Key Issues for Collectors: Authenticity, Provenance, and Working with Museums

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Authenticity, Provenance, and Working with Museums

Richard Horwood*

MR. AHASAY: So I haven't introduced myself yet. I'm Dan Ahasay, the symposium chair from the Business and Commercial Law Journal. I’d like to announce our next speaker, Richard Horwood. Richard is a partner at Horwood Marcus & Berk. He devotes his practice to business, financial, and tax matters, including business law, art law, income, gift and estate taxation, as well as charitable succession and collection planning.

Mr. Horwood advises business owners, nonprofit organizations, donors, and collectors on a variety of complex planning issues, as well as collectors and their other advisors on key issues, such as authentication, provenance, collection management, tax matters disposition, and charitable museum and family gifting. As collectors’ counsel, Mr. Horwood assists in enhancing the value of the collection by positioning exhibits and cataloging, as well as working with dealers, auction houses, family foundations and museums.

Mr. Horwood has significant experience negotiating art loan agreements, gift acceptance agreements, dealer and auction agreements, and tax efficient planning strategies during a lifetime and at death.

He’s been a frequent speaker at national conferences and seminars and was chosen as one of the nation’s Top 100 attorneys by Worth Magazine, and was recognized in the Trust and Estate section of the 2014 editions of the Best Lawyers in America and Chicago’s Best Lawyers. Most recently, Mr. Horwood received the Austin Fleming Distinguished Service Award from the Chicago Estate Planning Council for his significant contribution to the improvement of estate planning practices.

He earned his B.A. from Colgate University, his LL.B. from the University of Pennsylvania, his M.B.A. from American University, and his LL.M. in taxation from George Washington University. Lastly, Mr. Horwood has just published a book called Planning for Art Investments. And, if anyone would like a copy or to get ahold of it, you could leave your information with either myself or Mr.

* Partner at Horwood Marcus & Berk

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Horwood, and we can get that taken care of for you. So with that, I will turn it over to Richard Horwood.

MR. HORWOOD: I have been lucky over the years to change my focus in my practice and reinvent what I do just from my own personal standpoint. So my background starts with tax, then I did a lot of business work, a lot of trust and estates work. And from that, I always had an interest in art. And then I found that I really liked that and started doing some art consulting.

What I will tell you is that collectors — and that’s what we’re going to talk about today, more from the standpoint of collectors — collectors need attorneys. They need people who go beyond the knowledge of works of art to how to deal with it, how to protect yourself, some of which is coming after me. It relates to what I’m going to talk about, but I’m also going to give you a little art education as well. So how many of you had any courses in art history or art appreciation in school, in college?

Okay. So we’re going to test your knowledge today. So, again, I’m going to speak more from the collector’s standpoint. But one thing I read a few years ago that resonates with me still today is something Hippocrates said, who was before my time in 400 B.C. And he said, “Life is short, art endures.”

When we think about art enduring, if we look at what was at the Field Museum, there are aspects of art. Many of the objects were before people used the written word, other than wall cave paintings and what have you. So I think being able to go back many years and to learn more about us, our world, is incredibly important. And the other part of the same thing is what we’ll talk about today, is the issue of cultural heritage.

The Field Museum shows a vast number of objects. Where do those objects belong? Do they belong where they were produced, or do they belong in traveling exhibitions or other museums where other people can learn and enjoy? Most people who get their beginning information about art do so by going to museums or to a gallery where they’re serving refreshments, and learning what you like and what you don’t like.

Now, much of what I will talk about includes paintings, but it will include other objects as well. The people I deal with who are collectors all started somewhere learning. Sometimes they started by having a collection when they were a child of whatever — toy trains, books, anything — and they just got this bug and got this interest in collecting.
The first thing to consider is how one learns about art. And, again, there are many ways. And people learn at various times, some early on, some later, some do it just because it looks nice, it fits with their couch, it fits something they do. But the most important thing to know about art is this painting.

[Slide displayed on screen]¹ Now, no one is going to know who this was, but at the Art Institute of Chicago, Robert Ryman, and all his paintings are in white. But it's a great understanding of the art world. The art world is opaque. There are no rules, regulations really covering the buying and selling of art. There are no regulations. There's no Securities and Exchange Commission for art. There's nothing involved with purchasing art. And what I like to use, and I will do today, everything is in the materials I gave you except if I tell you otherwise.

