

GUIDE TO  
ARTIST-GALLERY

# consignment contracts

VLAA  

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Volunteer  
Lawyers and  
Accountants  
for the Arts

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St. Louis Volunteer Lawyers and Accountants for the Arts (VLAA) is a referral service that provides free legal and accounting assistance to income-eligible artists and small arts organizations. For those who are ineligible for free services because their family income or annual operating budgets exceed VLAA guidelines, VLAA can provide the names of lawyers and accountants who have expertise in addressing arts-related problems.

VLAA also offers a wide variety of educational programs in arts law and business including seminars, speakers, a resource library, and publications.

Arts Resolution Services, a national collaboration among several volunteer lawyers for the arts organizations, provides mediation services and workshops in negotiation skills.

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# Preface

Not too long ago, a prominent New York painter's work was shown for the first time at a well-known West Coast gallery. The artist requested that a particular brand of champagne and an elaborate selection of hot hors d'oeuvres be served at the opening reception. The gallery cheerfully complied with his requests. Many paintings were sold at the opening, so the artist was thrilled with his new gallery; that is, until he received an astronomical bill for the food and drink. Suddenly, the financial and critical success of the show was overshadowed by an ugly and unnecessary dispute.

Misunderstandings like these arise when the parties have different ideas of who is responsible for what. While it's difficult to anticipate every potential source of conflict, most disagreements between artists and galleries can be avoided when the parties negotiate and sign written consignment agreements.

In fact, a written contract is *required* by Missouri law whenever a work of art is given to a second party "for the purpose of sale to the public on a commission, fee, or other basis of compensation." The law:

1. Requires written contracts for works left on consignment. (Artwork delivered to a dealer or gallery by an artist is considered "on consignment" unless it is an outright sale.)
2. Stipulates that the following provisions be included in those contracts: delivery of sale proceeds to the artist according to a schedule; the gallery is responsible for the stated value of work in case of loss or damage; a work will not be sold for less than an amount that both parties agree will be the minimum sale price; and the prior written consent of the artist is needed before a particular piece is exhibited.
3. Defines the gallery's trustee role. As Susan Melon and Tad Crawford explain in *The Artist-Gallery Partnership*, the gallery "must act in ways which benefit and protect the artist. The money that the gallery receives for sale of the artworks, for example, is trust property until the artist has been paid in full. Until that time, it should be kept separately from the gallery's general funds. Money owed to the artist may not be applied to other uses, and it cannot be made subject to the claims by creditors of the gallery."
4. Provides for punitive damages (defined as damages awarded in excess of normal compensation to punish a defendant for a serious wrong).

Likewise, the Illinois Fine Arts Consignment Act (Appendix 2) protects artists in their business dealings with galleries by requiring a written contract. The Act includes safeguards, such as provisions making an art dealer/gallery strictly liable for any loss or damage to an artwork on consignment while that work is in the possession of the dealer/gallery. Under the Illinois law, the artwork is trust property.

Because this publication is posted on our Web site, a list of consignment statutes elsewhere in the country is provided in Appendix 3.

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Although these laws have been on the books for many years, our informal survey found that many galleries are not using written contracts. We hope this publication will encourage them to do so. We do realize how long this contract seems, so we also included a sample, one page agreement (Appendix 4).

The longer model contract for consignment covers many of the issues artists and galleries should discuss and finalize. It has nineteen “clauses” that cover most aspects of a consignment agreement. Each clause is prefaced with a boxed explanatory note. The left margin contains brief definitions of unfamiliar terms. We have included two schedules, dealing with consigned works of art (Schedule A) and the apportionment of costs (Schedule B). These documents should be used; they make an artist-gallery relationship more manageable and facilitate the resolution of problems.

Artists tell us that the vast majority of their problems involve galleries that are located more than 200 miles from their homes. “Strangers” are more inclined to not pay on time, misplace work, and argue about shipping mishaps. Using a written contract will go a long way towards building trust.

We hope this publication will inspire artists to approach their gallery relationships with good business sense. As Toby Judith Klayman notes in her book *The Artist’s Survival Manual*, artists are often so grateful when galleries agree to handle their work that they are “willing to agree to anything — and everything — the gallery wants.” Klayman wisely calls the artist-gallery relationship “a mutual affair” with obligations on both sides. She also stresses that artists can and should negotiate with their galleries. We have, therefore, included some tips on effective negotiation (Appendix 5).

One of the negotiation tips offered by VLAA volunteer attorney Joseph S. von Kaenel is “beware the standard form.” We urge you to modify the model contract reproduced in this guide to suit your needs. Remember that this contract is “off the rack.” It will not fit every situation without tailoring. Before you go to negotiate a contract, make sure you understand each clause and its effect. You can always include more details to suit your particular needs.

For most artists, the principal value their work is derived from the original sale. They do not enjoy the benefit of a revenue stream from the subsequent sale of their work in the way that composers or writers do. California and most European countries have addressed this disparity with resale royalty laws that ensure that if, and when, the value of an artist’s work increases, the artist receives a percentage of the resale price.

While few galleries voluntarily collect resale royalties for their artists, we believe that concept has merit. Artists may be able to collect royalties (and other rights) by means of a written contract entered into with the initial purchaser (Appendix 6).

Finally, we urge you to seek legal counsel before signing this or any other contract.

## Artist-Gallery Agreement

Agreement: another word meaning contract

This section identifies the parties to the contract and why each party has entered into the contract.

This agreement entered into on the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_ by and between \_\_\_\_\_ (“Artist”), residing at \_\_\_\_\_ and \_\_\_\_\_, (“Gallery”), whose principal place of business is \_\_\_\_\_.

WHEREAS, Artist is in the business of creating Works of Art and Gallery is in the business of exhibiting and selling Works of Art, and

WHEREAS, the parties wish to enter into a business relationship for the sale by Gallery of Works of Art created by Artist;

NOW, THEREFORE, in consideration of the foregoing premises and conditions, mutual covenants contained herein, and for other valuable considerations, the parties have agreed as follows:

Covenant: a promise by one of the parties to a contract to do a specified thing

As an agent for the Artist, the Gallery acts as the Artist’s public representative for the business at hand. This clause outlines the Gallery’s duties in broad strokes; subsequent clauses explicitly define the Gallery’s duties.

Agency: a legal relationship where one has the authority to act for another

1. AGENCY; FIDUCIARY DUTY OF GALLERY. Artist appoints and establishes Gallery as agent for the purpose of exhibition and sale of the consigned Works of Art in \_\_\_\_\_. The parties agree that Gallery, as agent for Artist, has a fiduciary relationship to Artist and owes a duty to Artist to deal fairly and honestly, to care prudently for and to manage the business affairs for Artist on sales and commissions, to account periodically and disclose promptly all information relevant to Gallery’s representation of Artist. Parties agree that Gallery has a legal obligation to act only in the interest of Artist and to forego all advantages aside from proper compensation.

Fiduciary: a person who acts primarily for another’s benefit

This clause lays out the method of consignment and the procedure to add other works not originally consigned. Options 1 and 2, following this main clause, may be added to explicitly spell out the rights of both parties concerning Works of Art that have not been consigned.

