likely to be protected.

“Could I be held liable for the Wongs’ misdeeds?” Arabelle asked, glaring accusingly at the brothers. She seemed to have forgotten that she had been complicit in their actions.

“Unlikely,” we said, “unless you had somehow maliciously or intentionally interfered with the employee’s relationship with the gallery, to the injury of either party.” And, practically speaking, the art world is such a relationship-driven business that most galleries are reluctant to alienate a seller or a buyer by taking either to court.

“Does it help that we worked on the deal together?” the younger dealer asked.

The answer was no. As the saying goes: “Two Wongs don’t....”