All in a Day's Work: How Museums May Approach Deaccessioning as a Necessary Collections Management Tool

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HOW MUSEUMS MAY APPROACH
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I. INTRODUCTION

Deaccessioning is the removal of an object from a museum’s permanent collection. Deaccession is addressed in numerous professional organizational and institutional ethical codes, but there are few statutes or cases governing museum collection management policies. Recognizing there is a need for a universal standard, this Article seeks to synthesize previous museum practices so that it may be a reference going forward.

In light of prior practices, this Article contends that museums must (1) deaccession for reasons accepted by the museum field, (2) require proper authority to approve a deaccession, and (3) act in compliance with fiduciary duties so challenged deaccessions will be protected by the business judgment rule. In furtherance of these practices, this Article provides a model deaccession policy.

Section II considers museum deaccessioning policies, providing a definition of “art museum” as used within this Article, and an explanation of collections management policies, including accession policies, deaccession policies, and the purpose of deaccessioning. Section III discusses a variety of professional organizational and institutional codes of ethics after explaining the difference between ethical guidelines and legal requirements. The section concludes with an overview of the codes and the accepted reasons for deaccessioning, plus what level of authority should be required to approve a deaccession. Section IV considers the legal guidelines for deaccessioning, looking first to the role of the Attorney General in overseeing museum practices. Legislation related to deaccessioning is reviewed as well as case law, including the business judgment rule. Proposals by other legal commentators for how to approach deaccessioning are presented and the reasons they are insufficient discussed. The section concludes with a distillation of the statutes and case law regarding

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deaccessioning. Section V presents the factors, policies, and procedures that museums need to consider if they are to undertake acceptable deaccessioning.

II. BACKGROUND OF MUSEUM DEACCESSIONING POLICIES

"Collections are dynamic, not static."¹

To understand deaccessioning policies, a number of terms must be defined. The following section defines the terms “art museum,” “acquisition,” “accession,” “deaccession,” and “disposal.” Museum accession and deaccession policies are introduced generally.

A. Defining an "Art Museum"

Many organizations have attempted to define what a museum is, including the International Council of Museums (“ICOM”), the American Association of Museums (“AAM”), and Institute of Museum and Library Services (“IMLS”). The definition is elusive because a wide variety of collecting institutions fall under the umbrella term “museum.”

ICOM and AAM promulgate broad definitions reflective of their memberships. ICOM defines a museum as “a non-profit, permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment.”² AAM’s definition states that museums are institutions whose “missions include collecting and preserving, as

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well as exhibiting and educating with materials not only owned but also borrowed and fabricated for these ends."

The Association of Art Museum Directors ("AAMD"), again, reflective of its membership, promulgates a narrower definition, stating that art museums eligible for membership in its organization are "non-profit institutions primarily concerned with the exhibition of works of art, [employ] professional staff and [have] an annual operating budget equivalent to or exceeding $2 million for two consecutive years."

Consolidating and synthesizing these definitions presents a working definition of an art museum for the purposes of this paper. For purposes of this discussion, an art museum is a non-profit, permanent organization overseen by a Board of Trustees which has an educational purpose, is open to the public, and, through the utilization of a professional staff, collects, preserves, researches, communicates, and exhibits works of art to that public. This definition draws heavily from the AAMD definition, the only professional organization here to solely address art museums, while bringing in aspects of the other definitions to provide a more specific definition.

3. AM. ASS'N OF MUSEUMS, CODE OF ETHICS FOR MUSEUMS 1 (2000) [hereinafter AAM Code of Ethics], available at http://aam-us.org/museumresources/ethics/upload/Code-of-Ethics-for-Museums.pdf. Both IMLS and AAM explicitly include a wide variety of institutions within their definition of museum, including aquariums, arboretums, botanical gardens, children's museums, historic sites, planetariums, science and technology centers, zoological parks, and others. See id.; Museum Definition, supra note 2. Similarly, the ICOM definition could be read to implicitly include this wide variety of institutions.


5. While this paper focuses entirely on art museums and their deaccession practices, they will be referred to interchangeably as "museums" and "art museums." References to "museums" is not intended to include the broader definitions promulgated by AAM and IMLS.
B. The Collections Management Policy

“The difference between an accumulation and a collection is that a collection is organized in some way.”

Museums are generally considered public trusts, and they hold their collections not for themselves but for the public at large. A museum’s collection can be viewed as a cultural property belonging to the public, which is why many commentators argue that it is important to keep the works of art available to that public.

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6. SIMMONS, supra note 1, at 1.

7. Andrew W. Eklund, Note, Every Rose Has its Torn: A New Approach to Deaccession, 6 HASTINGS BUS. L.J. 467, 471 (2010). While museums may not technically be organized as trusts under the applicable laws, courts have found them to be trusts charged to properly utilize their collections in a manner consistent with donor intent and public interest. See In re Estate of Vanderbilt, 441 N.Y.S.2d 153, 157 (Sur. Ct. 1981). In a traditional trust, the trustee holds property on behalf of the trust beneficiaries in a fiduciary relationship that requires the trustee to only use the trust property in the manner intended to benefit the beneficiaries and in accordance with the trust instrument that created the trust. MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 6 (2d ed. 1998). The trustee is required to “exercise the skill and care of a person of ordinary prudence in carrying out” his duties, unless the trustee has greater skills that would require a higher standard of care to be applied (known as the duty of care). Id. Trustees may not engage in self-dealing (the duty of loyalty). Id; see also Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). Charitable corporations, such as museums, share qualities with traditional trusts, in that they hold property for beneficiaries, though these beneficiaries are the public at large (or a large section of the public) rather than private individuals. MALARO, supra, at 9. Charitable organizations are understood to have the powers conferred upon the organization by the enabling instrument plus any additional implied powers that are necessary to carry out its purpose. Id. at 10.

8. AM. ASS’N OF MUSEUMS, INFORMATION CENTER FACT SHEET: GUIDELINES FOR DISCUSSION OF DEACCESSIONING 1 (2003) [hereinafter AAM DEACCESSIONING DISCUSSION]. Museums may be classified as private (i.e., its support comes from the private sector) or public, however either type of museum “may be ‘public’ in the sense that it is an institution open to the public and dedicated to a public purpose.” MALARO, supra note 7, at 3-4. This is what is meant by museums’ maintaining their collections for the public.
This fact that the public is the museum’s strongest stakeholder group is also why museum professionals and academics repeatedly state that “[a] museum’s reputation is its most important asset.” Museums’ other important assets are the collections themselves, though that importance is derived entirely from the collections’ “historic, scientific and/or aesthetic qualities alone,” as museums do not place a monetary value on their collections.

To ensure the proper care of the collections, museums implement collections management policies. These policies are intended to minimize risk to the collections and typically address a variety of issues such as conservation, proper storage, and environmental standards. The process of collections management, which these policies describe, includes “everything that is done to document, care for, and develop museum collections and make them available for use.” Besides defining the proper care of the collections, the collections management policy prevents unhindered collecting, which, left to be conducted without guidance, “can create serious administrative, legal, and ethical problems” for the institution. By taking the necessary steps to develop and implement a collections management policy, a museum exerts control over its collecting program.


11. Steven H. Miller, Selling Items from Museum Collections, in A DEACCESSION READER, supra note 10, at 51, 56 [hereinafter Miller Selling Items]. It is only for insurance purposes that museum collections are valued, and that monetary value is not used for any other purpose. Id.


13. Id. at 28.

14. Id. at 24.

15. MARIE C. MALARO, MUSEUM GOVERNANCE: MISSION, ETHICS, POLICY 43 (1994) [hereinafter MALARO MUSEUM GOVERNANCE].

16. See id. at 44.
The collections management policy is typically an outgrowth of the museum’s mission statement, which establishes the parameters of the collection (e.g., time period, intellectual themes, subject, or culture). The broad scope of collections as established in the mission is then clarified and precisely described in the collections management policy. The policy also explains how the collections are to be expanded, culled, stored, cared for, and documented. The document details how the museum relates to its collections, staff, other institutions, and the public. The policy itself is implemented through collections management procedures, which provide comprehensive instructions to staff on how to properly implement the policy in daily work.

C. Museum Accession and Deaccession Practices

Acquisition, accession, deaccession, and disposal policies are contained in the collections management policy. It has been said that “[t]he best deaccession policy is a good accession policy.”

19. Gardner, supra note 17, at 69. “Collections management policies govern what a museum does to care for and grow its collections and make them available to the public.” SIMMONS, supra note 1, at 2. This is distinct from a collecting plan, which is a “plan that identifies what the museum wants to acquire over a period of time” but does not address topics such as “deaccessioning, resource allocation, partnerships with other museums, and other aspects of building and sustaining the collections,” topics which appear in a collections management policy. Introduction to THE AAM GUIDE TO COLLECTIONS PLANNING, supra note 17, at 2.
20. SIMMONS, supra note 1, at 2. “Enacting and enforcing good collections management policies helps the museum achieve its mission, demonstrates commitment to professional standards and practices, and enables the governing authority to meet its legal and ethical obligations to protect and make accessible the collections in the public trust.” Simmons, supra note 12, at 24.
21. SIMMONS, supra note 1, at 2.
22. See ASS’N OF ART MUSEUM DIRS., ART MUSEUMS AND THE PRACTICE OF DEACCESSIONING [hereinafter AAMD ART MUSEUMS].
I. Accession Policies

To understand the term “deaccession,” one must first understand the term “accession.” Accessioning is the process by which objects enter the museum. It is a two-step process: (1) the object is acquired by the museum, and (2) the object is recorded or processed into the permanent collection. All objects accessioned into the collection must first be acquired by the museum, but not all items acquired will necessarily be accessioned.

In the museum field, the term “accession” has two different but related meanings. First, an “accession” is “an object acquired by a museum for its permanent collection,” and “composed of everything acquired at the same time, from the same source, as a single transaction between the museum and that source.” Second, “accession” is “the act of recording/processing an addition to the permanent collection.” Accession policies outline the museum’s policies and procedures on how to process (accession) objects into the permanent collection. They ensure that the process of acquiring new collections objects is conducted in a judicious manner, furthers the museum’s mission, and brings in objects that

23. Nat’l Park Serv., Museum Handbook Part II § 6.1 (2000), available at http://www.nps.gov/museum/publications/MHII/mh2ch6.pdf. “Today, it is widely recognized that the best control a museum has over deaccessioning is a good accessions policy.” Simmons, supra note 1, at 51. This section will discuss accession and deaccession policies. They are referred to as such for clarity, but in reality these separate “policies” may actually be sections in the collections management policy or some other document, depending on the individual museum and how it conducts its activities.

24. Clarisse Carnell & Rebecca Buck, Acquisitions and Accessioning, in New Museum Registration Methods, supra note 12, at 44, 44.

25. Id. Acquisition can occur by gift, purchase, or any other means by which the title of the object is legally transferred to the museum. Id.

26. Id.

27. Id. For instance, office furniture, display vitrines, and shipping crates are acquired by museums for use in their day-to-day operations, but none of these objects would necessarily be accessioned into the permanent collection.

28. Id. at 44.

29. Simmons, supra note 1, at 39.

30. Carnell & Buck, supra note 24, at 44.
can be used and cared for. Due to potential tax liabilities, objects the museum intends to deaccession should not be accessioned.

The accession policy regulates the accessioning process. It will generally list requirements for an accession to proceed, including that the accession (1) conform to the institution’s mission, (2) enhance the collections, and (3) have a free and clear title. The policy builds off of the museum’s collecting policy to ensure that

31. See MALARO MUSEUM GOVERNANCE, supra note 15, at 44. Not all objects acquired by a museum must be accessioned. Carnell & Buck, supra note 24, at 44. For example, teaching collections which are regularly handled by visitors including children are often made up of non-accessioned objects. SIMMONS, supra note 1, at 40. Title passes to the museum through the process of acquisition, for instance through purchase or donation, so accessioning is not mandatory for objects to become the property of the museum. Carnell & Buck, supra note 24, at 49. As a general rule, objects which the museum does not intend to keep in perpetuity in the permanent collection and to hold in the public trust are not accessioned. SIMMONS, supra note 1, at 40.