Consignment: the physical transfer of possession of goods to an agent for sale; right of ownership does not pass

2. CONSIGNMENT. Artist shall consign to Gallery, and Gallery shall accept consignment of, all Works of Art described in the Consignment Sheet (Schedule A), for the full term of the agreement. The parties shall each have a copy of Schedule A. All modifications or additions to Schedule A shall be in writing, signed by both parties, and attached to this Agreement.

Artist shall not exhibit or sell any Works consigned to Gallery without the prior written approval of Gallery. If consent is given, Gallery shall receive \_\_\_\_\_ percent of the sale as commission. Artist and Gallery specifically agree that Artist shall be free to exhibit and sell any Work of Art not consigned to Gallery or otherwise included under this paragraph.\*

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In addition, Artist and Gallery may mutually covenant that the following Works of Art will become part of this Agreement if agreed to in writing, signed by both parties, and attached to this Agreement:

\_\_All FUTURE Works created by Artist in the following media:

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\_\_Any or all EXISTING Works of Art by Artist which Gallery shall select.

\_\_Not less than \_\_\_\_ NEW Works of Art per year in the following media:

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\_\_All NEW Works of Art in all media created by Artist.

**The following options are mutually exclusive. Only one should be used.**

**Option 1** limits the Artist's right to sell already consigned works, but allows the Artist to sell works that are not consigned. The Gallery is made the exclusive agent of the Artist — the Artist is not allowed to consign any other works to a second gallery or agent. As an exclusive agent, the Gallery asserts a right to collect on its advertising and promotion of the Artist, and would collect commission on works sold through other agents. Option 1 should be used if the parties desire to establish an **exclusive agency** for the duration of the consignment. If used, Option 1 should replace the last sentence ("Artist and Gallery specifically agree...") of the paragraph ending with an asterisk on page 5.

Option 1: Gallery as exclusive agent. Artist may not, without Gallery's written consent, sell or consign any Works of Art of Artist to any other Gallery or agent in the \_\_\_\_\_ area ("exclusive territories") for the duration of this Agreement. Artist warrants that none of the Works of Art are at present consigned to, located or exhibited in, or being sold at any other Gallery or by any other agent in the exclusive territory except as otherwise agreed by the parties and specifically set forth. In the event of such consent to and sale of a Work of Art either included in Schedule A or under an exclusive agency agreement, Gallery, as Artist's exclusive agent, shall receive a commission of \_\_\_\_ percent.

**Option 2** outlines the duties and rights of the Gallery as **exclusive seller**. As exclusive seller, the Gallery would collect commission whenever a work by the Artist is sold — whether by the Gallery, another agent, or the Artist herself. This is a very far-reaching clause. If the parties decide to incorporate Option 2, it should replace the last sentence ("Artist and Gallery specifically agree...") of the paragraph ending with an asterisk on page 5.

Option 2: Gallery as exclusive seller. Gallery is the exclusive seller of Artist's Works in the \_\_\_\_\_ area ("exclusive territories") for the duration of this Agreement. Artist may not sell in the exclusive territory any Works of Art without the prior written approval of Gallery. In the event of such consent and subsequent sale, Gallery shall receive \_\_\_\_ percent of the sale as commission.

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The power to terminate the agreement is an important and useful right. For instance, if a party is dissatisfied with the other's performance of its duties, the agreement may be terminated. The clause gives the right to termination to both parties, only if the non-terminating party also agrees to end the relationship. The subsequent options eliminate the termination "agreement" requirement, thus, one party may void the agreement without the other's consent.

3. DURATION; TERMINATION. This Agreement shall commence upon the date of signing and shall continue in effect until the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_. Neither party may terminate this Agreement without the prior written consent of the other party. The Agreement shall continue in force for \_\_\_\_ days after such consent is given.

If the parties decide to include a power of termination that does not depend on getting the other party's consent, the second to last sentence of clause 3 should be deleted ("Neither party...") and **Option 1** should replace it.

Unilateral: *one-sided; not dependent on the other party*

Option 1: Unilateral termination. Either party may terminate this Agreement by giving \_\_\_\_ days written notice.

The parties also might want to extend the duration of the agreement if a sale is in progress. **Option 2** should then be added.

Option 2: Extension of agreement while sale is in progress. The consignment shall be extended for a period of \_\_\_\_ days if a bona fide sale or negotiation for sale is in progress.

After choosing to include Option 1 or Option 2, you may add:

Upon any event of termination, Gallery shall within \_\_\_\_ days return to Artist studio or storage facility all Work within possession of Gallery.

Clause 4 places the responsibility of getting the works to the Gallery on the Artist; however, the costs of transporting the works can be apportioned between the Gallery and the Artist.

4. DELIVERY. Artist shall be solely responsible for delivering the consigned Works of Art to Gallery at the above address and agrees to accept delivery of the property, if not sold, at Artist's address on the expiration or termination of this Agreement. Costs of delivery (including transportation and insurance) to Gallery and costs of delivery (including transportation and insurance) for return to Artist shall be paid by the parties according to Schedule B.

The next clause has three functions. First, it asserts that the Artist owns the works outright, i.e. no one else has any claim to them. Second, it retains rights of title for the Artist until someone purchases the work **and** the Artist is paid in full. This is very important in a consignment agreement, especially in cases where third parties (usually creditors of the Gallery) claim ownership. Finally, it preserves the Artist's copyright and the work itself from alteration.



## Guide to Artist-Gallery Consignment Contracts

Title: *right to ownership and superior right to possession*

Copyright: *the exclusive right to copy or authorize others to reproduce, distribute copies, prepare derivative works, and display work publicly*

Possession: *actual physical control over property*

Indemnify: *to secure against hurt, loss or damage*

Good Faith: *honesty of purpose, freedom from intention to fraud, and being faithful to one's duty or obligation*

5. TITLE; COPYRIGHT. Artist warrants and represents that he/she created the Works of Art, possess unencumbered title and full copyright to each and all Works of Art consigned to Gallery under this Agreement.

This Agreement is nor intended not does it transfer any rights of title or copyright to Gallery. Title to the consigned Works shall remain in Artist's name until delivery to purchaser and Artist is paid in full. Title then passes directly to the purchaser. No work may be reproduced by Gallery without the prior written approval of Artist. If written permission is given, then all approved reproductions in catalogues, brochures, advertisements, and other promotional literature shall carry the following notice: © by \_\_\_\_\_ 20\_\_.

Gallery shall not attempt to or actually modify or alter the artistic or structural integrity of any Work consigned under this Agreement.

The works are to be **insured by the Gallery** while in its possession for their full value. This is one of the necessary elements in both the Missouri and Illinois statutes. Both parties should be careful in their assessment of the value of the works. If they are destroyed or damaged, the Artist will seek full compensation. If the works are undervalued, the Artist will not receive their true value from the Gallery's insurance company. If they are overvalued, the insurance company will only pay a fraction of the value. The Gallery would then need to pay the Artist out of its own funds to meet the full stated value. The last sentence of clause 6 clearly addresses this provision.

