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CONFIDENTIALITY IN ART TRANSACTIONS

11/17/2010 Dealer Forum

Acknowledge the Risk

As Ben Franklin said, "Three may keep a secret if two of them are dead." If it is truly critical to keep something confidential, do not tell anyone.

Cultivate Good Business Practices.

1. Use code names, even in-house, e.g., "Mr. Pink" or "Client No. 9."

2. Maintain good "tech" security. Keep data on a secure server – not laptops – and make frequent password changes and firewall updates, etc.).
   a. "Seed" client data with your own address to catch data thieves.
   b. Showing that you keep information confidential may be important to proving that it is confidential.

3. Emphasize Confidentiality with Staff.
   a. Set the tone as hospitals and lawyers do. ("No talking about patients/clients in elevators.") Demand discretion and professionalism in e-mail. Remember : Dealers own their staff's work e-mail. Choose your staff with discretion in mind. (Someone once said "It is a greater compliment to be trusted than to be loved.") Train staff—the "letter scene" in the film Atonement is surprisingly effective and painless training tool—and hold them accountable.
   b. Caveat email. So-called "private" and "internal" e-mail are not legally privileged. They are often disclosed in a lawsuit. If you would be embarrassed to have your client or others see an e-mail, don't write it.
   c. Obtain signatures on employee confidentiality agreements with specific art business terms (e.g., references to client information, images, appraisals, etc.)
   d. Consider noncompete and nonsolicit agreements.
   e. When hiring, new employees should represent that they are not bringing confidential information with them from another dealer, gallery or auction house.

4. Have a Document Retention Policy. Write it down and make the personnel responsible under the policy accountable for it. What is legally required varies (e.g., employment applications have to be kept for three years, tax records for seven, etc.), but transactional documents should be part of the "permanent record" with at least one electronic copy of all key documents (e.g., contracts and shipping documents) and one paper original. Make sure that more than one person knows the location of key documents and that no one other than equity owners have access to all copies to avoid sabotage.
   a. Important: Don't destroy documents (delete e-mail, etc.) if threatened with a lawsuit. Such "spoliation" can carry fines and other serious consequences.

5. Be aware of international law, e.g. the UK's Data Protection Act and EU regulations, which more strictly govern the use of information related to private individuals.

Carefully Document Art Transactions

1. Get it in writing. (The Rule of Robins)

2. Make it clear. (The Rule of Dumas)

3. Consider the following terms:
   a. Establish the duration—a number of years or indefinitely.
   b. Insist on no disclosure in provenance.
   c. Get the right to enjoin disclosure.
      i. Ask for a waiver of the usual bonding requirement.
      ii. Get an acknowledgement of "irreparable harm."
   d. Require the return or destruction of confidential material if the transaction does not close.
   e. Damages are hard to prove, so consider a fixed sum of "liquidated damages."
      i. The amount must be "fair compensation" and not "punitive."
      ii. An acknowledgment that damages are hard to calculate can help.
      iii. Require payment of attorneys' fees as an additional disincentive to disclosure.
   f. Address potential subpoenas and other requests for disclosure by others.
      i. Require prompt notice of a subpoena.
      ii. Require that the subpoena be resisted if it is lawful to do so.
      iii. Insist on a "protective order" if the information must be disclosed and that it is signed by the limited group permitted to see the information.
   g. Protect confidentiality in the event of a dispute.
      i. Arbitration is the best vehicle for doing so.
      ii. In the event that court litigation is deemed a better option, consider requiring that papers are filed "under seal" and avoid identifying the work so as not to "burn" it.
         – Once the case is started, a "protective order" should be put in place to keep confidential information from the public.
   h. Make sure that everyone, including the other party's employees, agents (e.g., intermediary dealers) is covered.

Consider Using An Attorney

1. Confidential information (e.g., a party's identity for a lien search) can be delivered to an attorney for "attorney's eyes only."
2. Information (e.g., a party's identity), money, and works can be put into escrow.

Dealer, Protect Thyself

1. Remember that you are an agent and if your client is an "undisclosed principal," you may be directly liable for your client's actions.

2. Get an indemnity from your client.
   a. Try to get it from a human or an entity with resources, i.e., not a shell company.

3. Consider "parachute" agreements where you are authorized to disclose your client's identity in the event of a dispute and which then absolves you from liability.

4. Consider single use companies for certain transactions.

5. Make sure all intermediary dealers are aware of, and sign on to, the confidentiality restrictions.

6. Don't keep things confidential when it would be illegal to do so, e.g., "empty box" tax avoidance schemes, frauds on partners and spouses, etc.
   a. Know where the money is coming from to avoid being an unwitting money-launderer.
   b. Don't lie for other dealers, e.g., about commissions (introductory or otherwise) or the details of the transaction such as sources or destinations.

Consider Alternatives to Confidentiality

1. Transparency: What a Concept.
   a. From the opinion in Robins on the "seemingly refined bazaar": "[S]ome in the art world desire a market that is neither open nor honest."

2. Noncircumvent agreements—in which one party agrees not to deal with the other dealer's client—can be effective.

3. Nondisclosure agreements—in which one party agrees to keep information confidential for the purpose of exploring or negotiating a transaction—can also be effective.