

AUTHENTICATION  
IN ART

**AUTHENTICATION IN ART CONGRESS**

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**Art and Law Work Group**

**RECOMMENDATIONS OF THE ART AND LAW WORK GROUP  
ON THE TECHNICAL REQUIREMENTS FOR VALID WRITTEN EXPERT OPINION  
REPORTS ON THE AUTHENTICITY OF PAINTINGS FOR USE BY THE  
INTERNATIONAL ART COMMUNITY PRIVATELY AND IN JUDICIAL  
PROCEEDINGS DETERMINING THE AUTHENTICITY OF PAINTINGS AS A  
MATTER OF LAW**

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## CONTENTS

1. BACKGROUND
2. RECOMMENDED AIA STATEMENT OF INTENT
3. RECOMMENDED TECHNICAL REQUIREMENTS FOR EXPERT OPINION REPORTS
  - 3.A. CLIENT; SUBJECT PAINTING
  - 3.B. LACK OF FINANCIAL AND OTHER CONFLICTS OF INTEREST
  - 3.C. COMPENSATION
  - 3.D. EXPERT QUALIFICATIONS
  - 3.E. SCOPE OF WORK
  - 3.F. INFORMATION CONSIDERED IN FORMING OPINION
  - 3.G. METHOD(S) OF ANALYSIS
  - 3.H. APPLICATION OF METHOD(S) OF ANALYSIS
  - 3.I. ULTIMATE CONCLUSION AND OPINION
  - 3.J. LEVEL OF CERTAINTY OF EXPERT OPINION
  - 3.K. RECORD RETENTION
4. ANNEX: SAMPLE AIA STANDARDS-COMPLIANT EXPERT REPORT

## 1. BACKGROUND

The international art market has watched disputes over authenticity of paintings rise to debilitating levels. The subsidiary goals of the Authentication in Art (AiA) Congress – a body which was formed as a result of these market developments – are manifold but each centers on establishing a means by which the art market can address questions of authenticity of paintings in a more orderly, reliable and ultimately, if necessary, legally-effective manner.

The Art and Law Work Group was formed to help put the ultimate question of fact – is a painting authentically that of the attributed artist<sup>1</sup> – into a framework that can be more effective with enhanced certainty for the market.

Even this issue has many dimensions because of the relationship between observation-based (traditional art historical connoisseurship) and scientific-based authenticity opinions.<sup>2</sup> The intent of the former is to reach an affirmative conclusion that a work is, or is not, an authentic work. The latter is inherently limited to a conclusion that the scientific evidence is consistent with, or inconsistent with, an observational conclusion. And the latter, much like the former, often must be placed into a market-historical factual context, leaving the scientific opinion which augments the observational opinion contingent upon the accuracy of the underlying contextual assumptions.

This means that the authenticity opinions of observationalists and scientists are subject to the ever-present *possibility* that new information can come to light which will buttress or detract from past opinions of either form. Previously unknown paintings or new information about already known paintings can come to light, add to the knowledge of academics and scholars on the total body of an artist's oeuvre and change the opinion on the authorship of a particular work. Discoveries can place scientific evidence into new factual contexts – for example, a given artist used canvases of a type that the market did not previously think the artist used, or pigments of a certain type were available for use earlier than the market previously thought – changing a prior scientific conclusion about a work from being *inconsistent with* to *consistent with* what had previously been regarded as the artist's full body of work.

For a market seeking greater reliability and certainty of authenticity opinions, compounding the above is the fact that observational and scientific opinions are rendered as binary absolutes. That is, a painting either is or is not [*absolutely*] by the hand of a given artist when compared to all known works by the same artist; or the pigments or canvas at issue either

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<sup>1</sup> The term “authenticity” as used in this report does not differentiate between *fake* paintings (fabricated paintings attributed to a given artist) and *forged* paintings (authentic paintings on which a forged signature of an important artist has been affixed and which were originally unsigned or on which the original signature has been masked) and excludes the issue of attribution, i.e., by whose hand created the authentic work.

<sup>2</sup> The terms “observational,” “connoisseurship,” “scientific” and in their various forms and similar foundations for expert authenticity opinions are not intended to be limiting but rather general references for opinions based on observation by experts of different fields having an eye for the oeuvre of a given artist or based on traditional forms of scientific testing. The Art and Law Work Group recognizes that new terms for different fields of art authentication expertise may evolve and that parties and courts will determine the most meaningful references for general or sub-specialty expertise, experience and training in each case. Title or characterization of field of expertise aside, what matters most is that an expert be able to express a verifiable (and ideally generally accepted in the relevant field) methodology to analyzing a work and to applying the facts.

are or are not [*absolutely*] consistent with the pigments or canvases available to artists in general when the attributed work was created as dated by scientific technology. This conflict between authenticity opinions inherently being indefinite (i.e., always subject to the possibility of newly discovered information), on the one hand, and being formulated as binary absolutes, on the other, creates a complex dilemma which the art industry must resolve but to date lacks effective means to do so.