6. INSURANCE. Gallery shall be responsible for all loss of, or damage to, the consigned Works of Art while in its possession; specifically from the date of delivery to Gallery until the date of delivery to a Purchaser, repossession by Artist, or return delivery to Artist. Gallery warrants and represents that it has an insurance policy with \_\_\_\_\_, which insures all of Artist's Work against loss, theft, fire, and destruction of any kind. Gallery agrees to indemnify and hold harmless Artist from any loss resulting from lapse of coverage, error, or failure by Gallery to have the insurance coverage warranted provided that Gallery's liability under this paragraph is limited to the amount which should have been due to Artist if the Work had been sold at the price stated herein.

Clause 7 outlines the exhibition, opening, and promotion of the Artist's works. For the protection of both the Artist and the Gallery, every cost should be spelled out and put in writing before anything is contracted for or purchased. The apportionment of costs need not be equal.

7. EXHIBITION; PROMOTION; COSTS. Gallery agrees to exhibit the consigned Works of Art beginning on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, and continuously thereafter until \_\_\_\_\_ or the expiration or termination of this Agreement. Artist's Works shall not be interspersed with any other displays or Works, or included in any group exhibition, without Artist's prior written approval.

Gallery shall consult Artist on all decisions relating to the exhibition and reproduction of the Works. Gallery agrees to make all reasonable and good faith efforts to promote Artist and sell the consigned Works. Artist shall cooperate with Gallery in such advertising and promotional efforts.

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Gallery agrees to sponsor and to hold an “Opening,” or reception, for Artist to be held during the first week of the exhibition on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_. The “Opening” shall be specifically advertised and notices shall be sent to all members or patrons of Gallery and to a list of persons, not more than \_\_\_\_ in number, to be supplied by Artist.

Costs for the exhibition and “Opening” shall be apportioned by Gallery and Artist as provided on Schedule B, and shall include specifically photography, printing, postage, shipping, publicity, refreshments, and any special framing, construction, catalogs, signage and other costs. The Parties agree that they shall put in writing prior to incurring any cost or expense, each item consented to, how much shall be paid for these expenses, and how much they each will pay in advance of the exhibition.

The Gallery will not sell work for less than an agreed price that is found on Schedule A. This is another statutory requirement of the Missouri and Illinois consignment acts. The Gallery may want to have the power to ask for more than the agreed price. However, the Artist should carefully consider before agreeing to the power to vary the price. The Parties also should consider whether the Gallery should receive commission on total sales or a specific commission for each piece (a definite amount regardless of the actual sale price).

8. SALES PRICES; COMMISSIONS. Gallery shall sell the consigned Works at the prices mutually agreed to by both parties as specified in writing on Schedule A. The Works shall be sold only for an amount at least equal to the price agreed upon by Artist as specified in writing on Schedule A. Gallery shall receive a commission according to Schedule A. Gallery shall have discretion to vary the agreed price only by \_\_\_\_ percent.

This clause has three functions. First, it ensures that the Artist will be paid within a certain amount of time after a sale is made. Second, it ensures that the Artist will get paid before the Gallery receives its share. Third, it is required by Missouri and Illinois statute. The Artist can agree to modify this stipulation and pro-rate payments. However, any modification must follow the requirements stated in the last paragraph (“Waiver of proceeds in trust”).

9. PAYMENT. The parties agree that Gallery shall hold the proceeds from sales of the consigned Works in trust for the benefit of Artist. Gallery shall get written consent from Artist before any installment sales are made. Payments shall be made to Artist as follows:

- a) On outright sales, Gallery shall pay Artist’s share within \_\_\_\_\_ days from receipt of payment from purchaser;
- b) On installment sales, Gallery shall first apply the proceeds of installment payments to Artist’s share. Artist’s share shall be completely satisfied before Gallery may deduct its commission. Payment to Artist shall be made within \_\_\_\_ days from the receipt of any installment payment.

*Waiver: the intentional  
relinquishment of a  
known right*

Waiver of proceeds in trust: Parties may agree in writing by special stipulation that installment payments will be pro-rated between them. The waiver of proceeds in

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Pro-rated: *proportioned according to a certain rate or percentage*

trust must be clear, conspicuous, in writing, and signed by Artist. No waiver shall apply to Gallery purchases of Works initially received on consignment.

Clause 10 limits the uses of the Artist's Works by the Gallery. In addition, it requires the Gallery to obtain written consent from the Artist for any display or use. This is the last statutory requirement in the Missouri and Illinois laws.

10. RENTALS; OTHER USES OF WORKS. The Works of Art may be used or displayed by Gallery only with the prior written consent of Artist. Gallery may not rent or lend any consigned Work without the prior written consent of Artist. If Gallery should desire to enter any of the consigned Works in any art show or other exhibition, Gallery shall obtain written consent of Artist on any entry form used for the purpose, or in the event there is no entry form, to obtain the written consent of Artist prior to the entry in any display, art show, or other exhibition.

This clause protects the Artist by preventing the Gallery from giving someone else the rights to display the Works. The Artist retains control over whom she is dealing with. Notice on the change of management also serves to inform the Artist.

11. ASSIGNMENT. This Agreement may not be assigned by Gallery to another person or gallery without the prior written consent of Artist. Gallery shall notify Artist in advance of any change in personnel in charge of Gallery or of any change in ownership of Gallery.

This clause, in conjunction with the next, are intended to facilitate bookkeeping. The Bill of Sale should be signed by the collector. It should state that the Artist retains the copyright and has the right to photograph and reproduce the Work for publicity purposes. It also could ensure that the Artist has the right to borrow the Work for a retrospective, to share in any rental income, and to limit the exhibition of the work in public. Finally, the Bill of Sale could include a Resale Royalty provision (See Appendix 6).

Bill of Sale: *legal document or form recording purchase of property*

12. BILL OF SALE. Gallery shall use a standard bill of sale or other form approved in advance by Artist for any sale of the consigned Works of Art.

13. RECORDS. Gallery agrees to keep accurate records of, together with payments made, for the Works of Art on Consignment by Artist. Gallery agrees that it will send Artist an accounting every \_\_\_\_\_ months. The accounting shall include:

- (1) the number of Artist's Work which have been sold;
- (2) the amount of sales price for each Work;
- (3) the amount of the sales price collected by Gallery to the date of the accounting;
- (4) the amount of Gallery's commission on payments received;
- (5) the amount of money paid and the amount due to Artist from Gallery;
- (6) the list and location of all unsold Works covered by the Consignment sheet. \_\_\_\_\_

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This clause protects the Artist from the Gallery's creditors, and is supported by the "consignment" statute. However, to be extremely safe, the Artist may want to file a "security interest" claim; it is a straight-forward form and is inexpensive. It should be filled out if the Artist has consigned a very expensive or valuable work. This also will protect the Artist if the Gallery removes the Works out-of-state. Consult an attorney for more information.

Uniform Commercial Code: *a statute adopted by the state that governs the sale of goods*

14. SECURITY. The consigned Works of Art shall be held in trust for the benefit of Artist and shall not be subject to any claim by a creditor of Gallery. In the event of any default by Gallery or any claim made against the consigned Work by any creditor of Gallery, Artist shall have all the rights of a secured party pursuant to the Uniform Commercial Code. \_\_\_\_\_

This clause emphasizes that any changes to the Agreement must meet certain criteria.

