

AN ETHICS FRAMEWORK FOR REPRESENTING SMALL MUSEUMS

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The United States is filled with small museums that require legal counsel. For the most part, these smaller museums cannot afford to retain lawyers who specialize in art and museum law. However, these museums have the same legal issues as large museums such as conflicts of interest, deaccessioning, provenance problems with potential gifts, trustee matters, and a host of others. In many cases, the lawyers for these smaller museums will not be art law specialists nor devote a large portion of their time to art and museum law. It is to these lawyers that this paper is addressed.

One approach to understanding the responsibilities of attorneys who may only represent a single small or medium size museum as part of a general business or commercial practice is to look at the *Rules of Professional Conduct* adopted in the state in which such attorneys practice and analyze how the *Rules* affect such a practice. In this lecture I will highlight some of the *Rules* and how they relate to representing smaller and medium size museums.

The first of the ethical rules that impact museum representation by the non-specialist lawyer is Rule 1.1 which requires that lawyers be competent.¹ Specifically, Rule 1.1 requires that lawyers possess the knowledge and experience to provide acceptable representation to a client.² A lawyer who has a general law practice and a single museum client may well not be competent to handle all of the museum's legal matters and, indeed, may not even understand the complexity of those problems as they arise.

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¹ MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1980).

² *Id.*

Most experienced lawyers—unless they are non-profit tax lawyers—will be aware that they are not competent to handle a museum's tax matters. But, will most general practice lawyers be aware of the potential legal problems that may arise from a potential donation to the museum. There are a host of legal pitfalls for a museum who takes a gift in kind.³ Art may have been looted or stolen or acquired contrary to the law of the nation from which it is taken of international law on art theft and looting.⁴ Few even large museums have the resources to do adequate provenance research.⁵ Will a lawyer for a smaller museum be able to adequately counsel the staff and trustees of the museum on the legal issues involved in accepting a specific gift?⁶ For instance, many veterans of WWII brought home “souvenirs” from their European service.⁷ Procedures to protect national patrimony during WWII were, to put it mildly, less than ideal.⁸ As the “greatest generation” dies off, their families are discovering these artifacts and artworks.⁹ Some are being offered to museums.¹⁰ Museum counsel must understand the risks involved in such donations and educate the museum staff and the museum directors in these risks.¹¹ To do so,

³ Lisa Migliore Black, *Look a Gift Horse in the Mouth: The Pitfalls to Gifts and Ethical Obligations*, MIGLIORE & ASSOCIATES (2024), <https://miglioreassociates.com/look-a-gift-horse-in-the-mouth-the-pitfalls-to-gifts-and-ethical-obligations/#:~:text=The%20answer%20is%20simple%3A%20According%20to%20the%20National,the%20terms%20under%20which%20they%20are%20being%20offered.> [https://perma.cc/RB9P-C8D8].

⁴ See, e.g., Samantha Smart, *Top Ten Art Thefts*, COLUMBIA J.L. & ARTS (Nov. 15, 2019), <https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/237> [https://perma.cc/Y57G-XQ33] (discussing the top ten art thefts of all time).

⁵ There are provenance programs at Boston Museum of Fine Arts, Nelson-Atkins, the MET, and MoMA. See MFABOSTON, *Provenance Research* (2024), <https://www.mfa.org/collections/provenance> [https://perma.cc/4UVF-S6EE]; NELSON ATKINS, *Provenance* (2024), <https://www.nelson-atkins.org/provenance/> [https://perma.cc/6JVD-MTCF]; THE MET, *Provenance Research Resources* (2024), <https://www.metmuseum.org/about-the-met/provenance-research-resources> [https://perma.cc/UR2P-VZWP]; MOMA, *Provenance Research Project* (2024), <https://www.moma.org/collection/provenance/>. Generally, these museums are the exception not the rule.

⁶ CHRISTOPHER C. MILLER, *Surprises and Their Consequences: A Survey of Museum Reactions to Unexpected Bequests*, WESTLAW (Mar. 23–25, 2022).

⁷ See Lynn H. Nicholas, RAPE OF EUROPA, 226 (1994); Tom Mashberg, *Returning the Spoils of World War II, Taken by Americans*, THE NEW YORK TIMES, (May 5, 2015) <https://www.nytimes.com/2015/05/06/arts/design/returning-the-spoils-of-world-war-ii-taken-by-our-side.html>.