Okay, so one of them is something from yesterday's New York Times.² A Modigliani painting had an irate purchaser. He purchased the painting, a Modigliani, for $120 million, give or take. He then found out that the person he bought it from, the dealer, had paid, I think $85 million for it. Whatever it was, there was a multi-million dollar profit to the dealer. But the dealer purchased it just recently.

The question is: What obligation did the dealer have to the buyer to disclose what he bought it for? And the answer is — well, there's a case where he's going to sue him over it, but the fact of the matter is he is not an agent, he is not an employee, he is not a representative. He's a dealer.

Anyone bought a car? Do you have any idea — even though there are regulations — do you have any idea what the dealer paid for that car? Okay, or whether they made money when they sold you that car? Guaranteed they made money when they sold you the car, either through a rebate or otherwise. So even if you had disclosure, as you do in automobile purchases, you really don't know. So that's part of the opaque nature of dealing with art. You have to trust your instincts. You have to trust the people you're dealing with. You have to decide what the value is, if you're buying from a dealer. And we'll get into it - it's also an issue with auction houses as well.

¹. Robert Ryman, Twin (1966). Please contact the DePaul Business & Commercial Law Journal at depaul.bclj@gmail.com for copies of the slides.
Another artist who you may not be familiar with, Damien Hirst, there’s an advantage with him; he’s alive. Now, having a work by an artist who’s alive, at least you can find out, did he actually do it. Because many people would look at this Robert Ryman as well and say, “Well, I could have done that.” The answer is “You didn’t.” And that’s worth tens of millions of dollars. And he has done a number of them. They’re either called dot or spot paintings, one or the other. But if you’re in the market for one of his pieces, and I think it’s fairly attractive - it could match almost any couch. And he also has done pigs in formaldehyde cases. He’s done some things totally different than this. He’s from England. But at least here you could check to see that it was authentic.

But if you were going to buy that, what would you want to know? You would want to know when it was made and the chain of title, or what’s known as provenance. What’s the chain of ownership? Anyone who buys any work of art of any significance should have provenance information, that is, how was it originally produced, who bought it from the artist, if you can go back that far. And if you buy something, have a contemporaneous picture taken somehow indicating that that’s the object. Because we have clients who buy objects. Indian Ganeshes, they bought them many years ago when they weren’t worth much. That’s the real issue here. If you buy something that has value, you know to do something. But you bought a Damien Hirst early on, maybe you spent a few thousand dollars, you want a picture of it; you want to show exactly what it is.

When you’re dealing with objects that aren’t signed on the back, you better be clear to know when you received the object and its history. The UNESCO treaty - most issues of provenance and whether you bought something in the United States legally or illegally, they look at all these materials. Purchased something before 1970, you’re fairly home free. If you purchased it after that - well, so far the Ganesh - the Ganesh is the little Indian person with an elephant head. I can describe it later, but - and you’ve seen them. I’d want to know that it came into the United States before 1970, right? And if I had bought it in 1963 in a bazaar in India, I probably didn’t bother - if I bought it in England - somewhere where many of them were sold.

So today the importance of anyone buying anything - forget about owning it - anyone buying anything that’s antiquity, get the information on who the sellers were and then the transfers from person to person, how it was transferred, just to create this title transaction.

When I say title insurance, I'm speaking of "insurance" with quotes around it because - and I know we had a speaker earlier on title insurance - there are sometimes exceptions to title insurance for objects. So, again, you want to show the work, how it progressed from hand to hand until it got to you.

Now, I think the material goes into this. It helps if you're a "good faith purchaser" and you didn't know that the object was stolen. It wasn't handed to you by someone. You can get some protection from the Uniform Commercial Code. Again, this is in the outline.

So there are ways around the issue, at least somewhat. But, again, the reason a lot of people have these issues is because they purchased something for a few thousand dollars that's now worth an immense amount of money. And to have objects - objects, including paintings - that are worth $7, $10, $20 million is not that unusual. You know, I actually have seen people actually spend that kind of money for something. But most people who have them, have owned them for many, many years. So, again, incredibly important to test provenance.

The other question after provenance - and remember, going back to Damien Hirst, maybe you could ask him did he really paint that. It's impossible to ask Rembrandt whether it's an authentic Rembrandt. Now, there's a German art historian who said that Rembrandt produced 700 paintings in his lifetime. Take a guess at how many are in existence today. Come on, you can guess. There's no penalty here. Okay. Three thousand. He produced seven hundred, there are three thousand that exist today, meaning there are experts saying that there are a number of Rembrandts that obviously aren't Rembrandts.

