

Opportunity Knocks: Brothers in Law on Deaccessioning



Charles and Thomas Danizger
(Photo by Keziban Barry)

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The call came from Tuscaloosa, and it was quite memorable. Our ivory-collecting client, Horton, had heard that a small museum with a colossal netsuke collection might be going broke. He wanted to swoop in and snap up the collection immediately—for peanuts.

Horton flew to New York and appeared in our office the next day with a trunk full of documents and a load of questions on laws concerning deaccessioning. His first query: Are museums legally permitted to sell their works to private collectors?

Yes, we told him, as long as the original donors didn't put restrictions on the sale of the objects in the deeds of gift or related documents.

While donors frequently seek such stipulations to assure that their treasures won't be off-loaded to parts unknown, some museums won't accept gifts that come with restrictions. We recommend to our donor clients that they negotiate a three-year stay on any deaccession in writing. (Under the Internal Revenue Code the sale of a donated work within this period could have negative tax implications for the original donor, because the museum could be viewed as putting the donation to a use that is unrelated to its exempt purpose.)

"I already checked, and there are no restrictions on the ivory collection!" Horton trumpeted.

His next question: Could the museum use the proceeds from the ivory sale to pay its debts—or its lighting and maintenance bills? He was familiar with the recent brouhaha in Detroit, where there was speculation that the Institute of Arts might be compelled to sell from its collection, reportedly valued at more than \$2 billion, to help offset the bankrupt city's debt, estimated to be as much as \$20 billion. Horton's instincts were sound. The use of such proceeds for operating expenses might be legal, we explained, but under accepted museum guidelines, it wouldn't be ethical. The American Alliance of Museums (AAM) and the Association of Art Museum Directors (AAMD) require that their member institutions use any funds from the sale of deaccessioned works for acquisitions. The penalties are no joke. The National Academy Museum in New York was censured and sanctioned in 2008 by the AAMD after using proceeds from the sale of two Hudson River School paintings for operating expenses. Carmine Branagan, the museum's director, notes that the sanctions affected the museum's ability to secure loans for exhibitions as well as funding until they were lifted in 2010. Moreover, the state attorney general—who oversees all nonprofits in New York—could also sue the museum for breaching its fiduciary duties if it acted improperly.

There is very little established case law in this area. However, we believe the court would likely consider the museum's decision-making process and its need for, and use of, the funds before ruling against the institution.

Horton was now wondering whether he gave a hoot about the potential ivory deal, but he still had a few more questions. "The museum might want to use the sale proceeds to satisfy its bond requirements. Would that violate the ethics rules?"

Our considered response: definitely yes—or maybe no. The AAMD guidelines issued in 2007 state that proceeds from a deaccessioned work are never to be used to build a general endowment. On the other hand, in 2009 the Montclair Art Museum in New Jersey, an AAMD member, put up more than 50 pieces at Christie's, including a 1951 Jackson Pollock drawing. Technically the museum adhered to the ethical guidelines by agreeing to use the proceeds to buy art. But it later turned out that the works were actually being sold to satisfy the museum's bond covenant, which required it to retain a certain amount in its endowment. The proceeds conveniently kept the endowment fund at the necessary level. No sanctions were imposed.

Horton mentioned that the museum in question is located in New York. That might be a mammoth problem, we said, because New York happens to be the only state to have a statewide deaccessioning policy set by the Board of Regents, which oversees most museums in the state that were established after 1889.

The rules, which went into effect on June 8, 2011, clearly state that proceeds from deaccessions may not be used to pay operating expenses and may be used only for "the acquisition of collections, or the preservation, conservation, or direct care of collections." Not only are the New York standards stricter than those imposed by the AAM and AAMD, but they are also legal requirements, as opposed to merely ethical guidelines. Museums in New York that fail to adhere to the rules could lose their charter.

"Babbaric," muttered Horton. Next question: Would there be any issue if the museum accepted Horton's quiet, lowball offer?

Perhaps, we said, since that might call into question whether the museum's trustees were fulfilling their fiduciary obligation to realize the best price for the art. Consequently, museums generally prefer to deaccession objects at public auction to avoid charges of possible impropriety—and negative press. However, they are not obligated to sell at auction. The AAMD suggests selling "through publicly advertised auction, sale to, or exchange with another public institution, and sale or exchange to a reputable, established dealer."

Horton next confessed that the reason he even knew about the museum's financial difficulties was that his wife was a trustee there. Yikes! We advised him that trustees must act with total loyalty to the institution. At a minimum, his wife would have to recuse herself from any discussion or vote on a deaccession involving Horton. Otherwise, he would be buying a lawsuit, not a collection of ivory.

"Could the museum sell through a dealer, who, in turn, could sell to my wife?" Horton asked.

We thought this could still create the impression of a conflict of interest and raise concerns about whether Horton or his wife was working with insider information regarding the museum's decision to sell the pieces, as well as the asking price. The code of ethics of the International Council of Museums warns that "no person involved in the policy or management of the museum, such as a trustee... may take advantage of privileged information received because of his or her position."

Even a whiff of impropriety can be a big problem. S.I. Newhouse Jr., for instance, stunned the art world in 2000 by resigning as a trustee of the Museum of Modern Art after nearly three decades on the board when questions arose concerning his quiet, \$10 million purchase of Picasso's *Man with a Guitar*, 1913. The work had recently been deaccessioned by MoMA, and Newhouse had reportedly bought it through dealer Larry Gagosian.

Although museum guidelines lack the force of law, the last thing any trustee wants to be accused of during a board meeting is a possible breach of ethics—and the last thing any museum director wants is to read about his institution's questionable dealings in *Art+Auction*. Let's not forget that, when it comes to deaccessioning, those are the real elephants in the room.

Some facts have been altered for reasons of client confidentiality or, in some cases, created out of whole cloth. Nothing in this article is intended to provide specific legal advice.

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