Monetizing the Collection:
The Intersection of Law, Ethics and Trustee Prerogative
By Mark S. Gold*

There is no greater flashpoint – real or imagined – in the relationship between trustees and museum professionals than the monetizing of the collection, defined as the use of the proceeds of deaccessioning for purposes other than the collection and its care or, even worse, deaccessioning to raise money for operations or other institutional expenses.

Underlying the distrust and disaffection, frequently, is a lack of appreciation for the legal status of the ethical rule that proscribes monetization and a lack of appreciation for the duties and responsibilities that are vested in trustees as a matter of law.

Although the language of the rule differs slightly from association to association, it is a universally accepted ethical principle of museums and museum professionals that the proceeds of deaccessioning may be used only for acquisitions or direct care of the collection.¹

In the case of American Alliance of Museums, the ethical rule was a reaction to an initiative of Financial Accounting Standards Board to require the financial statements of museums to list their collections at fair market value. The enactment of the ethical rule was more about avoiding the capitalization of collections than it was about preserving collections.² Regardless, it has become sacrosanct, and condemnation of violators is swift and unequivocal. While the professional museum associations have no legal authority, they seek to turn the offending institution (even if not an association member) into a pariah, often encouraging other museums to refrain from inter-museum loans with the offender.³

With some very limited exceptions in a few states, and assuming there are no donor-imposed restrictions on any particular object, however, there are no laws or regulations on a federal or state level that prohibit the sale of objects from the collection nor restrict the use of the proceeds from those sales. There is nothing illegal about monetizing the collection.

If monetizing the collection were illegal, the Attorneys General would be enforcing the prohibition. In the United States, oversight of public charities (and the decisions of their boards) is vested exclusively in the office of the Attorney General of the state having jurisdiction over the institution. In performing that function, they are considered to act as guardian of the public’s interest.⁴ The very rare exception occurs in those situations in which someone has such an intimate relationship to the specific object at issue (the donor of a recently accessioned painting, for example) that the courts might allow that person to participate in the process. Generally, though, it is only the Attorney General who has standing to challenge museums on their disposition-related decisions.

That oversight is limited to ensuring that the board, in taking the action at issue, has met its fiduciary duties and obligations to the institution and has complied with any applicable donor

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restrictions. It is not a matter of substituting the judgment of the Attorney General for the judgment of the board in the good faith exercise of its decision-making power.  

If one examines the cases of monetization, a common thread is the very limited extent, if at all, to which Attorneys General have entered the fray to oppose the transaction. Indeed, in the massive deaccessioning for operations by New-York Historical Society in 1994-95, the Attorney General of New York helped structure the transaction. In the recent case of Fisk University’s plan to sell a partial interest in its Stieglitz collection to Crystal Bridges Museum of American Art, the Attorney General of Tennessee was a very active participant but the dispute centered on an interpretation of a donative document and not on whether Fisk University otherwise had the legal authority to sell an interest in the collection to support the operations of the university. When Randolph College undertook to sell paintings from its Maier Museum of Art, the only action by the Attorney General of Virginia was to join in efforts to obtain an injunction while litigation relating to a specific donor was resolved, which effort failed when the requisite bond could not be posted. Had the controversy over the planned sale of the collection and closing of the Rose Art Museum at Brandeis University not been resolved by abandoning the plan, the involvement of the Attorney General of Massachusetts would ultimately have been limited to ascertaining if any of the objects to be sold were subject to donor restrictions.

Unquestionably, professional associations have authority to create a system of rules for their members and impose sanctions on those that violate them. Although the associations, admirably, do not seek to confuse their members into believing that the rules have the force of law, one would be hard pressed to find any of the associations making the distinction. The mistaken perception as to the status of the rule does nothing to help museum professionals think about the issue of monetization and respond thoughtfully when it takes place.

The unwillingness of the museum community to recognize the legal right of museums to monetize their collections lies not just in the misconception that the ethical rule has somehow acquired the status of law but, more importantly, is encumbered by a failure to appreciate the legal obligation and prerogatives of the governing boards of museums – the trustees.

The principles are stunningly simple and logical. There are two duties of trustees that are relevant to this discussion – the duty of due care and the duty of obedience. Almost every articulation of the duty of due care shares the following language or concept:

A director… shall perform his or her duties as such in good faith and in a manner he or she reasonably believes to be in the best interests of the corporation, and with such care as an ordinarily prudent person in a like position would use under similar circumstances.

Marie C. Malaro and Ildiko Pogány DeAngelis, describe the duty of due care as follows:

At the very least, the board should be under obligation to institute policies reasonably designed to further the mission of the organization and should also be able to demonstrate good-faith efforts to monitor such policy.
Malaro and DeAngelis describe the duty of obedience as “the obligation to focus on the specific mission of the organization” and continue with the following elaboration:

Also, although a museum board has discretion in deciding how its mission is to be accomplished, careful adherence to the duty of obedience means selecting goals carefully. The question should not be merely, “Is this goal relevant to our mission?” The harder question needs to be asked: “Is this a wise goal in light of our anticipated resources?”

Both in theory and in practice, it is all about mission and the legal obligation of the trustees to deploy institutional resources to support the mission.

For most free-standing museums, the mission goes far beyond possession and care of a collection. The museum community is justifiably proud of the evolution of museums into sites for education and community dialogue. A museum without programming is little more than the proverbial cabinet of curiosities. The mission statements of most museums are expansive articulations of the several benefits that the institution provides to its defined community.