⁸ *Id.*

⁹ Rick Sobey, *Massachusetts Family Finds Looted World War II Artifacts, FBI Boston returning them to Japan*, BOSTON HERALD (2024), <https://www.msn.com/en-us/news/us/massachusetts-family-finds-looted-world-war-ii-artifacts-fbi-boston-returning-them-to-japan/ar-BB1jZSxU> [https://perma.cc/BK9M-V836]; Kristen Setera, *FBI Boston Recovers and Returns 22 Historic Artifacts to Japan*, (Mar. 15, 2024), <https://www.fbi.gov/contact-us/field-offices/boston/news/fbi-boston-recovers-and-returns-22-historic-artifacts-to-japan> [https://perma.cc/WYK7-Y9H5].

¹⁰ See Karen K. Ho, *US Investigators Move to Seize Three Egon Schiele Works from Museums on Claims From Jewish Heirs of Stolen Property*, ARTNEWS, (Sept. 14, 2023), <https://www.artnews.com/art-news/news/us-investigators-seize-three-egon-schiele-museums-jewish-heirs-stolen-property-claims-1234679610/> [https://perma.cc/9QT2-A33L].

¹¹ See ILDIKO P. DEANGELIS, WILLS AND ESTATES CHECKLIST: FOR MUSEUM STAFF ADMINISTERING BEQUESTS, SMITHSONIAN INST. (1994).

they must know both domestic and foreign law applicable to such situations. Whether the average lawyer who represents a small or medium size museum has such knowledge is questionable.

In a situation where the lawyer does not know all of the potential legal issues affecting a gift, Rule 1.1 permits a lawyer who does not possess the requisite knowledge to represent a client adequately either to acquire such knowledge through research and education or, more simply, to affiliate with a lawyer who possesses such knowledge.¹² But a lawyer in the situation I am describing must know what they does not know so as to know to affiliate with someone else in the matter.

Rules 1.7 through 1.10 regulate how lawyers must deal with actual and potential conflicts of interest.¹³ The museum world, alas, is flooded with potential conflicts of interest. At the very least, there is always the possibility of conflicts between the museum's interests and trustees interests, the interests of museum staff and the museum, and, of course, the conflicts of interest that may apply to lawyers both between lawyers and trustees, lawyers and the museum itself, and, occasionally, between the lawyers and staff. Let me briefly illustrate a few scenarios that might give rise to conflicts.

Imagine a situation in a small local museum when a major donor to the museum wants to give a large in-kind donation of their collection of Victorian chromolithographic trade cards to the museum. In addition, the donor wants, naturally, the highest valuation for tax purposes that will meet the scrutiny of the IRS. And the donor wants the museum to agree never to dispose of the collection and exhibit it for no less than three months every five years. The problem, however, is that the proposed donation does not fit with the museum's acquisition policy, would be a financial burden to store or exhibit, and its value, as collectibles is difficult to ascertain. Even more problematic for the lawyer, is that the individual donor is the president of the local bank which is the lawyer's largest client in terms of annual billings.

To understand the lawyer's potential ethical problems in this scenario, we must begin by identifying the client and the extent of duty the lawyer owes to that client. In this situation, the best guide to the question of the identity of the client is Rule 1.13(a) of the *Model Rules of Professional Responsibility* published by the American Bar Association:

¹² MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 2 (AM. BAR ASS'N 1983).

¹³ See MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 1983); MODEL RULES OF PRO. CONDUCT r. 1.8 (AM. BAR ASS'N 1983); MODEL RULES OF PRO. CONDUCT r. 1.9 (AM. BAR ASS'N 1983); and MODEL RULES OF PRO. CONDUCT r. 1.10 (AM. BAR ASS'N 1983).

A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.¹⁴

Thus, the lawyer's client is the museum. As to the duty owed to the museum, this is not specifically defined by the *Model Rules*, but, at Common law, is deemed to be a fiduciary duty that is best defined in United States law by Judge Benjamin Cardozo in his decision in the New York case, *Meinhard v. Salmon*:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions (*Wendt v. Fischer*, 243 N. Y. 439, 444). Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.¹⁵

This concept of the fiduciary nature of the lawyer-client relationship underlies Rule 1.7 that requires that a lawyer must disclose both direct and indirect conflicts of interest to a client and that, absent a waiver, such conflicts generally will preclude a lawyer from representing the client.¹⁶ In Kansas KRPC 1.7 reads:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; (2) there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer

¹⁴ MODEL RULES OF PRO. CONDUCT r. 1.13(a) (AM. BAR ASS'N 1983).

