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Deaccessioning: Legal Parameters

Stephen K. Urice

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Deaccessioning: Legal Parameters¹

Stephen K. Urice²

The longstanding debate about “deaccessioning” concerns not so much whether a museum may deaccession works of art in its collection as under what circumstances it may do so.

Linden Haveymeyer Wise and Beverly M. Wolff, *Deaccessioning, Disposition, and the Pledge of Museum Collections: The Legal Parameters* (1991).

I. INTRODUCTION.

The *legal*³ parameters of deaccessioning are fairly straightforward: As a general rule, a museum’s governing board has legal authority to alienate a work in its collection absent (1) a legally enforceable, donor imposed restriction; (2) a legally enforceable restriction in the museum’s governing documents (articles of incorporation or trust instrument); or (3) an applicable statutory prohibition.⁴ As with all legal issues, however, nothing is as simple as it sounds, and in few areas of museum law, is the interplay among law, policy, best practices, and accounting principles so complex. As the quote above indicates, nearly 40 years ago, this course of study’s materials already described the “debate” about deaccessioning as “long-standing;” today, though long in the tooth, it remains a topic of vigorous, often impassioned, discussion.

Despite the exceptional diversity of U.S. museums, their deaccessioning policies and practices share a common denominator: the ethical imperative to adopt a collections management policy,⁵

¹ An earlier version of this paper appeared as *Deaccessioning Policies and Practices in United States Museums*, in KUNST & RECHT 2018/ART & LAW 2018, 15 (Peter Mosimann and Beat Schonenberger, eds., 2018). I express appreciation to Stämpfli Publishers for permission to use portions of that prior article in these course book materials.

² Professor of Law, University of Miami School of Law.

³ The *ethical* issues are addressed elsewhere in this panel’s materials for this course book.

⁴ Some states have specific statutory requirements for acquisition and disposal of works in state (i.e., governmental) collecting institutions such as state historical societies or collecting institutions embedded in a state university system. Those statutes are collected in Linden Havemeyer Wise & Beverly M. Wolff, *Deaccessioning, Disposition, and the Pledge of Museum Collections: The Legal Parameters*, C579 ALI-ABE 107, at 115-131 (1991).

⁵ The imperative derives from codes of ethics adopted by museum service organizations. The American Alliance of Museums (“AAM”) addresses Ethics, Standards, and Professional Practices in detail. See, AM. ALLIANCE OF MUSEUMS, ETHICS, STANDARDS, AND PROF’L PRACTICES, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/ethics/> [“AAM

a key component of which is an explicit policy on deaccessioning. However, I am aware of only one state – New York – that mandates its museums to adopt a collections management policy.⁶ As discussed below, the Board of Regents’ regulations address deaccessioning in detail.

ETHICS]. The AAM considers a Collections Management Policy to be one of five “Core Documents” every museum should have adopted. It defines a “Core Document” as:

... fundamental for professional museum operations [which] embody core museum values and practices. They codify and guide decisions and actions that promote institutional stability and viability, which in turn allows a museum to fulfill its educational role, preserve collections and stories for future generations, and be an enduring part of its community.

AAM ETHICS: CORE DOCUMENTS, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/core-documents/>.

On the purpose of a Collections Management Policy, the AAM says, in pertinent part, the following:

Collections advance the museum’s mission while serving the public. Because collections are held in trust for the public and are made accessible for the public’s benefit, the public expects museums to maintain the highest legal, ethical and professional standards. To demonstrate these standards, museums should create a collections management policy that outlines the scope of a museum’s collection, explains how the museum cares for and makes collections available to the public, and clearly defines the roles of the parties responsible for managing the museum’s collections.

AAM ETHICS: COLLECTIONS MGMT. POLICY, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/collections-management-policy/>.

The Association of Art Museum Directors (“AAMD”) Code of Ethics provides:

Member museums must have clear, written collections management policies, including collection goals and acquisition and deaccession principles, procedures, and processes, as well as policies that address preservation, conservation, and collection care.

ASS’N OF ART MUSEUM DIRECTORS, PROF’L PRACTICES IN ART MUSEUMS, at 7 (2011).

The International Council of Museums’ Code of Ethics provides a clear directive for museums to adopt a collections management policy:

The governing body for each museum should adopt and publish a written collections policy that addresses the acquisition, care and use of collections. The policy should clarify the position of any material that will not be catalogued, conserved, or exhibited...