When the museum is part of a parent organization, the collection is of even less prominence. The typical college or university will cast its mission in terms of education and, in some cases, research. One is not likely to find a college or university that includes the collection, preservation, exhibition, and interpretation of objects in its mission statement. Although there may be a predilection on the part of a college or university to maintain a museum and its objects for the prestige it can bring to the institution, the only basis on which any academic museum will fit into the mission of a college or university is as part of the educational process.

That educational mission is the seminal justification for college and university trustees thinking about the museum and its collections differently than if they were museum trustees. The academic museum is just one component of an array of resources and strategies available to meet the mission of the organization, which is broadly educational and not limited to the care, preservation and interpretation of the collection owned by the museum on campus.

Similar issues pertain to other parent organizations such as foundations, municipalities, and other governmental entities.

Regardless of whether a museum is free-standing or part of a parent organization, when there are insufficient resources to support its mission, a prudent board of trustees will, in addition to seeking other sources of revenue and reductions in expenses, look to programs that can be eliminated and, perhaps, assets that can be monetized – all within the context of fulfilling its mission.

When the Randolph College community was informed that the trustees were considering a monetization of the collection of its Maier Museum of Art, the interim president clearly articulated the legal obligation of the trustees, as follows:

The art is, of course, an issue of great concern. By many valuations, the art collection is more valuable that the College’s endowment. In carrying out their fiduciary duty, trustees must determine that the College is deploying all the assets
available to it in a fashion that will best enable the College to fulfill its mission of educating students in the liberal arts and sciences.  

The tension between law, the ethical rule, and trustee prerogatives have real-life implications. The Berkshire Museum in Pittsfield, Massachusetts, is an excellent example.

The Berkshire Museum hosts around 85,000 visitors per year with an array of exhibitions and programs. It boasts a natural science collection, objects from ancient civilizations and a collection of American art. Few students leave the public schools of Berkshire County without experiencing at least one field trip to the Berkshire Museum.

In 2008, the museum deaccessioned three Russian paintings that had no relevance to the collection and had never been exhibited in more than 50 years of ownership. The museum netted about $7 million in proceeds at public auction—a significant event in the life of an institution with a $2 million operating budget. The proceeds were placed in an account restricted to acquisitions and the direct care of the collection, as the rule requires.

Although the Berkshire Museum is lean, efficient and well-managed, staff reductions to meet budget shortfalls could impair the museum’s ability to be the educational and cultural resource so valued by the community. The collection, on the other hand, is well cared for, and there is no interest in expanding it in a new direction.

The mission of the Berkshire Museum is to “bring people together for experiences that spark creativity and innovative thinking by making inspiring education connections among art, history, and natural science.” Although the museum possesses a collection of over 30,000 objects, the word “collection” is not even mentioned in its mission statement.

To date, the trustees of the Berkshire Museum have honored the restriction of the use of the proceeds from this sale, as required by the ethical rule. Since the proceeds are otherwise unrestricted as to use, if the trustees were to apply those proceeds to fund operating or capital expenses for the museum, all in support of its articulated mission, they would unquestionably be within their legal right to do so. Indeed, one might speculate that at some point, if conditions became dire, they would be violating their fiduciary duties to the institution by declining to do so.

In fact, there is no stronger case for the use of the proceeds of deaccessioning than when the survival of the museum hangs in the balance.

On March 26, 2014, the Delaware Art Museum announced that it would deaccession and sell four works of art from its collection of 12,500 objects. The museum’s stated goal was to raise $30 million to pay off the bond debt of $19.8 million incurred in connection with renovation and expansion of its Kentmere Parkway building and to replenish the endowment to secure the financial future of the museum.

The following statement issued by Elva Ferrari-Graham, President of the Board of Trustees, is an articulate expression of how thoughtful governing boards will weigh priorities and deploy resources:
This decision was made with heavy hearts, but clear minds. While the Trustees fully understand and respect museum best practices, we couldn’t bear voting to close our beloved Delaware Art Museum — a local treasure with a century-long legacy of uniting our community and cultivating a deep connection to art. This decision today will help us achieve financial stability and allow us to channel all of our collective energy back into our tradition of being a cherished community resource. Our unique collections provide educational opportunities, access to art for all ages and the chance to experience learning and creativity. In addition, the Museum fosters innovation, drives economic development and tourism and adds to the quality of life in our region. The Trustees and staff will work tirelessly in 2014 to support our new educational initiatives, our thriving Studio Art program, our new Membership program and the exciting exhibition schedule.¹⁷

Mike Miller, Chief Executive Officer of the Delaware Art Museum, could not have summarized the issue more precisely:

After detailed analysis, heavy scrutiny and the exhaustion of every reasonable alternative to relieve our bond debt, the Trustees had two agonizing choices in front of them—to either sell works of art, or to close our doors. While today’s decision is certainly hard to bear, the closure of this 100-year-old museum would be, by comparison, unbearable.¹⁸

The Berkshire Museum and the Delaware Art Museum are situated at the intersection of law, ethics, and trustee prerogative. They are not alone.

The ethical rule is all about collections to the exclusion of all else. A thoughtful and informed trustee will put the collection into the context of the broader institutional mission. The trustee will recognize that the rule does not rise to the level of law and that the trustee’s legal obligation is to deal with the collection as one of several resources to fulfill the mission of the museum and, indeed, ensure the survival of the museum. In being so transparent about their decision and in articulating their rationale so clearly, the trustees of the Delaware Art Museum have contributed significantly to highlighting how this can and should operate in the real world.

A failure by museum professionals to understand the legal obligations and prerogatives of trustees, and their persistent opposition to the use of the proceeds of deaccessioning to support the mission of the museum, risks rendering them irrelevant in the important discussion on the deployment of limited institutional resources.

12 Ibid at 20.
17 Id.
18 Id.