¹⁵ *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

¹⁶ MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 1983).

will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.¹⁷

If one applies Rule 1.7 to the hypothetical we are discussing the lawyer has, most probably, an indirect conflict under Rule 1.7(a)(2).¹⁸ The lawyer represents the museum and many of the donor's proposals are adverse to the museum's interests, but the lawyer has a strong economic interest in not displeasing the would be donor because the donor is an important client. If the lawyer is not acutely aware of the provisions of Rule 1.7(a)(2) they may find themselves in serious professional disciplinary difficulties.¹⁹ One should also note that Rule 1.7(a)(2) does permit a lawyer to undertake a prima facie indirect conflict if the lawyer makes certain determinations.²⁰ Since a lawyer inexperienced in such matters may not have a basis for judging whether they can satisfy the requirements of Rule 1.7(a)(2), they might well want to seek advice on this matter from another lawyer, of course maintaining client confidentiality when doing so.

Just as legal questions may arise as to a museum's accepting artwork, questions as to deaccessioning artwork also often arise and present difficult legal questions. Many museums find that deaccessioning works of art will both produce needed revenue and fit with changed directions in the museum's collection patterns.²¹ In many cases, smaller museums may have been willing to accept anything donated to them but now find that these older collections take up needed space and could be sold and the revenue used for a variety of needed purposes.²²

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 1983).

²⁰ See *id.*

²¹ Caroline Goldstein, *In a Major Shift, Museums Can Now Use the Proceeds from Deaccessioning for More Than Just Buying Art*, ARTNET (Oct. 3, 2022), <https://news.artnet.com/art-world/aamd-museum-deaccession-rules-2185274> [<https://perma.cc/3U7U-QBJ9>]; *AAMD Policy on Deaccessioning*, ASS'N OF ART MUSEUM DIRS. (June 9, 2010) (amended Oct. 2015), https://aamd.org/sites/default/files/document/AAMD%20Policy%20on%20Deaccessioning%20website_0.pdf [<https://perma.cc/63AF-QBMJ>] (Also, express limitations on deaccessioning for Museums who are members to AAMD and AAM).

²² See Angelica Villa, *The Most Controversial U.S. Museum Deaccessions: Why Do Institutions Sell Art?* ARTNEWS (Oct. 26, 2020), <https://www.artnews.com/feature/most-controversial->

Over the years, as an attorney, collector, and donor, I have seen this problem arise repeatedly. Small community museums often have, as their mandate to collect and illustrate the history and culture of their community. This usually means that they will accept anything from vintage cars to clothing to holiday decorations. I am a proud member of the Lecompton Historical Society. Our small museum is, to my mind, an historical Wunderkammer with bits and pieces of 150 years of our small town's history. This is a very traditional approach to a small-town museum. I can see in the future that a new director or board of trustees may decided to "modernize" and deaccession some of the pieces, particularly those that have value to collectors. I can also see that such a proposal would meet with strong opposition from many residents—including me—who think the museum is marvelous.

If a small museum may deaccession objects at some point, it needs legal counsel, not at the time that it actually wants to deaccession an object, but long before that so that it has a standing policy. It is at this point, at the latest, that a lawyer should be consulted to help draft such a policy and tailor it to the specific concerns of the smaller museum. The lawyer involved must be familiar with both the law and policy side of museum deaccessioning. I find the advice of a fact sheet from New South Wales quite illuminating:

Deaccessioning is a process that requires much tact as the general public may view deaccessioning practices as a rejection or neglect of their gifts to the community. Most people give items to a museum or gallery because they want to see it preserved for future generations. They see the local museum or gallery as the best way to do this for what they consider to be their most precious and prized possessions. If they hear of the local museum deaccessioning items, they could be hurt and offended by the action. One way of combating this is to be open and honest with the community about what you are doing and why, and be very clear in your explanations of your actions.

Deaccession can be a tricky process if the organisation is unclear of the object's provenance, or how it came to be in their collection. It may also discourage potential donors from donating to the organisation if they feel it is just going to be rejected in the future. This can be alleviated by explaining to the community that the process of deaccession and that a more rigorous collections policy is intended to diminish the need for future deaccession procedures. This may be done through the

museum-deaccessioning-plans-1234575019/ [https://perma.cc/HXG9-GPXW]; see also Steve Schindler & Katie Wilson-Milne, *Current Events of Deaccessioning and Cries of Censorship*, THE ART LAW PODCAST (Oct. 29, 2020), <https://artlawpodcast.com/2020/10/29/current-events-of-deaccessioning-and-cries-of-censorship/> [https://perma.cc/3XCL-ETDM].

local press or by holding an open day at your organisation, focussing on the issue.²³

The local lawyer who counsels a small or medium sized museum on deaccessions enters a legal, political, and economic minefield. Of course, they must be competent to advise on these issues under Rule 1.1. They must also be careful not to be caught in an indirect conflict under Rule 1.7(a)(2) if donor or other public anger may affect their ability to provide competent counsel.