INTERNATIONAL COUNCIL ON MUSEUMS, ICOM CODE OF ETHICS FOR MUSEUMS, §2.1, at 9 (2011).

⁶ This requirement is set out in Regulations promulgated by New York’s Board of Regents, the administrative agency with responsibility for approving the incorporation of museums in the state. The Board of Regents regulation requiring a museum to adopt a collections management policy states:

[Museums chartered in New York state must] have a written collections management policy providing clear standards to guide institutional decisions regarding the collection, that is in regular use, available to the public upon request, filed with the commissioner for inspection by anyone wishing to examine it; and which, at a minimum, satisfactorily addresses the following subject areas: (a) acquisition...(b) loans...(c) preservation...(d) access....and (e) deaccession.

8 NYCRR §3.27(c)(6)(iv).

I use the term “deaccession” (and its various forms) to mean the permanent removal of a work that previously had been accessioned into a museum’s collection pursuant to action of the museum’s governing board.⁷ Not all acquisitions are accessioned. For example, museums acquire all kinds of tangible personal property that are never accessioned – never made a part of the museum’s collection. Works may loosely be said to have been “acquired” when placed in a museum on loan⁸ or, on rare occasion, when a work is donated for the purpose of sale rather than to form part of the collections. Works that have not been accessioned, obviously, cannot be deaccessioned.

Although journalists and others often confuse the terms,⁹ “deaccession” must be distinguished from “disposal,” which refers to the manner in which title to a deaccessioned work is transferred from the museum to the successor title holder – if there is one. Disposal may occur not only by sale but also by exchange, gratuitous transfer, or destruction:

Deaccessioning is defined as the process by which a work of art or other object (collectively, a “work”), wholly or in part, is permanently removed from a museum’s collection. Disposal is defined as the transfer of ownership by the museum after a work has been deaccessioned; in the case of false or fraudulent works, or works that have been irreparably damaged or cannot practically be

⁷ In the leading text on the management of museum collections “deaccessioning” is defined as “...the process used to remove permanently an object from a museum’s collection *or to document the reasons for an involuntary removal (one required by law or due to circumstances not controlled by the museum)*. The definition presupposes that the object in question was once accessioned, that it was formally accepted and recorded as an object worthy of collection status.” MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS, at 138 (1st edition, 1985). The italicized clause first appeared in the 2d edition (1998) at 217 and is retained in the most recent, 3d edition, (co-authored with Ildiko Pogány de Angelis (2012) at 249. Elsewhere, Malaro defines deaccessioning as “...the permanent removal of an object that was once accessioned into a museum collection” *Deaccessioning – The American Perspective*, reprinted in STEPHEN E. WEIL, A DEACCESSION READER, 39-40 (1997). Malaro’s article appeared earlier under the same title in 10 MUSEUM MGMT. & CURATORSHIP 273 (1991).

⁸ At common law, the loan of a work to a museum creates a bailment: the lender is the bailor, and the borrower is the bailee. On museum loans, *see*, NORMAN PALMER, ART LOANS (1997), and on bailments, *see*, PHILIP T. VAN ZILE, ELEMENTS OF THE LAW OF BAILMENTS & CARRIERS (2d ed. 1908).

⁹ The confusion began with the first widely disseminated discussion on deaccessioning in a 1972 New York Times article (discussed below) when the author stated: “The Museum of Modern Art recently deaccessioned (the polite term for ‘sold’) one of its only four Redons....” John Canaday, *Very Quiet and Very Dangerous*, N.Y. TIMES, Feb. 28, 1972, D21.

restored, removal from the collection and disposition is determined by the museum and may include destruction of the work.¹⁰

There are voices that consider deaccessioning to be inappropriate, wrong, or misguided (or all three) no matter what the circumstances.¹¹ And, indeed in some countries, public museums are prohibited from deaccessioning.¹² The prevailing view in U.S. museums has been and remains that deaccessioning is an appropriate way to focus and improve (i.e., “refine”) a museum’s collection provided it is undertaken pursuant to well-defined policies adopted by the governing board.¹³ Thus, as a general rule, unless a donor has effectively imposed a legally binding restriction on an accessioned work,¹⁴ it is within the legal authority of a museum’s governing board’s to deaccession.¹⁵