15. AMENDMENTS. This Agreement may be amended, waived, discharged, modified or terminated only by an instrument in writing signed by both parties and attached to this Agreement. \_\_\_\_\_

The following clause simply protects the parties from misunderstandings and unscrupulous business partners. The clause limits the Agreement to the **written** contract — ensuring that both parties have at all times the sum and substance of their agreement in front of them. Any modifications — if in writing, signed, and attached — will be considered part of the "integrated" agreement.

Integration: *total agreement, and not alterable unless certain requirements are met*

16. INTEGRATION. This Agreement embodies and contains the entire Agreement and understandings of the parties and shall be binding upon and inure to the benefit of and be enforceable by their respective heirs, legal representatives, successors, and assigns. \_

This clause says that even if one clause of the contract turns out to be invalid, the rest of the contract remains in force.

Inure: *to take effect*

17. SEVERABILITY. If any provision of this Agreement or the application thereof is held invalid, the invalidity shall not affect other provisions or applications of this Agreement which can be given effect without the invalid provisions or application, and to this end the provisions of this Agreement are declared to be severable.

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Mediation: *an informal dispute resolution process in which a neutral third party helps the disputants arrive at their own solution*

Arbitration: *alternative dispute resolution forum in which a neutral third party hears both sides of the problem then decides what the solution should be*

Compared to litigation, mediation and arbitration are much quicker and less costly methods of resolving problems that may arise. **The following options are mutually exclusive. Only one should be used.**

18. Option 1: MEDIATION. All disputes arising out of this Agreement shall be submitted to mediation in accordance with the rules of the Arts Resolution Services, a program of the St. Louis Volunteer Lawyers and Accountants for the Arts.

Option 2: ARBITRATION. In the event a dispute arises under this Agreement, the parties shall confer with all reasonable dispatch and endeavor to arrive at a solution; failing agreement, the dispute shall be submitted to a single arbitrator either agreed to by the parties, or appointed by the American Arbitration Association, who shall decide the dispute under the rules of the Association; and any decision by an arbitrator shall be final and binding upon both parties.

19. GOVERNING LAW. This Agreement is entered into in the State of Missouri (or Illinois), contains covenants to be performed within the State of Missouri (or Illinois) and shall be construed in accordance with and governed by the laws of the State of Missouri (or Illinois). All performance by both parties shall be in accordance with Missouri Consignment Act §§407.900-910 (or Illinois Rev. Stat. Ch.121 1/2 Sec 1400-1408).

IN WITNESS THEREOF, the parties have signed this Agreement

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Artist	Date

  


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Gallery	Date

## Consignment Record Schedule A

Title	Date	Retail Price	Insurance Value	Commission
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

## Apportionment of Expenses Schedule B

	Artist's Share %	Gallery's Share %
Shipping to Gallery	_____	_____
Shipping to Artist	_____	_____
Advertising	_____	_____
Printing	_____	_____
Postage	_____	_____
Refreshments	_____	_____
Framing	_____	_____
Special Construction	_____	_____
Photography	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

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Artist \_\_\_\_\_ Date \_\_\_\_\_

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Gallery \_\_\_\_\_ Date \_\_\_\_\_

## Appendix 1 Missouri Consignment Act

### Merchandising Practices

#### Section 407.900

#### SALES AND EXHIBITION OF CERTAIN WORKS OF FINE ART

##### Definitions.

407.900. As used in sections 407.900 to 407.910:

(1) The term "art dealer" means a person engaged in the business of selling fine arts. The term "art dealer" does not include any person engaged exclusively in the business of selling goods at public auction;

(2) The term "artist" means a person who creates fine art or, if such person is deceased, such person's heir, legatee, or personal representative;

(3) The term "consignment" means a transfer of the physical possession of fine art by the artist creating the fine art as consignor in which no title to, estate in, or right to possession of the fine art superior to that of the artist who is the consignor shall vest in the consignee, notwithstanding the consignee's power or authority to transfer and convey the title, and all of the rights and interests of the artist who is the consignor in and to such fine art to a third person;

(4) The term "creditors" includes, but is not limited to, those persons included in the definition of "creditor" in section 400.1-201, RSMo;

(5) The term "fine arts" includes:

(a) Visual art such as paintings, sculptures, drawings, mosaics, or photographs;

(b) Calligraphy;

(c) Graphic art such as etchings, lithographs, offset prints, silk screens, and other works of a similar nature;

(d) Crafts, including any item made by an artist or craftsman through the use of clay, textiles, fibers, wood, metal, plastic, glass, ceramics, or similar materials;

(e) Works in mixed media such as collages or any combination of the art forms or media listed in paragraph (a), (b), (c), or (d) of this subdivision.

(L. 1984 S.B. 688 § 1)

##### Art delivered to art dealer for sale or exhibition deemed consignment, when, exception--written contract required, contents.

407.902. 1. Notwithstanding any custom, practice, or usage of the trade to the contrary, whenever an artist delivers, or causes to be delivered, a work of fine art of the artist's own creation to an art dealer in this state for the purpose of exhibition or sale, or both, on a commission, fee, or other basis of compensation, the delivery to and acceptance of such work of fine art by the art dealer from the artist shall constitute a consignment unless the delivery to the art dealer is pursuant to an outright sale for

which the artist has received or receives, either prior to or upon delivery, full compensation for the work of fine art.

2. Whenever a consignee accepts a work of fine art from an artist for the purpose of sale or exhibition and sale to the public on a commission, fee, or other basis of compensation, there shall be a written contract or agreement between the artist who is the consignor and consignee which shall include, but need not be limited to, provisions that:

(1) The proceeds of the sale of the work of fine art shall be delivered to the artist who is the consignor at a schedule agreed upon by the artist who is the consignor and consignee;

(2) The consignee shall be responsible for the stated value of the work of fine art in the event of the loss of or damage to such work of fine art while it is in the possession of such consignee;

(3) The work of fine art shall only be sold by the consignee for an amount at least equal to the amount agreed upon by the artist who is the consignor in writing;

(4) The work of fine art may be used or displayed by the consignee or others only with prior written consent of the artist who is the consignor.

(L. 1984 S.B. 688 § 2)

##### Consignment, effect.

407.904. A consignment of a work of fine art shall result in all of the following:

(1) The art dealer, after receipt of the work of fine art, shall constitute an agent of the artist for the purpose of sale or exhibition of the consigned work of fine art within the state of Missouri;

(2) The work of fine art shall constitute property held in trust by the consignee for the benefit of the artist who is the consignor and shall not be subject to claim by a creditor of the consignee;

(3) The proceeds from the sale of the work of fine art shall constitute funds held in trust by the consignee for the benefit of the artist who is the consignor, and such proceeds shall first be applied to pay any balance due to the artist who is the consignor, unless the artist who is the consignor expressly agrees otherwise in writing.

(L. 1984 S.B. 688 § 3)

##### Art dealer is agent of artist--work of art and sale proceeds held in trust for artist, not subject to creditor of consignee.

