EXPERT OPINION

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The Significance of a Contract or an Agreement

Throughout your art practice, in addition to your dealings with clients, agents, and fellow artists, you will no doubt engage a number of professionals who will provide services to *you* (accountants, vendors, suppliers, contractors, etc.). And as with any business transaction, it is in *everyone's* best interest to document these relationships. You will typically do so by a contract or agreement.

Contracts go by many names and appear in many forms. However, the ultimate purpose of a contract is to document a relationship. (And not just a business relationship—a contract can set the expectations for personal and familial relationships as well.) The contract that will best suit your needs is one that

- accomplishes your business **goals** and the **goals of the specific engagement**;
- reflects your **relationship** with the other party; and
- states deal terms in **understandable, unambiguous** language.

In this note, experienced attorneys and leading educators on estate and legacy planning for artists Jim Grace and Luke Blackadar will address some common legal issues that arise when entering into various types of contracts.

Get It in Writing!

In most jurisdictions, unwritten oral or implied contracts can be enforceable, but it is always best to get any agreements *in writing*. There are a few reasons why a written contract is preferable:

- it creates **accountability**—the parties have legally enforceable rights and duties;
- referring to a neutral document the parties created when they had a collaborative mindset can **ease tension** when emotions flare; and
- it's easier to **enforce** a written contract—a factfinder (either a judge or a jury) can rely on the document rather than the parties' individual and conflicting memories or opinions.

Any professional you engage *should* be amenable to executing a written agreement. And depending on the type of service provider, you may likely review *their* agreement rather than create your own.

Important Deal Terms

It may seem obvious, but it is important to pin down the key deal terms. While the "important" terms will inevitably vary from contract to contract, there are at least three items that are universally critical:

Goods or Services Provided: "What Am I Giving, Getting, or Doing?"

This is usually the heart of the transaction. What is the work that is being performed or the goods that are being delivered? In contracts for the provision of services, this might be referred to as the "Scope of Work," and for the purchase of goods, simply a description of the goods. For example, a Scope of Work might include the following language:

SCOPE OF WORK

1. Consultant shall design a digital inventory system to include the entirety of Client's body of artwork as of the date of execution of this Agreement.
2. No later than 12 months after the date of the execution of this Agreement, Consultant shall (a) deliver to Client the Deliverables (as that word is defined in this Agreement), and (b) furnish Client with the necessary access credentials for the Deliverables, if applicable.

Both the Scope of Work or description of goods may appear either within the body of the contract or as an exhibit attached at the end (though make sure to identify any attachments in the body of the agreement). In addition to precisely identifying what the goods or services are, it is also generally a good idea to describe how and when the goods or services will be delivered.

Contract Fee: "How Much Am I Paying?"

What compensation is being exchanged for the delivery of the goods or services? Clearly identify the dollar amounts and, similarly with how you describe the Scope of Work, include **how** and **when** payment will occur. (A common strategy is to tie payments to delivery milestones.) If you plan to rely on a calculation to determine what the payment amount will be, make sure the calculation **consistently works**.

Ownership of Deliverables: "What Is Mine?"

Many transactions result in the delivery of goods, such as raw materials or works of art, or the creation of work product, such as a database or archival system. Identifying exactly what you own can easily become a sticking point, and getting it right really depends on the work being done. One important factor is whether the Deliverables embody any intellectual property ("IP"), such as copyrights, patents, or trademarks.

Personal property rights (ownership of a tangible object) are **separate** from IP rights, and both rights typically do not move together at once. Traditionally, the creator of an IP asset retains ownership of the IP, even if ownership of the physical object that embodies the IP changes hands.

For example, suppose you hire a photographer to shoot photos of a series of your drawings, and they give you both physical and digital copies of the photos. You have a personal property right

in the physical photos, meaning you can dispose of them however you wish. Similarly, with the digital copies, you can keep them or delete them. However, for *both* versions, you may not *copy* the photographs without the photographer's permission.

The best practice here is to be explicit about exactly what rights are granted with respect to any Deliverables, especially for any Deliverables containing IP:

RIGHTS IN THE DELIVERABLES

Upon the execution of this Agreement, Consultant grants Client a worldwide, non-exclusive, royalty-free license to use, reproduce, and display the Deliverables for both personal and commercial purposes.

Employee vs. Independent Contractor

Don't overlook this issue! It's essential to be clear on the nature of the transactional relationship, and it's easy to make incorrect assumptions. Whether the person you hire is an employee or an independent contractor has significant consequences on worker rights, tax liabilities, and even intellectual property ownership. It is in the best interest of *both parties* to any service agreement that they mutually understand exactly where they stand. Fortunately, a contract can easily clarify the issue.

Both employees and contractors perform work on behalf of another party—either an employer or a client—but there are key distinctions. While employment laws vary from state to state, generally,

- an **employee** works for an employer who *controls the manner in which the work is performed*, including the schedule, place of work, and resources used.
- an **independent contractor** usually sets their own schedule, determines their own pricing, supplies the tools necessary to complete the work, and is *free from control* over how they perform the work.

There are advantages and disadvantages in either relationship. For example, while employers have tighter control over their employees' work, they also have to strictly comply with wage, hour, and worker's compensation laws, among others. We recommend checking your own state's independent contractor laws or consulting with an employment attorney.

In either case, make sure you confirm whether your worker is an employee or independent contract in writing!

Managing Risks

Being a working visual artist can be complicated. If you expect to have team members (assistants, consultants, photographers, etc.) onsite, then be prepared to include contract language that spells out who is responsible for keeping them and their property safe, and how you will handle personal injury or property damage.

Indemnification

Your contracts may include an "indemnification" clause. Put simply, an indemnification clause requires one party (an "indemnitor") to cover the costs incurred by another party (the "indemnitee") for injuries sustained by a third party. For example, a commercial studio tenant (indemnitor) indemnifies their landlord (indemnitee) against a personal injury claim brought by the tenant's visitor (third-party) who slipped on a wet floor.

Waivers, Releases, and Covenants Not to Sue

Your contracts may also include a "waiver" against any claims, a "release" from liability, or a "covenant not to sue." While these words are often seen together, they have separate (though similar) purposes:

- In a **waiver of a claim**, the waiving party *gives up* the right to file a lawsuit for certain injuries.
- In a **release from liability**, the releasing party *relieves* another party from a duty to pay for the costs resulting from certain injuries.
- A **covenant not to sue** is *a duty* for the covenanting party not to file a lawsuit for certain injuries. A covenant not to sue is stronger than a waiver, because filing a lawsuit would violate the covenant and therefore breach the contract.

Assumption of Risk

Even though you have made a good faith effort to keep your space safe for visitors, you might want your visitor to acknowledge up front that they understand that visiting your studio can present certain risks. An assumption of risk clause does just that, and is usually paired with a waiver, release, covenant not to sue, or a combination of them:

ASSUMPTION OF RISK

Client represents that it has, to the best of its ability, made a good faith reasonable effort to keep the Art Studio free and clear from any known hazards. Consultant acknowledges that visiting a visual artist's studio can present certain risks, and Consultant agrees to waive any claims against Client and release Client from any liabilities arising from personal injury or property damage resulting from Consultant's visit to the Art Studio.

Bear in mind that each of these clauses has its own unique advantages and disadvantages, and so they are complementary risk-management strategies meant to work together.

A Note on Sources

Be careful relying on templates and samples found online. Every relationship is different, every contract is different, and each state has its own contract laws. Never rely on a sample agreement you found online without first tailoring it to your specific needs.