

# AMERICAN ASSOCIATION FOR STATE AND LOCAL HISTORY

## WHEN A HISTORY MUSEUM CLOSES

### ETHICS POSITION PAPER #2

#### **I. Preface**

The American Association for State and Local History (AASLH) issues periodic position papers to assist individuals and institutions in implementing specific components of the Association's *Statement of Professional Standards and Ethics* (revised 2002). Adopted by the Council in June 2006, *Ethics Position Paper #2* provides practical guidelines for interpreting, adopting, and implementing the Association's position on the ethics of the dissolution or closing of a history museum.<sup>1</sup>

#### **II. Introduction**

Sometimes, despite all the best intentions and efforts, a history museum has no alternative but to cease operations and close its doors. This worst-case scenario catches all involved unprepared and presents legal and ethical challenges that few ever expect to face. What are your responsibilities when facing such a situation? How are collections protected from creditors? Can the endowment be protected from creditors, and if so, how? Are the legal requirements for history museums different from those for other museums facing dissolution? But beyond the legal requirements, what ethical issues should be taken into consideration? And from a different perspective, what obligations does the museum community at large have to a museum that is closing? The paper that follows will provide guidance to both those institutions facing the prospect of dissolution and those having to deal with a closing in their community.

#### **III. Deaccessioning, Disposal, and Dissolution**

When discussing the dispersal of collections, the museum community's usual concern is with deaccessioning and disposal by a history museum of some portion of its collections: the focus is on policies and procedures that govern decision making within an *operating* institution. In *A Legal Primer on Managing Museum Collections*, Marie Malaro defines **deaccessioning** as "the process used to remove permanently an object from a museum's collections or to document the reasons for involuntary removal (one required by law or due to circumstances not controlled

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<sup>1</sup> For ease of reading, the term history museum will be used throughout this document. The term should be broadly construed to include any historical organization other than a historic house or site that holds and interprets collections.

by the museum).”<sup>2</sup> The courts have upheld the legality of deaccessioning, and professional associations across the museum community have deemed it ethical when handled within the context of appropriate policies and procedures. The AASLH *Statement of Professional Standards and Ethics* recognizes deaccessioning as a legitimate practice as long as it is done to improve the collections: “Collections shall not be deaccessioned or disposed of in order to provide financial support for institutional operations, facilities maintenance, or any reason other than preservation or acquisition of collections, as defined by institutional policy.” In short, while removing an objects or objects from a collection should never be considered lightly, it is appropriate when the goal is the improvement or preservation of the collections and the process recognizes that the collections are held in the public trust.

**Disposal** shifts the discussion from whether an object should be removed from the collections to what will be done with it. Disposal can be handled via transfer to another institution, sale, physical destruction, or other methods. In deciding how to dispose of an object, historical organizations must keep in mind that those objects are held in the public trust and that public perception may be more binding than legal or ethical requirements.

**Dissolution** poses a very different situation. The decision-making process no longer addresses the future of a functioning institution but rather the consequences for its collections, endowments, and other restricted assets when an institution ceases to exist. The closest the literature on deaccessioning comes to offering guidance is in regard to an institution deaccessioning a substantial portion of its holdings. In such a situation, Marie Malaro advises the museum or historical organization to consult with the state attorney general’s office, noting that in New York, for example, “court approval is needed for a proposed sale of substantially all the assets of a not-for-profit corporation.”<sup>3</sup> That advice is even more pertinent when an institution faces closing or dissolution, for ethical policies and procedures do not offer clear direction, perhaps in part because we do not want to acknowledge such a possibility. The literature instead assumes the continued existence of the larger collection and of the collecting institution.

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<sup>2</sup> Marie Malaro, *A Legal Primer on Managing Museum Collections* (Washington, DC: Smithsonian Institution Press, 1998), 217.

<sup>3</sup> *Ibid.*, 224.

## Legal Issues

While the literature on deaccessioning and disposal offers little in the way of guidance, there are legal precedents and standards that provide the context for dissolution. Generally speaking, the state's attorney general and courts, acting on behalf of the public, will ultimately be the key players in the disposition of the history museum's collections and endowment. While institutional governing boards hold legal title to the collections and other assets, they do so in the public trust, and the states' attorneys general are charged with protecting the public interest in those assets through either common law *parens patriae* power (in which case the government acts on behalf of a child or mentally ill person) or specific statutory provisions or both. Generally speaking, the state attorney general must be notified of dissolution plans, and the state courts may have to review and approve the plan.

