

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a bold, serif font, centered between two horizontal blue bars.

**NEW YORK
CITY BAR**

Contact: Maria Cilenti - Director of Legislative Affairs - mcilenti@nycbar.org - (212) 382-6655

**REPORT BY THE ART LAW COMMITTEE
RECOMMENDING AMENDMENTS TO NEW YORK'S ARTS AND CULTURAL
AFFAIRS LAW RELATED TO OPINIONS CONCERNING AUTHENTICITY,
ATTRIBUTION AND AUTHORSHIP OF WORKS OF FINE ART**

This report is respectfully submitted by the Art Law Committee of the New York City Bar Association in support of proposed legislation attached hereto as Exhibit C (the "Bill"). The Association is an organization of over 23,000 lawyers and judges dedicated to improving the administration of justice. The members of the Art Law Committee address legal issues relating to works of art.

The Committee is proposing the Bill because it addresses certain deficiencies in provisions of the New York Arts and Cultural Affairs Law ("NYACAL"): namely, the absence of protections under the law for authenticators in rendering independent, good-faith opinions about the authenticity, attribution and authorship of works of fine art. Specifically, the Bill in Article 11 adds "Authenticator" as a defined term, including within its coverage authors of catalogues raisonné or other scholarly texts as well as other persons recognized in the visual arts community as having expertise regarding the artist or work of fine art with respect to which the authenticator renders an opinion as to authenticity, attribution or authorship. "Authenticator" also includes persons recognized in the visual arts or scientific community who have expertise in uncovering facts (such as forensic scientists) that serve as a direct basis for an authenticity or authorship opinion regarding a work of fine art. The definition of "authenticator" expressly excludes anyone with a financial interest in the work of fine art being evaluated, other than to be compensated for the rendering of the opinion. Additionally, the Bill in Article 13 adds a section designed to discourage frivolous lawsuits brought against authenticators who render such opinions in good faith.

While there is, at present, no other state law speaking to the circumstances addressed by the Bill, the Committee is hopeful that New York State, which is arguably the art commerce capital of the United States, the governing law for many major art transactions, and the locus for the flag-ship branches of international auction houses and art galleries, will approve the Bill, rendering it the prototype for such legislation in other states. The Committee's support is also informed by various lawsuits which had been lodged against artists' foundations such as The Andy Warhol Foundation, the Pollock-Krasner Foundation, The Calder Foundation, the Basquiat Authentication Committee and the Dedalus Foundation (dedicated to preserving the artistic legacy of Robert Motherwell), causing The Andy Warhol Foundation, The Pollock-Krasner Foundation, the Roy Lichtenstein Foundation and the Estate of Jean-Michel Basquiat to cease their authenticating activities – to the detriment of the artists' legacies, and to the art market, as discussed below. Moreover, the Committee has determined that enactment of the Bill is made all

the more timely by the closing in 2011 of Knoedler & Company which, at the time, was New York's oldest art gallery. Knoedler was forced to close its doors in the wake of an F.B.I. investigation that resulted in one indictment to date and the filing against the gallery of, to date, six lawsuits alleging the sale of forged works of fine art, including works claimed to have been created by Jackson Pollock, Robert Motherwell and many others, as will also be addressed below.

BACKGROUND

The art market is peculiarly vulnerable in that the value of works of art is dependent upon their authenticity. Although authenticity is in large part the driver in art transactions, authenticity can be difficult to determine. Where a party spends six, seven, eight or even nine figures on a work of art, for example a painting by Picasso, the buyer wants confirmation that he or she is buying, in terms of authorship, what the artwork is purported to be, whether the buyer is acquiring it from a private individual, a gallery or an auction house. Whatever the source, a buyer may have no interest at all if there is no reliable opinion regarding the work of art's authenticity. When a work of art is lent to a museum, the museum, as a nonprofit institution essentially educational and aesthetic in purpose, requires assurance that what it will be exhibiting is, in terms of authorship, what it is described to be. When a work of art is donated to a museum, the donor, in order to be able to take an appropriate tax deduction for the donor's charitable donation, must obtain a reliable authenticity opinion that will justify the amount of the deduction. Estates that include works of art require authenticity determinations in order to affix a dollar value to those works of art. Moreover, reliable authenticity opinions reduce the likelihood that fakes and forgeries will flood the marketplace. These principles apply to all art transactions throughout the state, whether or not money changes hands and whether or not the entities involved are for-profit or not-for-profit, examples of such entities being set forth in Exhibit A.