The relatively recent transformation of the art world into an art market and now an art industry has ushered in economic considerations of *value* and *marketability* of paintings and accorded scientific, technologically-related considerations at least equal if not greater importance than traditional connoisseurship. It is these high-stake economic considerations that can be expected to create more and more private disputes around the authenticity of paintings and to drive more and more parties to resolve these disputes in the courts.

In all other commercial settings where factual disputes must be resolved with finality, the resolution is based on less than absolute certainty, on all presently known information and without regard to future possibilities. This is the only way that markets can operate efficiently to resolve commercial disputes. Although often expressed in different terms in different countries' legal systems, the ultimate questions of fact in civil proceedings are resolved by an evidentiary standard of preponderance of the evidence, or greater weight of the credible evidence, or in effect what is *more likely than not* the case.<sup>3</sup>

The Art and Law Work Group concludes that a similar approach is needed for transacting parties, academics and other stakeholders including the courts to resolve questions of authenticity of paintings.

The balance of this report discusses the recommended guidelines for implementing this approach and sets forth the requirements and components that should be deemed necessary for a written (or verbal) expert observational or scientific opinion on the authenticity or non-authenticity of a painting to be deemed factually and legally valid.

This discussion includes in Section **3.I.** the specification of the level of certainty by which experts are to express expert opinions consistent with these guidelines.

## **2. RECOMMENDED STATEMENT OF INTENT**

The Art and Law Work Group recommends that the final guidelines promulgated by the AiA on the technical requirements for valid written expert opinion reports on the authenticity of paintings be accompanied by the following statement of intent:

*The Authentication in Art Congress at The Hague promulgates these Technical Requirements for Valid Expert Opinion Reports on the Authenticity of Paintings for the purpose of establishing standard requirements in the market for reports of*

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<sup>3</sup> In criminal versus civil proceedings in many countries the evidentiary standard is beyond a reasonable doubt; this standard similarly removes from consideration mere possibility. See Section 3.J. for comparison and summary discussion of different countries' burdens of proof and persuasion.

*this nature. It is the hope of the Congress that the standardization of expert reports and opinions in form, structure and transparency of content and work undertaken will facilitate the market's good faith, fact-based determinations of the authenticity of paintings when a genuine issue of fact arises in the market on this question. It is further the intention of the Congress that in those instances where this issue of fact must be resolved by courts or other judicial tribunals, the framework which these guidelines establish will enable courts and judicial tribunals to assess the admissibility of expert reports under the applicable rules of evidence and law; and that credence be given not only to the report but also to establish better rules of law and findings of fact in court and judicial proceedings on liability, or non-liability, of experts rendering opinions that are inconsistent with, or consistent with, these promulgated guidelines.*

### **3. CRITERIA FOR EXPERT OPINIONS**

Both observationalists<sup>4</sup> and scientists may serve as experts engaged to assess (communicated orally when appropriate or possible or more often in written reports) the authenticity of paintings for transactional purposes as well as after disputes have arisen to provide testimony as to authenticity in court proceedings. To help the market, clients and ultimately the courts to evaluate and compare experts' art authenticity opinions, the Art and Law Work Group recommends that the community of experts voluntarily agree to issue opinions based on the criteria described below.

This approach will increase the predictability of art authenticity outcomes and level the playing field in the authenticity process. It will also importantly minimize the likelihood and impact of unreasonable, baseless authenticity opinions, which can damage the salability of a painting.<sup>5</sup> And by following industry standards in report form and structure, this will help to insulate experts from claims of liability for their conclusions. The legal system can and always has accepted – at the least the judicial systems are designed to accept and then allow finders of fact to reach conclusions – that reasonable experts can differ in their opinions. The intent is to

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<sup>4</sup> Observationalists may include academic art historians and commercial dealers in the trade.