So how do you deal with that issue? Well, we'll get to the next slide and we'll begin to see the issue. [Slide change.]

Okay. I want to get some participation, so next let me know who that's a picture of. It happens to be by the artist, but who is that a picture of? Andy Warhol. Okay. So question number two: In the last three years at auction, who is the artist who has sold the most in dollar value? Dollar value of his or her work in the last three years?

AUDIENCE MEMBER: Andy Warhol.

MR. HORWOOD: I would have guessed Picasso. It's actually Andy Warhol. How many people have seen Antiques Roadshow? Someone takes a napkin with a doodle on it to Antiques Roadshow, I think in Canada - it doesn't really matter where - and said he was told it was doodled by Andy Warhol. And the auction house expert who was handling that part of Antiques Roadshow said, "No, it's not in his

type of work, and so it’s not a real Andy Warhol.” Many artists who aren’t alive today set up foundations - their foundations were obviously set up. And then the persons running the foundations decided, “We should be authenticating works of art, because we don’t want to wind up in a situation where somebody comes along with a napkin, comes in with something. We want to authenticate the works.”

And, with most artists of note - Picasso being one, there are books called “catalogue raisonne,” which has all the works he produced, so that you can know - now, you may have a copy, you may not know if it’s original, but you will know that at least that’s in his work. Well, obviously, this napkin is not in Warhol’s catalogue raisonne, but the foundation said it was legitimate. Now, again, so he’s able to sell it for $30,000. It doesn’t sound like that much. We talked about how much - this is a few years ago, but it’s a paper napkin, and it’s a doodle; sold it for $30,000.

At about the same time there was someone who was suing the Warhol Foundation because, quite frankly, I’m trying to remember whether they authenticated it as real or authenticated as not real, and you can’t win. You know, either a buyer or a seller is going to say, and guess what - and they spent $7 million defending the case, the foundation. Good for lawyers, bad for the foundation. Guess what they decided to do? Get out of the business of authenticating. So now the foundations that used to authenticate, Warhol’s Foundation being one, no longer authenticate.

So you often can’t really get a seal of approval from a foundation anymore. You have to go to experts. And when I went to law school, we took evidence. And we found in evidence we could find witnesses on any side of an issue. And you could find experts on any side of an issue for lots of reasons, particularly when, again, there is no corroborative evidence from the person who produced it.

So when you’re dealing with works of art, you have a major issue when it comes to authenticity, except your best protection is that protection that you get from provenance. Bought originally from a dealer, we’ll get into that later, that can be an issue, too. Bought from a dealer, chain of title is helpful.

For people who collect objects, many of these objects could be from the Field Museum or any other museum, any national history museum, how do you show provenance? Again, it’s a little harder with objects than a painting. So did it come into the country before 1970? Does the country of origin want it back?

Some of the objects are not that valuable, as the previous speaker said, but some of them - some of them do have value. So that’s a
serious question for owners of art and a serious question for collectors who want to donate art to museums. If you go back twenty, thirty, forty years, a museum would take almost anything from a collector because they were just donating it to them. Now, museums are running out of space. I don’t know how much the — the Field Museum has tons in storage, I’m sure, so they don’t want things anymore that they’re not going to show or display.

What percentage of objects in, we’ll talk about art museums, are in storage versus on display?

AUDIENCE MEMBER: Probably more than 50 percent.

MR. HORWOOD: Yes. In major museums, 90 percent is in storage rather than on display.

So if you’re a director of a museum, you don’t necessarily - and, obviously, things rotate, but there’s no particular reason to just accept objects. So in the past, they would accept an object if they weren’t paying for it. If someone offered you something, it was less likely that you were going to look into the detail than if you had to pay for it. So values of objects in particular are coming under increasing scrutiny. People who have ethnographic collections, which this would be one, are increasingly difficult to value and sell.

[Slide change.] So this is an example from someone I know. It’s an ivory horn, decorative ivory horn. The person bought it for $10,000 about ten years ago. You’re going to have to participate again. We’ll just go with a show of hands. How many think it’s worth more than $10,000? Your choices are more than ten, less than ten.

How many think it’s worth more than 10 today?
How many think it’s worth less than ten?
How many think it’s worth zero?

Okay. There’s a ban on the importation of ivory, and that’s as of about a year and a half ago. And the reason is that the government wants to protect elephants. Where does ivory come from? Elephant tusks. So if you can’t prove that this came into the country in 1970 or before, and you can’t prove it’s not from - the restriction is African tusks - you can’t sell it. You’re actually not supposed to own it. You can’t buy; you can’t trade it. This is what I love about this area of the law, is because it leaves you with law school questions.