It should be noted here that authenticity opinions encompass more than uncovering fakes and forgeries: often, authenticity issues arise because a legitimate work of art has been misattributed to a particular artist. For example, the question of whether a painting was authored by Sir Joshua Reynolds, a distinguished 18th century English portrait painter, or by Tilly Kettle, a lesser contemporary, was the subject of a lawsuit in the 1980's, *Travis v. Sotheby Parke Bernet*.

Artwork is generally authenticated by (1) documentation, (2) stylistic inquiry, and (3) scientific verification, and each of these three methods has its drawbacks. Documentation of the history of ownership and public exposure of a work of art is sometimes unavailable, inasmuch as documentation itself is, on occasion, either forged or missing entirely. Stylistic inquiry is subjective: an expert examines the work and, on the basis of his or her knowledge, experience and intuition, determines its authenticity. The results of stylistic inquiry may vary from expert to expert, and the opinion of an expert may change over time. Scientific verification, including such techniques as radio carbon dating and thermoluminescent analysis which are useful in determining the age of art objects, frequently used in conjunction with stylistic inquiry, employs objective procedures, thereby permitting the accuracy of the results to be tested by other scientists. However, scientific verification is more useful in uncovering a fake, rather than in confirming authorship.

Not surprisingly, in view of the necessary imperfections of the authentication process, authenticators must practice their profession at their own risk. They have been sued in the course of rendering opinions in good faith about the authenticity, attribution or authorship of artworks on a variety of theories, to wit: negligence, negligent misrepresentation, fraud, product disparagement, defamation, as well as on antitrust grounds.¹ Usually, under the law, the expert prevails, after having spent thousands of hours and dollars on a legal defense rather than practicing his or her profession. But that does not prevent an expert from being bullied and harassed by frivolous lawsuits brought by unhappy plaintiffs displeased with an expert's opinion.

Consider, now, the state of artists' foundations and authentication boards. If an artist has a resale market, the artist or his estate often creates a foundation to preserve the artist's legacy. That foundation will often publish a catalogue raisonné, that is, a definitive text of the artist's work and a primary reference for the art market. Inclusion of a work in a catalogue raisonné – particularly one affiliated with the artist's foundation – constitutes an imprimatur of the work's authenticity; if a work is excluded from such a catalogue raisonné, it may well be unsalable. If a work purportedly by an artist is *not* in the artist's catalogue raisonné, an interested party may seek validation of the work's authenticity through an artist's authentication board, which is frequently created by the artist's foundation. An authentication board generally includes people with scholarly knowledge of the artist's work, people with direct experience working with the artist, relatives of the artist, and/or people who are officers of the artist's foundation. Unlike the process of preparing a catalogue raisonné, an authentication board only reviews artwork submitted to it and its process of evaluation is, of necessity, generally secretive since transparency can enable art forgers to readily ascertain "hallmarks" of a work actually authored by the artist and incorporate them into fakes. Perhaps predictably, artists' foundations and authentication boards have been sued on conspiracy theories in the course of rendering opinions about the authenticity, attribution or authorship of a work of art. One such artist foundation, The Pollock-Krasner Foundation, established an authentication board to examine and make authenticity determinations on works of art purportedly by the artist Jackson Pollock. The board, in operation for six years (1990-1996) and during that period having evaluated hundreds of hitherto unknown works and certifying for entry into the catalogue raisonné only a few of them, dissolved after the Pollock catalogue raisonné was completed. The Pollock-Krasner Foundation, however, has continued to receive legal challenges based on its authenticity determinations.