32. NAT’L PARK SERV., supra note 23, § 6.3. Donations made to a qualified organization, including educational organizations such as museums, qualify for a tax deduction. See DEP’T OF THE TREASURY, INTERNAL REVENUE SERVICE, PUBLICATION 526: CHARITABLE CONTRIBUTIONS 2 (2011). The monetary value of the contribution generally is the fair market value of the property donated. Id. at 7. If the donee museum is going to put the donated artwork to use in a manner unrelated to its exempt purpose, the amount of the deduction is reduced from the fair market value to its cost basis. Id. at 11-12. For example, if the museum accepts the donation of artwork with the intention to sell the work in order to gain the proceeds from sale, the donation has been put to an unrelated use. Id. at 12. Additionally, donors will be required to recapture part of their deduction in a later tax year if (1) the donation consisted of tangible personal property claimed to have a value in excess of $5,000 and the donor’s deduction was greater than the basis; (2) the donee sells, trades, or otherwise disposes of the property after the year of donation and within three years of receiving the property; and (3) the museum fails to provide the donor with IRS Form 8282, signed by a museum officer under penalty of perjury, that states either that (a) the use of the donated property “was substantial and related to the organization’s purpose” or (b) certifies that the purpose intended for the property became impossible for the museum to pursue. Id. Because of these potential adverse effects on donors who take deductions for donations that the museum does not intend to put to a related use, museums are well advised to inform donors of their intentions with the donations and if the donation will not be accessioned and retained as part of the permanent collection.

33. SIMMONS, supra note 1, at 39.
the collection's strengths and weaknesses are addressed with accessions, thereby ensuring intelligent collecting by the institution. 34

The policy also helps to ensure that the legal and ethical obligations a museum takes on when a new object is accessioned are considered. 35 The museum "must provide proper storage, management, and documentation for everything in its collections and maintain those collections for the benefit of the public." 36 Accessioning objects into the permanent collection is a long-term allocation of the institution's resources, 37 including staff, facilities, and finances. Therefore, the collecting plan's goals and the decision to accession "must be weighed in light of [the] impact on the museum's ability to carry out other functions that may be part of its mission, such as exhibition, research, and educational outreach." 38

There are numerous financial costs associated with the acquisition of an object, including the purchase price, curation costs, documentation, conservation, and storage. 39 It is easy to assume that storage of collections objects is a minor part of a museum's budget. 40 However, storage of an object does not simply involve the physical space of the object; museum storage facilities are expensive spaces that require adequate security, proper atmospheric controls to ensure preservation, and complex design elements to permit efficient access to a large variety of objects. 41 A 1989 study found that 66% of museums' operating budgets were related to collections care. 42 Direct care of the

34. Carnell & Buck, supra note 24, at 47.
35. SIMMONS, supra note 1, at 38.
36. Id. at 38-39. See supra note 8 regarding the maintenance of collections for the public.
37. MALARO MUSEUM GOVERNANCE, supra note 15, at 44.
38. Id.
40. MALARO LEGAL PRIMER, supra note 7, at 289 n.22.
41. Id. at 217.
42. LORD, supra note 39, at 1.
collections cost 38% of the budget. A separate 1989 study found that for the previous two fiscal years, museums’ annual growth of collections was reported at 4.3% and 5.4%. If the annual growth of museums’ collections is approximately 5%, the figure compounded annually results in a doubling of size every 15 years. As the collection doubles, so does the cost of maintaining the collection, thus also doubling every 15 years (plus the cost of inflation). In 1983, American museums were paying an average of $50 per year per object for proper storage and preservation. If that price were to double every 15 years, it will have reached $200 per object per year by the year 2013, not accounting for inflation. Accession policies also specify who may authorize an accession. Some accession policies indicate different levels of authority needed depending on the type of object proposed for accession, for instance based on the object’s monetary value.

43. Id. The exact breakdown was: security 14%; curatorial programs 13%; documentation 4%; conservation 4%; research 2%; and inventory 1%. Id. A more expansive list of collections care includes “recording, periodic inventory, maintaining accessible records, environmental pest control, storage equipment, security, conservation, insurance, and the general overhead including management and building expense.” MALARO LEGAL PRIMER, supra note 7, at 290 n.22.

44. Introduction to A DEACCESSION READER, supra note 10, at 1, 2.

45. Id.

46. See id.

47. Id. at 3.

48. “The museum can benefit from an analysis of the ongoing costs associated with collecting and maintaining collections, including not only the cost to acquire—e.g., purchase cost, transportation and insurance, initial conservation—but also long term costs such as cataloging, storage, conservation, photography, and inventory control.” Morris, supra note 18, at 101.

49. SIMMONS, supra note 1, at 42.

50. Id.
2. Deaccession Policies

Deaccessioning, in contrast, is the process by which an object is removed from the museum's permanent collection.\(^{51}\) Deaccessioning is not the same as disposal, which is when ownership of an object is transferred from the museum to another institution, organization, or individual.\(^{52}\) Disposal typically will occur after the process of deaccessioning,\(^{53}\) but disposal is not required to complete the deaccessioning process.\(^{54}\)

Deaccessioning is an internal museum procedure that has no effect of the museum's legal ownership of the object.\(^{55}\) However, even if the museum retains physical custody of the object, the fact it has been deaccessioned indicates that the museum does not intend to hold the object in the public trust in perpetuity.\(^{56}\) If the museum does not intend to retain physical custody of the object after it has been deaccessioned, then the object will be disposed.\(^{57}\)

Because the deaccessioning process indicates that the museum no longer intends to hold the object in perpetuity, it is a sensitive issue and must be conducted judiciously and systematically.\(^{58}\) The decision to deaccession should be handled in a manner that guarantees the museum's governing body is being responsible in


\(^{52}\) Id.

\(^{53}\) Id.

\(^{54}\) For example, if an object is deaccessioned from the permanent collection because it was previously and inappropriately accessioned, but the museum intends to retain ownership of the object, then disposal will not occur. Some commentators combine the process of deaccessioning and disposal into the term “deaccession.” For instance: “[d]eaccessioning is the procedure whereby museums sell or dispose of unwanted or less desirable pieces in their collections to provide funds for new purchases or to achieve a balanced collection.” Marilyn E. Phelan, Museum Law: A Guide for Officers, Directors, and Counsel 153 (2d ed. 2001). However, such definitions are misleading, as it suggests that deaccessioning is not complete until the object has been disposed.

\(^{55}\) Gardner, supra note 17, at 69.

\(^{56}\) Id.

\(^{57}\) Morris, supra note 18, at 101.

\(^{58}\) AAM Deaccessioning Discussion, supra note 8, at 1.
its decision and the interests and mission of the institution are upheld.\textsuperscript{59}

Deaccessioning is legal\textsuperscript{60} and is considered by many to be a legitimate activity for museums to undertake.\textsuperscript{61} When properly done, deaccessioning can improve the quality of the permanent collection.\textsuperscript{62} "It is recognized that museum collections occasionally may be strengthened by the \textit{wise and constructive sale} and exchange of previously acquired works of art . . . ."\textsuperscript{63} In some instances, failing to deaccession may be a breach of the museum’s duties.\textsuperscript{64}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{59} \textit{Id.} Because of the seriousness of the process, the National Park Service indicates that deaccessioning objects from its collections “should be a rare action.” \textit{NAT'I'L PARK SERV.}, supra note 23, § 6.1.
\item \textsuperscript{60} The legality of deaccessioning is dependent on there being no restrictions on the initial donation of the work to the museum. \textit{MALARO LEGAL PRIMER}, supra note 7, at 222. If the donor included a restriction on the gift which prevented later deaccessioning and/or disposal, than the museum will be bound by the language of the instrument and cannot deaccession the object. \textit{Id.}
\item \textsuperscript{61} David R. Gabor, \textit{Deaccessioning Fine Art Works: A Proposal for Heightened Scrutiny}, 36 UCLA L. REV. 1005, 1005 (1989). This is not to say that deaccessioning should be undertaken lightly. It has been suggested that “[i]he deaccession of art is, in a sense, a sale of the public’s property.” Jason R. Goldstein, Note, \textit{Deaccession: Not Such a Dirty Word}, 15 CARDozo ARTS & ENT. L. J. 213, 214 (1997). This is an extreme statement, but also common among some commentators. This extreme stance adds to the controversy surrounding deaccessioning, with some commentators holding the belief that it should rarely, if ever, be done. As such, deaccessioning should be treated as a serious decision by the museum. Museum trustees do well to remember this, since the decision to deaccession works could, if improperly done, call into question if the trustees are maintaining the necessary level of fiduciary responsibility to the institution. Gabor, supra, at 1005-06. Anti-deaccessioning commentators are likely to strongly question any deaccession: “[t]he trustees must consider the ultimate effect of deaccessioning upon the collection as a whole as the entire collection is dedicated to the public benefit.” \textit{PHelan}, supra note 54, at 153.
\item \textsuperscript{62} \textit{JOHN HENRY MERRYMAN ET. AL., LAW, ETHICS, AND THE VISUAL ARTS} 1271, 1271 (2007).
\item \textsuperscript{63} \textit{CAA RESOLUTION}, supra note 9, ¶ 3 (emphasis added).
\item \textsuperscript{64} \textit{SIMMONS}, supra note 1, at 52, stating “[u]sing museum resources to maintain inappropriate collections can be an abrogation of the public trust.”
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Deaccessioning is governed within the museum by its deaccession policy. The deaccession policy states the criteria for deaccessioning to precede, lists acceptable reasons to deaccession, sets up a review and approval procedure, and indicates when, if ever, outside opinions or appraisals are necessary. The policy also indicates what level of authority is needed to approve a deaccession, which museum professional standards indicate should be at least at the level needed to approve an accession, if not higher. A well-drafted deaccession policy clearly states the criteria to be considered when determining if an object will be deaccessioned from the collection.

65. Simmons, supra note 12, at 28.
66. MALARO LEGAL PRIMER, supra note 7, at 225. While the process of deaccessioning can be used to cull and improve the collections overall, it does raise questions. One obvious concern may be that there was some error in accessioning the object, suggesting the object should never have been accessioned into the permanent collection. Miller Selling Items, supra note 11, at 57. When deaccessioning an object that was received as a donation, that donor or other potential donors may question if future donations to the institution will also be deaccessioned. See id. at 58. If donors are concerned a museum will deaccession their donations, those donors may choose to donate to a different institution, thereby negatively impacting the museum's ability to solicit donations and potentially damaging the institution's relationship with its donors. In order to avoid this scenario, some museums have adopted a policy of notifying donors of a possible deaccession of an object that donor gave to the museum. MALARO LEGAL PRIMER, supra note 7, at 228. When the proceeds of deaccessioned and disposed donated works are used to purchase new works, museums will often indicate that they were acquired with funds generated by the original donor's generosity. Id. These concerns demonstrate some potential issues associated with deaccessioning, highlighting why a high level of authority should be required. By not permitting employees to acquire and accession objects without oversight, the museum can ensure that objects unrelated to the mission or inappropriate in some other way do not enter the collection. Likewise, a high level of authority encourages the ramifications of a potential deaccession, including donor relations and the reaction of the public, be considered by not only staff members but also officers such as the Director and the Trustees.

67. SIMMONS, supra note 1, at 53. Museum professional standards also dictate that the museum retain indefinitely the deaccession records for the object. MALARO LEGAL PRIMER, supra note 7, at 225.

68. Morris, supra note 18, at 101. Also discussed in the deaccession policy will be methods of disposal, detailing what the preferred methods are and how a
Despite its usefulness in collections management and care, deaccessioning is a highly controversial practice. The controversy stems from a fundamental disagreement concerning just how permanently objects are to be held in museums' collections. "While some believe museums are inviolate cultural repositories and contend nothing should ever be removed, others argue museums should be allowed flexibility to meet challenges or changes in the artistic climate." This disagreement has both ethical and legal dimensions. A prominent and widely-discussed concern involves the disposal process that often follows deaccessioning. However, many in the museum profession agree

method should be chosen. MALARO LEGAL PRIMER, supra note 7, at 226. Disposal methods, from least to most common, are destruction, gift, trade, and sale. Miller Guilt-Free, supra note 10, at 93-94. As mentioned above, see supra notes 52-54 and accompanying text, disposal is not mandatory following a deaccession, and objects may also be transferred from the permanent collection to another collection held by the museum, such as study or teaching collections. MALARO LEGAL PRIMER, supra note 7, at 217. While such transfers retain legal ownership and physical possession of the object with the museum, the object is still being removed from the permanent collection and will not be held in the public trust, making full compliance with the deaccession policy necessary. Id. Disposal methods and the proceeds generated by disposal sales are outside the scope of this Article.

69. SIMMONS, supra note 1, at 51. "The concept of deaccessioning in the last 35 years has frequently been controversial as the profession has been ever more alert to issues of legal responsibilities, the public's expectations of museums, and ethics codes for institutions and individuals." Morris, supra note 18, at 100.

70. Gabor, supra note 61, at 1014.

71. MALARO LEGAL PRIMER, supra note 7, at 218.

72. See note 68, supra. Some commentators are concerned that when museum objects are sold, it has the potential to create a scenario where collection objects may be viewed as fungible assets. Jennifer L. White, When It's OK To Sell the Money: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses, 94 Mich. L. Rev. 1041, 1042 (1996). According to those commentators, the collection's monetary price will then be considered, possibly above the objects' cultural value. Id. at 1043. "Although cultural value often translates into high dollar value, the cultural value of a work of art is an important consideration independent of the price that work of art might bring on the market." Id. However, it is important to remember that deaccessioning itself is a legal and ethical process for museums to undertake; it is often the manner by which disposal is implemented that can cause problems. MALARO MUSEUM
that deaccessioning is a proper task for museums to undertake as part of their duty to manage and preserve the collection as a whole. Deaccessioning permits the museum to exert control over the collection, refining and focusing what is held by the museum so that it better reflects and serves the institution’s mission.

