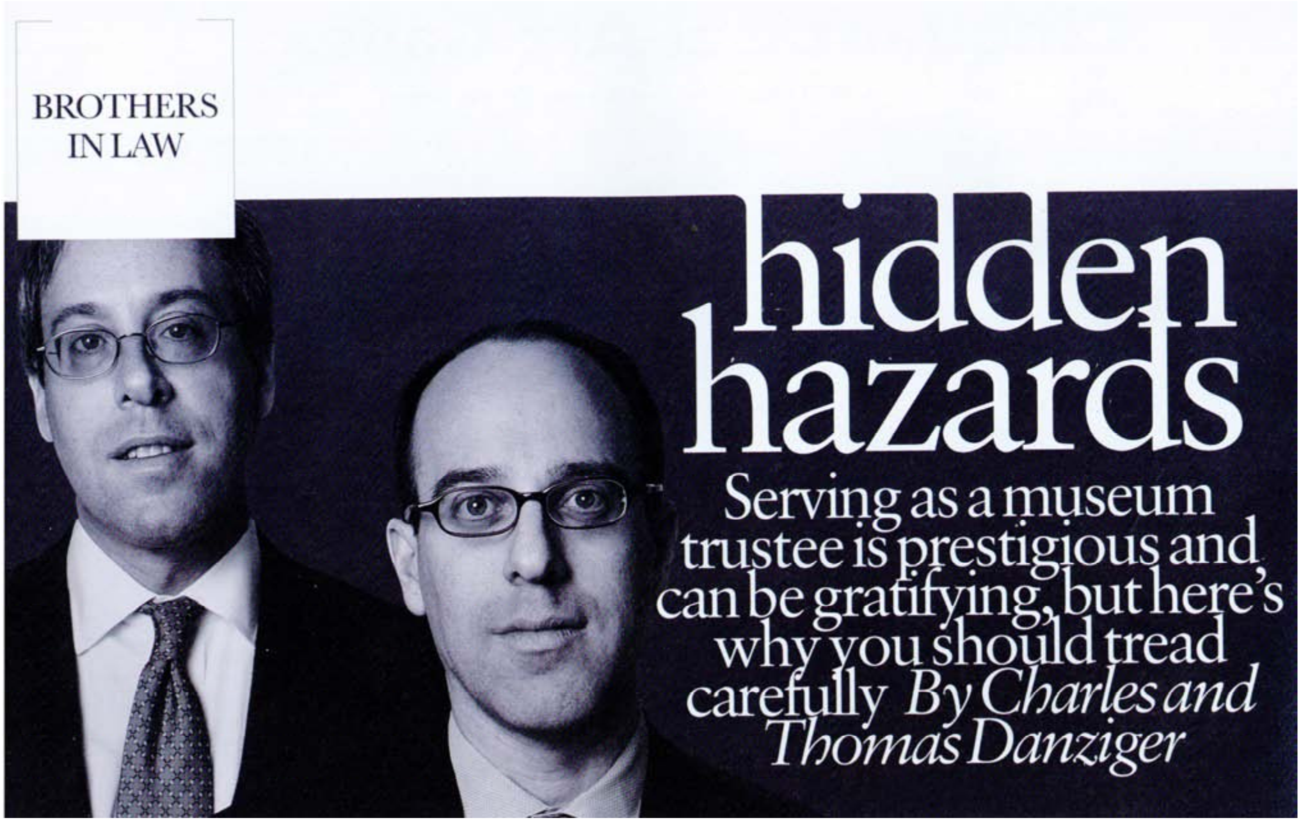

By Thomas & Charles Danziger

As careful attorneys, we are not much given to games of chance like roulette or, the way Thomas plays it, golf. Others whom we advise, though, are somewhat less averse to risk, and enjoy eating oysters in the sun or even serving as trustees for prestigious museums. Though the appeal of these activities may seem obvious enough, the risks they carry are not. Trustees bear the ultimate responsibility for a museum's activities and hold their museum's assets in trust for the general public; their responsibilities often include overseeing the collections policy, fund-raising and audit oversight. Many donate their time, money and art, and might assume that, because their efforts are usually unpaid, they are exempt from legal liability. But recent flaps involving the Getty Museum in Los Angeles and the Tate in London show that the opposite is true.

The Getty in particular has become the poster child for problems arising from "insufficient oversight by the trustees," as the California attorney general puts it. These include financial dealings under former president Barry Munitz, as well as purchases of antiquities that were allegedly looted from Greece and Italy. These controversies, along with the criminal trial in Italy of former Getty curator Marion True who has been charged with trafficking in antiquities, have museum trustees throughout the U.S. concerned about their potential liability in the event that their institutions are discovered to possess illegally excavated or exported artifacts.