Certain proposed legislation in the US (New York State ), which aims to protect experts giving art authenticity opinions from unnecessary litigation, defines the protected class of authenticators as: “Authenticator means, subject to the limitations in the final sentence of this paragraph, a person recognized in the visual arts community as having expertise regarding the artist with respect to whom such person renders an opinion as to the authenticity, attribution or authorship of a work of fine art, or a person recognized in the visual arts community as having expertise in uncovering facts that serve as a direct basis, in whole or in part, for an opinion as to the authenticity, attribution or authorship of a work of fine art. ‘Authenticator’ shall include, but not be limited to, authors of catalogues raisonné or other scholarly texts in which an opinion as to the authenticity, attribution or authorship of a work of art is expressed or implied. ‘Authenticator’ shall not include a person who 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, other than to be compensated for services such person engaged in to provide an opinion as to the authenticity, attribution or authorship of such work of fine art or to provide information on which such an opinion is based in whole or in part.” See A. 9016, 2014 Sess. (N.Y. amend. §13.04. Arts & Cul. L, intro. Mar. 6, 2014, entitled “An act to amend the arts and cultural affairs law, in relation to opinions concerning authenticity, attribution and authorship of works of fine art.”).

<sup>5</sup> Today, even one expert's published opinion stating for instance that “the work is not authentic because it does not look right” (without further detailed explanation or sound scientific basis) can deflate the value of an artwork in the open market.

create a comprehensive, process-focused structure for differently trained and experienced experts to present opinions with clearly discernable bases and rationales on art authenticity.

The Art and Law Work Group recommends that all experts (both observational and scientific) must include the following eleven components (described in sections 3.A. through 3.K. below) in their opinions on the authenticity of paintings for the opinion to be considered inherently credible and acceptable as a valid opinion by all market stakeholders including courts of law.

Many of these factors derive from the U.S. Supreme Court decision known as the *Daubert* rule and U.S. Federal Rules of Evidence, which established flexible, threshold standards for determining the reliability of expert witness testimony in the U.S. judicial system<sup>6</sup> (and to some but a lesser extent in the UK<sup>7</sup> and EU<sup>8</sup>).

### **3.A. Client; Subject Painting**

Expert reports must identify who has asked the expert to prepare an opinion on the authenticity of the painting. The identity of the client and if relevant other intended users of the report provides baseline transparency to the report and, if necessary, allows other stakeholders to assess any potential bias or conflicts of interest. The requesting party may be the beneficial owner of the painting who may wish to remain anonymous or a party on the buy-side of the art transaction.

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<sup>6</sup> See U.S. FED. R. EVID. 702 (Testimony by Expert Witnesses) (adopting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) flexible approach aimed to admitting relevant and reliable expert testimony into evidence by assessing among other factors the reliability of expert's foundation, relevance of expert testimony, sufficiency of expert's basis of facts or data and expert's application of principles to facts).

Progeny of the *Daubert* case, the seminal US rule for assessing admissibility of expert testimony, has found that the *Daubert* rule applies not only to scientific experts but also to all other kinds of experts with various skills or experience; to determine whether the expert's theory was reliable to particular case (*Kumho Tire Co. v. Carmichael* 119 S. Ct. 1167 (U.S. 1999)); expert testimony can be excluded if there is an analytical gap between reviewed data and ultimate opinion (*General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)) or if the expert has not accounted for obvious unexplained alternative conclusions (*Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994)); and the more subjective and controversial the expert's inquiry, the more likely it should be excluded as unreliable (*O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994)).

<sup>7</sup> In the UK, the admissibility of expert testimony has focused on revising standards for forensic science in criminal proceedings; proposed initiatives have included creating registry/roll of forensic scientists admitted to expert societies with admission criteria including testing; see "House of Commons Science and Technology Committee, Forensic Science, Second Report of Session 2013-14," which refers to 2011 inquiry on "The Forensic Science Service" and 2005 predecessor committee report entitled "Forensic Science on Trial."

<sup>8</sup> As in the UK, European standards on the admissibility of expert testimony have focused on forensic scientific evidence in criminal proceedings; see "Law Society EU AGIS 2006 Project Safeguarding Expert Evidence, Final Report of the Task Force of England and Wales."

Generally, in distinguishing between expert testimony in civil and criminal proceedings, there may be greater liberality in allowing admission of defendants' scientific evidence in criminal proceedings to ensure a fair criminal trial; and there is less concern as to reliability of evidence (in the EU as opposed to US) because in most European civil law jurisdictions the trier of fact is/are the judge(s) rather than jury (serious crimes are the exception and guilt of the offense but not sentencing tends to be decided by juries.). The Rules of Procedure of the Court of First Instance of the European Communities (General Court) Articles 68-76 address the summoning and examination of witnesses and experts but provide minimal guidance for expert testimony reports (noting that experts should receive all necessary documents and may give opinion only on instructed points).

To maintain confidentiality requirements, representatives of parties may serve as the requesting party provided that this request is accompanied by a description of the nature of the beneficial inquirer, e.g. owner, non-owner buyer, etc.

The report must describe the painting in sufficient detail to identify the unique artwork and list the alleged attribution, title, date, medium and dimensions. High quality digital images of the front and back of the painting must be included as attachments to the report.