II. BACKGROUND.

Public awareness of deaccessioning began with two incidents whose unfortunate facts smeared the practice in a way that has not entirely dissipated. On February 27, 1972, the then-chief art critic for The New York Times, John Canaday, introduced the word “deaccession” to the broader art world and interested public. The headline of his article indicated Canaday’s assessment of the practice: “Very Quiet and Very Dangerous.” Canaday, revealed that, in an astonishing lapse of judgment, the trustees of New York City’s Metropolitan Museum of Art (“Met”) had quietly sold paintings bequeathed to it by Adelaide Milton de Groot, who died in 1967.¹⁶ Although her will

¹⁰ ASS’N OF ART MUSEUM DIRS., POLICY ON DEACCESSIONING (2010) (amended 2015), https://aamd.org/sites/default/files/document/AAMD%20Policy%20on%20Deaccessioning%20website_0.pdf.

¹¹ Various viewpoints on deaccessioning are collected (with valuable links to sources) in various posts on Donn Zaretsky’s Art Law Blog: <http://theartlawblog.blogspot.com/>.

¹² Non-U.S. examples are beyond the scope of this paper. However, for a recent discussion of deaccessioning practices in Europe with references to legislative provisions, *See*, Dieuwertje Wijismuller, *Deaccessioning & Disposal in Europe 2008-2017*, <https://www.museumsanddeaccessioning.com/>.

¹³ For example, the AAM’s *Deaccessioning Activity Guide* states “Deaccessioning is a necessary and appropriate tool in collections management, and a way for a museum to refine its collections.” AM. ALLIANCE OF MUSEUMS, DEACCESSIONING ACTIVITY, <https://www.aam-us.org/wp-content/uploads/2018/01/deaccessioning-activity.pdf>.

¹⁴ Such restrictions may appear in the donor’s deed of gift or, if the donor established the museum, in the museum’s governing instrument.

¹⁵ *See for example*, N.Y. Not-for-Profit Corp. Law § 202 (a) (4)-(5).

¹⁶ Canaday, *supra* note 9.

did not require the Met to retain the works in perpetuity,¹⁷ it contained precatory instructions that the museum should contribute to other museums any of her works the Met did not keep. Put another way, although Mrs. de Groot had not imposed a legal obligation on the Met, she had created an ethical one, which the Met did not honor. Exacerbating the controversy were disingenuous denials by Thomas Hoving, the Metropolitan's director at the time, that the sales had occurred. Thus, while the museum's trustees acted legally, their actions represented a violation of ethical norms. Eventually, the Met, under pressure from New York's Attorney General, Louis J. Lefkowitz, adopted procedures for deaccessioning that hold to this day.¹⁸

Canaday illustrated his report with stunning, specific examples of recent deaccessions from New York City art museums. Although Canaday incorrectly defined "deaccession" to mean "sold," he rightly observed that deaccessioning "...is perfectly legal when the works have been acquired without restrictions against sale." Insightfully Canaday questioned whether that is the end of the inquiry when he asked: "But are these sales always strictly ethical...?" Importantly, Canaday observed that through tax incentives the public contributed to the cost of a museum's acquisition of their collections and concluded: "By any ethical standard, the public owns them." Canaday's article triggered strong published responses from the Met and New York's Museum of Modern Art ("MoMA") defending deaccessioning as a necessary component of prudent collections management. Significantly, MoMA's reply emphasized that revenue from its deaccessions were used exclusively to acquire new works for the collection.

The second embarrassing example became public six years later when New York's Attorney General Lefkowitz filed a complaint against Michael Kan, a former curator at the Brooklyn Museum of Art, and other individuals. The Attorney General alleged there had been a conspiracy

¹⁷ In 2014, The New York Times described a discussion between the then director of the Metropolitan Museum, Philippe de Montebello, and a donor. In reply to the donor's question "How long is 'in perpetuity,'" de Montebello is reported to have responded, "For you, 50 years." The story is perhaps apocryphal but nevertheless indicates that the museum had achieved an admirable frankness in discussing the duration of restricted gifts with its potential benefactors. Sam Roberts, *With Naming Rights Agreements, 'Perpetuity' Often Falls Short of Forever*, N.Y. TIMES, Nov. 28, 2014, at A29.