Jessica Darraby, a California attorney who advises nonprofit arts boards, suggests that to avoid liability, "trustees should ensure that their museums adopt acquisition policies that are consistent with the law, and that these policies are actually carried out." Before acquiring any artifact, she says, a museum should thoroughly research its background, review documentation from previous owners and search databases such as the Art Loss Register.

The foregoing "due diligence" includes checking relevant U.S. and foreign patrimony laws. It could be argued that carrying out such research is unmanageable—especially for small museums—considering that the foreign laws might not be accessible, clear or even written in English. Our disinterested response: That's where competent outside counsel comes in.

Removing an artifact from a source country after its patrimony law was enacted could result in criminal liability under the U.S. National Stolen Property Act, which prohibits the transport or transfer of stolen property in interstate or foreign commerce. In light of mounting international pressures to protect the world's heritage, American authorities have recently begun to apply foreign patrimony laws to determine whether objects are stolen. (See the column on repatriation claims in Art & Auction, April 2003.)

Cautious trustees might be tempted to insist that the museum return all artifacts that lack a complete history, but we actually advise against this. If the museum has a good defense and if the repatriation claim is questionable, returning the object may violate the trustees' duty to care for the collection. Furthermore, identifying the rightful owner is not always easy.

Trustees are on safer ground if they adhere to the standards established by the Revised Model Nonprofit Corporation Act of 1987, which requires that directors—including museum trustees—act in good faith; with the care an ordinarily prudent person in alike position would exercise under similar circumstances; and in a manner that director reasonably believes to be in the best interests of the corporation."

Would-be trustees should bear in mind that courts have held trustees personally liable for breach of their fiduciary duties. And according to the 1978 Supreme Court ruling in Slodov v. United States, this risk is especially high if the trustees have significant control over the organization's funds. Notably, trustees cannot avoid liability simply by not attending regular board meetings. In fact, such routine absence may suggest that they failed to perform their duties conscientiously.

U.S. law does attempt to protect nonprofit trustees in various ways. Under the so-called business judgment rule, trustees are not liable for ordinary negligence as judgment rule, trustees are not liable for ordinary negligence as long as they carry out their duties in good faith. But the rule does not shield trustees from criminal activity, fraud, bad faith or willful misconduct. In addition, since nonprofits lack shareholders, typically only the state attorney general can enforce the standard of conduct governing it. This means that, as a practical matter, most prosecutors pursue only egregious cases involving nonprofits.

Some institutions may offer trustees protection in the form of directors and officers ("D&O") liability insurance, which covers costs incurred in connection with claims made against them. But smaller organizations may not be able to afford such insurance, and what coverage is available to them usually contains significant exclusions.

Even if a museum lacks D&O insurance, it might have a policy of indemnifying trustees for claims made against them. Of course, if a museum lacks the assets or insurance to back up its promise to indemnify a trustee, the promise is not worth much. Some states also immunize trustees from certain liabilities in order to encourage them to serve on nonprofits.

Perhaps there is no better protection than transparency and openness, especially when it comes to dealing with real or perceived conflicts of interest between trustees and the museum. Conflicts of interest are bound to arise if, say, a collector of African pottery becomes a trustee for a ceramics museum. In this example, the trustee might learn of a museum object becoming available for purchase and be in a strong position to acquire the work personally. Or the trustee's collection may stand to increase in value if the museum stages an exhibition of similar objects.

In the case of the Tate, in 2004 the museum paid around £600,000 ($1.1 million) for The Upper Room, 1999 to 2002, a 13-canvas work by Chris Ofili, while the artist was serving as a trustee. Apparently, the museum trustees didn't realize that a benefit to one of them had to be approved by the Charity Commission, which oversees charities in England and Wales. This past July, the commission sharply reprimanded the Tate, and while the museum is keeping the work, Tate director Sir Nicholas Serota commented: "We accept that our procedures need to be modified, and we have already made significant improvements to strengthen our governance in this area."

Museums often choose to adhere to voluntary ethical codes, which are stricter than the law's minimum requirements and are codified in the U.S. by two of the largest museum associations: the American Association of Museums and the Association of Art Museum Directors. In addition, some expect that the Sarbanes-Oxley legislation—passed in 2002 to protect against corporate governance abuses such as those of Enron and WorldCom—will set a higher standard for the conduct of nonprofits as well. Though the law generally doesn't apply to nonprofits, "museums will probably look more to Sarbanes-Oxley for guidance on how to behave," says Richard Wood, interim president of the Japan Society in New York, who serves on a number of nonprofit boards.

We generally advise our clients that if they follow basic ethical and legal guidelines when serving as trustees, the risk of legal liability is slight. Still, trustees are under increasing public scrutiny and should bear in mind the old adage "No good deed goes unpunished." That's something any smart trustee can bet on.