

## **Legal Issues in Accessioning and Deaccessioning**

Last week a trustee of one of our local historical museums called me about a deaccessioning problem. They had an item in their collection, which had been "provided" by a now former member who claimed the item in question as hers and demanded its return. The museum had no evidence of title. The trustees had decided to return the item since it was not important to the collection and not worth a hassle over title, but had been told by someone that they needed a "legal document" to deaccession the item from the collection. My answer was that there is no prescribed "legal" form for deaccessioning an item from a museum's collection. The museum should document that the item was deaccessioned, the reasons therefore, and that the deaccessioning was done in accordance with the museum's written policies or had the approval of the board of trustees.

"Accessioning" and "deaccessioning" are technical jargon used by museum people and not often understood by persons not associated with museums, at least in the sense the words are used in connection with museums.

"Accessioning" can be found in the dictionary. Webster defines "accession" (a noun) as "something added to a collection." "Accession" or "accessioned" (a verb) is defined as "to record in the order of acquisition." That is very close to museum usage.

Accessioning is not the acquisition of the item. Accessioning is simply declaring that an item is part of the collection, as distinguished from things also acquired by museums by purchase or gift that do not go into the collection, e.g., office furniture, computers, even land and buildings. Museums are also sometimes given things of value with the understanding they are to be disposed of to raise money. None of these items of property are "accessioned," i.e., made a part of the collection. Therefore they are not "deaccessioned" when they are ultimately disposed of.

The fundamental legal issue in the acquisition of an item for the collection is title. The title should be clear, should not be subject to any condition or restrictions, and should be documented. For a donated item, a deed of gift is the appropriate document. The model, included as a slip-sheet to this issue of the Museum Messenger, provides for unrestricted title going to the museum and includes rights to any copyright, which may relate to the item. When the prospective donor insists on imposing conditions on the donation, the decision to accept or not accept should be made by the board of trustees. The board must consider the future impact of the restrictions on the ability of the museum to fulfill its mission. For example, it would be unwise to accept a condition that the donated item or items be placed on "permanent display." No museum, if it expects to have many visitors, can afford to have static permanent exhibits.

The Collection Policy of the museum (and every museum, large or small, should have one) should restate the museum's mission and set forth those things the museum will collect in furtherance of that mission. The policy should also designate who may accept donation of items. This authority should be limited to a person or to a few persons who are knowledgeable about what the museum collects, what is the state of the collection, and what is the museum's ability to store and care for additional items. The museum should not be the community's attic where people can leave any old stuff that is "too good to throw away."

What is to be done about evidence of title when stuff is left on the doorstep or dropped off with the receptionist, and no one has had the chance to say yea or nay? Have the person who found the item or items or the person with whom it was left make an affidavit setting forth the circumstances of how the item or items were found or the circumstances of their being left at the museum. This affidavit should support a conclusion that the person leaving the items intended an unqualified gift to the museum.

Good collection practice should include reevaluation of the collection and pruning where necessary. A Collection Policy must include standards for deaccessioning as well as accessioning. As is acquiring items for the museum's collection, the responsibility for deaccessioning is a responsibility of the board of trustees. This responsibility may be delegated to certain members of the staff, subject to the Collection Policy.

"Deaccessioning" is an untidy mixture of legal issues, ethical questions, social problems, and practical considerations. The word is not found in the dictionary. My wife, the linguist, calls it a "back formation from a bastard verb." I suggest that in the world of museums it is a useful term of art. Deaccessioning is a formal declaration that an item is no longer part of the collection. Deaccessioning of itself is not disposal of the item, though it may be a precursor of disposal.

Managing the affairs of the museum and of setting the Collections Policy (including accessioning and deaccessioning) is the responsibility of the board of trustees. There is nothing illegal about deaccessioning and disposing of items from the collection. In the case of *Rowan v. Pasadena*, a 1981 California case, several former directors challenged the authority of the current directors to change the focus of the museum's collection by deaccessioning several pieces of contemporary art so as to acquire more traditional pieces. They (the former directors) argued that past practice had permanently set the direction of the museum. It was charged that the defendant directors failed to preserve and maintain the museum's collection, had failed to exhibit properly, failed to establish collection management policies, and failed to receive reasonable amounts for the sale. The court held for the defendant directors. In its ruling the court said:

"Members of the board of directors of the corporation (the museum) are undoubtedly fiduciaries and as such are required to act in the highest good faith toward the beneficiary, i.e., the public... Acting within their broad discretion, the trustees must assume responsibility for making decisions regarding all the affairs of the museum... So long as trustees act in good faith and exercise reasonable care as contrasted with clear abuse of discretion, the decision must be left in the hands of the trustees, where it has been placed by law." (emphasis supplied)

This decision represents the state of the law today. Courts will not second-guess the acts of directors or trustees unless their actions are the result of gross negligence. Charges of misconduct on the part of trustees usually result from trustees neglecting their duties as trustees rather than from acts of affirmative misconduct.

Following is a checklist, which should prove useful when an item in the collection is to be disposed of (deaccessioned):

Was the Collection Policy followed or was the deviation approved by the board of trustees?

Is this fully documented?

Is the reason for deaccessioning fully documented?

Did the person or persons making the decision to deaccession the item have the authority to do so?

This would be as set forth in the Collection Policy or by special delegation by the board of trustees (in writing).

Does the museum have clear, unrestricted and documented title to the item or items being deaccessioned?

This is where restricted or conditional donations (see above) can be very troublesome!

If the museum has less than clear title, clear and marketable title can be obtained using the procedure set forth in RCW Chapter 63.28, "An Act Relating to Unclaimed Property in Museums and Historical Societies" under the following circumstances:

- a. The museum can document that it has held the property for five years without anyone make a claim to the property, or
- b. The property is on an indefinite loan, or was on loan the term of which has expired, and has not been reclaimed.

Is the method of disposal appropriate? This is as much an ethical question as a legal question. Should an item of historic significance be sold to private parties or should it be kept in the public domain by restricting the sale (at perhaps a lesser financial return) to museums or other public benefit organizations?

Does anyone, trustee, director, or other staff member or volunteer involved in the decision to deaccession or in the disposition of the item have an actual or apparent conflict of interest?

I suggest that permitting anyone connected with the museum to acquire deaccessioned items, except perhaps at public auction, should not be permitted. Even this has been held to be a conflict of interest when it appears that some knowledgeable museum staffer (in this case the curator) has special knowledge of the value of the object not available to the public.

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