Between the constant need to refine the collection and the high costs associated with maintaining inappropriate objects in the collection, deaccessioning can easily be viewed as a necessary aspect of museum collections care. As the museum field becomes more professionalized, many recognize that judicious culling of museum collections is necessary to ensure purposeful collecting. This is especially true in older institutions since many “have collected material that is clearly outside the scope of their mission, that may be deteriorated beyond a useful life, or that could be better used by other educational institutions.” In situations where

GOVERNANCE, supra note 15, at 46. Commentators must remember that if the decision to deaccession was made reasonably and in compliance with accepted ethical guidelines, the proceeds of a disposal through sale is secondary, while the primary purpose of the deaccession (for instance, removing works inconsistent with the museum’s mission or collecting goals) remains paramount.

73. See SIMMONS, supra note 1, at 52.
74. Simmons, supra note 12, at 28. In a sense, deaccessioning is the museum profession’s admission that not everything can be collected and that procedures are needed to periodically review, reevaluate, and cull the collections. MALARO LEGAL PRIMER, supra note 7, at 219.
75. MALARO LEGAL PRIMER, supra note 7, at 217.
76. Morris, supra note 18, at 100. While a modern museum would hopefully not have this problem with current acquisitions and accessions, the fact remains that museums have items in their permanent collections which should not be there and likely would not have been accessioned under modern museum professional practice. As one commentator has indicated, “years ago some museums accessioned everything on the premises,” MALARO LEGAL PRIMER, supra note 7, at 217, an act which is unlikely to occur in a museum today. While these objects should never have been accessioned, that does not mean that the deaccessioning process can be skipped. Id. If an object is being removed from the permanent collection, the policies and procedures for deaccessioning as instituted by the museum must be followed. Id. But these objects do not necessarily need to be maintained in the permanent collection just because they were once accessioned under policies and procedures that would be rejected under modern museum professional standards as inappropriate and not in
the collection contains objects that do not further the museum’s mission or are past their useful life, deaccessioning permits those objects to be removed. 77

Having considered the costs of keeping inappropriate objects in the collection and the numerous reasons that an object could reasonably be selected for deaccessioning, the museum should also consider its responsibilities in connection with its role as steward of the collection. As Steven Miller, past Director of the Morris Museum (NJ), stated, museums have a “triple responsibility” directed toward “the institution, to its collections and to the public. If the best interests of all three are served by removing an item from a museum, without endangering the item itself, then deaccessioning is probably being carried out correctly.” 78

Such well-thought-out deaccessioning decisions require a carefully considered deaccession policy. 79 This brings the deaccession argument full circle to the issue of collections management, which is intrinsically tied to the deaccessioning compliance with the goals of upholding the mission and ensuring proper collections care.

77. See AAMD POLICY, supra note 51, at 6. Instead of considering this a weakness due to past poorly-conceived accession policies, this ability can be viewed as a strength for American museums. “One of the strengths of American museums is, in fact, their ability, absent some express restriction placed on a gift by a donor, to remove particular objects from the collection.” Patty Gerstenblith, Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public, 11 CARDOZO J. INT’L COMP. L. 409, 423 (2003). Museums deaccession to improve the collection and bring the collection closer to the mission. This can be expressed as a myriad of reasons for why the object is being deaccessioned. A partial list of reasons an object is specifically removed includes

- a desire to improve the quality of a collection by acquiring a better example of a particular artist or time period;
- elimination of a piece that does not fit into the current collection;
- elimination of pieces that are thought to be redundant with others in the collection;
- changing notions of taste; and
- the desire to obtain funds to meet general operating expenses or for particular capital improvements to the museum’s physical facility.

Id. at 422-23.

78. Miller Selling Items, supra note 11, at 60-61.

79. Introduction, supra note 44, at 1.
issue. Just as accessioning is an important part of collection growth, so is deaccessioning, which permits reevaluation of the contents of the collection to ensure that the best and most useful materials are retained for posterity.

III. ETHICAL CODES AND DEACCESSIONING

"The law is not designed to make us honorable, only bearable." 82

The museum profession has adopted various ethical codes that address deaccessioning. In order to place these ethical codes in context, it is necessary to consider what the difference is between ethics and the law.

A simple description of what function the legal system serves is that "[t]he purpose of the law is to require conduct that allows us to live in society without undue harassment." 83 In contrast, "[a]n ethical code sets forth conduct that a profession considers essential in order to uphold the integrity of the profession." 84 In other words, museums voluntarily adopt and adhere to ethical codes in order "to ensure good stewardship of assets held in the public trust and to maintain public confidence," which often call for more than the legal requirements. 85 Between the two, the law sets a lower standard than ethical codes. 86 Because of this lower standard, it is possible to engage in actions that are ethically questionable while

80. Id. at 4.
81. See MALARO LEGAL PRIMER, supra note 7, at 216.
82. MALARO MUSEUM GOVERNANCE, supra note 15, at 17.
83. Id.
84. Id.
85. AM. ASS’N OF MUSEUMS, INFORMATION CENTER FACT SHEET: STANDARDS AND BEST PRACTICES FOR MUSEUMS 1 (2009) [hereinafter AAM STANDARDS].
86. Marie C. Malaro, Deaccessioning — The American Perspective, in A DEACCESSION READER, supra note 10, at 39, 40 [hereinafter Malaro Deaccessioning].
perfectly legal.\textsuperscript{87} The ethical codes provide more definitive guidance for the real-world issues that typically arise in the profession.\textsuperscript{88}

Breaching legal requirements may result in civil or criminal liability.\textsuperscript{89} Enforcement of ethical codes is more problematic and requires “a consistent and voluntary commitment from a sizeable portion of the profession” if it is to happen at all.\textsuperscript{90} While the legal standard is lower, the ability to enforce the legal standard through civil and criminal liability provides that lower standard with a degree of clout, unattainable by ethical codes.\textsuperscript{91} When reviewing codes of ethics, this lack of enforcement must be borne in mind.\textsuperscript{92}

\textsuperscript{87} Id. “If a profession does not police itself [via ethical codes], the law allows the profession to sink quite low before liability is imposed.” Malaro Museum Governance, supra note 15, at 17.

\textsuperscript{88} Id. at 18

\textsuperscript{89} Id. at 17.

\textsuperscript{90} Id.

\textsuperscript{91} Id. “Quite frequently codes of ethics have no enforcement mechanism. They depend on self-education, self-motivation, and peer pressure for their promulgation.” Id. Organizations where members are invited to join (such as the Association of Art Museum Directors) or which have an accreditation program (such as the American Association of Museums) may be able to enforce their ethical codes by revoking membership or accreditation for noncompliance. See About AAMD, supra note 4.

\textsuperscript{92} This lack of enforcement means that while professional codes are widely promulgated, there is limited remedy when a museum does not follow the codes (generally, removal from the membership ranks of the professional organization that promulgated the code). In contrast, institutional codes of ethics can only be enforced against the institution by itself. This means that institutional codes of ethics tend to represent what the institution considers the lofty aims the institution should strive for but have even less enforcement options than professional codes.

A code of ethics sets forth conduct deemed necessary by a profession to uphold the integrity of the profession. It sets a higher standard because it is based on principles of personal accountability and service to others. A code of ethics, however, frequently has no enforcement power. It is effectively only if there is personal commitment and informed peer pressure.

Malaro Deaccessioning, supra note 86, at 40.
A. Professional Codes of Ethics

When discussing professional codes of ethics, it is important to understand that there is no overarching set of professional ethics that apply to the museum field. Therefore, the ethical codes promulgated by three of the largest organizations will be considered in turn.

1. American Association of Museums

Founded in 1906, AAM represents the widest-defined scope of museums, museum professionals, and museum volunteers. The organization represents over 18,000 employees and volunteers, close to 3,000 institutions, and 250 corporate members. Member-museums represent a wide-range of disciplines, including “art, history, science, military and maritime, and youth museums, as well as aquariums, zoos, botanical gardens, arboretums, historic sites, and science and technology centers.” Because of its broad definition, AAM’s Code of Ethics for Museums necessarily discusses a wide variety of topics, many very shallowly. It only has two vague references to deaccessioning: “acquisition, disposal, and loan activities conform to [the museum’s] mission and public trust responsibilities,” and “disposal of collections through sale, trade, or research activities is solely for the advancement of the museum's mission.”

Perhaps because the Code of Ethics is so vague, AAM also promulgates a fact sheet on deaccessioning discussions. The Guidelines for Discussion of Deaccessioning (“Guidelines”) introduces the topic by stating that the state Attorney General has legal oversight of museums and the general public often

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93. AAM STANDARDS, supra note 85, at 1.
95. Id.
96. Id.
97. AAM Code of Ethics, supra note 3.
98. Id.
99. AAM DEACCESSIONING DISCUSSION, supra note 8.
scrutinizes deaccessioning decisions. It then states that deaccessioning decisions need to be “[j]udicious, [w]ell-informed, [w]ell-intentioned, [and] [g]rounded in an understanding of the legal and ethical issues involved.”

Guidelines provide potential reasons a museum can appropriately deaccession an object: (1) inconsistent with mission or collecting goals; and (2) unable to provide care. Guidelines further recommend that deaccessioning proceed under a pre-established and proactively applied framework, for instance a mission, vision plan, or collections management plan. The remainder of Guidelines addresses public relations issues that may arise in connection with deaccessioning. Overall, Guidelines provides little practical information for a museum undertaking a deaccession.

2. Association of Art Museum Directors

AAMD has a much smaller and more focused membership than AAM. Currently with 198 members, AAMD “consists of persons who serve as directors of art museums in the United States,

100. Id. at 1.
101. Id.
102. The various codes use different language to state substantially similar concepts. Therefore, this article will standardize the language given in each code to describe why a work may be deaccessioned and provide the exact language used in the code in a footnote to simplify comparison of the different ethical codes. This will permit an easier comparison across codes of when deaccessioning is permitted within the various organizations and institutions. Specifically, the reasons to deaccession will be simplified to the following phrases: (1) poor quality; (2) duplicate/redundant object; (3) violation of law; (4) authenticity/attribution questioned; (5) restoration impractical; (6) inconsistent with mission or collecting goals; (7) refine/improve the collection; (8) unable to provide care; and (9) to acquire superior works.
103. “[The] [c]ollections need to align with and support the mission . . . .” Id.
104. “[The] [c]ollections need to be supportable with the resources the museum has available, [and] [d]eaccessioning can help museums manage resources more effectively.” Id.
105. Id.
106. AAM DEACCESSIONING DISCUSSION, supra note 8, at 1-2.
Canada, and Mexico which, by purpose, size, and standards of operation meet the eligibility requirements established by the Trustees of the Association.  

The organization promulgates the AAMD Policy on Deaccessioning ("Policy") which states that "art museums continue to build and shape their collections over time to realize more fully and effectively their mission." AAMD provides a clear statement in favor of deaccessioning by stating, "Deaccessioning is a legitimate part of the formation and care of collections and, if practiced, should be done in order to refine and improve the quality and appropriateness of the collections, the better to serve the museum’s mission."

In order to conduct deaccessioning, AAMD requires museum members to write clear collections management policies that address acquisitions and deaccessioning, to thoughtfully acquire objects, to follow all applicable laws when deaccessioning, to present appropriate research when recommending a work be deaccessioned (including prior ownership history, scholarly research, donor intent, and the object’s relevance to collecting goals), and publication of deaccessioned works on the museum’s website.