### **3.B. Lack of Financial and Other Conflicts of Interest**

The expert must explicitly affirm that he or she has no economic, ownership or other beneficial interest in the painting. The expert must identify all actual or potential conflicts of interest, which can influence the expert's authenticity determination and which a third-party such as a court can choose to consider in assessing the credibility of the report or its findings.

This disclosure must include an affirmative statement that there is no conflict of interest and explain any matters that can potentially be considered a conflict of interest. The expert should state that the expert is not and was not in the employ (other than as an independent expert) of the owner at any time during the subject authenticity-related work nor was the expert previously (at least for the past five years<sup>9</sup>) in the employment of any such party nor does the expert expect to have such employment in the future.

### **3.C. Compensation**

The expert must state how much he or she has been or will be paid in total for the services provided or to be provided including expected additional fees and hourly rates for future work including testimony in any court proceeding. The expert's compensation may be an hourly fee or an agreed-upon flat fee but may not be a percentage of the value of the painting. Proportionate payment arrangements based on valuation are deemed to create a conclusive conflict of interest.

### **3.D. Expert Qualifications**

The expert must describe his or her academic and professional background which bears on his or her knowledge, experience and expertise about the particular artist or relevant scientific methodologies as well as whether the expert has given an opinion about this artist's work before or reviewed other similar artists or kinds of paintings. The expert's associations and publications

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<sup>9</sup> The Art and Law Work Group does not propose a "bright line test" on the circumstances that can create or appear to create a conflict of interest for a hired expert. For example, an expert can be retained and disclosed in the report as having been employed by the owner or representative of the work on a full-time or *ad hoc* basis in the past two years. Certain neutral exceptions may exist such as the case of an expert who at the time of the authentication work was also employed by the foundation or estate of the artist. The Group encourages the market to engage experts with the fullest degree of actual independence possible. Given the complexity of the authenticity issues in the art industry and the level of certainty with which experts must opine under these guidelines, *see* discussion at Section 3.J., courts will ultimately determine what circumstances materially impair the credibility of an expert witness and may disqualify the expert from testifying or submitting a report at all in judicial proceedings.

must be noted and his or her C.V. should be referenced as an attachment. These listed qualifications should reflect the competency of the expert.<sup>10</sup>

### **3.E. Scope of Work**

The expert must specify the full scope of the engagement, that is, to provide an opinion only on the authenticity of the painting. The expert should also expressly note what is not included in the scope of work and that he or she is not determining valuation or legal title of the painting.

The expert must identify any specific analyses or activities that the expert was directed not to undertake, the source of such directions and the stated reasons for such directions.

### **3.F. Information Considered in Forming Opinion**

The expert must articulate what facts, data and other information as well as the source of such background materials which the expert has reviewed in forming his or her opinion. To the extent that any of this information is inaccurate or incomplete, it could adversely affect the expert's opinion. Relied upon data may be data that is first identified by the expert through research, proprietary, confidential or other means.

For instance, it is important to know whether an observationalist reviewed images of the work or physically inspected the painting in person, reviewed a provided provenance history for the painting or created a provenance history for the painting based on scholarly research (including public sales records). Likewise, it is critical to note what forensic materials the scientist reviewed to create baseline environmental assumptions before undertaking scientific testing.

### **3.G. Method(s) of Analysis**

The expert must detail all of the methods of analysis used or purposefully not used (but contemplated and rejected as inappropriate in these circumstances) to form the opinion. The applied methods should logically and directly correlate to the expert's academic and professional qualifications, experiences, knowledge base and skill set. For example, a witness without scientific credentials in the precise and relevant field should not be relied upon to conduct radiography or metallography tests.

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<sup>10</sup> The expert's qualification listing is akin to the Competency Rule of the US Uniform Standards of Professional Appraisal Practice (USPAP) 2014-2015 Edition (published by The Appraisal Foundation) which provides: "An appraiser must: (1) be competent to perform the assignment; (2) acquire the necessary competency to perform the assignment; or (3) decline or withdraw from the assignment. . . ."

Applicable in the US or through UK (such as a Royal Institution of Chartered Surveyors (RICS) Valuation-Professional Standards "Red Book,") and EU counterpart schemes creating best practices, USPAP governs and provides performance standards for real and personal property appraisals as well as business valuations. Compliance in the US is mandated through the U.S. Financial Institutions Reform, Recovery and Enforcement Act of 1989, Public L. 101-73, codified at 12 and 15 U.S.C., which governs all federally-related transactions in the US, and under US state appraiser certification and licensing boards as well as local agencies and various trade associations. USPAP compliance is mandated by the U.S. Internal Revenue Service for all appraisals having a taxation effect.