More recently, The Andy Warhol Foundation for the Visual Arts dissolved the Andy Warhol Art Authentication Board in 2012 following a series of controversial authenticity decisions, including the double denial of validation of a silk-screened Warhol self-portrait prepared by a silk-screen factory which may or may not have been created at Warhol's direction. This decision by the Warhol authentication board resulted in a lengthy lawsuit, *Simon-Whelan v. The Andy Warhol Foundation for the Visual Arts* commenced in 2007, involving an array of

¹ See generally R. Lerner and J. Bresler, "Art Law, The Guide for Collectors, Investors, Dealers, and Artists," 4th Ed., Vol. I, p. 491-562 (2012).

claims, including antitrust claims, lodged against the Foundation by the owner of the purported Warhol. The legal defense for this case alone cost the Foundation more than \$6 million dollars. Consequently, after having evaluated approximately 6,000 pieces over a fifteen-year period, the Foundation determined that, in the current legal climate, it should dissolve its authentication board and concentrate its resources on its grant-making and its other charitable activities. Other artist's entities, such as the Roy Lichtenstein Foundation and the Jean-Michel Basquiat Estate, have also ceased authenticating works of art in the face of the potential legal exposure.

When authenticators cease authenticating, forgeries can flood the market. In 2011, the Knoedler Gallery, a distinguished art gallery in Manhattan which had been in business for 165 years, closed its doors and has been subsequently sued, to date, by six different clients on various charges, including fraud, for selling allegedly forged paintings: two forged Jackson Pollocks; one forged Clyfford Still; one forged William de Kooning; and two forged Mark Rothkos. A seventh client commenced legal proceedings on being sold a forged Jackson Pollock. That case ultimately resulted in a confidential settlement. The Knoedler Gallery acquired the "Modernist masterpieces" from a little known art dealer on Long Island, New York, named Glafira Rosales, who apparently sold some 63 works to Knoedler and one other art dealer between 1994 and 2009. The works were all new to the market and it is alleged that Ms. Rosales was not forthcoming about the cache of works' ownership history. It has been claimed that no experts challenged the authenticity of the works while they were in Knoedler's hands. After many of the works had been sold, the F.B.I. commenced an investigation based on the opinions of several experts who, when the works that were the subjects of lawsuits had been submitted for a determination of authenticity after they were sold, either questioned their authorship or denounced the works as fake. If the experts that did come forward after the sales had been too wary of potential liability to opine, the investigation that ultimately uncovered the fraud would have been substantially impeded. The art dealer on Long Island who was Knoedler Gallery's source for the paintings, Ms. Glafira Rosales, was indicted in May 2013 for tax fraud and pled guilty. The original complaint against her alleged that several of the works of art "have been conclusively determined by authorities experienced in the field of art, art history and materials science not to be by the hand of the artists that Rosales represented." The alleged forger later was discovered -- a superseding indictment alleges that a person residing in Queens, New York created the 63 fake works of art. Ms. Rosales allegedly was paid \$33.2 million for the fakes, and the galleries allegedly sold them into the stream of commerce for \$80.7 million.²

² In this litigious environment, the trend of art authenticators has been either to 1) entirely dissolve their authentication boards – (for example, The Pollock-Krasner Foundation, The Andy Warhol Foundation, the Roy Lichtenstein Foundation, the Estate of Jean-Michel Basquiat) or 2) substantially increase their liability insurance. For example, The Richard Diebenkorn Foundation expects to protect its authentication board's seven experts with a multi-million dollar insurance policy when Diebenkorn's catalogue raisonné is published in two-to-three years. *See* "Fear of litigation is hobbling the art market," *The Economist*, Nov. 24, 2012, *available at* <http://www.economist.com/news/business/21567074-fear-litigation-hobbling-art-market-collectors-artists-and-lawyers> (last visited Dec. 5, 2013).