So what can you do with it?

Well, it specifically says you can’t profit from the ownership of an object. So if you want to give it to a museum, which is probably where it’s going to wind up, one expert - one of the legal experts says, “Well,
give it to a museum, but you just can’t claim a charitable deduction,” because then you’ve profited by getting a deduction. So you can give it to the museum, but you can’t claim any value.

In this case, this actually is owned by someone I know who wants to give it to a museum. I said — we’ll get into this later — “Well, make it a promised gift. Why give it now? Because the law may change and you may be able to prove it later and just make a promised gift.” We’re going to get into that in a minute.

But you can own something that has value and that value can be eliminated. One place that issues of provenance come up are auctions. [Slide change.] So if we went back to - or I’ll go ahead to this bird, which I believe is from Mexico or South America. Then you wind up with people who, with cultural heritage issues, and say, “This object was taken from the country. It shouldn’t have been taken from the country.”

And the material has at least a couple of examples of Latin American art where in the middle of an auction there were claims made, and then many items didn’t sell because people — there’s a cloud on title and ownership. The same thing with Hopi Indian masks. Again, a claim was made. These were cultural heritage. They should not - should not be owned by the person; needs to be returned to the country. So those are issues of cultural heritage and provenance.

[Slide change.] My favorite one is that, which is - who is the artist? Pollock. So Pollock, this is about two years ago - and this is fascinating. Most of these you can find in the New York Times and the current news. These are all - when I say “current news,” within the last two or three years. This woman on Long Island discovered a stash of Pollocks, Rothkos, and a couple of other artists that - and I don't remember of how the story came up, how she found them or what have you, and they were sold by Knoedler Gallery for eighty-some million dollars - a number of pieces.

When you go back into the story - her name is Rosales. There was a starving Chinese artist who came to the United States, couldn’t make a living selling his work and he decided to make “originals” of well-known artists. We’re not talking about copies, we’re talking about fakes — it’s a fake Pollock; it is not a copy of a Pollock.

Now, think about how hard that - first, it’s hard enough to duplicate something, but actually make something that’s a fake and pass it off. And what they would do - you can look at the news articles. What did

they do? In their backyard in Long Island, they put these things outside so they could age a little.

Now, one of my lines is that there’s nothing new that wasn’t in the Bible: Greed, lust, sibling rivalry. You’ve got it all covered. This is greed. Somebody gets a chance to buy a Pollock at a “bargain price” and they don’t look into the — they’re just happy to have one. They obviously aren’t checking catalogue raisonné, because this doesn’t appear anywhere. Okay. But yet it was bought for several million dollars.

Pollock had a woman friend after his - I think his wife died or he was divorced, and she claimed the piece that he had made for and given to her. And when the experts were examining it, they found a pigment that wasn’t in existence at the time it would have been made, and then there’s all that issue over it. Now, someone might buy this anyway but, I mean, they’d pay $80,000 instead of $8 million.

So the sleuths that were looking at this after these pictures were bought by someone - now, this is even hard for us to believe - one of them had the ‘C’ missing from his name. See the top one, there’s no ‘C’ in Pollock. The bottom one there’s a ‘C,’ yet they were able to sell them as Pollocks, under the “greater fool theory,” I guess. Knoedler is now out of business. Rosales pled guilty. And, again, we’re talking about real money. We’re talking about tens and tens of millions of dollars.

[Slide change.] Since I know that — well, you’ve taken art history. Who knows this artist?

AUDIENCE MEMBER: Robert Indiana.

MR. HORWOOD: Robert Indiana. So he had somebody who works with him who came up with a version of that. And Prem, P-R-E-M, which, evidently, means love in Hindu. And his assistant said that Robert Indiana also made those. Well, fortunately, Robert Indiana is alive and said it wasn’t true, but he had sold plenty of them in the meantime. I don’t know that I would want one that said “PREM,” but obviously there’s some people, again, who would take that - he made many of these. Is it real? Is it fake? Again, ask the artist. Ask the dealer.

[Slide change.] Another one from the recent news is John Constable. And this relates a little to PBS in the sense that this would be a good PBS story. It’s a woman in — a few years ago, her name is Lady Hamilton or something. And she found a number of things in her

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house, and she was downsizing, and she decided to sell. She’s going to sell at Christie’s, and she sold a huge number of items.