¹⁸ The de Groot controversy is described in KARL E. MEYER, *THE PLUNDERED PAST*, 50-54 (1977), reproduced in JOHN HENRY MERRYMAN, ALBERT E. ELSSEN, AND STEPHEN K. URICE, EDS., *LAW, ETHICS AND THE VISUAL ARTS*, 1273-75 (5th ed., 2007) ("LEVA5"). The "Disposition Procedures" agreed to between the Metropolitan Museum of Art and the Attorney General is reproduced in LEVA5, at 1275-76.

involving works deaccessioned from the museum and traded through a dealer from whom Kan was acquiring other works for his personal collection.¹⁹ More significantly, as matters developed, the Kan case was only part of a wider revelation of questionable deaccessioning practices at the museum. According to press reports, the museum's deaccessioning policies were under review at the time the trades occurred (raising the question why any deaccessions were undertaken without board-adopted policies in place).²⁰ Moreover, at the time, it was accepted practice at the Brooklyn Museum to sell deaccessioned works in the museum's gift shop, raising concern that museum trustees and employees might have had preferential access in acquiring the deaccessioned works.²¹

The practice gained further negative journalistic treatment in several instances in which museums sold works to meet operating deficits or to retire debt. All museum codes of ethics restrict the application of sale proceeds from the disposal of a deaccessioned work to the acquisition of new works for the collection or for "direct collections care." Once the de Groot and Kan affairs made deaccessioning a topic of public discussion, journalists became more alert to reporting on museums that deaccessioned in violation of their codes of ethics. Those museums, as one observer characterized it, used their collections as if they were cookies in a jar, eaten at will – until the cookies were consumed, leaving only an empty jar.²²

III. CONTEMPORARY DEACCESSIONING PRACTICES AND POLICIES

Since the 1970s, debate on deaccessioning has been continual, stoked from cinders into flame whenever a museum pursues deaccessioning that violates ethical strictures, lacks the transparency and accountability expected of museums, or is misunderstood or misreported by journalists.

¹⁹ Ted Carey, *The Kan Case: Exploiting Museum Resources or Faithful to His Duties*, ARTNEWS, Mar. 1978, at 100-104.

²⁰ Ted Carey, *The Brooklyn Museum Case*, ARTNEWS, Apr. 1978, at 93, et seq., reproduced in LEVA5, at 1234-37.

²¹ *Id.* In the 1950's, the Metropolitan Museum of Art also had sold deaccessioned works in its museum shop. Personal communication to the author dated February 21, 2018, from the museum's current General Counsel, who commented that it was a practice the museum is not proud of.

²² The metaphor has never been exceeded in illustrating the futile nature of selling collections items to meet operating costs. See, Stephen E. Weil, *The Deaccession Cookie Jar*, MUSEUM NEWS (Nov./Dec. 1992) [pagination unavailable] reprinted in A DEACCESSION READER 87 (Stephen E. Weil, ed., 1997). I am unaware of any situation in which a museum has returned to financial stability after deaccessioning to meet chronic operating deficits or to retire significant debt.

Each decision to deaccession implicates at least five fundamental concerns:

1. The reason(s) for the deaccessioning;
2. The legality of the deaccessioning;
3. The person(s) responsible for recommending, and the person(s) with authority to approve, the deaccessioning;
4. The manner in which disposal of a deaccessioned work is accomplished; and
5. If disposal is by sale, the use of sale proceeds.

My charge is to address the second of these, which is also the most straightforward: the legality of deaccessioning. I will, however, offer a brief comment on each.

Reasons for deaccessioning.²³ The New York State Board of Regents recognizes 10 acceptable criteria for deaccessioning, thus providing a handy list:

Deaccessioning of collections. An institution may deaccession an item in its collection only in a manner consistent with its mission statement and collections management policy and where one or more of the following criteria have been met:

- (i) the item is inconsistent with the mission of the institution as set forth in its mission statement;
- (ii) the item has failed to retain its identity;
- (iii) the item is redundant;
- (iv) the item's preservation and conservation needs are beyond the capacity of the institution to provide;
- (v) the item is deaccessioned to accomplish refinement of collections;
- (vi) it has been established that the item is inauthentic;

