

## Nonprofits' "What Not To Do" (1.3)

08.15.22 | Linda J. Rosenthal, JD



First, there was [Nonprofits: What Not To Do](#) (July 13, 2021). Then, two months later came [Nonprofits: More "What Not to Do"](#) (September 7, 2021).

This premise is loosely based on a hugely popular BBC reality show about twenty years ago called [What Not to Wear](#). Each episode featured the ambush of an ordinary woman with no fashion sense. Confronted with examples from her own tragic wardrobe, she was clueless: "What's wrong with this outfit?" The fashion-stylist hosts and the viewing audience shake their heads: "What in the world was she thinking?"

Our version features "hapless examples in the nonprofit community of 'it seemed like a good idea at the time.'" As we noted in our debut post in this series, there's little chance we'll run out of gems like last year's ["The Case of the Careless Classified"](#) or ["The Case of the Signature Shortcut."](#)

At the end of last September's post, we teased: "Stay tuned ... for the Case of the Possible Pledge [big donors successfully threatens to revoke \$50-million 'verbal pledges' if the board doesn't reverse a decision]."

So here we go with –

### ***The Case of the Possible Pledge***

The art-museum world has been rocked by a certain controversy for the past few years. The volatile issue: the circumstances, if any, under which an institution can or should "deaccession" – that is, sell off or remove – pieces in its collection. [As Museums Push to Sell Art, Competing Ideas About Deaccessioning Are Playing Out in Public](#) (February 8, 2021) Andrew Russeth, *artnews.com*.

A notable battle erupted in a picturesque and ordinarily tranquil Massachusetts community; the rancor eventually went well beyond the walls of the single museum. We covered this story culminating in: [The End of the Berkshire Museum Saga: Everyone Loses](#) (May 2, 2018).

Two years later, with COVID-19 wreaking havoc on the finances of arts institutions, a similar tale played out in connection with the Brooklyn Museum. See our report in [\*Museums & Deaccessioning in COVID-19\*](#) (October 23, 2020). In that post's conclusion, we wrote: "Other American museums are beginning a similar process of evaluating their collections for possible deaccessioning. Even in normal times, '... storing large stockpiles of art may not be sustainable.' During a pandemic, there are more compelling reasons to take drastic steps."

The following day, we added a breaking-news "update" on a developing story hundreds of miles south: "Not everyone is on board with these deaccessioning decisions; see [\*Donors rescind \\$50 million in gifts over Baltimore museum's planned sale of Warhol painting\*](#), (October 24, 2020) Peggy McGlone, *The Washington Post*.

In the body of her article, Ms. McGlone explained that the "... [\*Baltimore Museum of Art\*](#) continues to be hit by criticism and turmoil, since announcing earlier this month that it would sell three paintings by Andy Warhol, Clyfford Still and Brice Marden to generate \$65 million for diversity and equity programs...."

She continues: "Now, two former museum board chairmen say they've rescinded planned gifts totaling \$50 million." The details emerge: "Former board chairman Charles Newhall III said Friday that he and another former chairman, Stiles Colwill, made **verbal pledges of \$30 million and \$20 million**, respectively, in gifts to the 'In a New Light' campaign that was tied to the museum's 100th anniversary in 2014. In a letter in which he resigned as an honorary trustee, Newhall said he and Colwill are rescinding those promises because of the museum's intention to sell the three artworks, which include Warhol's 'The Last Supper.'" (emphases added)

Say what? "Verbal pledges? Of \$30 million and \$20 million....?"

[Hint: Our "What Not to Do" advice here is *not* about the deaccession decision itself or the apoplectic reactions to it.]

### ***The Plot Thickens***

Peggy McGlone's *Washington Post* article about the Baltimore Museum dispute continues with this zinger: "... Clair Zamoiski Segal, chairwoman of the board of trustees, said in an email that the museum has no record of a \$50 million pledge or any pledges totaling that amount. 'While we appreciate that Charles Newhall is expressing that he had intended on making such a pledge, this was not negotiated or recorded with the museum,' Segal wrote."

Mr. Newhall rejected Ms. Segal's statement, characterizing it as part of a pattern. "'We never put anything in writing, but I ran that campaign for five years. I'm sure it's in the minutes of the various board meetings,' he said. 'That's what they are doing about everything. They are denying everything. They lie.'"