However, carrying liability insurance (which can be particularly burdensome to an individual authenticator) does not guarantee protection. For example, in 2007-2009 when the Andy Warhol Foundation was sued by Joe Simon-Whelan as part of a class action, and later named in a similar class action suit, the Philadelphia Indemnity

SUMMARY OF PROPOSED BILL

Article 11 of NYACAL

To define the group of art experts that the Bill is intended to incentivize to continue rendering authenticity opinions for the benefit of both legitimate commerce and the artists' legacy, the Bill would amend Article 11 ("Definitions") to include a definition of "Authenticator." An authenticator includes a person recognized in the visual arts community as having expertise regarding the artist or work of fine art to be evaluated, or a person similarly recognized in the visual arts or scientific communities as having expertise in uncovering facts (such as, for example, a forensic scientist) that serve as a basis for an opinion regarding the authenticity, attribution or authorship of a work of fine art.³ Expressly excluded from the

Insurance Company (PIC) initially denied coverage but ultimately agreed to pay the full limit of \$2 million of defense fees under its E&O policy – but nothing under its Directors & Officers policy. This resulted in even further litigation.

Note also, that a provider of liability protection can require the art professional to establish and maintain a loss-prevention program to help minimize the chance of a professional liability claim being brought in the first place.

Elements of such a loss-prevention program can include the following:

- Establishing the fees and/or billing practices at the beginning of a client relationship
- Using engagement letters, contracts, and other means to precisely identify the scope of services to be performed
- Keeping written documentation of all activity, including telephone calls, billing calculations, and the like
- Participating in peer reviews, when feasible
- Avoiding situations that present conflicts of interest
- Obtaining appropriate credentials and certifications and taking continuing-education courses to remain current regarding developments in the profession
- Screening new clients carefully and keeping existing clients informed at all times
- Avoiding giving specific warranties and similar performance guarantees

Adherence to all of these elements can be burdensome to authenticators – particularly those such as scholars with modest incomes who practice their profession solo. Moreover, alleged non-compliance with even one of the above elements might cause an insurance carrier to "justify" withholding compensation payments.

Therefore, while liability coverage for the art authenticator may be advisable, it can work well in conjunction with the Bill, and is not a substitute for the Bill.

³ The standard requiring recognition in a particular community or industry has been used in various other legal contexts. For example, certain councils created by the New York State Legislature may only appoint members who are "recognized for their expertise." New York Executive Law § 941.1; New York Mental Hygiene Law § 80.05(c)(i). Similarly, the U.S. Congress requires members of the National Council on the Arts to be "widely recognized for their broad knowledge of, or expertise in, or for their profound interest in the arts." 20 U.S.C. §955(b)(1)(C)(i)(I). In a related context, one of the standards in the Visual Artists Rights Act ("VARA") requires a work of art to be "of recognized stature." 17 U.S.C. §106A(a)(2)(b).

The Committee anticipates that courts will determine whether a person giving an authenticity opinion qualifies as an "Authenticator," using a process similar to that for qualifying an expert. Various factors may include some or

definition is any person having a financial interest in the work of fine art to be evaluated, other than to be compensated for the rendering of the expert opinion.⁴

Article 13 of NYACAL

Having defined in Article 11 the group to be incentivized to continue to render authenticity opinions, a new proposed Section 13.04 in Article 13 creates a mechanism to enable an authenticator to continue to practice his or her profession in a more hospitable legal climate. The objective of Section 13.04 is to deter a frivolous civil lawsuit (but not a meritorious civil suit) against an authenticator who renders an opinion in good faith about the authenticity, attribution or authorship of a work of fine art. To accomplish this objective, Section 13.04 provides for a three-pronged mechanism set forth below.

Section 13.04.1(a) requires that the complaint specify with particularity facts sufficient to support each element of each claim asserted. This particularity requirement parallels similar requirements in Rule 3016 of New York's Civil Practice Law and Rules and Rule 9(b) of the Federal Rules of Civil Procedure. Such particularity requirements raise the standards for filing a claim, discouraging the filing of a frivolous suit.