²³ Deaccessioning was common practice long before its rationale and limitations were addressed by museums' codes of ethics or state regulation. Since the practice became a matter of public attention in 1972, *See* Canaday, *supra* note 9., there have been occasional efforts to identify and report on current examples of museum deaccessionings. Among those efforts are the following from this course of study's earlier course books: Linden Havemeyer Wise and Beverly M. Wolff, *Deaccessioning, Disposition, and the Pledge of Museum Collections: The Legal Parameters*, ALI-ABA Course of Study Legal Problems of Museum Administration Course Book C579 (1991) 109; Stephen E. Weil, *Selected Materials Concerning Deaccessioning and Disposition*, ALI-ABA Course of Study Legal Problems of Museum Administration Course Book C579 (1991) 141; Marie Malaro, *Deaccessioning in Hard Times*, ALI-ABA Course of Study Legal Problems of Museum Administration Course Book C723 (1992) 25; Elaine L. Johnston, *Deaccessioning to Raise Operating Funds*, ALI-ABA Course of Study Legal Problems of Museum Administration Course Book C794 (1993) 165. Stephen K. Urice, *Deaccessioning: A Few Observations*, ALI-ABA Course of Study Legal Issues in Museum Administration Course Book SR005 (2010); Stephen K. Urice et al. *Deaccessioning: Selected Policies* ALI-ABA Course of Study Legal Issues in Museum Administration Course Book SR005 (2010) 233; and Craig Blackwell, *CY (sic) Pres and Deviation: An Overview*, American Law Institute, Course of Study Legal Issues in Museum Administration, SZ006 (2018) 345.

- (vii) the institution is repatriating the item or returning the item to its rightful owner;
- (viii) the institution is returning the item to the donor, or the donor's heirs or assigns, to fulfill donor restrictions relating to the item which the institution is no longer able to meet;
- (ix) the item presents a hazard to people or other collection items; and/or
- (x) the item has been lost or stolen and has not been recovered.²⁴

In many situations, more than one of these criteria may apply

Legality of Deaccessioning. The common law disfavors restrictions on alienation of property.²⁵

A valued and valuable component of ownership is the right to convey. Museum ownership is no exception and, thus, as a general rule, a museum's governing board has legal authority to transfer, by sale, exchange, or other means, title to works it owns, *unless* one of three conditions exist: the work is encumbered by a legally enforceable, donor imposed restriction prohibiting alienation; the museum's governing instrument prohibits alienation; or the museum is subject to an local or state statute prohibiting alienation. That said, it has repeatedly been asserted in museum codes of ethics, in scholarship, and in journalism that museums' governing boards hold their collections as fiduciaries "in public trust."²⁶

That assertion is true under the common law of trusts, but very few U.S. museums are organized as charitable trusts; virtually all are organized as charitable, nonprofit corporations, and, to the best of my knowledge there is no *statutory* authority for the public trust limitation on the ownership by a museum organized as a nonprofit corporation. In the context of deaccessioning,

²⁴ 8 NYCRR §3.27(c)(7)(i)-(x).

²⁵ The best known such limitation is expressed in the so-called "Rule Against Perpetuities," which was summarized in a classic work as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (1886). The Rule is sufficiently complicated in application that the California Supreme Court held that an attorney who prepared a will for a client in which a testamentary trust was deemed invalid for violating the Rule could not properly be said to have "...failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise." *Lucas v. Hamm*, 56 Cal. 2d 583, 592 (1961).

²⁶ The New York Board of Regents provides one of the few governmental definitions of the term in the context of educational institutions such as museums: "*Public trust* means the responsibility of institutions to carry out activities and hold their assets in trust for the public benefit." 8 NYCRR §3.30 (a)(11).

there has been insufficient scholarship²⁷ and a lack of judicial guidance²⁸ on the meaning and relevance of “public trust.”

Who Decides? As a general rule, museum codes of ethics and individual museum’s collections management policies insist that a decision to deaccession originate with the museum’s staff. As the AAMD’s 2009 Report on Deaccessioning states:

[Although t]he final authority for...deaccessioning and disposal...rests with the...governing body.... *The process of deaccessioning and disposal must be initiated by the appropriate professional staff* and any recommendations, with full justification, [must be] presented to the director, who will review the [recommendations].... If the director determines that deaccessioning is appropriate, the proposal shall be presented to the... governing body...in accordance with the...museum’s collection policy....²⁹

Vesting initiation of the process of deaccessioning in the museum’s professional staff – rather than the museum’s governing board – assures that deaccessions are undertaken for appropriate curatorial rather than economic reasons or for expediency.