In [\*Baltimore Museum of Art Halts Deaccession of Artworks After Controversy\*](#) (October 29, 2020) Shreeya Maskey, *auctiondaily.com*, a different tale emerges, courtesy of the other former board chair and possible pledgor: "In an interview with [\*The Art Newspaper\*](#), former board chairman Stiles Colwill" said "he resigned with immediate effect following a disagreement with [the museum

executive director’s] plan to sell the paintings. In 2014, he had pledged his estate, worth \$20 million, to create funds for the museum. ‘Just over a year ago I quietly changed my estate plans when it became clear to me that under the leadership of Christopher Bedford the BMA was no longer trustworthy to receive this bequest,’ he wrote in an email.”

And in *Assailing leadership, two former board chairmen say they are rescinding \$50m in planned gifts to Baltimore Museum of Art* (October 24, 2020) *theartnewspaper.com*, reporter Nancy Kenney, describes the situation: “The strife surrounding the Baltimore Museum of Art (BMA)’s decision to deaccession three valuable paintings is mounting, with two former board chairmen saying they have withdrawn pledges to give \$50m to the institution....” Mr Newhall, she writes, sent a letter of resignation on October 15, 2020: “Sadly, due to the museum’s new directions and leadership the two major donors that were making the combined \$50m gift have changed their minds and that money will now go to other charitable purposes....”

Ms. Kenney adds that, in an email to The Art Newspaper, museum-director Bedford and current board chair Segal “say that the pledges ‘have not been recorded with the museum as gifts and are not part of the museum’s current budgeting.’”

Mr. Newhall retorted: “I reported on this at every board meeting for four years .... Mysteriously there are no minutes.”

### ***What Not to Do***

The “What Not To Do” point almost writes itself.

It’s not that there’s no such thing as a “verbal” pledge. See our post from the first year of this blog: *So What, Exactly, is a Pledge?* (October 29, 2014). “In California, as in other U.S. jurisdictions, a charitable pledge is analyzed as a matter of contract law.” Most, though not all, contracts may be oral or in writing.

But the key difficulty in any non-written agreement is, later on, proving with certainty the exact terms and conditions mutually adopted. A second problem is particular to pledges: a verbal one may or may not be enforceable under the laws of a particular state.

And the “matter of enforceability isn’t the only issue when it comes to charitable pledges. There are many and varied issues and questions that may arise, each of which is easier to resolve with a “writing.” For instance:

- Is the donee-organization required to try to collect on the pledge? Is a board of directors in breach of its duties if it doesn’t authorize legal action – that is, if it fails to act to preserve the charity’s assets?
- What if the donor makes certain payments, but then dies before the pledge is completed? Is the donor’s estate bound to honor the pledge? Does the executor have a duty to the heirs to resist payment?
- What if the organization’s mission or activities change before the entire pledge is paid. Can the donor revoke the pledge based on changed circumstances?

See for example: [Legal Issues for Unfulfilled Charitable Pledges](#), Perlman & Perlman LLC; [Donors' Charitable Pledges: The ins and outs](#) (October 2021) Conrad Teitell, Esq., et al, [trustsandestates.com](#); [An Introduction to Charitable Pledges: Podcast](#) (October 2021) Reynolds T. Cafferata, Esq. & William Finestone, Esq., [actecfoundation.org](#).

In the case of any agreement, the best practice is to write it down. It doesn't have to be an epic novel. It can be as simple as grabbing a pen and the restaurant's napkin from the lunch-meeting table, scribbling down some words, and signing and dating it. Best practice tip: Aim for something between the epic novel and the lunch napkin. (The "napkin contract" should be amended within a reasonable time to fill in more details.)

The Baltimore Museum of Art case is the poster child for why verbal pledges – especially for enormous sums of money like the tens of millions involved here – are a very bad idea indeed.

### ***Conclusion***

This case of the Possible Pledge ran on so long that we'll need a follow-up for the three additional tantalizing tales left out. That will be our next post. Stay tuned for:

- The Tale of the Gilgamesh Goof
- The Tale of the Town/Gown Tiff
- The Tale of the No-No Name.

– Linda J. Rosenthal, J.D., FPLG Information & Research Director