Section 13.04.1(b) requires that a plaintiff prove the elements of each claim by "clear and convincing evidence." Under this standard, a plaintiff must prove that a proposition is *substantially* more likely than not to be true. While most civil cases require a lesser standard of proof, *i.e.*, "preponderance of the evidence" (a standard which is met if a proposition is merely more likely to be true than not true, effectively a 51% likelihood of being true), an array of civil claims adhere to the higher standard. Examples of claims requiring clear and convincing evidence include some fraud claims, the law in New York of Public Nuisance, patent claims, habeas corpus, certain actions in defamation, child custody cases and administrative hearings (citations for each are set forth as Exhibit B). Again, the objective of Section 13.04 is to discourage frivolous lawsuits and thereby create a safer legal climate for authenticators to render in good faith opinions on the authenticity, attribution or authorship of a work of fine art, all for the benefit of legitimate commerce and an artist's legacy.

Section 13.04.2 provides that an authenticator is entitled to recover reasonable attorneys' fees, costs and expenses if and to the extent that the authenticator prevails in an action addressed

all of the following: the extent to which the Authenticator is known in the art or scientific community to have expertise concerning the artist, the artist's works of art or the scientific technique employed; whether the Authenticator has authored scholarly texts or articles concerning the artist or the artist's works of art; whether the Authenticator has personal knowledge of the creation of the work of art or the artist sufficient to be material to a determination of authenticity; etc.

⁴ If there is a dispute concerning whether a person qualified as an Authenticator "has a financial interest in the work of fine art for which such opinion is rendered or in any transaction concerning such work of fine art for which the opinion is rendered," the Committee anticipates that a determination in that regard would be made by the finder of fact, or, under applicable summary judgment or motion to dismiss standards, by the court.

by this Section 13.04. This provision parallels similar provisions in other sections of New York's Arts and Cultural Affairs Law, to wit: Section 12.01.3⁵ of Article 12 and Section 15.15.4⁶ of Article 15.

CONCLUSION

Acknowledging authenticity's unique role as a driver in the art market, the vulnerability of the market to fakes and forgeries flooding the stream of commerce and, consequently, the considerable legal exposure of authenticators who practice their profession in good faith, this Bill defines with clarity that segment of the art market that should be incentivized to so practice its profession, and provides a mechanism through which authenticators can do so and thereby promote legitimate commerce in New York's thriving art market and preserve an artist's legacy without fear of "legal thuggery."⁷ For these reasons, the Committee is proposing the Bill and urges its enactment into law.

December 2013

⁵ NYACAL 12.01(3) provides that "Any person who has been injured by reason of a violation of this article may bring an action in his or her own name to enjoin such unlawful act, to recover his or her actual damages, or both. The court may award reasonable attorneys' fees, costs and expenses to a prevailing plaintiff in any such action."

⁶ NYACAL 15.15(4) provides that "In any action to enforce any provision of this article, the court may allow the prevailing purchaser the costs of the action together with reasonable attorneys' and expert witnesses' fees. In the event, however, the court determines that an action to enforce was brought in bad faith it may allow such expenses to the art merchant as it deems appropriate."

⁷ *Seltzer v. Morton*, 336 Mont. 225, 154 P.3d 561 (2007) (Montana Supreme Court upheld punitive damages against a law firm representing a collector who filed a lawsuit against an authenticator, stating that the law firm's "use of the judicial system amounts to legal thuggery").

EXHIBIT A

New York Arts Foundations and Museums

The following are some of the many arts foundations and museums located throughout the State of New York:

Artist Foundations:

Romare Bearden Foundation, NY, NY
Calder Foundation, NY, NY
Chuck Close Foundation, NY, NY
Dedalus Foundation (for Robert Motherwell); 57th Street, NY NY
The Adolph & Esther Gottlieb Foundation, NY, NY
The Renee & Chaim Gross Foundation, NY, NY
The Keith Haring Foundation, NY, NY
Wolf Kahn & Emily Mason Foundation, NY, NY
The Willem de Kooning Foundation; Madison Ave., NY, NY
The Pollock-Krasner Foundation; Park Ave, NY, NY
The Roy Lichtenstein Foundation; Washington St., NY, NY
Boris Lurie Art Foundation; 2302 49th Ave., Long Island City, NY
The Robert Mapplethorpe Foundation, Inc., NY, NY
Joan Mitchell Foundation, NY, NY
Newington-Cropsey Foundation, Hastings-on-Hudson, NY
The Robert Rauschenberg Foundation, Lafayette St., NY, NY
Larry Rivers Foundation, Wainscott, NY
The Andy Warhol Foundation, 65 Bleecker St., NY, NY