The AAMD provides eight reasons a work may be deaccessioned: (1) poor quality, (2) duplicate/redundant

108. AAMD POLICY, supra note 51.
109. Id. at 2.
110. Id. at 4. Further explaining its position on deaccessioning, the AAMD states in a separate document that "[t]he decision to deaccession is made solely to improve the quality, scope, and appropriateness of the collection, and to support the mission and long-term goals of the museum; . . ." AAMD ART MUSEUMS, supra note 22 (emphasis added).
111. Meaning museums whose director is a member of AAMD. AAMD POLICY, supra note 51, at 3.
112. See id. at 3, 4.
113. The language suggests that this is a non-exhaustive list and other reasons may exist. "There are a number of reasons why deaccessioning might be contemplated." Id. at 5.
114. "The work is of poor quality and lacks value for exhibition or study purposes." Id. at 5.
object;\textsuperscript{115} (3) violation of law;\textsuperscript{116} (4) authenticity/attribution questioned;\textsuperscript{117} (5) restoration impractical;\textsuperscript{118} (6) inconsistent with mission or collecting goals;\textsuperscript{119} (7) refine/improve the collection;\textsuperscript{120} and (8) unable to provide care.\textsuperscript{121}

Authority to approve a deaccession is also addressed, though specific requirements and guidelines are vague. The deaccession process is to be initiated by "appropriate professional staff" who then make a recommendation to the director.\textsuperscript{122} Final decision to deaccession must come from "the Board of Trustees or governing body or its designee."\textsuperscript{123} Procedures and decisions are to comply with the museum's collections management policy.\textsuperscript{124} The Policy does not provide a definition of "appropriate professional staff" or who the Board of Trustees may designate to approve deaccession

\textsuperscript{115} "The work is a duplicate that has no value as part of a series." \textit{ld.}

\textsuperscript{116} "The museum's possession of the work may not be consistent with applicable law, e.g., the work may have been stolen or illegally imported in violation of applicable laws of the jurisdiction in which the museum is located or the work may be subject to other legal claims." \textit{ld.}

\textsuperscript{117} "The authenticity or attribution of the work is determined to be false or fraudulent and the object lacks sufficient aesthetic merit or art historical importance to warrant retention. In disposing of or retaining a presumed forgery, the museum shall consider all related ethical issues including the consequences of returning the work to the market." AAMD POLICY, \textit{supra note 51}, at 5.

\textsuperscript{118} "The physical condition of the work is so poor that restoration is not practicable or would compromise the work's integrity or the artist's intent. Works damaged beyond reasonable repair that are not of use for study or teaching purposes may be destroyed." \textit{ld.}

\textsuperscript{119} "The work is no longer consistent with the mission or collecting goals of the museum. The Board of Trustees or governing body of the museum must exercise great care in revising a museum's mission or reformulating collecting goals." \textit{ld.} at 6.

\textsuperscript{120} "The work is being sold as part of the museum's effort to refine and improve its collections, in keeping with the collecting goals reviewed and approved by the museum's Board of Trustees or governing body." \textit{ld.}

\textsuperscript{121} "The museum is unable to care adequately for the work because of the work's particular requirements for storage or display or its continuing need for special treatment." \textit{ld.}

\textsuperscript{122} AAMD POLICY, \textit{supra note 51}, at 6.

\textsuperscript{123} \textit{ld.}

\textsuperscript{124} \textit{ld.} at 7.
decisions in its place. Failure to comply with the Policy can result in sanctions, including expulsion from AAMD.\textsuperscript{125}

3. \textit{International Council of Museums}

Founded in 1946, the International Council of Museums ("ICOM") represents almost 30,000 members and museum professionals from 137 countries and territories.\textsuperscript{126} ICOM is more international in nature than either AAM or AAMD, but is similar to AAM in that it has a broad definition of "museum."

The \textit{ICOM Code of Ethics for Museums} ("ICOM Code")\textsuperscript{127} is meant to compile internationally-accepted codes of ethics under one document.\textsuperscript{128} The \textit{ICOM Code} is a self-proclaimed "minimum standard for museums" who are members of the organization.\textsuperscript{129}

The \textit{ICOM Code} indicates that all member museums are to write a collections management policy addressing acquisitions, among other topics.\textsuperscript{130} Authority to approve a deaccession is placed with the institution's governing body, which then makes the decision with the assistance of the director and curator.\textsuperscript{131} Specific appropriate reasons to deaccession are not provided.

\textsuperscript{125} "In the event a member or museum violates one or more of the provisions of this Policy, the member may be subject to censure, suspension, and/or expulsion, and the museum may be subject to censure and/or sanctions in accordance with the relevant provisions of the Code of Ethics of the AAMD . . . ." \textit{Id.} at 9.


\textsuperscript{128} \textit{Id.} at iv.

\textsuperscript{129} \textit{Id.} As discussed above, ethical codes in America represent a higher standard than laws, which are seen to provide the minimum standard. ICOM acknowledges this discrepancy: "[i]n some countries, certain minimum standards are defined by law or government regulation." \textit{Id.} The \textit{ICOM Code} is not intended to supplant American law, but instead is intended to be used as a minimum standard upon which member museums develop their internal institutional code of ethics. \textit{See id.}

\textsuperscript{130} \textit{Id.} at 3.

\textsuperscript{131} \textit{Id.} at 5.
B. Institutional Codes of Ethics

1. Museum of Modern Art

The Museum of Modern Art, located in New York City, NY ("MoMA"), was founded in 1929 to address a "need to challenge the conservative policies of traditional museums and to establish an institution devoted exclusively to modern art." The museum's mission, in part, states that it "seeks to create a dialogue between the established and the experimental, the past and the present, in an environment that is responsive to the issues of modern and contemporary art, while being accessible to a public that ranges from scholars to young children."

Today, the collection contains 150,000 visual works and approximately 22,000 films and 4 million stills. The institution's Library and Archives holds over 300,000 books and related materials plus files on over 70,000 individual artists. In 2000, MoMA became affiliated with P.S.1 Contemporary Art Center.

MoMA's total operating revenue for the fiscal year ending June 30, 2010, totaled $155,731,000. During that fiscal year, it generated $11,296,000 in the sales of artworks and spent $15,970,000 to acquire new works for the collection. In the previous fiscal year ending June 30, 2009, the total operating revenue was $150,967,000.

134. Those visual works are comprised of "paintings, sculptures, drawings, prints, photographs, architectural models and drawings, and design objects." MoMA History, supra note 132.
135. Id.
136. Id.
137. Id.
139. Id. at 4.
140. Id. at 3.
revenue was $157,895,000, $1,774,000 was gained in sales of artworks, and $33,638,000 was spent to acquire new works.

MoMA’s Board of Trustees appoints a Committee on the Collection for each of its curatorial departments. Each committee approves all accessions into and deaccessions from the curatorial department’s collection. The museum’s accession policy requires that proposed acquisitions be relevant to the mission and be in a physical condition that is capable of being returned to an acceptable state of condition or currently is such (unless the integral meaning of the work dictates otherwise). Additionally, the museum must have the ability to store and house the work in a manner reflective of accepted museum standards.

Under the accession procedure, the curator recommends the acquisition, the Director approves the acquisition, and the curatorial department’s Trustee Acquisition Committee approves the decision by a majority vote.

Regarding deaccessioning, MoMA requires that “[t]he decision to deaccession should be made cautiously and follow generally accepted museum practices.” MoMA enumerates six reasons a

141. Id.
142. Id. at 4.
143. Id. at 3.
145. MoMA COLLECTIONS MANAGEMENT, supra note 144, at 2.
146. Id.
147. Id.
148. Id. Alternatively, if timing concerns or other constraints make this procedure impractical, the Chief Curator of each Department is authorized to approve acquisitions valued at $10,000 or less ($25,000 or less in the Department of Painting and Sculpture). Id. If the object is valued between $10,000 and $20,000 ($25,000 to $50,000 for the Department of Painting and Sculpture), approval must come from the Director and the Chair of the appropriate Trustee Acquisition Committee. Id. at 3.
149. Id. at 4.
work may be deaccessioned: (1) inconsistency with mission or collecting goals; (2) duplicate/redundant object; (3) poor quality; (4) authenticity/attribution questioned; (5) lack of merit or art historical importance; and (6) restoration impractical.

Under the deaccession procedure, the Chief Curator recommends the work be deaccessioned, subject to Director approval. If the object is valued over $25,000, the recommendation and Trustee committee approval must be documented in writing. Additionally, the Committee must submit the written recommendation to the entire Board of Trustees, who must approve the deaccession by a 3/4 vote.

150. This is a non-exhaustive list. “Works of art may be deaccessioned for a variety of reasons, including but not limited to . . . .” Id.
151. “The object is not relevant to the mission of the Museum or has little value in the Museum’s Collection” and “The object lacks sufficient aesthetic merit or art historical importance to warrant retention.” MoMA COLLECTIONS MANAGEMENT, supra note 144, at 4.
152. “The object is redundant or is a duplicate and is not necessary for research purposes.” Id.
153. “The object is of lesser quality than other objects of the same type either already in the Collection or about to be acquired.” Id.
154. “The authenticity, attribution or genuineness of the object is questionable or determined to be false or fraudulent.” Id.
155. “The object lacks sufficient aesthetic merit or art historical importance to warrant retention.” Id. at 4.
156. “The Museum is unable to conserve the object in a responsible manner or it is determined that it has decomposed.” Id.
158. Id.
159. Id.
2. Metropolitan Museum of Art

Founded in 1870, the Metropolitan Museum of Art ("MMA") in New York City, NY, hosts more than 5 million visitors each year.\textsuperscript{160} Its current mission statement, adopted in 2000, states

[i]he mission of The Metropolitan Museum of Art is to collect, preserve, study, exhibit, and stimulate appreciation for and advance knowledge of works of art that collectively represent the broadest spectrum of human achievement at the highest level of quality, all in the service of the public and in accordance with the highest professional standards.\textsuperscript{161}

MMA holds over two million objects in its collection, which spans 5000 years.\textsuperscript{162}

MMA has a Collections Management Policy\textsuperscript{163} "intended to document the basic policies that guide the development and care of the Museum’s art collection consistent with the mission of the Museum and with professional museum standards."\textsuperscript{164} MMA’s Policy defines "deaccession" as the procedure whereby "a work is removed from the collections and considered for disposal by sale

\begin{itemize}
\item \textsuperscript{162} Main Building, supra note 162.
\item \textsuperscript{163} "Through this Collections Management Policy, the Museum ensures that: . . . acquisition, deaccessioning, and loans of works in the collection are conducted in a manner that conforms to the Museum’s mission, complies with applicable law, and reflects the highest ethical standards." THE METRO. MUSEUM OF ART, COLLECTIONS MANAGEMENT POLICY § II (2008), available at http://www.ifar.org/upload/PDFLink497dec6899a4dMet.2008.CollectionsMgmtPolicy.pdf.
\item \textsuperscript{164} Id.
\end{itemize}
or exchange.” 165 By its terms, deaccessioning is limited to reasons “solely for the advancement of the Museum’s mission.” 166

Objects are acquired by the museum on the recommendation of the curators. 167 Like at MoMA, the Policy requires that the object be in a physical condition that is capable of being returned to an acceptable state of condition or currently is such (unless the integral meaning of the work dictates otherwise). 168 Additionally, storage and care of the object must be achievable in compliance with “generally accepted museum practices.” 169

The Policy details different acquisition procedures for purchased and for donated objects. For purchases, the procedure dictates that: (1) the curator recommend the purchase in a report; (2) a conservator (or, if necessary, a scientist) examine the object and includes her recommendation in the curator’s report; and (3) the curatorial department head approve the acquisition and makes a recommendation to the Director. 170 The level of final approval depends on the purchase price. 171

For gifts and bequests, the procedure requires that: (1) the curator recommend acceptance of the donation in a report; (2) the conservator sign the curator’s report; (3) the curatorial department head approve the acceptance and submits the report to the Director; and (4) the Director report the proposed donation to the Board of Trustees, who either accepts or declines the donation. 172
The Policy requires that before the deaccessioning process begins, the curator must review the object file to determine if the work was donated and, if it was, if deaccessioning is permitted by the terms of the gift. Additionally, the Policy forbids the museum to deaccession a work valued at $50,000 or more within 25 years of acquisition if there is an objection to the deaccession upon proper notice to the donor, the donor’s heirs, or the donor’s legal representatives. Besides these blanket limitations, the non-exhaustive list of criteria to determine if an object may be deaccessioned is: (1) duplicate/redundant object; (2) violation of law; (3) inconsistent with mission or collecting goals; (4) refine/improve the collection; and (5) unable to provide care.

reported to the Board of Directors by the Director at the January meeting and the Director can accept such donations without Board approval. For so-called “Summer Gifts” (made after the June Executive Committee meeting and prior to the September meeting), the Director has the same power to accept gifts with Board approval and the donations are reported to the Board at the September meeting. Id.

173. Id.
174. Id.
175. The Policy states: “The criteria for determining whether an object should be deaccessioned include, but are not limited to, the following . . .” THE METRO. MUSEUM OF ART, supra note 165, § VI(A). Not included in the non-exhaustive list are works determined by the museum to be forgeries, which may be deaccessioned but are generally not disposed. Id.

176. “The object is redundant or is a duplicate and is not necessary for research or study purposes.” Id.

177. “The Museum is ordered to return an object to its original and rightful owner by a court of law; the Museum determines that another entity is the rightful owner of the object; or the Museum determines that the return of the object is in the best interest of the museum.” Id.

178. “The object is not relevant to the mission of the Museum or has little value in the Museum’s collection.” Id.

179. “The object is of lesser quality than other objects of the same type in the collection or about to be acquired” and “[t]he object lacks sufficient artistic merit or art historical importance to warrant retention.” Id.