When you go to an auction house, obviously, they authenticate, they look at things. And it wasn’t thought to be a Constable. Constables are worth a lot of money. It had been painted over with varnish. She sold it for $5,200 at auction by Christie’s. A year later an expert comes along and says, “No, it’s a Constable.” They took a little of the varnish off the top, they looked at it, they said it was worth $3 million. He was wrong. It sold at auction for $5.2 million, at Sotheby’s.

The woman said, “You know what? I’ve had it for years. I don’t need the money. I’m not going to sue anyone.” This is England, not the United States. But she said that her children, which she was going to give it to, if they want to, they can. Nothing has happened yet.

So what obligation did Christie’s have to determine the true value? And guess what? They could find an expert that said it was not a Constable, and someone can say it is a Constable. Well, it doesn’t matter whether it’s a Constable or not. Again, there were experts on both sides, but somebody paid $5.2 million for it. Pretty big difference, all based upon authenticity.

AUDIENCE MEMBER: Well, is the question — did they have — did she have a cause of action against them?

MR. HORWOOD: Well, that’s the question. If the auction house reasonably believed it wasn’t a Constable, right — they looked into it. Auction houses look at what they auction — and do you have a cause of action? Yeah. Are you going to win your cause of action? I don’t know.

AUDIENCE MEMBER: Did they profit from the mistake?

MR. HORWOOD: Christie’s didn’t profit from the mistake because they get a percentage of the sales price, so they lost out.

Now, there’s another case which is in your material where the same thing happened with Sotheby’s, another case, where they — you know, it goes back and forth. Just like if you fly American Airlines to New York and you’re mad at them, there’s someone else who flew United and is mad at them. They cancel each other out. So you won’t fly American again, they won’t fly United again.

[Slide change.] Artist again? Jeff Koons. Okay. Here’s another picture. This is some pretty odd-looking stuff. And this is one of his odd pieces. It’s a woman, there’s some snow, there’s a pig — pretty odd, right? Wouldn’t you think?

The show was at the Whitney in New York. The last show they had was retrospective, before the Whitney closed and they're moving. It's in France now at another exhibition. And someone comes out of the woodwork who had produced this piece in 1988, a few months before the Koons.

Do you see any similarity? I mean, how many people take a picture of a woman with wet hair in the snow with a pig? I mean, is that a common sight? So he's suing now. This is an example where it's in the museum in France. They didn't take it off exhibit. Now, that person isn't claiming ownership of this piece. They're suing Jeff Koons for appropriating the concept. If they were claiming ownership of the piece, I don't care what indemnifications exist, I would not let any important piece travel outside the United States if I had any issue whatsoever if I were representing a collector.

So, again, now, could it just be happenstance? Yeah. I mean that's what Koons says. There happens to be another Koons case, same thing - happenstance? So now we're getting to the issue of cultural heritage, which is - here, what I'm covering is items that are in the news today that show you that things still exist.

[Slide change.] This is not the picture of ISIS destroying objects, because there's a question whether ISIS, when they were allegedly destroying those objects actually did it or whether it was staged. This was not staged. This is the Taliban in Afghanistan ten or so years ago that took these objects from Afghanistan to destroy their history. What's on the left is the Buddha - I think it's a Buddha, and on the right the Buddha had been destroyed. So that gets to the issue of cultural heritage. And the issue that we talked about before is the return of objects to the country of origin.

There is a dispute, again, currently in the news about whether things belong back in the country of origin.

How many did they need?

How many should really be there, under the theory that wouldn't it be better to have them in different museums?

Jim Cuno, who used to be the director of the Art Institute, said, "distribute rather than concentrate" them so at least they won't all be destroyed. If you read about what's happening in Syria or other countries, they're going through this issue of how to protect their cultural heritage. The same thing happened in World War II. Museums took, stored everything, put them underground.

11. Photograph of Buddhas of Bamiyan before and after March 2001 (photograph unattributed).
And the argument, too, is how many - you know, does the country need all of them or should they be in other countries? Some museum directors believe that you should be able to go into a museum, like the Art Institute, and see a Korean vase, a Chinese vase, Egyptian, and see their points of comparison.

The British Museum has a motto: The world under one roof. That works in opposition to the anthropologists who want things in their country of origin. So that's what led to the UNESCO Treaty of 1970, that things have to be returned, but it's a - but you could argue it both ways, as we as lawyers know how to do, or law students.

[Slide change.]