Means of Disposal. Once the professional staff has recommended and the governing board has approved the deaccessioning of a work, the next determination is *how* to dispose of it. Generally, the reason for a particular deaccession will lead to a logical means of disposal. For

²⁷ The Public Trust Doctrine, rooted in Roman law, addresses the public’s interest in rivers and oceans for purposes of navigation and fishing. The doctrine was developed in a seminal article in the field of environmental law: Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1969). Thirty years later, Professor Sax sought to extend aspects of the Public Trust Doctrine in the context of cultural properties in *PLAYING DARTS WITH A REMBRANDT, PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* (2001). The title of Sax’s book derives from an observation of Stephen E. Weil, the progenitor of museum law as a distinct discipline in the United States: “An eccentric American collector who, for a Saturday evening’s amusement, invited his friends to play darts using his Rembrandt portrait as the target would neither violate any public law nor be subject to any private restraint.” FRANKLIN FELDMAN & STEPHEN E. WEIL, *ART WORKS: LAW, POLICY, PRACTICE* 15 (1974). *See also*, Jennifer Anglim Kreder, *The Public Trust*, 18 J. Const. L. 1425 (2016), in which Professor Kreder explores the term “public trust” in the context of its use in the U.S Constitution (art. VI, cl. 3) and its expansion into other fields including museum law (at 1460-76).

²⁸ A judicial exploration of the term in the context of museum deaccessioning was expected had a recent case involving the Berkshire Museum in Massachusetts not been settled by the museum and the Massachusetts Attorney General and approved by the Massachusetts Supreme Judicial Court. *Rockwell v. Trs. of the Berkshire Museum*, No. 139925, 2017 Mass. Super. LEXIS 208, 2017 WL 6940932 (2017).

²⁹ ASS’N OF ART MUSEUM DIRS., *POLICY ON DEACCESSIONING*, at (III)(C) (2015) (emphasis added), https://aamd.org/sites/default/files/document/AAMD%20Policy%20on%20Deaccessioning%20website_0.pdf.

example, if the work is deaccessioned for purposes of repatriation or restitution, the work will be conveyed without consideration – that is without equal value being paid to the museum – to its rightful owner. Or, if the work has deteriorated to a degree that it can no longer be exhibited or otherwise used for a museum’s educational purposes, the disposal may be accomplished by destruction. When a museum determines to dispose of a deaccessioned work by sale, two further decisions must be made. First, by what means will the work be sold; second, how will the proceeds of sale be applied.

Public auction appears to be the most common way museums sell deaccessioned works. It is generally assumed that sale at public auction, where fair market value is determined in an open, transparent transaction, may decrease chances of allegations that the board did not realize a work’s highest financial value. However, especially for works in esoteric fields of collecting, a museum may well realize a greater gain by selling through a dealer. AAMD’s code of ethics addresses that alternative.³⁰

Use of Sale Assets. The most troubling aspect of disposal by sale is how a museum applies the proceeds. All museum service organizations’ codes of ethics limit application of disposal by sale to two purposes: (1) acquiring new works or (2) for “direct collections care.” The development of these restrictions in the AAM’s Code of Ethics is instructive.

AAM first published a code of ethics in 1925. Entitled *Code of Ethics for Museum Workers*,³¹ it emphasized the public service role of museums and their staff. That code was not supplanted until half a century later when, in 1978, AAM published its *Statement on Ethics*. Reflecting the rapidly changing landscape within which museums operated in the 1980s, AAM began work to

³⁰ The AAMD code of ethics notes:

Preferred methods of disposal are sale or transfer to, or exchange with, another public institution; *sale through publicly advertised auction; and sale to, or exchange with, or through a reputable, established dealer.* Every reasonable effort should be taken to identify and evaluate the various advantages and yields available through different means of disposal

ASS’N OF ART MUSEUM DIRS., PROF’L PRACTICES IN ART MUSEUMS, *Appendix B, Deaccessioning and Disposal* §IV.A (2011) (emphasis added).