Museums outside Manhattan:

Albright-Knox Art Gallery, Buffalo, NY
Albany Institute of History and Art, Albany, NY
The Bronx Museum of the Arts, Bronx, NY
Brooklyn Museum, Brooklyn, NY
Dia: Beacon, Riggio Galleries, Beacon, NY
Everson Museum, Syracuse, NY
Fenimore Art Museum, Cooperstown, NY
Herbert F. Johnson Museum of Art, Cornell University, Ithaca, NY
The Hyde Collection, Glens Falls, NY
Jacques Marchais Museum of Tibetan Art, Staten Island, NY
Memorial Art Gallery, Rochester, NY
Museum of Contemporary African Diasporan Arts, Brooklyn, NY
Munson Williams Proctor Arts Institute, Utica, NY
The Noguchi Museum, Queens, NY
Olana, Hudson, NY

Queens Museum of Art, Queens, NY
SculptureCenter, Long Island City, NY
Storm King Art Center, Mountainville, NY
The 1890 House Museum, Cortland, NY

Museums in Manhattan:

American Folk Art Museum, NY, NY
Asia Society and Museum, NY, NY
China Institute, NY, NY
El Museo del Barrio, NY, NY
The Frick Collection, NY, NY
Japan Society, NY, NY
The Jewish Museum, NY, NY
Leslie-Lohman Museum of Gay and Lesbian Art, NY, NY
The Metropolitan Museum of Art, NY, NY
Museum of African Art, NY, NY
Museum of Biblical Art, NY, NY
The Museum of Modern Art, NY, NY
National Academy Museum, NY, NY
National Museum of the American Indian, Smithsonian Institution, NY, NY
Neue Galerie, NY, NY
Nicholas Roerich Museum, NY, NY
Rubin Museum of Art, NY, NY
Solomon R. Guggenheim Museum, NY, NY
The Studio Museum in Harlem, NY, NY
The Ukrainian Museum, NY, NY
Whitney Museum of American Art, NY, NY

EXHIBIT B

I. Statutes – New York

Adjustment of Tax on Unrelated Business Income

N.Y. TAX § 292 (McKinney 2008 & Supp. 2013)

Guardianship Proceedings

N.Y. MENTAL HYG. § 81.12 (McKinney 2006)

Establishing Paternity

N.Y. EST. POWERS & TRUSTS § 4-1.2 (McKinney 2012)

Child Custody

N.Y. SOC. SERV. § 384-b (McKinney 2010)

Unjust Conviction and Imprisonment Claims

N.Y. CT. CL. ACT § 8-b (McKinney 1989 & Supp. 2013)

Simultaneous Death Act

N.Y. EST. POWERS & TRUSTS § 2-1.6 (McKinney 2012)

II. Statutes – Federal

Civil Action Against Labor Organization

29 U.S.C.A. § 464 (West 1998)

Whistleblower/Employee Reprisal Hearings

5 U.S.C.A. § 1221 (West 2007 & Supp. 2013)

42 U.S.C.A. § 5851 (West 2012)

49 U.S.C.A. § 30171 (West Supp. 2013)

49 U.S.C.A. § 42121 (West 2007)

Tax Evasion and Fraud

TAX CT. R. 142 (West 2011)

Admissibility of Aliens

8 U.S.C.A. § 1229a (West 2007)

Child Custody

25 U.S.C.A. § 1912 (West 2013)

III. Cases

Fraud Claims

Ceglia v. Zuckerberg, No. 10-CV-00569A(F), 2013 WL 1208558, at *13 (W.D.N.Y. Mar. 26, 2013)