So we're going to take the other thing that's in the news today, and this is a movie called “Woman in Gold,” which is based on Lady in Gold, which is a Klimt painting. And this was owned in Austria. And the woman, when she died, was the - who owned the painting, said she wanted it given to the Austrian Museum, but her husband outlived her. The husband fled Europe. And when he left - it was confiscated, and the piece wound up in the Austrian Museum, now known as the Belvedere. I'm not saying you have to see the movie, and I haven't seen it yet, but the claim was, who is the rightful owner of the piece. And, of course, the only way it makes a story is there's a case in the United States. The United States, through the heirs of this woman who was the owner and also the subject of the piece.

And the Austrian Courts, I don't know, want to - it's a spoiler alert, if you want to see the movie, loses the case and it winds up in the United States, and Ronald Lauder spent - I think bought it for more than $100 million. Now, the interesting part about the piece from people I know who study art appreciation say it probably wouldn't be worth $100 million if it wasn't for the backstory. I mean, it's a pretty piece, but it probably isn't worth $100 million but for the backstory.

So the backstory of this one is, again, the issue of provenance, who's the owner. And, obviously - oh, and, of course, the museum claimed cultural heritage too, but they wound up losing in their own court. [Slide change.] My favorite one that shows the intersection of the law and art is this painting, but I'm not asking more questions from the art history standpoint.

This is a Rauschenberg, and it's called “Canyon.” And it's sort of - it's three-dimensional in the sense that if you - if you look at it, you

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12. Gustav Klimt, Portrait of Adele Block-Bauer (1907) (also referred to as The Woman in Gold).
can see an eagle, that’s an eagle in front. It happens to be a bald eagle. Well, the bald eagle is a protected species. You can’t sell, own, whatever. So the owner, Sonnabend, who is a gallery owner, dies, and they claim the value - because you can’t sell it, it’s illegal - claims a value of zero.

Now, if you don’t find this interesting and you’re a law student, stop right now. So her estate on death claims a value of zero. The IRS comes back and says $80 million. Eighty million dollars claimed. What’s their claim? Well, it’s illegal, but if you had a stash of marijuana, you could sell it on the black market, and you could sell this on the black market. Our government making this claim as to value - I mean, I think it’s craziness.

I’m going to go back for one second on this issue of ivory. Remember I said that - I told them to wait because I’ll somehow narrow this exception. Well, there is someone fighting to narrow the exception for ivory.

Now, again, there’s good reason for the rule. We don’t want people harvesting, killing elephants. And it’s a substantial number. It’s in the tens of thousands. It’s a serious problem, but they’re going to have to do something to limit this.

So who is now lobbying for change in the law? No one will guess this one. The NRA. But when I tell you the reason in a minute, it will become apparent. There are a lot of antique pistols that have ivory handles. Now, when they ask for an exception to the law, they’re probably going to - you know, it might only be weapons of destruction or anything like that. But, of course, many of the ivory objects were ivory handles on swords and, you know -

So they may change the rule, and they may narrow the rule, and the NRA wants - anyway, so the question here was Rauschenberg claimed that he took it out of the trash can, or his assistant took it out of a trash can. So he didn’t buy this - and remember, the bald eagle is a protected species. It has been for many years. And as a result of it being protected, there are a ton of bald eagles now.

So, again, he couldn’t sell that. So how was it resolved? The resolution was that it could be given to the Museum of Modern Art in New York by the estate as long as the estate didn’t claim a charitable deduction. So if you go to the Museum of Modern Art, you can see it. It’s an interesting piece, but what makes it interesting is the legal case.

Now, if you go back, remember I told you there was a lawyer who said, well, if you had ivory, if you give it, but you don’t take a deduction - I think he had read about this case. So this is, it seems to me, fascinating. Again, he said he didn’t break any law because when it
was taken out of the - so he didn’t kill a bald eagle - it was in the garbage.

Same issue exists with Indian objects that were used in religious ceremonies. Now it’s illegal to own them. Now, you’ve got to understand the reason. These are objects that are to be sold and put in a museum when they were really used for religious purposes, and they should be protected. Almost the same rule: you can’t own, possess, or sell. I have a client who owns some. Not this one shown here, but some. What do they do with it? They give it to the Field Museum. I think the resolution, again, is going to follow that same format; don’t take a deduction. But, I mean, what’s supposed to happen to this?

So it’s just a confluence of interesting issues. And we get Congress involved, right? We get the federal government involved - whether it was the issue of ivory, what issue it was. And we’re going to get into estate tax issues in a minute.