180. “The Museum is unable to preserve the object in a reasonable manner” and “[t]he object is unduly difficult or impossible to care for or store properly.” Id.
Procedurally, the curator recommends the deaccession to the Department Head and the Director. The museum staff, assisted by the general counsel, determines if there are any legal restrictions that would prohibit a deaccession. The recommended deaccession is discussed at a meeting attended by the curators and the Director. After the meeting, if the Director determines that the proposed deaccession should be included in the Agenda for Deaccessions of the Acquisitions Committee of the Board, then the curator will prepare a presentation for that meeting.

At the Acquisitions Committee meeting, the curator presents the recommendation accompanied by the required number of outside appraisals. Based on the curator’s presentation, plus the recommendations of the Department Head and the Director, the Acquisitions Committee considers the deaccession. If the object was appraised at $50,000 or less, the Acquisitions Committee’s vote is final. If the object is appraised over $50,000, the Acquisitions Committee’s vote results in a recommendation to deaccession and is presented to the Executive Committee of the Board of Trustees or to the full Board, whichever has a meeting scheduled next. After an object receives final approval for deaccessioning, the Director and curator may choose to reevaluate the decision.

During the 2010 fiscal year, the MMA earned $146,400 from the sale of objects, including both deaccessioned works and works that

182. *Id.*
183. *Id.*
184. *Id.* at 3.
185. *Id.* For works valued by the curator over $10,000, one outside appraisal is required; if the curator appraises the work over $50,000, two outside appraisals are required. *Id.*
186. *Id.*
188. *Id.*
189. *Id.*
had not been accessioned. One object, valued above $50,000, was exchanged.

3. The Guggenheim Museum, New York City

The Solomon R. Guggenheim Foundation was established in 1937 and opened its first museum, the Museum of Non-Objective Painting, in 1939. The architect, Frank Lloyd Wright, was commissioned in 1943 to build a permanent museum, and the renamed Solomon R. Guggenheim Museum opened in 1959. The mission statement of the Guggenheim Foundation, which applies to the museum as well, is to promote the understanding and appreciation of art, architecture, and other manifestations of visual culture, primarily of the modern and contemporary periods, and to collect, conserve, and study the art of our time. The Foundation realizes this mission through exceptional exhibitions, education programs, research initiatives, and publications, and strives to engage and educate an increasingly diverse international audience through its unique network of museums and cultural partnerships.


191. Id. The work was Pat Steir's The Water Series: The Port Reflected at Night in the Waterfall, oil on canvas, 1987-88, accession number 1988.205. Id.


193. Id. Today, the Foundation operates, in addition to the New York City Solomon R. Guggenheim Museum, museums in Venice, Italy; Bilbao, Spain; Berlin, Germany; and Abu Dhabi, UAE (construction expected to be completed in 2013). Guggenheim Foundation, GUGGENHEIM, http://www.guggenheim.org/guggenheim-foundation (last visited Nov. 23, 2011).

Today, the Museum’s collection is comprised of objects from the late-19th century to the present.\textsuperscript{195}

The Guggenheim’s Collections Management Policy “is intended to establish a reference tool for developing appropriate practices and procedures of collection management that are consistent with the mission of the Foundation and with professional museum standards.”\textsuperscript{196} The Policy requires that accessioned objects “conform to the Museum’s mission and public trust responsibilities.”\textsuperscript{197} The Board of Trustees considers the proposed accession’s (1) impact on the collection’s historical dimension, (2) if it is a strong addition to the collection’s contemporary focus, (3) the object’s quality, (4) how it relates to the collection, and (5) how the work compares to currently-accessioned work by the same artist or representing the same period.\textsuperscript{198} Procedurally, the museum’s Director, with the assistance of the staff, recommends the accession to the Art and Museum Committee of the Board of Trustees.\textsuperscript{199} The Committee votes on the accession and then makes a recommendation to the Board of Trustees, who also votes.\textsuperscript{200}

The deaccession of an object must comply with limitations in the original donation document.\textsuperscript{201} The Policy lists criteria\textsuperscript{202} to consider in determining if a work may be deaccessioned: (1) duplicate/redundant object;\textsuperscript{203} (2) violation of law;\textsuperscript{204} (3)

\begin{flushleft}
197. Id. § III(B).
198. Id.
199. Id.
200. Id.
201. Id. § III(C).
202. This list of criteria is non-exhaustive: “The criteria for determining whether an object should be deaccessioned include, but are not limited to, the following . . . .” SOLOMON R. GUGGENHEIM FOUND., supra note 196, § III(C).
203. “[I]f there is a better example of the same work in the collection . . . .” Id.
\end{flushleft}
authenticity/attribution questioned;\textsuperscript{205} (4) restoration impractical;\textsuperscript{206} (5) inconsistent with mission collecting goals;\textsuperscript{207} (6) refine/improve the collection;\textsuperscript{208} or (7) unable to provide care.\textsuperscript{209}

For a work to be deaccessioned, the Director, with staff assistance, recommends the deaccession to the Executive Committee of the Board of Trustees' Art and Museum Committee.\textsuperscript{210} If it is in agreement, the Executive Committee makes the recommendation to the Board of Trustees who then make the final decision.\textsuperscript{211}

\textsuperscript{204} "[l]f the Museum is ordered to return an object to its original and rightful owner by a court of law . . . ." \textit{Id.}

\textsuperscript{205} "[l]f the Board of Trustees has received a professional opinion(s) that the work is not authentic or has been misidentified and is no longer important or valuable . . . ." \textit{Id.}

\textsuperscript{206} "[l]f the work has been damaged or has deteriorated and repair by either a conservator or the artist is impossible or impractical . . . ." \textit{Id.}

\textsuperscript{207} "[l]f the object is no longer useful or relevant to the purposes and activities of the Museum . . . ." \textit{Id.}

\textsuperscript{208} "[l]f its deaccession would allow the Museum to improve and strengthen another area of the collections such that the Museum's goals would be furthered by such deaccession . . . ." SOLOMON R. GUGGENHEIM FOUND., \textit{supra} note 196, § III(C).

\textsuperscript{209} "[l]f it is unduly difficult or impossible for the object to be cared for properly, including storage . . . ." or "if the cost of insuring the object has become prohibitive." \textit{Id.}

\textsuperscript{210} \textit{Id.}

\textsuperscript{211} \textit{Id.} The Policy does not state what majority is required to vote in approval of deaccessioning. However, the Policy does state objects part of the Founding Collection may only be deaccessioned with a 2/3 vote by the full Board of Trustees. \textit{Id.} The Policy also has an exception for works composed of so-called "perishable" materials:

Works or art which have been fabricated or otherwise industrially manufactured, and works which include materials that are understood to be perishable, may be exempt from the deaccessioning process in the discretion of the Executive Committee of the Art and Museum Committee. In such cases, the [non-exhaustive list of criteria] will be considered, but will not be deemed to control the disposal of such objects.
4. The Newark Museum

Located in Newark, New Jersey, The Newark Museum ("TNM") was founded in 1909.212 Included within the museum is the Ballantine House, a National Historic Landmark,213 and the Dreyfuss Memorial Garden.214 The museum’s mission states,

The Newark Museum operates, as it has since its founding, in the public trust as a museum of service, and a leader in connecting objects and ideas to the needs and wishes of its constituencies. We believe that our art and science collections have the power to educate, inspire and transform individuals of all ages, and the local, regional, national and international communities that we serve. In the words of founding Director John Cotton Dana, "A good museum attracts, entertains, arouses curiosity, leads to questioning—and thus promotes learning."215

TNM’s collection focuses on art and natural sciences and holds collections representing the areas of American, Asian, African, classical, contemporary, and decorative art.216

TNM policies on accessioning and deaccessioning are contained in its Collections Management Policy. In deciding to accession an object, a variety of issues are considered, including, but not limited to, (1) it’s applicability to the exhibition and education needs, (2) how it fits into the institution’s and curatorial department’s

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213. Id.
215. About the Museum, supra note 212.
216. Permanent Galleries, supra note 214.
collecting goals, (3) its state of preservation, and (4) the existence of proper exhibition and storage space.\textsuperscript{217}

Gifts to the museum are accepted by the Director and reported to the Acquisitions Committee of the Board of Trustees at their next meeting and at the end of the year.\textsuperscript{218} The Director is authorized to approve purchases valued under $3,500; over $3,500, approval must be obtained by the Acquisitions Committee.\textsuperscript{219}

The Policy has a series of statements regarding deaccessioning and its place within TNM. The Policy specifically states that deaccessioning is “legitimate and desirable to refine the collection through the occasional sale or exchange of previously-acquired objects”\textsuperscript{220} to improve the collection.\textsuperscript{221} The Policy also states that deaccessioning is to be done “judiciously, with the same caution and prudence as is exercised in acquisition.”\textsuperscript{222}

TNM’s Policy provides a non-exhaustive list\textsuperscript{223} of reasons objects may be deaccessioned: (1) poor quality;\textsuperscript{224} (2) duplicate/redundant object;\textsuperscript{225} (3) violation of law;\textsuperscript{226} (4) authenticity/attribution questioned;\textsuperscript{227} (5) restoration impractical;\textsuperscript{228}

\begin{itemize}
  \item \textsuperscript{218} Id. at 16.
  \item \textsuperscript{219} Id.
  \item \textsuperscript{220} Id. at 9.
  \item \textsuperscript{221} Id.
  \item \textsuperscript{222} Id. at 22.
  \item \textsuperscript{223} “Objects may be removed from the permanent collection for any of the following reasons, without being limited to them . . . .” \textit{The Newark Museum, supra} note 217, at 22.
  \item \textsuperscript{224} “The object is of poor quality, either intrinsically or relatively, in comparison with other objects of the same type in the collection. Items of modest quality, however, may have sufficient study value to warrant retention, or transfer to other departments.” \textit{Id.} at 23.
  \item \textsuperscript{225} “The object is redundant or is a duplicate that has no value as part of a series.” \textit{Id.}
  \item \textsuperscript{226} “The Museum’s possession of the item is found to have been not legitimate, i.e, the work may have been stolen or illegally exported in violation of applicable state and federal laws.” \textit{Id.}
  \item \textsuperscript{227} “The authenticity, attribution or genuineness of the object is determined to be false or fraudulent and the object lacks sufficient aesthetic merit or art historical important to warrant retention. A suspected or known forgery or reproduction may be returned to the vendor for reimbursement, and must never
\end{itemize}
(6) inconsistent with mission or collecting goals; 229  (7) refine/improve the collection; 230  (8) unable to provide care, 231 or (9) to acquire superior works. 232

To initiate the deaccession, the departmental curator makes a recommendation to the registrar, who reviews the object file. 233 Paperwork recommending the deaccession is given to the Collections Committee, 234 and the Committee makes a recommendation to the Director. 235 If the Director approves the deaccession, the curator completes the necessary paperwork. 236 The Acquisitions Committee and the President are notified of the deaccession in relation to the method of disposal or when objects are being repatriated. 237
C. Distilling the Ethical Guidelines

Reviewing these professional and institutional codes, some common reasons to deaccession and who may properly authorize the deaccession emerge.

1. Acceptable Reasons to Deaccession

The most widely-accepted reason to deaccession is where the work is inconsistent with the mission or collecting goals, appearing in the lists of AAM, AAMD, and all four museums reviewed. Second-most accepted is deaccessioning works that are duplicate or redundant, which appear in the AAMD mission and the four museums reviewed. Deaccessioning works for which the museum is unable to provide care is approved by AAM, AAMD, MMA, the Guggenheim, and TNM. Slightly-less accepted is deaccessioning works whose ownership is in violation of law or to refine and improve the collection (AAMD, MMA, the Guggenheim, and TNM) and works whose authenticity or attribution is questioned or where restoration is impractical (AAMD, MoMA, the Guggenheim, and TNM). Deaccessioning works because they are of poor quality is not widely accepted (AAMD, MoMA, and TNM). Least accepted is deaccessioning works solely to acquire superior works (TNM).

Museums considering whether to deaccession a work should consider these findings. They indicate accepted “best practices” for the museum as found in professional and institutional codes of ethics. Deaccessions conducted for more widely-accepted reasons are more likely to be considered to have been conducted for a proper purpose than deaccessions that are not done for what the profession considers reasonable or acceptable.
Table 1: Acceptable reasons to deaccession, by professional or institutional code of ethics

<table>
<thead>
<tr>
<th>Reason</th>
<th>AAM</th>
<th>AAMD</th>
<th>MoMA</th>
<th>MMA</th>
<th>Guggenheim</th>
<th>TNM</th>
<th># of Codes Approving</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inconsistent with mission or collecting goals</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>6</td>
</tr>
<tr>
<td>Duplicate/redundant object</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>5</td>
</tr>
<tr>
<td>Unable to provide care</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>5</td>
</tr>
<tr>
<td>Violation of law</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td>4</td>
</tr>
<tr>
<td>Refine/improve the collection</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
<td>4</td>
</tr>
<tr>
<td>Authenticity/attribute questioned</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
<td>4</td>
</tr>
<tr>
<td>Restoration impractical</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
<td>4</td>
</tr>
<tr>
<td>Poor quality</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>To acquire superior works</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td>1</td>
</tr>
</tbody>
</table>

2. Acceptable Authority to Approve a Deaccession

No clear profession-wide guidelines emerge from this review regarding who should have the authority to approve a deaccession. All the museums reviewed herein require Board-level approval for deaccessions, though some make exceptions for low-valued objected. For organizations requiring Board-level approval, some permit a committee to make the decision and some require full-Board approval. Of the museums reviewed, only MoMA permits a
deaccession with Director (and not Board) approval, and then only for works valued under $25,000. This also means that MoMA is the only institution reviewed that permits a lower level of authority to approve a deaccession than to approve an acquisition.