The opinion must specify the then-currently accepted consensus of scientific authority on the specific efficacy rate of the scientific methodology employed to answer the associated question relevant to the ultimate opinion.

The method of analysis provides the logical basis and reasons for the opinion and any possible underlying secondary opinions or assumptions which support the ultimate opinion on authenticity. By specifying the methods of analysis, stakeholders are able to ferret out if and to what extent an expert's methods are credible. The assessment of the efficacy and probative value of the experts' chosen method of analysis is independent to the assessment of the expert's ultimate conclusion.<sup>11</sup>

The more the technique is purely subjective, the more the method and hence opinion should likely be discounted as unreliable. There is no checklist for identifying the reliability of methods; rather, this consideration is flexible. Factors must be relevant to the particular factual circumstances of the painting and subject analysis. Factors may include whether the method can and has been tested, whether it has been subject to peer review and publication, whether there is a known or potential rate of error for the technique and whether there is general acceptance surrounding the method within relevant community of experts.<sup>12</sup>

If the witness's methodology is based solely on observations, his or her methods of analysis may be deemed reliable only if the observations are based on relevant, extensive and specialized experience. Typically, experience-based observations without further explanation or preparation (such as recognition of the observation-only technique by others in the same field) are not generally acceptable.<sup>13</sup>

### **3.H. Application of Method(s) of Analysis**

After identifying the methods to be employed, the expert must explain how in using the described and intentionally selected method of analysis, the expert applied the specific and surrounding facts, data and information to analyze the authenticity of the painting. This is a critical step in the opinion formation.<sup>14</sup>

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<sup>11</sup> See *Daubert*, 509 U.S. at 595.

<sup>12</sup> See *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167, 1175 (U.S. 1999).

<sup>13</sup> "If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."); FED. R. EVID. 702 (Notes of Advisory Committee on Proposed Rules). In *Kumho Tire* 119 S. Ct. at 1176, the Court noted that in some cases it may be useful to ask an experience-based witness for their opinion, for instance to sniff and distinguish the scent of over 100 perfumes, if experience preparation is recognized by other in the perfumery field as an acceptable technique.

<sup>14</sup> By analogy, see generally USPAP Scope of Work Rule (listing steps for appraisers to follow; ". . . 1. identify the problem to be solved; 2. determine and perform the scope of work necessary to develop credible assignment results; and 3. disclose the scope of work in the report."); Standard 8: Personal Property Appraisal Report (listing required content of appraisal reports; ". . . sufficient information to enable the intended users of the appraisal to understand the report properly . . .").

The expert must be able to describe the applied techniques; how in relying on information about the painting and the selected methodology (which has been identified as relevant and considered generally reliable for use in art authentication) the expert reached the offered opinion. There should be no analytical gap between the facts and opinion akin to a *quid pro quo* determination. In other words, the expert's reconciliation of data and approaches to achieve the opinion should be easy to discern.

The expert should address possible but dismissed alternative explanations for the facts, data and information and why an alternative application of the underlying data is less likely. Any assumptions and secondary opinions reached to support the expert's application and reasoning must be stated expressly.

### **3.I. Ultimate Conclusion and Opinion**

In each case an expert must clearly understand and clearly state whether he or she has been asked to render an opinion on the ultimate question of fact (the object is (or is not) an authentic work by artist "X") or on an underlying question of fact (the object is consistent with (or is inconsistent with) an authentic work by artist "X"); and should be clear in the report which form of opinion is being rendered.

A party wishing to prove that a work is an authentic work will have to determine in each case how to assemble the expertise of (i) a purely scientific inquiry, (ii) a scientific inquiry plus historical contextual information, (iii) observational perspective to demonstrate in the market or prove in a court the authenticity of the work.

Conclusions based on the standard criteria (as described above in sections **3A** through **3I**) – especially those which apply different acceptable, reliable methodologies but reach diametrically opposed opinions about the same painting – are inherently credible. With the same underlying structure, these differing opinions of observationalist vis-à-vis observationalist, scientist vis-à-vis scientist or observationalist vis-à-vis scientist can easily and effectively be compared so that stakeholders can best determine authenticity.

### **3.J. Level of Certainty of Expert Opinion**

The expert must ultimately reach an expert conclusion in any instance based on all the facts, data and information reviewed under applied methods of analysis that the painting is or is not an original, authentic painting by the artist or that the object is consistent with or inconsistent with being a work by a given artist.

A distinction is to be made between burdens of proof and persuasion in legal proceedings and the level of certainty by which experts must express their opinions in order to serve their clients' purposes and as expert witnesses, which is to aid fact-finders whether judges or juries to reach a conclusion on the ultimate question or questions of fact.