The case law is strongest in New York, where non-profit museums and historical organizations must be chartered through the Board of Regents of the New York Board of Education. In a series of cases addressing the dissolution of nonprofits and charitable institutions, the New York courts have focused on the authority of the attorney general to enforce the terms and restrictions of charitable gifts. Three legal standards come into play—*cy pres*, quasi *cy pres*, and equitable deviation. *Cy pres* is shorthand for the French phrase *cy pres comme possible*, which means “as nearly as possible.” Under the doctrine of *cy pres*, a court may require that assets of a charitable trust that is closing be distributed consistent as nearly as possible with the will or intention of the original donor. Quasi *cy pres* is a variant that applies the same principle to gifts to museums, charities, and other nonprofits, which are not governed by trust law. And related to both is the doctrine of equitable deviation, which permits a court to alter the provisions of a charitable trust. While established largely through case law, these doctrines have been codified in many states in recent years. For the purposes of this paper and without attempting to explain the finer points of these concepts and standards, what is key is that all three focus on the disposition of restricted assets, including collections and endowments, to institutions with a similar purpose. In other words, in the case of dissolution, restricted assets should remain restricted consistent with original gift instruments, removing them from the reach of creditors. New York Not-for-Profit Corporation Law §1005 (a) (3) (A) states, “Assets received and held by the corporation for a purpose specified...or which are legally required to be used for a particular purpose shall be distributed to one or more domestic or foreign corporations or other organizations engaged in activities substantially similar to those of the dissolved

corporation.” While the case law in other states is thinner and some states do not have such statutes, New York’s handling offers a valuable starting point and context for discussion.

What appears critical is how the dissolving institution treats collections and other assets. If restricted and held in the public trust, the collections and endowment are better protected. If, on the other hand, the collections and endowment are already capitalized and treated as unrestricted assets, there is less protection and a far weaker argument against the claims of creditors. In *The Capitalization of Collections* (Ethics Position Paper #1), AASLH argued against capitalizing collections, an argument that buttresses the defense against creditors. Unfortunately, many of the institutions facing pressure to capitalize are often the ones in the most precarious situations, with boards or governing authorities considering capitalizing the collections as a way to strengthen the institution in the face of a deteriorating financial picture and potential closure.

#### **IV. AASLH Ethical Standards**

Regardless of what the law may require, history museums are obligated to protect the collections they hold in the public trust, regardless of what happens to the institutions. According to the AASLH *Statement of Professional Standards and Ethics*, history museums “are challenged to be advocates on behalf of the historical resources within their communities.” The Association’s insistence that “collections not be capitalized or treated as financial assets” extends to dissolution, and a history museum facing the latter prospect is obligated to make every effort to protect the collections from being seized to satisfy debts. History museums hold collections on behalf of their communities, and must work to make sure that the collections remain in the public domain.

Even when facing closure, history museums must recognize that what they do will have impact on the larger professional community of which they are a part. When one institution carelessly handles the dispersal of its collections and other restricted assets, all suffer, for such actions raise alarms among not only donors but also the general public and policy makers, undermining their confidence in us all. A history museum facing dissolution is ethically obligated to take all steps necessary to protect the collections and other restricted assets and to represent the ethical standards critical to the profession.

## **V. Guidelines for Action**

On the basis of consultation with a variety of individuals who have dealt with museum closings from different perspectives, the AASLH Committee on Professional Standards and Ethics offers the following guidelines for institutions facing closing:

1. A decision to dissolve an institution should be made at the earliest point in time after all alternatives have been weighed so as to minimize the adverse impact of running so short of cash as to place the collection in jeopardy of creditors.
2. Any institution that is facing dissolution should contact the state's attorney general and determine what laws impact the decision-making process. How an institution is set up—whether, for example, it is a charitable trust or a nonprofit—will determine what statutes and case law apply. The situation is often more complicated for public institutions than for private, simply because the former possess stakeholders with broader public roles and authorities and routinely undergo greater oversight.
3. While staff members facing such a situation are likely to be demoralized, they still have obligations to the collections that cannot be ignored. It is particularly important that accession files and other collections documentation be accurate and up to date. When the institution closes, those records will be critical in documenting good title, any donor restrictions, and other concerns that impact the disposition of objects.
4. Institutions that include historic houses or sites should make sure that the status of those historic properties relative to the collections is clear. While many historical organizations consider their historic properties to be part of the collections, they often do not have the collections records to back up that claim, leaving the structures in legal limbo. Creditors will be looking for assets that can be liquidated, and houses and other real property are immediate targets. You should also clarify the status of the parts—you may find that a component such as a mantle is an accessioned object, even though the structure itself is not.
5. Items donated to a museum are owned for the public good. Accordingly, a museum or historical organization is under no obligation to seek approval from or notify donors when disposing of unrestricted gifts or collections. A museum may elect to notify donors, without unnecessarily delaying the process, but should anticipate a certain amount of misunderstanding. Reassurance that the objects

will be cared for by another institution will go a long way in assuaging their concern and minimizing repercussions for the larger museum community.

6. From the standpoint of AASLH, merger with that institution or the transfer of collections to another institution rather than their sale is always preferable, and is far more consistent with the public trust that forms the context for our work. Furthermore, transferring a collection is always less expensive and more efficient because it does not require the same level of processing necessary for sales.
7. Although no one wants to add to the distress of a staff demoralized by the dissolution of their institution, prompt action to secure the collection's documentation is essential. Once a decision to close is made, critical information can disappear. In one instance, the collections were carefully protected, but the computers on which the collections records were kept quickly disappeared, leaving the new stewards of the collections to reconstruct the records.
8. Both the institution that is closing and the institution receiving the collections should assume a proactive public relations stance. Prepare talking points for staff and board leadership as well as press releases describing what is happening for distribution.

The Committee has also gathered advice for those institutions on the receiving end of a history museum closing—the institutions that take the collections and other restricted assets:

1. Before agreeing to accept the transfer of a collection, carefully work through how to handle it. While acquiring the entire collection as a single entity may appear to be the easiest and cleanest way to handle a transfer, weeding out the collection later will require a formal process of deaccessioning. Making selections from the collection before taking legal ownership may well save time and effort in the long run.
2. Keep in mind the potential costs associated with a transfer. Funds to pack and move the collection could be made a condition of accepting it. Processing a transferred collection is likely to be a time consuming and labor intensive activity that may tie up resources for years to come. For example, unless the collection is segregated in some way, incorporating it into existing collections may lead to the reorganization of entire collections. Long-term costs – additional storage, insurance, and staffing – should be budgeted at the outset to ensure that continued care can be provided. One institution agreed to accept the transfer of an estimated

9,000 objects that in reality turned out to be closer to 25,000. Do all you can on the front end to prepare your institution, for once the transfer happens, there is no backing out.

3. It may well be necessary to deal with processing and handling not only the objects but also the associated files and perhaps even the organizational records for the defunct institution. When assessing costs, consider what it would take another museum to process and care for your own institutional archives.
4. Be prepared to deal with angry donors. While your history museum may be the “good guy” rescuing the collections, unhappy donors will want to vent to someone—and your director, your staff, or your trustees may be the only targets. You may not be making the decisions and may not have control over the process, but you may nevertheless find your institution being held accountable simply because you’re the one left standing. A proactive process of notifying all donors of the transfer and assuring them of the recipient museum’s commitment to provide ongoing care should serve to help diminish their concerns.

## **VI. Conclusion**

No history museum ever expects to face closing its doors, but it can happen to even the most responsible institution. Sometimes things just go wrong, causing a situation for which there is no other solution. Regardless of the reasons for dissolution, a history museum cannot abandon its responsibility to act in the public trust. That means recognizing an obligation to protect the collections and other restricted assets and ensuring that they continue to be preserved and made accessible to the public. In the final analysis, when facing closing, the first priority should be the public, not satisfying creditors.

Rick Beard is Director of the Abraham Lincoln Presidential Library and Museum in Springfield, IL, a member of the AASLH Council, and Chair of the AASLH Standing Committee on Standards and Ethics. He can be reached at [rick.beard@illinois.gov](mailto:rick.beard@illinois.gov).