Both AAMD and ICOM require Board-level approval to deaccession. Specifically, AAMD requires approval by the Board or the Board’s designee. ICOM requires the decision to be made by the museum’s governing body.

Therefore, with the exception of MoMA for works valued under $25,000, it appears that authority equal to or exceeding that required for acquisitions is the widely-accepted level of authority required to approve a deaccession. Generally, Board-level approval is the standard.

IV. LEGAL GUIDELINES AND DEACCESSIONING

A. The Role of the Attorney General

Museums are considered public trusts, and the museum trustees are “entrusted to care for and maintain a particular community’s patrimony.” In this role, the trustees owe a fiduciary duty to the general public and not to any individual beneficiaries. This creates a situation different than ordinary trusts in that there are no individual beneficiaries who can contest abuses by the trustees. Charitable trusts, on the other hand, often have ill-defined beneficiaries who do not have a clear self-interest to prevent abuses of the trust.

238. Goldstein, supra note 61, at 214.
239. Id.
241. Kutner & Koven, supra note 240, at 411. The true beneficiaries are the public at large:

While the courts often talk of individuals who are to get charitable benefits as “beneficiaries,” strictly speaking the
The state’s attorney general has the responsibility to represent the state’s and citizens’ interests regarding charitable trusts.\textsuperscript{242} Under common law, even if the public only indirectly benefits from the charitable trust, the trust is still subject to public supervision.\textsuperscript{243} Members of the public do not have standing to directly bring an action against a charitable trust, though they may bring the attorney general’s attention to potential breaches by the trustees.\textsuperscript{244}

\textsuperscript{242} Bogert, supra note 240, at 633.

\textsuperscript{243} Kutner \& Koven, supra note 240, at 411. This tradition extends back the English common law, wherein “the King as parens patriae could institute a suit in chancery by his Attorney General to enforce a charitable trust.” \textit{Id.} The tradition continued in the United States “ever since the common law validity of charitable trusts was upheld in \textit{Vidal v. Girard’s Ex’r} [43 U.S. (2 How.) 127 (1844)].” \textit{Id.} at 412. Since then, the attorney general has been recognized to have the authority to supervise charitable trusts, and this authority has generally been held to be the exclusion of all others. \textit{Id.}

\textsuperscript{244} White, supra note 72, at 1045. The public’s lack of standing has been extended by some courts to any donor to the trust, because that court held that a non-trustee donor has not retained an interest in the gift that would grant standing. \textit{Hardt v. Vitae Found., Inc.}, 302 S.W.3d 133, 137 (Mo. Ct. App. 2009). Other courts have held differently, stating that the rule is “a claimant must show three elements to establish standing: (1) a distinct and palpable injury, as opposed to a conjectural or hypothetical injury; (2) a causal connection between the claimed injury and the challenged conduct; and (3) the alleged injury is capable of being redressed by a favorable decision of the courts.” \textit{Georgia O’Keeffe Found. (Museum) v. Fisk Univ.}, 312 S.W.3d 1, 10 (Tenn. Ct. App. 2009). A donor may be able to establish standing under this test. Additionally, donors do have standing to enforce restricted (also known as conditional) gifts. \textit{Malaro Legal Primer}, supra note 7, at 26.
For museums, it is the attorney general of the museum’s state of incorporation who oversees the trustees.\textsuperscript{245} In cases arising from deaccessioning of museum objects, the two most common ways the issues appear before the courts are (1) the museum directors seek a declaratory judgment from the courts to pre-approve a deaccession, and (2) the attorney general asks the courts to prevent a deaccession.\textsuperscript{246}

However, museums should not view the attorney general as an arm of the state working against the museum’s ability to conduct its affairs. The attorney general can be a useful resource for a museum contemplating deaccessioning, providing an external perspective on the museum’s proposed course of action.\textsuperscript{247} The decision to deaccession is a public concern,\textsuperscript{248} and input from the attorney general can aid the museum trustees in understanding what the public response will be to the decision.

\textit{B. Legislation and Deaccessioning}

1. \textit{New York Board of Regents}

The New York Board of Regents, a section of the New York State Education Department, is composed of 17 members elected by the New York State Legislature.\textsuperscript{249} The Regents oversee the New York State Education Department and supervise all educational activities within the state.\textsuperscript{250} In New York, the Legislature alone has the power to grant a charter of incorporation.\textsuperscript{251} The Legislature assigned the power to incorporate academies and colleges to the Regents in 1784, and this power was extended to cover libraries, museums, and other

\begin{thebibliography}{99}

\bibitem{245} AAM \textit{DEACCESSIONING DISCUSSION, supra} note 8, at 1.
\bibitem{246} White, \textit{supra} note 72, at 1044.
\bibitem{247} \textit{MALARO LEGAL PRIMER, supra} note 7, at 224-25.
\bibitem{248} Id. at 217.
\bibitem{249} \textit{About the Board of Regents, N.Y. ST. EDUC. DEP’T}, http://www.regents.nysed.gov/about/ (last visited Nov. 23, 2011).
\bibitem{250} Id.
\bibitem{251} \textit{History of the Board of Regents and the State Education Department, N.Y. ST. EDUC. DEP’T}, http://www.regents.nysed.gov/about/history-nysed.html (last visited Nov. 23, 2011).
\end{thebibliography}
non-academic institutions of higher education in 1889.\textsuperscript{252} Entities that have an "educational purpose" have sought Regent approval of incorporation since 1926.\textsuperscript{253} "New York state is unique in the United States because it not only considers its cultural agencies to be an integral part of its education system, it incorporates such agencies under Education Law instead of Corporation Law."\textsuperscript{254} As such, schools, cultural agencies, and other institutions with an "educational purpose" incorporate under the state’s Education Law section 216.\textsuperscript{255}

To be a nonprofit education corporation, a museum must petition the Regents for a charter.\textsuperscript{256} The Regents consider the professionally accepted standards and practices of AAM and AAMD in determining if a charter will be granted.\textsuperscript{257} After

\begin{footnotesize}
\begin{itemize}
\item 252. Id.
\item 253. Id.
\item 255. Id.
\item This is a significant difference [from other states] because the underlying assumption of [the] Education Law, as implemented by the Rules of the Regents, is that the Board of Regents will evaluate the quality of an organization or institution that seeks to be incorporated. This is the same judgment applied by the Board of Regents when it considers the chartering of schools and institutions of higher learning.
\item 256. Id. Historical societies must meet the same requirements as museums.
\item 257. Id. Obtaining a charter is a two-step process. First, the museum applies for a provisional charter which lasts for three to five years, during which time the museum is expected to develop guidelines which adhere to the Regent’s standards. Id. At the expiration of the provisional charter, the museum may petition for the provisional charter to be extended or to have an absolute charter issued. Id. To be granted an absolute charter, the museum must demonstrate that during the time period it was operating under the provisional charter, it achieved "a record of financial stability, programmatic accomplishment, and a well-founded reputation for excellence . . . ." Id. If the museum cannot meet the requirements for an absolute charter, the provisional charter may be extended for an additional term. Id. Further extensions will be granted if the museum continues to demonstrate progress towards obtaining an absolute charter. Id.
\end{itemize}
\end{footnotesize}
receiving a charter, the museum is required to file ongoing annual reports with the Regents, which includes programmatic and organizational accomplishments. If a provisional charter expires and the museum does not extend it or obtain an absolute charter, the corporation is dissolved. A museum may petition the Regents to amend its charter in order to change the corporate name, corporate purpose, increase the number of trustees, or make other changes.

Under this system, museums are required to have a collections management policy. Policies are required to address four areas: acquisitions, preservation, access, and deaccessioning. The New York State Education Department provides a sample policy museums may adopt or modify as necessary to meet the needs of their institution. The sample policy was written under former rules of the Regents and does not make recommendations on who should have the authority to approve acquisitions. The only

258. Id.
262. New York Collections Policy, supra note 261.
263. Id.
264. Id. § II(B). The sample policy includes reasons that objects may be deaccessioned, all of which are included in the newly amended rule and described infra.
procedural guideline provided in the sample policy is that the recommendation to deaccession an object should come from the Collections Committee and be approved by the museum's Board of Trustees.265

On May 17, 2011, the Regents amended section 3.27 to provide more guidance to New York museums.266 The amended section, effective June 8, 2011, applies to "chartered museums and historical societies authorized to own and hold collections," and is intended to provide a level of protection to collections held by those institutions.267

The amended rule provides inclusive and specific reasons when a museum may deaccession an object. The rule provides that "[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 . . . criteria have been met . . . ."268 The reasons to deaccession are: (1) duplicate/redundant object;269 (2) violation of law;270 (3) authenticity/attribution questioned;271 (4) inconsistent with mission or collecting goals;272 (5) refine/improve the collection;273 (6)
unable to provide care;\textsuperscript{274} (7) "the item has failed to retain its identity;"\textsuperscript{275} (8) "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;"\textsuperscript{276} and (9) "the item has been lost or stolen and has not been recovered."\textsuperscript{277}

Unlike other deaccessioning policies with similar criteria, the new Regents rule is exhaustive.\textsuperscript{278}

As under the old rule, the amended rule requires museums to file annual reports.\textsuperscript{279} In addition to the former requirement that the annual report include information related to museum’s “educational and cultural activities” and finances, museums are now required to report information related to deaccessions and disposals.\textsuperscript{280} Specifically, museums are required by the Regents to provide “a list of all items . . . deaccessioned in the past year and all items . . . disposed of in the past year.”\textsuperscript{281} As with the new enumerated reasons detailing when a museum may deaccession, this additional reporting requirement went into effect June 8, 2011.\textsuperscript{282}

\textit{2. Wisconsin Statute Section 229.18}

The state of Wisconsin authorizes its cities to establish free and public museums.\textsuperscript{283} The statute requires that museums make regular reports to the city comptroller of information related to the museum’s finances and operations. This includes a yearly report

\textsuperscript{274} "[T]he item’s preservation and conservation needs are beyond the capacity of the institution to provide . . . ,” id. § 3.27(c)(7)(iv), and “the item presents a hazard to people or other collection items . . . .” \textit{id.} § 3.27(c)(7)(ix).

\textsuperscript{275} \textit{Id.} § 3.27(c)(7)(ii).

\textsuperscript{276} \textit{Id.} § 3.27(c)(7)(viii).

\textsuperscript{277} \textit{Id.} § 3.27(c)(7)(x).

\textsuperscript{278} \textit{See id.} § 3.27(c)(7).

\textsuperscript{279} Memorandum, \textit{supra} note 267, § 3.27(e).

\textsuperscript{280} \textit{Id.} § 3.27(c).

\textsuperscript{281} \textit{Id.}

\textsuperscript{282} \textit{Id.}

\textsuperscript{283} WIS. STAT. § 229.11 (2011). The statute specifically refers to museums that hold collections of “natural history, anthropology and history” objects, \textit{id.}, so the statute does not strictly apply to the category of “art museums” as discussed within this Article.
of "the condition of the museum, the articles added to the museum, and such other information and suggestions as the board deems important, including also an account of the moneys credited to the museum fund." 284

While the statute does not explicitly require the disclosure of deaccessions, the requirement to report funds credited to the museum would capture many deaccessions, as the primary means of disposal of deaccessioned objects is through sale. "By removing the public accounting into an open forum of the common council, other experts, as well as the press, have access to museum transactions and can ask probing questions." 285 The impact of this public scrutiny is unclear, as no litigation has resulted from the statute.

C. Case Law, Judicial Review, and Deaccessioning

1. The Business Judgment Rule

The business judgment rule, which is related to corporation law, creates a presumption that a corporation’s directors’ business decisions were "made in good faith and with due care." 286 If the plaintiff can prove that the director breached one of his fiduciary duties (duty of loyalty or duty of care), then the presumption is overcome. 287 Once the presumption is rebutted, the burden of proof shifts to the defendant directors to prove the "entire fairness" of the challenged transaction. 288

2. The Providence Athenaeum: Deaccessioning to Maintain an Institution’s "Basic Nature"

The Providence Athenaeum (Rhode Island) opened in 1838 and evolved out of the Providence Library Company founded in

284. Id. at § 229.18.
287. Id.
288. Id.
1753. The original 1753 charter granted the Athenaeum legal status as a corporation, entitled to "[a]ll the privileges and powers incident to corporations instituted for literary and scientific purposes." In 1974, the Athenaeum was recognized as a 501(c)(3) nonprofit corporation. Today, it is a membership library whose mission is "to provide for a library of wider scope and depth than was in the means of any one member."