A burden of proof is the burden that a party to a legal proceeding has to prove a certain fact true or untrue – in the current context, that a work of art is (or is not) an authentic work created by the attributed artist. The litigant's burden of persuasion is a similar concept: it is the

threshold standard that the party making a claim in court has to meet for each procedural stage and ultimately to prevail in his or her burden of proof of the case.<sup>15</sup>

The burden of proof may be expressed in such terms in a civil case as a *preponderance of the evidence*, e.g., that the defendant's conduct caused the physical harm the plaintiff claims to have suffered; in a criminal case, in such terms as *beyond a reasonable doubt* that the defendant committed the crime of which he or she is accused.

The level of certainty of an expert opinion in legal proceedings is a related but separate concept that goes to the credibility and, when there is a failure to meet some threshold level of certainty which varies by case, the admissibility of the expert opinion.

As a general rule in most EU jurisdictions and in broader generally English common law jurisdictions such as the US, the degree of evidence (or burden of proof) by which a fact must be demonstrated to be true by the party having the burden of persuasion in the case is significantly higher under criminal laws than under civil laws.

Apart from this general rule, however, there are fundamental differences in burden of proof concepts among EU and non-EU jurisdictions as illustrated by the following four examples:

**a. Swiss Law**

Under Swiss civil law, courts must depart from a relatively low degree of proof for facts which are considered to be material or outcome-determinative and which however by their nature cannot be established with absolute certainty (Federal Court Ruling 130 III 321, 324 [para. 3.2]).

Under Swiss law, the fact question whether a work of art is an authentic work or not must be proven to a "predominant degree of probability" (*überwiegende Wahrscheinlichkeit*) (cf. Federal Court Rulings 123 III 715, 720 [para. 3.1]; 128 III 271, 276 [para. 2b/aa]). This degree of probability must be established according to the experiences of life; and the accuracy of this material fact must be proven through objective factors. A predominant degree of probability exists if according to objective factors significant grounds prevail over what might be other reasonably conceivable options.<sup>16</sup>

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<sup>15</sup> As described in the UK, for example, the standard or burden of proof means the legal burden on a litigant to establish the facts that support his case, *see, e.g., Wakelin v London & South Western Railway Co* (1886) 12 App Cas 41; and as used in the context of the evidential burden, that is, the burden to produce evidence capable of supporting a fact in dispute, this is the burden that rests on the party whose case would fail if no, or no further, evidence on the issue was adduced, *see, e.g., (Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154.

<sup>16</sup> Switzerland follows a "beyond a reasonable doubt" standard of proof in criminal law termed "in dubio pro reo" under which a person may not be convicted of a crime if, under objective considerations, significant and non-negligible doubts persist on the accuracy of the material facts. Abstract and theoretical doubts are not relevant, nor can absolute certainty be expected (Federal Court Rulings 1P.155/2005, of 29 June 2005 (para. 1); 1P.247/2005 of 9 June 2005 (para. 1.2.2); but this level of strict evidence required is not met under Swiss law if concrete elements exist to explain an alternative course of events (Federal Court Ruling 6P.163/2004/6S.432/2004 of 3 May 2005).

## **b. Italian Law**

Under Italian criminal law verdicts are based on evidence beyond a reasonable doubt, while civil litigation relies on the preponderance of evidence, i.e., what is more probable than not. When two or more plausible explanations of an event are available, the judge must apply the “prevailing probability” criterion and choose the explanation more adequately supported by the available evidence. In reaching this decision a court may not apply a quantitative probabilistic analysis, i.e. what has happened in similar cases and must apply a logical probabilistic process that considers in detail all of the evidence that is available. (Corte di Cassazione, Sentenza n. 10285 2009), (Cassazione Civile sez.III 2012, n.7554), (Corte Cassazione n.21619 2007 and n.9238 2007).

## **c. UK Law**

The standard of proof in civil cases under UK law is based on a balance of probabilities (Miller v Minister of Pensions [1947] 2 All ER 372). Some authorities suggest that this standard may vary according to the gravity of the conduct alleged or the seriousness of the consequences to the injured party (see Lord Nicholls, Paragraph 73, Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563; Re Doherty [2008] UKHL 33; rejected by Re B (Children) [2008] UKHL 35, Paragraph 64, Re B.; see also Re S-B (Children) [2009] UKSC 17, paragraph 13, Re S-B; JSC BTA Bank v Ablyazov and others [2013] EWHC 510 (Comm)). The seriousness of the accusation or consequences does not mean that a higher civil standard of proof applies in general; but the criminal standard of beyond a reasonable doubt can apply in appropriate "quasi-criminal" cases. See, e.g., Commissioner of Police of the Metropolis v. Ebanks [2012] EWHC (Admin) (higher criminal standard of proof may be appropriate in civil proceedings with potentially "serious consequences").