[Slide change.]

And so on the right of this picture shown on the screen, you may forget that’s Mitch McConnell, and that came up last fall when there was an election. And TIME Magazine had “change” on the cover. I think most people know the “hope” one from the campaign in 2008. But do you know the backstory on that? And that is the producer of that was sued because that was taken from an Associated Press photograph. And now the question is fair use, which we’re going to get into for two seconds.

So the issue of fair use is: Could they take that picture and then make a new picture based on it? And they wound up settling. Now, how TIME Magazine was able to take that, and how that’s fair use, I don’t know. I don’t know why, but that’s the same fair use issue. But we don’t know what’s going to happen. Now we’re getting into estate tax issues. And that’s what the note - that’s what the case with Rauschenberg involved.

There’s another fair use case, which I don’t have. There’s a photographer who photographed a Rastafarian. And he has a spear in the sand, and it’s a photograph, and someone took that and put a rifle in his hand. Again, is that fair use? Can I appropriate? What can I copyright? So I don’t know how you get away from the McConnell being an issue if the Obama one was an issue.

[Slide change.]

This is a David Smith sculpture. This is a - an issue of just a dispute with the IRS - it’s in the materials - over the value of


an estate. He did a lot of stuff. This is just one of many. He died with a few hundred. The IRS obviously placed a higher value on it than he did. But the important part about this case is they were able to deduct the sales and administrative costs against the estate tax, which I think the IRS valued it at $2 or $3 million. They were able to deduct almost - somewhere near $50,000 in administrative costs, which is not always the case in estates.

[Slide change.]16 This guy, whose work is pictured on the screen now, is not a well-known artist. I'm not going to ask you his name, but he was concerned about the estate tax on his estate, so he destroyed three-quarters of his art, which is probably somewhat a favor. But the other thing, obviously, if he destroyed three-quarters, maybe it makes the rest a little more valuable. But he was protesting against the estate tax.

So we covered, briefly: provenance, authenticity, title was part of it, what was in the news, things about cultural heritage, ownership issues. And now I want to turn to dealing with museums, which is the other part about this presentation, which is not incredibly connected, but I'll make it connected.

So dealing with museums, whether it's the Art Institute, which that is, or dealing with the Field Museum, the importance if you're a collector is to get to know about art. You get to know about art by reading, by knowing dealers, or by going to museums, seeing what you like. The beauty of art is there's something for everyone.

If you're a collector, you want to get to know the curators, you want to get to know - you want to learn from them; they're teachers, too. So the importance is to get to know them. They give you ideas of what to buy, et cetera. And it's in their interest because some day they hope you're going to donate objects to the museum.

When you're dealing with a museum, you have all sorts of issues on how you're going to deal with them.

- Do you give an object to a museum?
- Do you put it on loan?
- What do you do with it?
- If you put it on loan, what period of time do you let that object travel?
- How do you check out the insurance?

It's nice for the Field Museum to say they have insurance of $100 million. If I had an object, I'd probably be concerned about my insurance and how it's insured. It also depends on whether it's - and the

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Field Museum has plenty of fragile items, paintings are fragile, too. Some things are more fragile than others, obviously. I would be very concerned about loans to museums. It’s covered in the papers.

So when you’re loaning to a museum, what you’re concerned about is what’s the term of the loan, what kind of protection does the museum have. If it’s an object that’s subject to light, paper let’s say, light and humidity conditions, you want to be very careful. And are you going to allow them to loan it someplace else, and are you going to make sure that it stays on display.

So museums, obviously, like to get loans because it enhances their collection. Lenders like to make loans because it’s fun. And, quite frankly, it enhances the value of what they own. So loans for museums are common. And if you’re going to make a loan to a museum, what you should put in the agreement is in the paper.

And then the issue of promised gifts. I had a client many years ago who had 300 paperweights that were – one of three large collections of paperweights. And when he was giving them to the museum, that would mean there were less paperweights in private hands, which make the paperweights of more value. He gave it to the Art Institute, but he wanted them on display.

Well, we’ve talked about it before; at least 90% of the Art Institute objects are in storage. It’s not fair to ask the Art Institute to have it on display all the time, unless you’re going to pay for the exhibition to keep it on permanent display. Even if you are going to pay to keep it on permanent display, museums have an issue of real estate. They just don’t have the room for everything.