In 1832, a group affiliated with the Athenaeum subscribed to John James Audubon’s Double Elephant Folio of the Birds of America. Afterwards, the Folio and subscription were transferred to the Athenaeum in consideration of additional shares in Athenaeum stock. Over time, the Athenaeum faced increased financial difficulties, and the Board of Directors considered selling the Folio. Despite attempts to reduce the Athenaeum’s expenditures, the annual budget increased from approximately $450,000 to $900,000 from 1998 to 2002. During the same time, the Athenaeum had to use its endowment principal to cover its expenses. On February 24, 2003, the Athenaeum entered a consignment contract with the auction house Christie’s. That contract stated that Christie’s would attempt to sell the Folio at auction on behalf of the Athenaeum.

At its December 2002 meeting, the Board reviewed various proposed budget cuts to bring the Athenaeum into compliance with its internally-adopted spending policy. The Board determined

291. Id.
292. History, supra note 289.
294. Id. The Athenaeum also took on responsibility for the balance owed on the subscription. Id.
295. Id. at *7.
296. Id. at *14.
297. Id. at *14-15.
298. Id. at *7.
300. Id. at *16.
“that the proposed cuts would fundamentally and . . . adversely change the basic nature of the institution.” At the same meeting, the Board voted to sell the Folio, appraised at $5-7 million, instead of adopting those proposed cuts. The Board also determined to not sell the Folio if the endowment could be raised to $10 million by April 30, 2003.

Under judicial review, the court focused its inquiry on whether the Board acted in compliance with its fiduciary duty. The Rhode Island Non-profit Corporation Act required a director to “discharge his or her duties as a director . . . (1) in good faith; (2) with the care an ordinary prudent person in a similarly position would exercise under similar circumstances; and (3) in a manner he or she reasonably believes to be in the best interests of the corporation.” When directors do act in a manner that complies with the statute, they are protected by the business judgment rule.

Finding no evidence that the Directors violated their fiduciary duties to the Athenaeum, the court declined to find the business judgment presumptions had been rebutted. The court also found no evidence to show that the consignment contract with Christie’s was not in the best interest of the Athenaeum, even if the plaintiffs’ judgment was different than the Directors. The fact the plaintiffs disagreed with the Directors’ decision to sell the Folio did not rebut the presumptions of the business judgment rule.

3. The Albright-Knox Art Gallery: Deaccessioning to Align the Collection to the Mission

The Buffalo Fine Arts Academy (New York), founded in 1862 by John J. Albright, is the governing body of the Albright-Knox
Art Gallery. Today, the Gallery’s mission is “to enhance the understanding and appreciation of contemporary and modern art, principally by developing, exhibiting, and preserving its world-renowned Collection.”

On November 6, 2006, a unanimous Board voted to deaccession over 200 works from the collection in order to better focus on the institution’s holdings of modern and contemporary art. The works were to be auctioned at Sotheby’s, Inc. between March 20, 2007, and June 7, 2007. The plaintiffs alleged that the deaccession was in violation of New York’s Not-for-Profit Corporation Law.

Addressing the plaintiff’s claim that the deaccession deviated from the Academy’s purpose, the court looked to the actual language of the certificate, which was “to promote and cultivate the fine arts and for that purpose to establish and maintain a permanent art gallery . . . to the end encouraging and advancing the education and cultivation of art in all of its branches.” The court found this purpose to be broad in scope. The court also distinguished between the purpose enshrined in the articles of incorporation, which under New York law can only be changed by a majority vote of the members, and the Academy’s mission, which the Board had the power to change.

The court also determined the Board had the “authority to manage as it sees fit” under the business judgment rule. Stating

312. Id.
313. Id.
314. Id. (quoting Verified Petition Ex. 3).
315. Id. at 498.
316. N.Y. NOT-FOR-PROFIT CORP. LAW § 802.
317. Dennis, 836 N.Y.S.2d at 498. The court also noted the Board’s power to amend other internal documents, such as the Collections Management Policy and the Strategic Plan. Id.
318. Id.
that the business judgment rule applied to both for-profit and non-profit corporations, the court defined the rule as saying that “those actions taken by a board of directors in good faith in the exercise of honest judgment and within legitimate corporate purposes cannot be overturned by a court.” The plaintiffs would have to demonstrate the directors acted in “bad faith in the form of self-dealing, fraud, or unconscionability” for the court to undertake more than a limited review of the directors’ decision.

D. Distilling the Legal Guidelines

Based on these cases, it is clear that when museum directors demonstrate a good faith belief that the decision to deaccession is in the best interest of the museum at large, the courts will defer to their decision under the business judgment rule.

In its recently-amended rules, the New York Board of Regents provides reasons why a museum may deaccession. Of these, many are also the most-accepted reasons among museums and museum professional organizations: (1) inconsistent with mission or collecting goals; (2) duplicate/redundant object; (3) unable to provide care; (4) violation of law; (5) refine/improve the collection; and (6) authenticity/attribution questioned. Regarding authority to deaccession, the Regents, like museum professionals, prefer that final authority rest with the Board of Trustees. While the Regents do not indicate who should have authority to approve an acquisition, vesting deaccessioning authority with the Board (the highest governing body of a museum) suggests that deaccessioning authority must be equal to or greater than acquisition authority under the Regents’ approach. Finally, the Regents require annual reporting of programmatic and organizational accomplishments, financial information, and lists of deaccessioned and disposed objects from chartered museums.

Wisconsin, however, does not indicate accepted reasons to deaccession or who should have the authority to deaccession and object. But like New York, it does require annual reports, which

319. Id. (citations omitted).
320. Id.
indicate, among other topics, the monies credited to the museum in the reported year.

E. Prior Proposed Approaches to Deaccessioning

In the past, other legal commentators have proposed new approaches to deaccessioning. Those recommendations, however, are insufficient to provide guidance to museums in their real-world deaccessioning decisions.

1. Heightened Scrutiny

This argument recognizes that deaccessioning is "legal, legitimate, and [of] vital concern for museums."\(^{321}\) However, the heightened scrutiny approach argues "that state legislatures . . . [must] exert more control over the deaccessioning process to guarantee the protection of public cultural heritage."\(^{322}\) This is premised on the belief that museums are influenced by "financial pressures, to the movement of taste, or insufficiently controlled eagerness for innovation."\(^{323}\) There are some acceptable reasons to deaccession under this paradigm, specifically to upgrade the collection or to remove redundant objects.\(^{324}\) This approach finds basis for its reliance on legislative oversight because "most museums, even private ones, are significantly supported by both direct and indirect government subsidies."\(^{325}\) Thus, the public has an interest in public and private museum collections, which are held for the public benefit, and therefore deaccessions from those collections should be subject to state law.\(^{326}\)

\(^{321}\) Gabor, supra note 61, at 1005.
\(^{322}\) Id. at 1006.
\(^{323}\) Id. at 1049. This approach, however, does acknowledge that retention of objects is expensive, costing the museum the expenses associated with "storage space, restoration, registration, compilation, conservation, and insurance costs" which "may interfere with other museum activities needing funding." Id. at 1017.
\(^{324}\) Id. at 1017, 1019.
\(^{325}\) Id. at 1007.
\(^{326}\) Id. at 1007-08.
Under this level of scrutiny, there would exist a “state-mandated statutory deaccessioning policy,” which “might be used as a guideline for museums to draft their own institutionally relevant documents.” 327 This would require “a mandatory public annual accounting to a municipal or state arts council. This procedure allows both state agencies and the public to verify that museums are carrying out deaccessioning activity responsibility.” 328 Finally, the policy would require “a deaccessioning procedure with ‘teeth’ that can serve as a realistic tool to prevent abuse” by museums. 329 This would be accomplished through the revision and strengthening of remedies. 330

Heightened scrutiny finds existing remedies inadequate. 331 It propounds the belief that the director or curator who “mak[es] the deaccessioning decision should be directly liable.” 332 Under this approach, an automatic reverter to the donor would exist, even in unrestricted gifts, which would apply to all “illegal deaccessioning,” 333 a so-called “passive reverter.” 334 This passive reverter would occur after the deaccessioning decision but prior to disposal and would encourage directors to “de-deaccession” the work in light of the challenge to the legality of the deaccession. 335 However, if the object had already been disposed of, the reverter would become irreversible and the work would return to the original donor. 336

The heightened scrutiny approach fails to address adequately several important issues raised by deaccessioning. First, while it is

327. Gabor, supra note 61, at 1007. “[T]he proposed legislation should encourage maximum museum flexibility while still protecting the public’s interest in its cultural resources.” ld. This supposed flexibility seems unlikely, since this approach would prevent museums from undertaking good-faith deaccessions in the name of collections care and management, especially in light of the proposed remedy of passive reverter, discussed infra.

328. ld.
329. ld.
330. ld.
331. ld. at 1028.
332. ld. at 1031.
333. Gabor, supra note 61, at 1032.
334. ld.
335. ld.
336. ld.
correct that the public has an interest in museum deaccessioning practices, it is inaccurate to begin a discussion with the assumption that museums are inappropriately influenced in their decision to deaccession. Well-considered deaccessioning practices that follow enumerated procedures in accordance with state law and ethical guidelines are accepted as part of appropriate collections management by museums, and to begin a discussion otherwise is to state that the museum profession as a whole has failed to appreciate the gravity of the topic.

Second, heightened scrutiny relies on the remedy of passive reverter. Passive reverter presents numerous problems. The first is that it assumes a donor wants to re-take possession of a donated object. As discussed above, a donor has likely accepted a tax deduction for the donation, and passive reverter would require the donor to recapture that deduction in his or her taxes. A donor may not want this tax consequence.

Third, heightened scrutiny does not appreciate the fact that a deaccession may take place years, decades, or even longer, after the initial donation. Passive reverter could become a logistical nightmare if the original donor or the donor’s heirs are unknown to the museum. Even if the heirs are known, it may be unclear which heir can legally take title to the passively reverted work, since an object donated to a museum would in all probability not appear in a will. Heightened scrutiny gives no guidance for a museum for how a passive reverter would operate in a scenario where the original donor is deceased and multiple heirs lay claim to the object.

Finally, an automatic passive reverter would remove the object from the public’s access. While it is true that a deaccession can, and likely will, lead to the same result, an automatic reverter guarantees that the object would return to the hands of a private owner. That private owner would be under no requirement to donate the work again, and she would have a work in her possession that likely increased in monetary or cultural value during the intervening years the museum owned it, especially if it was prominently displayed, widely toured, or thoroughly researched and published. This gives an added benefit to the

337. See supra note 32.
original donor out of proportion with the supposed harm done by the museum in deaccessioning the work.

2. Proposed Lesser Levels of Scrutiny

   a. Intermediate Scrutiny

   This level of scrutiny focuses on deaccessioning’s use as a tool to obtain funds for new acquisitions and is mainly concerned with the use of disposal proceeds.\(^{338}\) The basic argument is that “courts should approve a museum director’s use of proceeds from the sale of deaccessioned art to meet operating expenses if the director’s conduct comports with the duties of trustees under the law of trusts.”\(^{339}\)

   Intermediate scrutiny suggests a three-prong test to be applied by the courts when reviewing a deaccessioning decision. The first prong examines if there is a legitimate need for the disposal proceeds and if the intended use of the proceeds comports with the public’s interest in the collection.\(^{340}\) If the intended use of the disposal proceeds does not satisfy what the court considers to be a legitimate need, then “the court should reject the transaction.”\(^{341}\)

   The second prong examines the necessity of disposal through sale, requiring the court to “instruct the directors to consider other options and seek approval [of the sale] at a later date” if satisfactory alternatives are not found.\(^{342}\)

   Finally, the third prong requires the court to consider the buyer of the work, where “[s]ale[s] of the work to another nonprofit organization that will make the work accessible to the public” are favored and should receive judicial approval unless “the directors are . . . obtaining a substantially lower price by selling” to the nonprofit.\(^{343}\)

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338. White, supra note 72, at 1043-44.
339. Id. at 1048.
340. Id. at 1059.
341. Id.
342. Id.
343. Id.
individual or entity, the sale should be approved “if the price is significantly higher than that offered by a public institution.”

b. Low Scrutiny

Low scrutiny also focuses on financial concerns, specifically drawing attention to “increasing maintenance and preservation costs and decreasing municipal support.” This level focuses on the need for disposal proceeds. With this narrow focus on finances, low scrutiny promotes a “more liberal use of museum deaccessions as a means of raising operating funds necessary for the care and maintenance of the museum’s collection, programs, and physical plant.”