³¹ AM. ALLIANCE OF MUSEUMS, CODE OF ETHICS FOR MUSEUM WORKERS (1925).

revise the 1978 code nine years later. That work culminated in AAM's governing board approval of a revised *Code of Ethics* in 1991.³²

The 1991 Code included a provision restricting the use of proceeds from sales of deaccessioned works solely to acquiring new works for the collections. That restriction faced significant resistance from certain components of AAM's membership.³³ The pushback was sufficiently strong that AAM revised its provision on the application of sales from deaccessioned works. Approved in 1993, and still part of the AAM's Code of Ethics, that provision states:

[D]isposal of collections through sale, trade or research activities is solely for the advancement of the museum's mission. *Proceeds from the sale of nonliving collections are to be used consistent with the established standards of the museum's discipline, but in no event shall they be used for anything other than acquisition or direct care of collections.*³⁴

However, by adding a second acceptable purpose for sale proceeds, "direct collections care," without simultaneously providing guidance on what the term meant, AAM generated uncertainty. Indeed, the limits of "direct care of collections" became a matter of contention between the AAM's president and Vermont's Shelburne Museum when it announced plans to

³² AM. ASS'N OF MUSEUMS, CODE OF ETHICS FOR MUSEUMS (1991), <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/code-of-ethics-for-museums/>.

³³ The AAM has described events as follows:

The AAM Board of Directors adopted the Code of Ethics for Museums in 1993, after several years of discussion and debate about how museums should use funds realized from the sale of deaccessioned collections. An earlier version adopted in 1991 restricted 'the use of proceeds from the sale of collection materials...to the acquisition of collections.' Nearly three-quarters of museums objected that this restriction was excessively limiting and an impediment to fulfilling their respective missions. History and natural history museums in particular argued that a museum's responsibility to care for and preserve its collections is of equal importance to its obligation to build its collections. Historic sites agreed, calling attention to the need to preserve buildings and landscapes as part of their collection stewardship responsibilities. Science and technology centers were shifting their focus to public education through interactive exhibitions not dependent on collections; some divested themselves of collections and did not plan to acquire more.

The issue became such a flash point that after six months, the 1991 Code of Ethics for Museums was suspended to allow for further discussion. Ultimately, in 1993, the AAM Ethics Commission recommended and the board of directors approved a revision stating that proceeds from the sale of nonliving collections should not be used for 'anything other than the acquisition or direct care of collections.'

AM. ALLIANCE OF MUSEUMS, DIRECT CARE OF COLLECTIONS: ETHICS, GUIDELINES AND RECOMMENDATIONS 3-4 (2016), available at, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/direct-care-of-collections/>.

³⁴ AM. ASS'N OF MUSEUMS, *supra* note 32 (emphasis added).

deaccession works in 1995.³⁵ In 2014, AAM convened a Task Force to provide guidance on the term.³⁶ In April 2016, the Task force published its report, *Direct Care of Collections: Ethics, Guidelines and Recommendations*³⁷

The *art* museum community has maintained a stricter standard than the AAM (whose membership comprises museums and museum professionals from all museum disciplines). The AAMD,³⁸ addresses deaccessioning and disposal not only in the body of its code of ethics³⁹ but also in an Appendix to that code.⁴⁰ AAMD restricts funds received from the disposal of deaccessioned works solely for the acquisition of new works, a position it repeats verbatim in Paragraph 25 of its code of ethics and in Paragraph I.B of the code's appendix:

Funds received from the disposal of a deaccessioned work shall not be used for operations or capital expenses. Such funds, including any earnings and appreciation thereon, may be used only for the acquisition of works of art in a manner consistent with the museum's policy on the use of restricted acquisition

³⁵ See discussion in Stephen K. Urice, *Deaccessioning Policies and Practices in United States Museums*, in KUNST & RECHT 2018/ART & LAW 2018, at 38-42 (Peter Mosimann and Beat Schonenberger, eds., 2018).

³⁶ The mandate of the Task Force was (in pertinent part) as follows:

The cross-disciplinary task force is charged with:

- Gathering data to find out how museums of different disciplines use proceeds from deaccessioning and how they define “direct care”
- Compiling a list of generally accepted uses of proceeds shared by all disciplines and those specific to each discipline
- Evaluating the ethics underlying current standards and practices and advancing the thinking on this topic
- Issuing a white paper with task force findings and recommendations, endorsed by the key discipline-specific organizations

AM. ALLIANCE OF MUSEUMS, ETHICS, STANDARDS, AND PROF'L PRACTICES: TASK FORCE ON DIRECT CARE, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/task-force-on-direct-care/>.

³⁷ AM. ALLIANCE OF MUSEUMS, *supra* note 33.