Before I conclude my brief talk, I want to go back and make a few observations about why providing legal representation to small and medium-sized museums is both potentially problematic and rewarding for a lawyer. As I said at the beginning of my talk, most smaller museums, often museums in small even rural communities, will not have the ability to retain specialists in art law or museum law. Instead, they will retain local lawyers, many of whom will be general practitioners. General law practice requires lawyers to have broad experience across a wide range of areas. Thus, an experienced general practice lawyer will likely have experience with fiduciary law, estate law, and, even some aspects of non-for-profit entity representation. But it is highly unlikely that a general practice lawyer in a small community will have expertise in many of the areas that will be most critical for a museum, including international art law. Indeed, lawyers who are asked to represent a small museum may not even know what they need to know to handle specific problems that might arise.

I suggested earlier that lawyers who found themselves in a situation in which they realized that they were not competent to provide adequate representation could, pursuant to Rule 1.1 simply affiliate themselves with a lawyer with the requisite knowledge and experience. The problem with this is financial. Who is going to pay the specialist lawyer? It is very likely that the museum will not have the funds to do so. The alternative to finding a specialist is that the museum's lawyer make herself a specialist through reading and attending continuing education courses. This path, too, is not without problems. First, once again, who will pay for the lawyer's time and CLE costs? Second, a lawyer who is presented with a problem that will require self-education may simply not have the time to bring herself up to speed in time to provide timely advice to her museum client.

In the light of these difficulties, what can museums and lawyers who represent them do to provide themselves with adequate legal help. I think that

²³ *Fact Sheet: Deaccession and Disposal in Small Museums*, MUSEUMS & GALLERIES NSW (2011), <https://sustainingplaces.files.wordpress.com/2012/09/deaccession-and-disposal-in-small-museums.pdf> [<https://perma.cc/RT8N-RP6J>].

there is an answer, and the answer lies in Rule. 6.1 that sets rules for lawyers to perform *pro bono* services.²⁴

The Kansas Rule of Professional Responsibility, 6.1 states:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.²⁵

The majority of states require that lawyers do some form of *pro bono* work each year.²⁶ Kansas is in the minority that do not require such work, but even Kansas requires that lawyers report the *pro bono* work that they perform annually, and most lawyers do at least some.²⁷ By every definition of such work with which I am familiar, providing free or discounted legal services to museums, would qualify. And this may be a partial solution to the problem of providing expert advice to smaller and medium size museums.

Of course, such museums could seek out lawyers with expertise in the field, but this may be burdensome. In my opinion, it would be far more efficient for local museums to act in concert to set up a standing group of expert lawyers in museum and art law willing to donate their services as needed. Then, when smaller museums had an issue that required specialized knowledge and experience, they could go to this list of lawyers and find one willing to help either on their own or affiliated with the museum's regular counsel. This would solve the Rule 1.1 problems as well as likely satisfy the expert lawyers' Rule 6.1 obligations. To the extent that the volunteer lawyers were not from the same community, this could also potentially eliminate Rule 1.7 conflicts.

I make the suggestion that museums use Rule 6.1 to acquire expert legal counsel based, in part, on my own experiences as a young lawyer in New York City in the 1970s. I worked for a large firm, Cravath, Swaine, & Moore. Even though lawyers were not yet required to do *pro bono* work, the firm encouraged us to do so. Among the suggested groups that we could work with was a relatively new one, "Associates for the Arts," which connected lawyers to artists to provide *pro bono* assistance. During the time I worked with this group, I was

²⁴ KAN. RULES OF PROFESSIONAL RESPONSIBILITY 6.1, (last updated Feb. 2, 2024), <https://casetext.com/rule/kansas-court-rules/kansas-rules-relating-to-discipline-of-attorneys/rule-240-rules-of-professional-conduct/rule-61-public-service-pro-bono-public-service> [<https://perma.cc/B52Q-KW52>].

²⁵ *Id.*

²⁶ Erin Mihalik, *Pro-Bono in 2022*, MARTINDALE-AVVO (Nov. 9, 2022), <https://www.martindale-avvo.com/blog/pro-bono-in-2022/> [<https://perma.cc/J67N-RP8K>].

²⁷ KAN. RULES OF PROFESSIONAL RESPONSIBILITY 6.1, *supra* note 24.

able to assist dancers, visual artists, and writers. I found it to be a welcome change from my normal tasks as a corporate tax lawyer. Indeed, I discovered an interest in art law which, over the past four decades, has led to my teaching and writing about various aspects of art law and even representing artists, activities which I have enjoyed enormously. I believe that making these kinds of *pro bono* activities available to lawyers—particularly young lawyers—will excite them and open up new areas of practice for them.