This approach does not present a clearly-articulated proposal for museum deaccessioning practices. It does, however, present some recommendations. First, deaccessions, along with the policies and procedures related to the process, should be fully disclosed to the public. Second, the language of donor documentation should state in plain language that “donations become the property of the museum for serving the public trust” and support of that public trust may require the donation be sold to support future acquisitions or operating funds. Third, museum directors should

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344. White, supra note 72, at 1059.
345. Goldstein, supra note 61, at 213.
346. See id. (recommending the use of deaccessions, and specifically disposal proceeds, to meet museum operating costs).
347. Id. at 216-17. The low scrutiny approach favors “[f]reer application of the cy pres doctrine” to permit the deaccessioning of restricted gifts against the donor’s intent. Id. at 217. The cy pres doctrine, which is outside the scope of this Article, is applied when a court determines that the administration of a charitable trust can no longer be done in compliance with the literal terms laid down by the testator. In re Trust of Hummel, 30 A.D.3d 802, 804 (N.Y. App. Div. 2006). The doctrine is applied when “the testator’s specific charitable purpose is no longer capable of being performed by the trust and ... the testator had a general charitable intent.” Id. (citations excluded).
348. Goldstein, supra note 61, at 226.
349. Id. “While donors are to be cherished by museums and given the utmost respect and gratitude, trustees must be wary of sacrificing their duty of loyalty to the public to run the museum and preserve its collections to the best of
be held to the standards of corporate directors and not to the standards of trust directors.\textsuperscript{350}

c. Problems with Intermediate and Low Scrutiny

These proposals have a similar basic problem, namely that they both approach deaccessioning from a purely financial concern. As discussed previously, the ethical and judicious application of deaccessioning by museums involves more than financial concerns; deaccessioning concerns collections care, management, and improvement. Yet neither of these proposals address these concerns. Instead, they both start from the need for disposal proceeds and encourage deaccessioning to generate those funds. This has little to do with collections care and management and everything to do with the museum’s bottom line. It also fails to address accepted deaccessioning practices within the field.

Deaccessioning solely to raise operating funds ignores the professionally-accepted purpose of deaccessioning. These proposals attempt to construct a deaccessioning approach that most museums and professional organizations would find unethical. Even if their proposals were to be adopted and were to set the standard of legal deaccessioning practices, these proposals are at such a distance from current ethical practices that it is unlikely that they would be applicable to real-world museum practice. The closest that any of the professional organizational codes or institutional codes surveyed herein come to permitting deaccessioning for purely monetary reasons is TNM, which permits deaccessioning to acquire superior works, a purpose which could arguably be seen as a form of collections care and management. To adopt a legal standard that sets the bar so low as to not be a recognized and accepted practice fails to address museums’ needs. Museums require guidance on the sticky situations of day-to-day professional practice to provide a guide when a decision to deaccession is difficult, not a legal standard that sets the bar so low as to be functionally useless.

\textsuperscript{350} Id. at 244.
V. RECOMMENDED GUIDELINES FOR ACCEPTABLE MUSEUM DEACCESSIONS

A. Proposed Considerations

This proposal for acceptable deaccessioning is deduced from the ethical codes of museum professional organizations and individual institutions, statutory law, and case law. In determining whether an object can be legally and ethically deaccessioned from the collection, a museum should consider if: (1) the reason for the deaccession is one of the commonly-accepted reasons; (2) proper authority is required to approve the deaccession; and (3) the decision to deaccession is conducted in good-faith compliance with the fiduciary duties of loyalty and care.

Three reasons to deaccession emerged as widely-accepted: (1) inconsistent with mission/collecting goals; (2) duplicate/redundant object; and (3) unable to provide care. A deaccession that is initiated in good faith for one of these reasons is widely accepted as ethical. Other generally-accepted reasons to deaccession are: (1) violation of law; (2) refine/improve the collection; (3) authenticity/attribution questioned; and (4) restoration impractical. Deaccessioning because of poor quality is accepted by some in the profession, but not all. Finally, deaccessioning solely to acquire superior works is only acceptable to one of the institutions reviewed and could be seen as a controversial reason.

First, museums considering a deaccession must start first with the reason for the deaccession, and consider how widely accepted that reason is among the museum professional community. If the reasoning for proposing the deaccession is widely- or generally-accepted, the museum should be able to go forward with the process and demonstrate that it acted in good faith, in accordance with the duties of loyalty and care to the institution and the public.

Second, regarding authority, museum professional organizations and individual museums generally recognize that the authority to deaccession should be equal to, if not greater, than the authority to acquisition. The deaccession authority rests in the hands of the Board of Trustees or its designee. Museums considering deaccessioning should include an explicit statement of authority in its Collections Management Policy and ensure that the adopted
guidelines are strictly followed to ensure that deaccessioning is done properly and judiciously. 
Because deaccessioning is such a serious component of collections care, museums should be wary of delegating this authority, and where it is delegated, the authority should be retained by a Committee of the Board. Delegation to an officer or staff, such as the Director or a curator, suggests that the Trustees have not seriously considered the importance of collections oversight and compliance with their fiduciary duties to the museum and the public. 
Finally, deaccessioning must be conducted in accordance with the fiduciary duties of loyalty and care. Courts appear willing to apply the business judgment rule in cases where a deaccession is under review. Museums where the Board has deaccessioned for a widely- or generally-accepted reason and in compliance with a clearly articulated Collections Management Policy that has a proper level of authority expressly stated should find that the decision upheld. Trustees must act in compliance with their dual fiduciary duties of loyalty and care in making deaccession decisions, just like any other decision affecting the museum, for the presumptions created by the business judgment rule to not be defeated. States (or cities) may consider adopting the precedent of the New York Board of Regents and the State of Wisconsin to require annual reporting of deaccessions to ensure Boards are maintaining their fiduciary obligations. This would provide oversight of the deaccessioning process and make it easier to determine if Trustees are maintaining their fiduciary obligations.

B. Proposed Sample Deaccessioning Policy

In determining how its museum should approach the issue of deaccessioning, a museum’s Board of Directors needs guidance that provides not just legal and ethical considerations but also realistic direction. This sample deaccessioning policy demonstrates how these proposed considerations can be applied by museums in their real-world daily work. It includes a section on compliance with the fictional city’s reporting requirements, which in turn serves as a series of suggestions regarding what cities or
states should consider including in any proposed reporting requirements and oversight laws.

DEACCESSIONING POLICY OF SAMPLE CITY MUSEUM OF ART

I. PREAMBLE

A. The purpose of deaccessioning

The Board of Trustees of Sample City Museum of Art believes that deaccessioning of works from the permanent collection is a valuable tool in caring for the collections and affirming the Museum’s dedication to its first-class collection. It is the opinion of the Board that the occasional judicious removal of previously-acquired objects from the permanent collection is necessary in order to ensure the formation and maintenance of the best possible collection. The Board also recognizes that deaccessioning must be undertaken in a manner that upholds legal and ethical requirements while also ensuring that the Museum’s mission is at all times maintained and followed. Accordingly, the Museum adopts the following policy and procedures on deaccessioning.

B. Adherence to the Museum’s mission

All deaccessions must be undertaken with the primary goal of furthering the Museum’s mission. This requires that the deaccession process be used only where necessary to maintain and enhance the collection or to bring the collection in line with the Museum’s mission. Deviations from this standard are considered by the Board to be violations of the Museum’s mission and of the Board’s duties to the Museum and its public. The Board holds itself to a high ethical standard and believes the Museum’s mission must guide every aspect of the Board’s and staff’s work. Therefore, deaccessioning must be approached in a manner that is judicious, thoughtful, reflective, and informed. This will ensure that only objects that do not meet the requirements of the Museum are removed from the permanent collection through the deaccession process.
II. ACCEPTABLE REASONS TO DEACCESSION

The Board reaffirms and states that deaccessioning is a valid part of collections care and management and that the deaccessioning process will be employed as such by the museum. Objects may be removed from the permanent collection for one of the following reasons. Each of these reasons is believed by the Board to be a potential means of continually strengthening the collection and ensuring objects held in the Museum’s permanent collection further the Museum’s mission.

The object is inconsistent with the Museum’s mission or collecting goals.

The object is a duplicate or redundant that has no value as a set or part of a series and has no value for research purposes.

The Museum is unable to provide the necessary care for the object, including an inability to provide appropriate storage or display facilities.

The Museum determines that the object was previously stolen, looted, improperly imported or exported, or in some other manner is held by the Museum in violation of applicable laws.

Removal of the object is necessary to refine and improve the overall collection.

The authenticity or attribution of the object has been seriously questioned or determined to be false and the object does not have sufficient aesthetic or academic merit to justify retention.

The object has suffered from extensive damage or deterioration and repair by a qualified conservator is impractical or impossible, and the deteriorated state of the object is not an inherent aspect of the object’s significance.

Objects may be deaccessioned for reasons other than those enumerated here so long as the ultimate reason to deaccession is in compliance with generally accepted museum professional standards and applicable law, is intended to improve the Museum’s collection, and adheres to the Museum’s mission.
III. PROCEDURE TO DEACCESSION

Deaccession procedures are initiated when the curator who oversees the relevant collection suggests the object for removal from the permanent collection. The curator is to submit a Deaccession Proposal form to the Office of the Registrar, where the object file will be reviewed to determine any restrictions on deaccessioning. If the registrar finds no restrictions, she will sign the Deaccession Proposal and submit it to the Museum Director for review and approval.

If the Director approves, the Deaccession Proposal is presented by the nominating curator at the next meeting of the Collections Committee of the Board of Trustees. The Committee members review the Proposal with the nominating curator and the Director and votes on the proposed deaccession.

If the Committee approves the deaccession by a majority vote, the proposed deaccession is submitted to the full Board of Directors. The nominating curator and Director again present the deaccession. Based on their recommendations and the recommendation of the Collections Committee, the Board of Trustees may deaccession the object by a majority vote.

IV. ADHERENCE TO APPLICABLE LAWS

All deaccessions from the Museum’s collection must comply with any applicable local, state, and federal laws. In order to maintain the highest legal and ethical standards, the Board expressly forbids that any member of the Board, museum staff, or family members of Board members and staff, to acquire either directly or indirectly any deaccessioned object or to benefit in any way from the deaccession or disposal of deaccessioned objects.

A. Compliance with donor restrictions

The Museum attempts whenever possible to ensure that donations are free from restrictions. However, where a donor insists on a restriction in connection with their donation to the Museum, the Museum will comply with the terms of that donation
as expressly stated in the donation forms, which are maintained permanently as part of the object’s file.

B. Compliance with Sample City reporting requirements

The Museum will conduct all deaccessions in compliance with Sample City’s laws and regulations governing the deaccession of museum collection objects.

i. Yearly reporting of deaccessioned works

All deaccessioned works are included in the Museum’s annual report to the Sample City Culture Council. Objects are listed with sufficient information to identify the object, including artist, title, medium, size, year, and accession number. The dates of votes related to the deaccession (the vote by the Collections Committee and by the full Board) are included in the annual report, as are relevant portions of the meeting minutes. Names of the individual Board members voting for or against the deaccession are redacted from minutes in compliance with Sample City law.

ii. Publication of deaccessioned works

A list of deaccessioned works for the previous five fiscal years is publically available on the Museum’s website. A digital image of the deaccessioned work and sufficient information to identify the object, including artist, title, medium, size, year, and accession number, is also be available on the Museum’s website.

iii. Maintenance of deaccession files

The object files of deaccessioned works, including all paperwork related to the deaccession of the object, are maintained permanently in the Museum’s off-site storage facility and digital copies are maintained permanently in the Museum’s collections management software files.
VI. Conclusion

Deaccessioning is a practice viewed as an appropriate and necessary means of collections care and management. However, it is currently unclear when museums have satisfied their legal obligations. Ethical codes provide guidance, but they do not provide clear profession-wide standards. The legal threshold to avoid civil or criminal liabilities for inappropriate deaccessioning practices is unclear for lack of case law and statutory law.

By reviewing and comparing ethical codes, statutes, and case law, an approach emerges which provides best practices for museums to consider when undertaking the deaccessioning of works from their permanent collection. First, acceptable reasons to deaccession derived from the museum profession and statutes provide guidance for determining when it is appropriate. Second, clearly articulated requirements for who may have the authority to approve a deaccession ensures oversight, particularly if that authority is equal to or higher than the authority required to acquisition. Finally, Trustee compliance with their fiduciary duties of loyalty and care improve the possibility of protection under the business judgment rule should a deaccession be questioned in the courts. Further, states (or cities) should adopt annual reporting procedures to ensure that these proposed guidelines are followed and the best interests of the museum and public are upheld. If these recommendations are followed, museums should find greater acceptance of deaccessioning decisions.

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