In this case, the gift was made to the Art Institute over a period of time because the person couldn’t use the charitable deduction during a lifetime, enough of it. And a charitable deduction only lasts for five years as a carryover. And so you give a little at a time. When you give a little at a time, it makes the value of the remaining part more because they’re fewer in private hands. Lo and behold, it’s back on display at the Art Institute downstairs. If you have to use the restrooms, just go around the corner and there is a collection of paperweights.

These were all made in the mid-1850s in Saint-Louis in France. You know, are they authentic? Aren’t they authentic? I think you could probably find different experts that say one or the other. We, of course, think they’re authentic. If I give these to a museum, do I care whether they de-access, which means sell?

Museums sell. The rule used to be that museums would only sell to other museums, and usually if they had better examples of the artist’s
work in their collection. But let's say for some reason they don't want paperweights anymore. Do you care if you're the person who gave it to the museum? So that's the right of the museum, to de-access. And even - whatever the rules are today, they can change. So the museums have rules about de-accessing. They can't use it for operating funds. They can only use it for buying other works.

But if I have paperweights, am I going to limit if they do? Can they buy anything? Can they buy a Rothko or do they have to buy something that's like what I gave? Or, again, if they stop having value to this museum, do I want them to give it to another museum that might still show paperweights, which are basically decorative arts?

So all kinds of issues when you give, in trying to think forward, on and on and on, and what's important to you. That's what lawyers are for, to help clients think about issues.

[Slide change.] So one of the most famous examples of someone who decided, you know, "I don't want to give to a museum because, number one, they don't know what they're doing; and, secondly, they don't agree with me." And this is Dr. Barnes in Philadelphia. He started collecting Cezanne and a number of other artists of his type, and the establishment in Philadelphia laughed at him, so he decided to build his own museum.

Now, he put it next to his house so he could walk out any time he wanted, and just open the door and walk in, and it was in Bryn Mawr, Pennsylvania. And he wanted art hung a certain way, and he hung them all the way floor to ceiling. Over the years he didn't provide enough money to keep this museum going. So there wasn't enough money to keep it funded. It reverts to the Commonwealth of Pennsylvania to make a decision because it is a charitable foundation. They decide it can be moved to downtown Philadelphia. They changed the configuration of the museum, a modern museum with more amenities, but kept the art the way it was.

The Friends of Barnes Foundation didn't want them to move, but there was no choice. He hadn't left enough money to permit it to be shown the way he wanted to, but he still did it. Now, what he was able to do, or you can do today by setting up your own museum, is to get a charitable deduction today. The only thing you can't do is take it back and show it in your house. But you can have a museum next to your house, which people do. They can limit when people can come into that museum. And the New York Times had a recent article, in many

cases like this, where people take advantage of the rules, and greatly limit the amount of people that can go.

The Barnes Foundation actually was limited because Bryn Mawr didn’t want all these people coming to their small town. So there was limited parking. It’s like trying to go to the beach in Lake Forest, you know, can’t park anywhere near. Anyone can go, it’s just you can’t park.

So private museums, where people with tons of money who want the deduction and the ego to keep their materials shown, and you see more and more about them — and part of the reason, again, is because they have a - the collection is either syncretic - for them, it’s either paperweights or it’s a certain type of art.

[Slide change.]

Okay. Who knows the person in this photograph? He’s an author.

AUDIENCE MEMBER: Sendak.


So he was an unusual guy. And I don’t recall - I don’t recall whether he was ever married, but for many years he had a caregiver. And when he died, he had promised his book collection, which is books he collected, not his books - book collection to a library in Pennsylvania, and before his death, he changed his mind and decided he would set up a private operating foundation, which is a museum. His caregiver would be in charge, and she would get paid. And he took his books, artifacts back and is putting them in his home as a museum. The library is actually suing to enforce their contract. Whether it will succeed or not, I don’t know.

People who have outsized egos and outsized collections include the Broads. They have an incredible contemporary art collection, and they couldn’t find a museum in Los Angeles who would agree with everything they wanted to do. And they had been lending art all over the world for years from their foundation.

They got a deduction for what they put in their foundation as long as they didn’t put it back in their home. Now they decided to build this building in Los Angeles. Clearly, tax deductions create a real value here, but it was also that they could deal with what they owned. So for many reasons, people who are dealing with museums use the tax law, use their personal interest, and wind up having more control over a long period of time of what happens to their objects. They’re building the museums so that they can enhance their collections and share their enthusiasm with others.

18. Photograph of Maurice Sendak (unattributed).
Thank you for your interest.
MR. AHASAY: Thanks, Richard.