407.905. A work of fine art received as a consignment from the artist who created the work of fine art shall remain trust property, notwithstanding the subsequent purchase thereof by the consignee directly or indirectly for the consignee's own account until the price is paid in full to the artist who is consignor. If such work is thereafter resold to a bona fide purchaser before the artist who is consignor has been paid in full, the proceeds of the resale received by the

consignee shall constitute funds held in trust for the benefit of the artist who is consignor to the extent necessary to pay any balance still due to the artist who is consignor and such trusteeship shall continue until the fiduciary obligation of the consignee to the artist who is the consignor with respect to such transaction is discharged in full. (L. 1984 S.B. 688 § 4)

##### Waiver of proceeds in trust by artist, requirements.

407.907. An artist who is a consignor may lawfully waive the provisions of subdivision (3) of section 407.904 if such waiver is clear, conspicuous, in writing, and signed by the artist who is the consignor. No waiver shall be valid with respect to the proceeds of a work of fine art initially received "on consignment" but subsequently purchased by the consignee directly or indirectly for his own account. No waiver shall inure to the benefit of the consignor's creditors in any manner which might be inconsistent with the rights under sections 407.900 to 407.910 of the artist who is the consignor. (L. 1984 S.B. 688 § 5)

##### Contracts, prior to August 13, 1984, not affected, exceptions.

407.908. Sections 407.900 to 407.910 shall not apply to a written contract executed prior to August 13, 1984, unless either the parties agree by mutual written consent that sections 407.900 to 407.910 shall apply or such contract is extended or renewed after August 13, 1984. The provisions of sections 407.900 to 407.910 shall prevail over any conflicting or inconsistent provisions of chapter 400, RSMo, affecting the subject matter of sections 407.900 to 407.910. (L. 1984 S.B. 688 § 6)

##### Violations--punitive damage and costs authorized.

407.910. Any art dealer or creditor of an art dealer who violates any provision of sections 407.900 to 407.910 with intent to injure shall, in addition to the payment of all other damages and costs owed by him, pay to the artist involved punitive damages in an amount as may be determined by law and reasonable attorney's fees. (L. 1984 S.B. 688 § 7)



## Appendix 2 Illinois Fine Arts Consignment Act

### CHAPTER 121<sup>1/2</sup>—SALES CONSIGNMENTS OF FINE ART

#### 1401. Definitions

As used in this Act, unless the context otherwise requires:

"Art dealer" means a person engaged in the business of selling works of fine art, other than a person exclusively engaged in the business of selling goods at public auction.

(2) "Artist" means the creator of a work of fine art or, if such person is deceased, the creator's heir, legatee, or personal representative.

(3) "On consignment" means that no title to, estate in, or right to possession of the work of fine art superior to that of the consignor shall vest in the consignee, notwithstanding the consignee's power or authority to transfer and convey all of the right, title, and interest of the consignor in and to such work of fine art to a third party.

(4) "Commission" means the fee, compensation, or percentage of the actual selling price of a work of fine art agreed upon by the artist and art dealer which the art dealer may retain after the sale of the artist's work to a third party.

(5) "Creditor" includes, but is not limited to, those persons embraced by the definition of "creditor" in Section 1-201 of the "Uniform Commercial Code", approved July 31, 1961, as amended.

(6) "Bona fide purchaser" means a person who in good faith makes a purchase without notice of any outstanding rights of others.

(7) "Work of fine art" means:

(a) A visual rendition including, but not limited to, a painting, drawing, sculpture, mosaic, videotape, or photograph.

(b) A work of calligraphy.

(c) A work of graphic art including, but not limited to, an etching, lithograph, serigraph, or offset print.

(d) A craft work in materials including, but not limited to, clay, textile, fiber, wood, metal, plastic, or glass.

(e) A work in mixed media including, but not limited to, a collage, assemblage, or work consisting of any combination of paragraphs (a) through (d).

(Source: P.A. 84-683.) (815 ILCS 320/2)

#### 1402. Consignment—Effect

2. Any custom, practice, or usage of the trade notwithstanding:

(1) Whenever an artist delivers or causes to be delivered a work of fine art of the artist's own creation to an art dealer in this State for the purpose of sale, exhibition, or both, on a commission, the delivery to and acceptance of the work of fine art by the art dealer is deemed to place the work of fine art on consignment, unless the delivery is pursuant to an outright sale for which the artist receives or has received full compensation for the work of fine art upon delivery.

(2) Such art dealer shall thereafter, with respect to the work of fine art, be deemed the agent of the artist.

(3) Such work of fine art is trust property and the art dealer is trustee for the benefit of the artist until the work of fine art is sold to a bona fide purchaser or returned to the artist.

(4) The proceeds of the sale of a work of fine art are trust property and the art dealer is trustee for the benefit of the artist until the amount due the artist from the sale is paid in full. Except for customer deposits, these trust funds shall be paid to the artist within 30 days of receipt by the art dealer unless the parties expressly agree otherwise in writing. If the sale of the work of fine art is on installment, the funds from the installment shall first be applied to pay any balance due to the artist on the sale, unless the parties expressly agree in writing that the proceeds on each installment shall be paid according to a percentage established by the consignment agreement. Customer deposits shall be used to pay the amounts due the artist within 30 days after such deposits become part of the payment for the work. Any agreement entered into pursuant to this subsection (4) must be clear and conspicuous.

(5) The art dealer shall be strictly liable for the loss of or damage to the work of fine art while it is in the art dealer's possession. The value of the work of fine art is, for purposes of this subsection, the value established in a written agreement between the artist and art dealer prior to the loss or damage or, if no written agreement regarding the value of the work of fine art exists, the fair market value of the work of fine art. Any reimbursement due the artist from the dealer as a result of the loss of or damage to a work of fine art shall not exceed the amount which would have been due to the artist if the work had been sold at the stated purchase price in the agreement.

(6) The art dealer shall not be held liable for loss or damage to the work of fine art if the artist fails to remove the work of fine art within a period of 30 days following the date agreed upon for removal of the work of fine art in a written contract between the artist and art dealer or, if no written agreement regarding a removal date exists, 30 days after notice to remove the work of fine art is sent by registered mail to the artist's last known address.

(Source: P.A. 84-683.)

#### 1403. Works of fine arts as trust property

3. (1) If a work of fine art is trust property under Section 2 when initially received by the art dealer, it remains trust property notwithstanding the subsequent purchase of the work of fine art by the art dealer directly or indirectly for the art dealer's own account until any balance due to the artist from the sale is paid in full.

(2) If the art dealer resells a work of fine art to which subsection (1) applies to a bona fide purchaser before the artist has been paid in full, the work of fine art ceases to be trust property and the proceeds of the resale are trust funds in the hands of the art dealer for the benefit of the artist to the extent necessary to pay any balance due to the artist. The trusteeship of any of the proceeds continues until the fiduciary obligation of the art dealer with respect to the transaction is

discharged in full.

(Source: P.A. 84-683.) (815 ILCS 320/4)

#### 1404. Trust property—Creditors of dealer

4. No property which is trust property under Section 2 or Section 3 is subject to the claims, liens or security interests of the creditors of the art dealer.

