

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a bold, serif font, centered between two horizontal blue bars.

NEW YORK
CITY BAR

COMMITTEE ON ART LAW

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Hon. Richard L. Brodsky
New York State Assembly
LOB 422
Albany, NY 12248

Dear Assemblyman Brodsky,

The Art Law Committee of the Association of Bar of the City New York very much appreciates your meeting recently with members of the Committee regarding Bill A6959, on deaccessioning by museums located in New York State. The Committee commends your intention to make the deaccessioning process more transparent to the public. However, the Committee also urges you to consult further with all the various stakeholders on the possible effects of the Bill, some of which may be unintended, and to consider elimination or clarification of certain provisions and language of the Bill as currently drafted.

We discussed the Bill at our regular May Committee meeting. As you know, the Committee is comprised of attorneys representing New York museums and other nonprofit cultural organizations, auction houses, artists, collectors, and dealers, as well as others with knowledge of and interest in law relating to art and cultural artifacts of all kinds. Quite a number of our members have had hands-on experience with deaccessioning. At the May meeting, the Committee noted that, to date, museums have self-policed the deaccessioning process through the policies of two trade organizations, the American Association of Museums and the Association of Art Museum Directors, as well as their own institution's collection-management policies. It was also noted that the majority of New York museums are subject to the Regents Rules governing deaccessioning. However, should the Assembly feel legislation is necessary, the Committee voted to recommend that the following terms of the Bill be given further consideration prior to passage. As you will see, these are the terms we discussed in our meeting with you.

First, as defined by Section 233-aaa-1(a), the term "museum" would encompass many organizations that maintain collections of some kind but which currently are not considered museums, per se. Examples include certain schools, libraries and archives (consider the case of a settlement house which may have a photographic archive relating to a particular neighborhood or community, or a library that contains materials used to train clients in basic language or vocational skills), as well as certain private foundations, such as foundations created to hold (but

not exhibit) works of art given or bequeathed by artists or collectors. The holdings of such foundations obviously must be used for some charitable or educational purpose (e.g., the collections may be made available to scholars for their research, lent out for exhibition, or sold in accordance with the founder's express wishes in order to raise funds to advance a wide array of charitable and educational activities). However, artist and collector foundations would not, under current standards or expectations, be viewed or treated as museums. The Committee recommends that the effect of this broad definition be further examined and that the definition of "museum" be tailored so that it is not unnecessarily inclusive or broad.

Second, with respect to the requirement of Section 233-aaa-3 that the "museum must accession all items in its possession", the Committee notes that as a practical matter, museums and other collecting institutions frequently have items in their possession for purposes that are within the scope of the institution's mission, but which items may not or should not necessarily be considered part of the collection. Examples include items on temporary loan and/or under conservation from third parties, and items held primarily for study and comparison, including faked and damaged items. During our meeting with you, we understood that the intent of the accessioning requirement is to ensure that every museum has a collections management policy, and that objects are accessioned consistent with that policy. If that is correct, the Committee recommends that a simple statement to that effect be adopted, rather than use the language of "possession".

Third, with respect to the requirement of Section 233-aaa-1(f) that museums "publish a registry" of accessioned items, the Committee notes that many collecting institutions maintain extensive records of their collections, although these records may not be in a publicly accessible form, and further notes that some museums publish records of deaccessioned works. It is not clear to the Committee what this Section would actually require, in practical terms, and there is concern that to publish a registry could prove labor-intensive and costly to many New York nonprofits, large and small, particularly at a time when they find themselves hard-pressed to continue existing programs. The Committee recommends that this requirement be reexamined with an eye to identifying the least burdensome means to accomplish its intended purpose.

Fourth, the Committee discussed the requirement of Section 233-aaa-9 that museums make a "good faith effort" to sell or transfer items to another museum in New York, or, failing that, another museum. Some Committee members question the basis for first attempting an intra-state transfer, noting that not all states enjoy the wealth of assets historically collected in New York, and that New York museums benefit from federal as well as state law. Others question the requirement at all, noting that some objects are deaccessioned precisely for reasons that make them more suited for collection by private parties. Should this requirement remain in the Bill, however, as a threshold matter the Committee recommends that the "effort" called for be specifically defined, whether it is "good faith" or "reasonable" or some other formulation. If the specific requirements of this effort are not defined, museums may be unable to deaccession items to anyone other than museums due to uncertainty among non-museum buyers about whether an adequate effort has been made. It should also be made clear such efforts are not required in cases of repatriation, settlement of a legal claim of ownership, or compliance with a donor's right of reversion. The Committee further recommends that museums' interest in obtaining fair market value, and even maximizing the sales prices, for deaccessioned objects, be taken into careful consideration in connection with the proposed requirement.

Finally, the Committee raises two practical questions: What would be the time-line for compliance with the proposed legislation? And what would be the penalty for non-compliance?

Because the Committee's membership is diverse and represents a broad range of the art and nonprofit sectors, we are keenly aware that there are differences of opinion regarding the ethics and rules that should apply to museum deaccessioning both within and outside these sectors. Significantly, a number of important constituencies maintain that existing corporate governance rules stand to protect the public interest with respect to museum deaccessioning, and/or maintain that uniform restrictions on the use of deaccessioning proceeds may not necessarily serve the best interest of the institutions or the public. We hope that you will take the time to hear these perspectives fully, and therefore strongly urge that that additional time be given to deliberation of this Bill.

The Committee appreciates your support of New York museums and your work on behalf of all those who enjoy and benefit from New York's museums, including non-State residents, and we offer these comments and questions in the spirit of making this Bill work for museums and their public audience. We understand that this Bill is on a fast track, and thus felt it important to register our concerns formally now, rather than go through a further deliberative process in order to propose specific revisions to the Bill's language, which we would also be happy to do.

Should the timetable for the Bill permit the Committee to return to a consideration of its terms and possible revisions, we would also discuss the proposed imposition of restrictions on the use of all sales proceeds from deaccessioned items. This broad provision may give rise to conflict in cases where the donor of an object has imposed or wants to impose different restrictions, or granted or wants to grant a museum unlimited discretion in the use of sale proceeds. The Committee might then recommend that more consideration be given to donor intent, as well.

Thank you again for your willingness to meet with us and continue discussion of this proposed legislation.

Yours sincerely,

Virginia Rutledge
Chair, Art Law Committee

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