

LEGAL CONSIDERATIONS IN COLLECTING, Part 1

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One of the panel sessions at the 2001 annual WMA conference was called “Collecting 20th Century Materials.” I was the third person on the panel, and my assignment was to address legal issues in collecting. The subject was so engrossing that by the time it was my turn to speak, there was only time left for me to close the session with the commitment to write a Law Note on the subject. So here it is.

I learned that collecting the artifacts of the 20th century has a certain urgency. I grew up in the first half of the 20th century when people still had attics. The attic was a wonderful place, and my grandparents’ attic was the best of all. There were phonographs, old records, radios, old pictures, clothing, copper boilers—all kinds of good stuff. After World War II, houses didn’t have attics; sometimes they had storerooms, but the space was limited and it was not possible to store all that good stuff. It used to be that this good stuff came out and was given to the local museum or was just thrown away every time there was a generational change. In the last half of the century, people didn’t save very much old stuff because they didn’t have a place to put it. So the artifacts don’t even get put in the attics for a while; they just go straight to the dump. It seems clear to me that museums must be more aggressive in collection artifacts of the 20th century or the stuff will be going to the dump. No more will we find treasures stored in the attic. However, there are advantages to collecting stuff before it gets very old. First, it is usually possible to get a detailed and accurate history of the object since its use is probably not more than one or possibly two generations back. Second, clear title can usually be obtained since people will recall how the object was acquired. There is really no need or excuse for acquiring additional undocumented property

Gifts, bequests, purchases, and exchanges

Museums acquire artifacts by gift, bequest, purchase, or exchange. The first important legal consideration is to document the transaction. In this throwaway society, people are glad to give away the old stuff and often don’t understand the need for formalities like a deed of gift or a clearly drawn loan agreement. For a gift, there should be a deed of gift; for a bequest, there should be a will; for a purchase there should be a bill of sale; and for an exchange, there should be a written agreement documenting the exchange. But more than a piece of paper may be necessary to establish ownership. Does the donor, the seller, or the party to an exchange really own the artifact? The museum should always inquire of any such person as to how he or she acquired the object and where it came from. Any curator will want to know the provenance of any object that comes into the collection. This same information may also be valuable to establish that the museum acquired clear title to the artifact.

It is, sad to say, not an uncommon problem for a museum to put an artifact from its collection on display and have someone come forward and claim ownership. In a situation such as this, the claimant has the burden of proof, but if the museum made no inquiry or raised any question about the donor’s ownership and right to convey the property and the deed of gift does not represent that the donor has the legal right to convey the property, the museum may have difficulty in defeating even a weak claim.

Every museum should have an acquisition policy. The first thing to be covered is who has authority to accept or to acquire an item for the collection. Usually this will be the curator and perhaps the executive director. If that person is not available or needs time to evaluate the artifact or the collection of objects, the would-be donor should be given a custodial receipt. An answer should be provided promptly—two weeks is not an unreasonable time. In the case of bequests, the will usually provides that the gift must be accepted, if at all, within a specified period of time. If the will contains onerous conditions, the museum must bite the bullet and reject the gift. Such

conditions do not go away with the passage of time. There is always the possibility that some heir or other person may come forward and accuse the museum of violating its trust.

Particular care should be taken if objects are offered to the museum for sale by other than an established and reputable dealer. The object may be a fake or it may be stolen. The thief cannot, of course, pass good title and neither can someone who bought a stolen object do so even in good faith. The title remains with the owner from whom the object was stolen. The museum must check both the object's historical provenance and its legal provenance.

For museums that include in their collections artifacts of foreign origin or Native American artifacts, special care must be taken to insure that the object was not acquired in violation of existing law. There is currently an international convention on the illicit import of cultural property. There is also the Native American Grave Protection and Repatriation Act which requires that Native American remains or sacred objects be inventoried and returned to the Tribe of origin. A Native American object offered by a private source or a dealer should be viewed with great suspicion and should not be acquired unless its provenance and legal status is clearly established. If there is any doubt, don't.

The museum should not put itself in the position of spending money on acquiring an artifact and on preservation and conservation and then have someone assert and establish a claim to the property.

Restricted gifts or bequests

Donors sometimes want to place restrictions on their gift. These should be examined with care to ensure that they do not have an adverse impact on the management of the collection. Some restrictions are innocuous, such as a condition that the donor's name be always identified when the gift is displayed. A restriction that the artifact will always be on display is of course not acceptable. Some, such as a restriction that the artifact cannot be disposed of, are also not acceptable. Frequently, however, negotiations with the potential donor can result in a compromise on a less restrictive restriction, e.g., that the artifact may not be disposed of except to another museum or if its condition has deteriorated to a point where it is not longer exhibitable or repairable. Bequests present a more difficult problem since negotiations with the donor are not possible. If it is a valuable artifact, the decision may be difficult, but in the long run it is better to say no to a restriction or condition that the museum cannot meet.

Included in this issue is a model deed of gift. Note that this deed includes the conveyance of any copyright, a representation that the donor is the owner and has the right to convey the property, and call for the signature of both spouses. If you would like a copy of this deed of gift send me an e-mail at rsemgruhn@attbi.com and I will send you one which you may use or edit as you chose.

To be continued in "Legal Considerations of Collecting, Part 2", where I will discuss loans, indefinite loans, and permanent loans.,

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DEED OF GIFT

I (We) hereby give, convey and assign to the (*Name of Museum*) all of my (our) right title and interest in and to the property hereinafter described, to be used or disposed of by the Museum in any manner in its sole discretion.

I (We) hereby represent that the property constituting this gift is, to the best of my (our) knowledge and belief, acquired legally and without encumbrance, and that I (We) have legal authority to transfer ownership by this deed of gift.

It is my (our) purpose and intention to vest any and all the incidents of absolute ownership, including but not limited to all rights of copyright, of the property described below in the (*Name of Museum*) from the date of this Deed of Gift forward.

Description of Gift: (make as specific as possible)

IN WITNESS WHEREOF I (We) have executed this deed at _____ on the _____ day of _____, 20____.

(Note: Husband and wife should both sign, even if the gift is made by only one. If the donor is not married the deed should so state.)