(Source: P.A. 84-683.) (815 ILCS 320/5)

#### 1405. Commission on consignment

5. (1) An art dealer may accept a work of fine art for commission on consignment from an artist only if prior to or within seven days of acceptance the art dealer enters into a written contract with the artist which shall include but not be limited to the following provisions:

(a) The value of the work of fine art.

(b) The time within which the proceeds of the sale are to be paid to the artist if the work of fine art is sold.

(c) The commission the art dealer is to receive if the work of fine art is sold.

(d) The minimum price for the sale of the work of fine art, and any discounts ordinarily given by the art dealer in his regular course of business.

(2) An art dealer who accepts a work of fine art for commission on consignment from an artist may use or display the work of fine art or a photograph of the work of fine art or permit the use or display of the work of fine art or a photograph of the work of fine art only if notice is given to users or viewers that the work of fine art is the work of the artist.

(3) If an art dealer violates this Section 5, the artist may seek relief in a court of competent jurisdiction by having the obligation of the artist voided with respect to that art dealer or to his successors or assigns.

(Source: P.A. 84-683.) (815 ILCS 320/6)

#### 1406. Waivers

6. Any portion of an agreement which waives any provision of this Act is void.

(Source: P.A. 84-683.) (815 ILCS 320/7)

#### 1407. Violations—Liability

7. Any art dealer who violates Section 5 is liable to the artist in an amount equal to:

(1) \$50; and

(2) The actual damages, if any, including the incidental and consequential damages, sustained by the artist by reason of the violation and reasonable attorneys' fees.

(Source: P.A. 84-683.) (815 ILCS 320/8)

#### 1408. Application and construction of Act

8. (1) This Act shall not apply to a written contract executed prior to the effective date of this Act, unless either the parties agree by mutual written consent that this chapter shall apply or such contract is extended or renewed after the effective date of this Act.

(2) The provisions of this Act shall prevail over any conflicting or inconsistent provisions of the "Uniform Commercial Code", approved July 31, 1961, as amended, affecting the subject matter of this Act.

(Source: P.A. 84-683.)



## Appendix 3 State Consignment Statutes

### **ALASKA** STATUTES

TITLE 45. TRADE AND COMMERCE  
CHAPTER 65. HANDICRAFTS AND WORKS OF ART  
ARTICLE 2. ARTISTS AND WORKS OF ART  
Alaska Stat. § 45.65.200 (2003)

### **ARIZONA** REVISED STATUTES

TITLE 44. TRADE AND COMMERCE  
CHAPTER 11. REGULATIONS CONCERNING PARTICULAR BUSINESSES  
ARTICLE 12. CONSIGNMENTS OF WORKS OF FINE ART  
Ariz. Rev. Stat. § 44-1776 (2004)

### **ARKANSAS** CODE OF 1987 ANNOTATED

TITLE 4. BUSINESS AND COMMERCIAL LAW  
SUBTITLE 6. BUSINESS PRACTICES  
CHAPTER 73. SALES AND EXHIBITIONS OF ART  
SUBCHAPTER 2. ARTISTS' CONSIGNMENT ACT  
Ark. Code Ann. § 4-73-205 (2003)

### **CALIFORNIA** CIVIL CODE

DIVISION 3. OBLIGATIONS  
PART 4. OBLIGATIONS ARISING FROM PARTICULAR TRANSACTIONS  
TITLE 1. CONSIGNMENT OF FINE ART  
CHAPTER 2. GENERAL PROVISIONS  
Cal. Civ. Code § 1738.5 (2004)

### **COLORADO** REVISED STATUTES

TITLE 6. CONSUMER AND COMMERCIAL AFFAIRS  
CONSIGNMENTS OF ART  
ARTICLE 15. CONSIGNMENT OF WORKS OF FINE ART  
Colo. Rev. Stat. 6-15-102 (2003)

### **CONNECTICUT** GENERAL STATUTES ANNOTATED

TITLE 42. BUSINESS, SELLING, TRADING AND COLLECTION PRACTICES  
CHAPTER 737a ARTIST-ART DEALER CONSIGNMENTS  
Conn. Gen. Stat. Ann. § 42-116l (2003)

### **DISTRICT OF COLUMBIA** OFFICIAL CODE ANNOTATED

DIVISION V. LOCAL BUSINESS AFFAIRS  
TITLE 28. COMMERCIAL INSTRUMENTS AND TRANSACTIONS  
ARTICLE 9. SECURED TRANSACTIONS: SALES OF ACCOUNTS AND CHATTEL PAPER  
PART 1. SHORT TITLE, APPLICABILITY AND DEFINITIONS  
D.C. Code Ann. § 28:9-114.

### **FLORIDA** STATUTES ANNOTATED

TITLE 39. COMMERCIAL RELATIONS  
CHAPTER 686. SALES, DISTRIBUTION, AND FRANCHISE RELATIONSHIPS  
Fla. Stat. Ann. § 686.502 (2003)

### OFFICIAL CODE OF **GEORGIA** ANNOTATED

TITLE 10. COMMERCE AND TRADE  
CHAPTER 1. SELLING AND OTHER TRADE PRACTICES  
ARTICLE 17A. CONSIGNMENT OF ART  
Ga. Code Ann. § 10-1-524 (2002)

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### **IDAHO** OFFICIAL CODE

TITLE 28. COMMERCIAL TRANSACTIONS

CHAPTER 11. UNIFORM COMMERCIAL CODE — ARTISTS AND ART DEALERS

PART 1. ARTIST AND ART DEALER

Idaho Code § 28-11-103 (2003)

### **ILLINOIS** COMPILED STATUTES

CHAPTER 815. BUSINESS TRANSACTIONS SALES

CONSIGNMENT OF ART ACT

ACT 320

815 Ill. Comp. Stat. 320/2 (2004)

### CODE OF **IOWA**

TITLE XIV. PROPERTY

SUBTITLE 1. PERSONAL PROPERTY

CHAPTER 556D. CONSIGNMENTS BETWEEN ARTISTS AND ART DEALERS

Iowa Code § 556D.3 (2003)

### **KENTUCKY** REVISED STATUTES ANNOTATED

TITLE XXIX. COMMERCE AND TRADE

CHAPTER 365. TRADE PRACTICES

CONSIGNMENT OF FINE ART

Ky. Rev. Stat. Ann. § 365.860 (2002)

### ANNOTATED CODE OF **MARYLAND**

COMMERCIAL LAW

TITLE 11. TRADE REGULATION

SUBTITLE 8A. CONSIGNMENT OF WORKS OF FINE ART

Md. Code Ann., Com. Law § 11-8A-01 (2003)

### ANNOTATED LAWS OF **MASSACHUSETTS**

PART I. ADMINISTRATION OF THE GOVERNMENT

TITLE XV. REGULATION OF TRADE

CHAPTER 104A. CONSIGNMENT OF FINE ART

Mass. Ann. Laws ch. 104A, § 2 (2004)

### **MICHIGAN** COMPILED LAWS

CHAPTER 442. SALES

SALES OF FINE ART

Mich. Comp. Laws § 442.312a (2003)