## **d. German Law**

The standard of evidence under German civil law is very high. In order to be legally proven, a fact must be considered to be “true” according to all of the facts of the case and the evidence shown, which is regarded as meaning a degree of probability almost equal to certainty (Prütting, in: MüKo ZPO, 4. Aufl. 2013, § 286 Rn. 40). Under explicit exceptions defined by German law, a judge may evaluate the truth of a fact according to a standard of “predominantly likely” (Foerste, in: Museliak, ZPO, 10. Aufl. 2013, § 286 Rn. 21), but none of these defined exceptions applies to the proof of authenticity in art-related civil disputes. In criminal law, the evidentiary rule of “in dubio pro reo” applies, which means that the judge must consider facts as being “true“ on the basis that there is no ground whatsoever for reasonable doubts (Ott, in: Karlsruher Komm. StPO, 7. Aufl. 2013, § 261, Rn. 4). However, even though the burden of proof is supposed to be slightly higher in criminal procedures, any reasonable doubt even in a civil case may defeat meeting the burden of proof.

As stated, the burden of proof in civil proceedings regardless of jurisdiction is not the exact equivalent of how experts by practice and rule of law should or commonly do express their expert opinions. In a common law jurisdiction in which the burden of proof is a “preponderance of the evidence,” for example, an expert may properly express an opinion on a specific fact material to the claim (for which there is an ultimate burden of proof and persuasion) to a “reasonable degree of professional or scientific certainty.”

Compounding the challenging circumstances surrounding art authenticity disputes is the fact that the subject matter is one with which courts are often highly unfamiliar and the ultimate question of fact – is a work of art an authentic work by the attributed artist – is a binary or absolute one. Either the work in dispute is, or is not, authentic. This binary nature of the issue is different from the typical less definitive issues that courts address, for example, was the defendant *negligent* or did the defendant fail to exercise *reasonable care* according to a level of proof.

The Art and Law Work Group recommends the following, simplified approach to aid fact-finders in art authentication disputes regardless of jurisdiction, which condenses burdens of proof into three basic degrees of certainty or probability: (a) reasonable degree, (b) high (highest) degree and (c) absolute certainty.

No jurisdiction requires absolute certainty. Jurisdictions which operate under lower standards of proof (such as preponderance of the evidence or reasonable degree of probability or certainty) will continue to create instability in the art market, uncertainty on the authenticity of a given work in dispute and be unable to reach legal determinations intended to resolve fully and finally a civil dispute on this subject matter.

Accordingly, the Art and Law Work Group recommends consistent with these guidelines that expert opinions, in order for the opinion or report to be admissible and to support a party's burden of proof and persuasion, must express opinions on the ultimate fact as follows:

**The object is (or is not) an authentic work by artist X, or is consistent with (or is inconsistent with) an authentic work by artist X, to the highest degree of professional or scientific certainty.**

The Art and Law Work Group intends this formulation to be a universal form of opinion and to mean that according to the expert witness who rendered such an opinion there is no credible evidence to support any other sound conclusion.

In making this recommendation, the Art and Law Work Group intends that courts which face competing expert opinions and reports that meet each of the foregoing criteria will be able to apply its normal rules of law and evidence including cross-examination and credibility to reach the final judgment of the case.

### **3.K. Records Retention**

The expert must retain all records including correspondence, supplied information, working notes and testing records (including equipment calibration and baseline preparatory testing) in accordance with accepted scientific, academic and business practices.

**ANNEX  
(NEXT PAGE)**

**4. ANNEX: SAMPLE AIA STANDARDS-COMPLIANT EXPERT REPORT**

\* \* \* \* \*

**Expert Witness Opinion Report of \_\_\_\_\_**

[If relevant, list Company Affiliation]

[Address]

\_\_\_\_\_, 20\_\_

I have prepared this report in accordance and conformity with the [May 2014] Recommendations on the Technical Requirements for Valid Written Expert Opinion Reports on the Authenticity of Paintings issued by the Authentication in Art Congress of The Hague.

**(i) CLIENT; SUBJECT PAINTING**

I have prepared this report and my opinion at the request of my client \_\_\_\_\_, who is the purported owner [or adviser to the purported owner] of the subject, studied painting; [list details of painting included alleged attribution, title, date, medium, dimensions and attach high quality digital image] (the “Painting”).

**(ii) COMPENSATION; NO FINANCIAL OR OTHER CONFLICT OF INTEREST**

The total compensation paid to evaluate the presented information (described below) and prepare this report was \_\_\_\_\_. The fee paid was \_\_\_\_\_ per hour plus customary out-of-pocket expense.