³⁸ The AAMD was founded in 1916. Its membership comprises *art* museum *directors*; the AAMD does not have institutional (i.e., museum) members, and no museum can have more than one director-member of the AAMD. At present, the AAMD has 246 members from the United States (228), Mexico (8), and Canada (10). See, *Membership*, ASS'N OF ART MUSEUM DIRS., <https://aamd.org/about/membership>. The AAMD's powerful influence derives from its membership, which comprises the directors of the largest art museums with the most significant collections in the United States, Mexico, and Canada.

³⁹ ASS'N OF ART MUSEUM DIRS., PROF'L PRACTICES IN ART MUSEUMS (2011) (“AAMD *Professional Practices*”)

<https://aamd.org/sites/default/files/document/2011ProfessionalPracticesinArtMuseums.pdf>.

⁴⁰ ASS'N OF ART MUSEUM DIRS., *supra* note 30.

funds. In order to account properly for their use, the AAMD recommends that such funds, including any earnings and appreciation, be tracked separately from other acquisition funds.⁴¹

As a general rule, U.S. museums do not capitalize their collections. That is, they do not recognize the value of their collections on their balance sheets. This rule is mandatory under the codes of ethics of some service organizations such as AAMD.⁴² Accordingly, museum collections items are deemed to be held to accomplish the museum's educational mission, not for financial gain.

Since the 1990s the Financial Accounting Standards Board ("FASB") has recognized the unique purpose of museum collections and, under its Generally Accepted Accounting Practices, permits a museum not to capitalize the value of its collections and to ignore in the museum's annual profit and loss statements the financial value of works contributed to the collections.⁴³ However, these exceptions are subject to a requirement that the museum's collections:

- a. Are held for public exhibition, education, or research in furtherance of public service rather than financial gain
- b. Are protected, kept unencumbered, cared for, and preserved
- c. Are subject to an organizational policy that requires the proceeds from sales of collection items to be used to acquire other items for collections.⁴⁴

In June 2018, FASB published a "Proposed Accounting Standards Update" that would bring the third of those factors into alignment with the AAM Code of Ethics such that third factor would read: "They are subject to an organizational policy that requires the proceeds of items that are sold to be limited *to direct care of existing collections or the acquisition of other items for collections.*"⁴⁵ In December 2018, FASB's "...affirmed its decision to update the Codification

⁴¹ *Id.* at 9 (¶ 25), 21 (¶ I.B.).

⁴² *Id.* at 11-12 (¶ 38), 20 (¶ D).

⁴³ It is beyond the scope of this paper to discuss the full implications of FASB's position on the application of proceeds from the disposal by sale of deaccessioned works. For an introduction, *see*, Lori F. Breslauer, *Making the Case: FASB's Accounting Standards Should be Re-aligned with AAM's Long-Standing Guidance on the Use of Sale Proceeds, Legal Issues in Museum Administration*, 201 (ALI-CLE, Apr. 14-16, 2016).

⁴⁴ FIN. ACCOUNTING STANDARDS BD., STATEMENT OF FIN. ACCOUNTING STANDARDS NO. 116, 7 (1993).

⁴⁵ FIN. ACCOUNTING STANDARDS BD., EXPOSURE DRAFT: NOT-FOR-PROFIT ENTITIES (TOPIC 958), UPDATING THE DEFINITION OF COLLECTIONS 3 (2018) (*emphasis added*).

Master Glossary definition of *collections* to include the concept of direct care.” The change in definition would be effective for annual periods beginning after December 15, 2019.⁴⁶

IV. CONCLUSION

The law provides only a starting point for discussion in matters related to, and the institutions that collect, cultural property. Legal solutions rarely settle disputed positions in a field that implicates heritage, the transmission of knowledge, the formation of identity, and seeks to balance current needs against aspirations for the future. Accordingly, this panel’s materials will now turn to other aspects of the “deaccessioning debate,” including its ethical dimensions and best practices.

⁴⁶ FIN. ACCOUNTING STANDARDS BD., PROJECT UPDATE, UPDATING THE DEFINITION OF COLLECTIONS, available at https://www.fasb.org/jsp/FASB/FASBContent_C/ProjectUpdateExpandPage&cid=1176170845230. A final standard incorporating direct care of collections as a permitted use of deaccessioning funds is expected in the first quarter of 2019. <https://www.fasb.org/technicalagenda>.