### **MINNESOTA** STATUTES ANNOTATED

Trade Regulations, Consumer Protection

CHAPTER 324.ART; FINE PRINTS

Minn. Stat. Ann. § 324.03 (2003)

### **MISSOURI** REVISED STATUTES

TITLE 26. TRADE AND COMMERCE

CHAPTER 407. MERCHANDISING PRACTICES

SALE AND EXHIBITION OF CERTAIN WORKS OF FINE ART

Mo. Rev. Stat. § 407.904 (2004)

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**MONTANA** CODE ANNOTATED  
TITLE 22. LIBRARIES, ARTS, AND ANTIQUITIES  
CHAPTER 2. ARTS  
PART 5. SALE OF FINE ART BY ART DEALER  
Mont. Code Ann. § 22-2-503 (2003)

**NEW HAMPSHIRE** REVISED STATUTES ANNOTATED  
TITLE XXXI. TRADE AND COMMERCE  
CHAPTER 352. AUTHORS' AND ARTISTS' PRODUCTIONS  
CONSIGNMENT OF WORKS OF ART  
N.H. Rev. Stat. Ann. § 352:4 (2003)

**NEW JERSEY** STATUTES ANNOTATED  
TITLE 12A. COMMERCIAL TRANSACTIONS  
SUBTITLE 1. UNIFORM COMMERCIAL CODE  
CHAPTER 2. SALES  
SUBCHAPTER 3. GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT  
N.J. Stat. Ann. § 12A:2-330 (2004)

**NEW MEXICO** STATUTES ANNOTATED  
CHAPTER 56. COMMERCIAL INSTRUMENTS AND TRANSACTIONS  
ARTICLE 11. ARTISTS' CONSIGNMENT  
N.M. Stat. Ann. § 56-11-2 (2003)

**NEW YORK** CONSOLIDATED LAWS SERVICE  
ARTS AND CULTURAL AFFAIRS LAW  
TITLE C. TRANSACTIONS INVOLVING ARTISTS AND THEIR WORKS  
ARTICLE 12. ARTIST-ART MERCHANT RELATIONSHIPS  
N.Y. Arts & Cult. Aff. Law § 12.01 (2003)

GENERAL STATUTES OF **NORTH CAROLINA**  
CHAPTER 25C. SALES OF ARTWORK  
ARTICLE 1. ARTWORK ON CONSIGNMENT  
N.C. Gen. Stat. § 25C-2 (2004)

PAGE'S **OHIO** REVISED CODE ANNOTATED  
TITLE 13. COMMERCIAL TRANSACTIONS -- UNIFORM COMMERCIAL CODE  
CHAPTER 1339. FIDUCIARY LAW  
CONSIGNMENT OF ART WORKS  
Ohio Rev. Code Ann. § 1339.71 (2003)

**OREGON** REVISED STATUTES  
TITLE 30. EDUCATION AND CULTURE  
CHAPTER 359. ART AND CULTURE  
ART TRANSACTIONS (CONSIGNMENTS)  
Or. Rev. Stat. § 359.220 (2001)

**PENNSYLVANIA** CONSOLIDATED STATUTES  
TITLE 73. TRADE AND COMMERCE  
CHAPTER 32. ARTWORKS CONSIGNMENT ACT  
73 Pa. Cons. Stat. § 2122 (2003)

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### GENERAL LAWS OF **RHODE ISLAND**

TITLE 5. BUSINESSES AND PROFESSIONS

CHAPTER 62. WORKS OF ART -- ARTISTS' RIGHTS

R.I. Gen. Laws § 5-62-2 (2003)

### **TENNESSEE** CODE ANNOTATED

TITLE 47. COMMERCIAL INSTRUMENTS AND TRANSACTIONS

CHAPTER 25. TRADE PRACTICES

PART 10. CONSIGNMENT OF ART

Tenn. Code Ann. § 47-25-1004 (2003)

### **TEXAS** CODE ANNOTATED

OCCUPATIONS CODE

TITLE 13. SPORTS, AMUSEMENTS, AND ENTERTAINMENT

SUBTITLE C. ARTS AND MUSIC

CHAPTER 2101. CONSIGNMENT OF ART WORKS

Tex. Occ. Code Ann. § 2101.003 (2004)

### REVISED CODE OF **WASHINGTON** ANNOTATED

TITLE 18. BUSINESSES AND PROFESSIONS

CHAPTER 18.110. ART DEALERS -- ARTISTS

Wash. Rev. Code Ann. § 18.110.030 (2004)

### **WISCONSIN** STATUTES

TRADE REGULATIONS

CHAPTER 129. CONSIGNMENTS OF WORKS OF FINE ART

Wis. Stat. § 129.02 (2003)



## Appendix 5 The Art of Negotiation

by Joseph S. von Kaenel

### *The Negotiation Process*

Negotiation consists of back and forth communications designed to reach an agreement when two sides have both common interests and opposing interests. In the continuing process of negotiations, the negotiators always have a three-fold choice: 1) to accept the last offer; 2) to let the deal fail; or 3) to propose an alternative. The result is either an agreement or an impasse. If a mutually beneficial agreement cannot be negotiated, the parties are probably better off not dealing with one another.

### *Rules for Negotiating*

*Identify and prioritize the issues.* Identify each area of potential difference. The issues should then be separated into “deal breaking” issues, negotiable issues, and false or throwaway issues.

*Consider the alternatives if no agreement is reached.* Knowing what alternatives you have if no agreement is reached will keep you from accepting terms that are too unfavorable or rejecting terms that are in your interest. The other party’s alternatives should also be evaluated.

*Avoid negative behavior.* Aggression, intimidation, accusations, threats, sarcasm, and ridicule should be used sparingly, if at all. Their use will provoke retaliation and bad feelings.

*Communicate your position.* Make certain the other side understands your position. Try to build to a logical and compelling conclusion by stating your reasoning first and your position last. The other side will then have to listen to your reasoning before knowing your final position. If you state your position first and then try to justify it, your opponent is likely to reject it out of hand without listening to your reasons.

*Ask them to explain their position.* Asking the other side to explain their reasoning and requirements may expose weaknesses in their position or suggest alternative solutions.

*Empathize.* Show concern and understanding for the other side’s needs and problems. Emphasize common goals and shared experience. If something is funny, laugh.

*Consider precedents.* Be familiar with the established and accepted patterns for transactions of the same type. If the precedents are in your favor, use them as arguments. If the precedents go against you, be prepared to argue why they don’t apply.

*Look for other options.* Consider other acceptable means of meeting the concerns of both sides. Finding acceptable alternatives is one of the most valuable skills of a negotiator.

*Beware the “standard printed form.”* Don’t trust what is portrayed as the “standard printed form.” Don’t hesitate to cross out portions of a form or add an addendum.

*Avoid on the spot decisions.* A good negotiator seldom makes an important decision on the spot. Take time to review information, consult with others, and think about a decision without pressure.

*Consider using an intermediary.* Having a lawyer or other representative handle negotiations can aid in maintaining objectivity and insulate you from pressure and arguments. Also, it is easier to back away from a position taken by your intermediary.