I have no direct or indirect economic, ownership or other beneficial interest in the Painting.

Other than in the sole capacity of an independent expert as reflected by this Written Expert Opinion Report, I am not now employed by the current owner of the Painting or any agent or representative of the current owner (regardless of whether such agent or representative has or has not been engaged to sell the Painting on the owner’s behalf). In addition, I have not

been employed by any such party at any time during the past five (5) years [other than as an independent expert in the following matter(s)] and I have no reason to believe that I may be employed by any such party in the future [other than as an independent expert in the following matter(s)].

**(iii) EXPERT QUALIFICATIONS**

I am an art historian [or scientist] trained at \_\_\_\_\_. My knowledge and expertise about the artist [or the applied scientific methodologies] derive from \_\_\_\_\_.

Individual Professional Licensure & Memberships

Publications Authored

Artworks Reviewed for Authenticity

Cases In Which Witness Testified as Expert At Trial or By Deposition

**(iv) SCOPE OF WORK**

I have been engaged to provide an expert opinion in the form of an [affirmative conclusion that the Painting is or is not an authentic \_\_\_\_\_] [affirmative conclusion that the Painting is consistent or inconsistent with being an authentic painting by \_\_\_\_\_]

I have not been engaged nor have I determined the market value of the Painting nor whether or the not the purported owner has clear legal title to the Painting. To the extent that I have evaluated any provenance, exhibition history or other market information about of the Painting, this information was for background purposes only.

**(v) INFORMATION CONSIDERED IN FORMING OPINION**

I have reviewed the following data, facts or information, which were provided to me as described below by \_\_\_\_\_ on \_\_\_\_\_, 2014 or as otherwise listed –

1. Provenance history of the Painting provided by the selling dealer \_\_\_\_\_
2. \_\_\_\_\_ . . .

(vi) **METHOD(S) OF ANALYSIS (ANALYSES)**

[My primary method of analysis is experience-based observation. My knowledge and expertise derives from having studied and reviewed over the past twenty years paintings by \_\_\_\_\_ and similar artists of that period in an academic scholarly environment.]

[My secondary technique focuses on comparing art historical documentation. I was trained as a connoisseur to review the texture, brushstrokes, composition and art historical knowledge about the artist's oeuvre. I compare paintings generally-accepted by the market and scholars as authentic with unattributed paintings.]

[My tertiary technique .....]

[My primary [sole] method of analysis is scientific testing and analysis.]

For each of the scientific techniques employed, the efficacy rate for the technique to discern the specific finding reached is, according to accepted scientific authority, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, respectively.

(vii) **APPLICATION OF METHOD(S) OF ANALYSIS (ANALYSES)**

In person [and from magnified high-quality digital images], I have examined the texture, brushstrokes, composition and overall impression of the Painting and compared it with market- and academically-accepted attributed, authentic paintings by the artist to assess the authenticity of the Painting. . . .

In person [and from scientific testing], I have . . . .

(viii) **RECORDS AVAILABLE FOR EXAMINATION**

I will retain all records including correspondence, supplied information, working notes and testing records including equipment calibration and baseline preparatory testing in

accordance with accepted scientific and academic practices and, in accordance with my standards record retention practices, for a period of \_\_\_\_ years.

(ix) **EXPERT OPINION**

In my opinion, based on the foregoing analysis (analyses), the data and information provided, reviewed and generated, and the application of the stated methods of analysis (analyses):

*The Painting is [is not] an authentic work of art by \_\_\_\_\_ to the highest degree of professional certainty.*

[or]

*The data is consistent [or is inconsistent with] an authentic work of art by \_\_\_\_\_ to the highest degree of scientific certainty.<sup>17</sup>*

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[Expert Witness Signature]  
Expert Witness' Name  
Company Affiliation

*Note: Each expert should consult with legal counsel on matters applicable to expert reports in the individual jurisdiction. These matters can include but are not limited to evolving considerations in the market of: (i) whether potentially to include in the report language on release, waiver, covenant not to sue and indemnity between the retaining party and the expert; (ii) these parties' intentions with respect to third-party beneficiaries of the report or impermissible reliance on the report by any third-party; and (iii) whether potentially to mandate in the body of the report that the report must be made public versus being intended only for private and confidential use insofar as such a provision might bear in some jurisdictions on issues of immunity on the grounds of free or public speech.*

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<sup>17</sup> Insert appropriate alternates for the terms “professional” and “scientific” in the conclusion if alternate terms for specific expertise, experience, or training will be helpful to understanding the determination in a given case. See discussion at p. 3, n. 2.