Arista Records LLC v. Lime Group LLC, 715 F. Supp. 2d 481, 522-23 (S.D.N.Y. 2010), *opinion withdrawn and superseded*, 784 F. Supp. 2d 398 (S.D.N.Y. 2011)

The law in New York of Public Nuisance

NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 478 (E.D.N.Y. 2003)

Patent Claims

CA, Inc. v Simple.com, Inc., 780 F. Supp. 2d 196, 209 (E.D.N.Y. 2009)

Habeas Corpus

Cotto v. Herbert, 331 F.3d 217, 235 (2d Cir. 2003)

Defamation - where plaintiff is a (general purpose or limited purpose) public figure and the matter is either public or private

Stern v. Cosby, 645 F. Supp. 2d 258, 272 (S.D.N.Y. 2009)

Zaidi v. United Bank Ltd., 747 N.Y.S.2d 268, 277 (N.Y. Sup. Ct. 2002)

Child Custody Cases

In Re Guardianship and Custody of Terrance G, 731 N.Y.S.2d 832, 837 (N.Y. Fam. Ct. 2001)

Administrative Hearings

Matter of Beck-Nichols v. Bianco, 20 N.Y.3d 540, 552 (N.Y. 2013)

New York Civil Liberties Union v. New York City Transit Auth., 675.F Supp 2d. 411, 418 (S.D.N.Y. 2009), *aff'd*, 652 F. 3d 247 (2d Cir. 2011), *opinion amended and superseded*, 684 F.3d 286 (2d Cir. 2012)

NEW YORK CITY BAR

Contact: Maria Cilenti - Director of Legislative Affairs - mcilenti@nycbar.org - (212) 382-6655

EXHIBIT C

STATE OF NEW YORK

2013-2014 Regular Sessions

AN ACT to amend the arts and cultural affairs law in relation to opinions concerning authenticity, attribution and authorship of works of fine art.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivisions 3 through 22 of section 11.01 of the arts and cultural affairs law
2 are renumbered subdivisions 4 through 23, and a new subdivision 3 is added to read as
3 follows:

4 3. “Authenticator” means, subject to the limitations in the final sentence of this
5 paragraph, a person recognized in the visual arts community as having expertise
6 regarding the artist or work of fine art with respect to whom such person renders an
7 opinion in good faith as to the authenticity, attribution or authorship of a work of fine art,
8 or a person recognized in the visual arts or scientific community as having expertise in
9 uncovering facts that serve as a direct basis, in whole or in part, for an opinion as to the
10 authenticity, attribution or authorship of a work of fine art. “Authenticator” shall include,
11 but not be limited to, authors of catalogues raisonné or other scholarly texts in which an
12 opinion as to the authenticity, attribution or authorship of a work of art is expressed or
13 implied. “Authenticator” shall not include a person who has a financial interest in the
14 work of fine art for which such opinion is rendered or in any transaction concerning such
15 work of fine art for which the opinion is rendered, other than to be compensated for
16 services such person engaged in to provide an opinion as to the authenticity, attribution or
17 authorship of such work of fine art or to provide information on which such an opinion is
18 based in whole or in part.

DRAFT

1 §2. The arts and cultural affairs law is amended to add a new section 13.04 to read as
2 follows:

3 § 13.04. Opinions as to the Authenticity, Attribution or Authorship of Works of Fine
4 Art.

5 1. In any civil action brought against an authenticator that arises from or relates to
6 the authenticator's opinion or information concerning a work of fine art, the claimant
7 is required to:

8 (a) specify with particularity in the complaint facts sufficient to support each
9 element of the claim(s) asserted; and

10 (b) prove the elements of such claim by clear and convincing evidence.

11 2. In any action described in Section 1, the authenticator shall be entitled to recover
12 his, her or its reasonable attorneys' fees, costs and expenses if and to the extent that
13 the authenticator prevails in such action.

14 §3. This act shall take effect on the sixtieth day after it shall have become law and shall
15 apply to all opinions as to the authenticity, attribution or authorship of a work of fine art
16 provided to someone other than the authenticator after such effective date.