### *Concluding Negotiations*

Once a basic agreement is reached, any remaining details should be worked out and the agreement put in writing. Beware of “mere details” and “oh-by-the ways” which can significantly alter the terms at the last minute. Don’t gloat over what you feel is a favorable result. Rather, you want the other side to feel good about the agreement so they won’t later renounce or challenge it.

## Appendix 6 Resale Royalties

The right to resale royalties, or *droit de suite*, is the right of artists to receive a royalty payment each time their work is resold at an appreciated value. This right has been a part of European law for many years, but is a recent concept in the United States.

In France, the legislation was prompted in part by a Jean-Louis Forain (1852-1931) drawing showing two children dressed in rags looking into a posh auction room and saying, “Look! They’re selling one of daddy’s paintings.” The French rationale for this right is that the increase in the value of the art is due to the continuing effort of the artist to improve their artistic talent and reputation. The German rationale, on the other hand, is that at first sale the public did not fully appreciate the work but it later catches up to its true and inherent value.

In the United States, federal copyright law code does not provide a resale royalty right (in 1990, it was dropped from the proposed Visual Artists’ Rights Act legislation, which addresses moral rights). Among the states, only California has enacted a *droit de suite* provision. The California Resale Royalty Act was adopted in 1977. With a few exceptions, if a work of art is resold for \$1,000 or more and that price exceeds the price the seller paid for that work of art, the seller must pay the artist five percent of that resale price.

To qualify for a resale royalty the work of art must have been a painting, sculpture, drawing or an original work of art in glass. Either the seller must be a California resident or the resale must take place in California. Although it does not matter where the work of art was created, its resale must occur either during the life of the artist or within 20 years thereafter. In the latter case, the royalty would go to the artist’s estate.

The California law has generated some controversy. A 1983 amendment to the law, worked out as a compromise between artists’ rights advocates and art dealer associations, provides that when a dealer buys art outright from an artist, the dealer’s resale is exempt from the royalty requirement if it takes place within ten years of the initial sale.

Under the California law, it is the seller’s obligation to locate the artist and pay the royalty due. If the seller is not able to locate the artist within 90 days after the sale, the seller is required to pay the royalty payment to the California Arts Council where it is held for seven years. If the artist fails to claim the money within that time, the money reverts to the Arts Council for use in its Art in Public Buildings Program.

Although the Resale Act has not created the administrative nightmare that was anticipated, no additional legislation is under consideration at this time. But resale royalties are available to Missouri and Illinois artists through their sales contracts with purchasers. Of course, the purchaser must agree to the resale royalty arrangement. How can an artist persuade a purchaser to accept this provision? Generating a win-win agreement is the key. Based on the best-selling book *Getting to Yes* by Roger Fisher and William Ury, the win-win approach focuses on satisfying the underlying needs of both parties. Instead of each side trying to get the best deal through demands and force, the parties listen to each other, discuss interests, develop options for mutual gain, and select outcomes that are fair to both sides.



## Guide to Artist-Gallery Consignment Contracts

If you haven't read *Getting to Yes*, please go to the library, your favorite bookstore or Internet bookseller and get a copy. While you're at it, get a copy of the companion publication, *Getting Ready to Negotiate* by Roger Fisher and Danny Ertel. It is a step-by-step guide to preparing for any negotiation.

"Legitimacy" is one of the seven steps described in the preparation guide. In other words, what criteria will you use to persuade the purchaser that he is not being ripped off? Try using the California law to explain why your proposal is fair as measured by an external standard. That's a much better approach than "please be fair to be nice."

Another suggestion is to offer the purchaser an attractive way to explain his decision: "I'm willing to pay a resale royalty later because I'm paying a little less for the painting now."

Of course, agreeing to reduce your price means that you really understand your own short- and long-term interests. When you prepare, you also need to make some educated guesses about the purchaser's interests. Early in the negotiation process, the two of you should share your thoughts. Be frank; open communication is the cornerstone of every successful relationship.

The parties may wish to modify the sales contract in ways that are more favorable to the purchaser. For example, the 15 percent of gross art could be changed to a lower figure. Or the contract might require that only the first purchaser, but not subsequent purchasers, be bound to pay the royalty.

### ***Bill of Sale Resale Royalty Provisions***

*This is not a stand alone agreement. Instead, it is language that could be added to a sales contract to ensure that the artist receives resale royalties.*

RETRANSFER: If Purchaser in any way whatsoever except the one in subparagraph (f) sells, gives, or trade the Work, or if it is inherited from Purchaser, or if a third party pays compensation for its destruction, Purchaser (or the representative of his estate) must within 30 days:

- (a) Pay Artist 15% of the "gross art profit," if any, on the transfer; and
- (b) Require the new owner to ratify this contract by signing a properly filled-out "Transfer Agreement and Record" (TAR); and
- (c) Deliver the signed TAR to the Artist.
- (d) "Gross art profit" for this contract means only: Agreed value on TAR less the "agreed value" on the last prior TAR, or (if there hasn't been a prior resale) less the agreed value on the original sale.
- (e) "Agreed value" to be filled in on each TAR shall be the actual sale price if the Work is sold for money or the fair market value at the time if transferred in any other way.
- (f) The Purchaser may, at any time, donate the Work to a museum and, in the event of such donation, no payment shall be required to be made to the Artist. If, however, at any time after the execution of the Agreement, the Purchaser donated the Work to any institution other than a museum and takes a tax deduction in respect of such donation, he shall pay to the Artist a sum equal to \_\_\_% of the excess of the tax deduction so taken over the price set forth in this paragraph.



## Guide to Artist-Gallery Consignment Contracts

**NONDELIVERY:** If the TAR isn't delivered in 30 days, Artist may compute "gross art profit" and Artist's 15% as if it had, using the fair market value at the time of the transfer or at the time Artist discovers the transfer.

**PROVENANCE:** Upon request, Artist shall furnish Purchaser and his successors a written history and provenance of the Work based on TAR's and Artist's best information.

**ARTIST CONTACT INFORMATION:** Artist, heirs, successors, and personal representatives shall report any and all changes in contact information to Purchaser.

**REPRODUCTION:** (a) The Purchaser shall be entitled to permit the reproduction of the Work in books, art magazines, and exhibition catalogues, as he shall see fit. (b) Except as provided in subparagraph (a), the Artist reserves all rights whatsoever to copy or reproduce the Work and the Purchaser agrees not to permit such reproduction without first securing the written consent of the Artist. (c) Nothing contained in this paragraph shall be construed as requiring that the Purchaser afford access to the Work for purposes of its being photographed, copied, or reproduced.

**NOTICE:** A notice must be permanently affixed to the Work, warning that ownership, etc., are subject to this contract. If however, a document represents the Work or is part of the Work, the notice must instead be a permanent part of said document.

**TRANSFEREES BOUND:** If anyone becomes the owner of the Work with notice of this contract, that person shall be bound to all its terms as if he had signed a TAR when he acquired the Work.

**EXPIRATION:** This contract binds the parties, their heirs and all their successors in interest, and all Purchaser's obligations are attached to the Work and go with ownership of the Work, all for the life of the Artist plus \_\_\_ years.