

IN THE COURT OF COMMON PLEAS IN AND FOR
THE COUNTY OF MONTGOMERY, PENNSYLVANIA
ORPHANS' COURT DIVISION

- - -
IN RE: : NO. 58,788

THE BARNES FOUNDATION, :
a corporation

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- - -

Petition To Amend Charter and Bylaws

- - -

Courtroom A
Friday, September 24, 2004
Commencing at 1 p.m.

- - -

Amy Beth Boyer, R. P. R.
Official Court Reporter
Montgomery County Courthouse
Norristown, Pennsylvania

- - -

Volume IX

BEFORE: THE HONORABLE STANLEY R. OTT, JUDGE

- - -

COUNSEL APPEARED AS FOLLOWS:

RALPH G. WELLINGTON, ESQUIRE
HONORABLE ARLIN M. ADAMS
CARL A. SOLANO, ESQUIRE
BRUCE P. MERENSTEIN, ESQUIRE
for the Petitioner,
The Barnes Foundation

LAWRENCE BARTH, ESQUIRE
Deputy Attorney General
for The Commonwealth of Pennsylvania
as parens patriae for charities

TERRANCE A. KLINE, ESQUIRE
HOWARD MASON CYR, III, ESQUIRE
PAUL M. QUINONES, ESQUIRE
for the Intervenors,
The Students of The Barnes Foundation

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I N D E X

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4 INTERVENOR' S EVIDENCE

5 Witness Voir Dire Direct Cross Redr Recr

6 MARIE C. MALARO 2 9

By Mr. Wellington 35

7 By Mr. Barth 74

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E X H I B I T S

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INTERVENOR' S

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Number Marked Rec' d

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13 50 Marie C. Malaro Curri cul um Vi tae 2 --

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MALARO - VOIR DIRE

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INTERVENOR'S EVIDENCE

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THE COURT: Okay. Yes,

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Mr. Kline.

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MR. KLINE: Your Honor, the

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amicus curiæ call Professor Marie Malaro.

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THE COURT: Very well.

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MARIE C. MALARO, having been duly

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sworn, was examined and testified as follows:

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11 VOIR DIRE EXAMINATION

12 BY MR. KLINE:

13 Q Good afternoon, Professor Malaro.

14 A Good afternoon.

15 MR. KLINE: We've marked this

16 document as Exhibit No. 50 for the amicus curiæ.

17 (Marie C. Malaro Curriculum Vitae

18 marked Exhibit No. 50 for identification.)

19 BY MR. KLINE:

20 Q Professor Malaro, the Amicus Exhibit No. 50 sets

21 forth a document. Do you recognize that as your

22 resume?

23 A Yes, I do.

24 Q Does this document accurately reflect your

25 educational, professional, and publishing background?

1 MALARO - VOIR DIRE 3

2 A I believe it does.

3 Q Professor Malaro, can you state your educational
4 and your professional background for the Court?

5 A Well, I have an undergraduate degree in History
6 and an LL.B. From Boston College Law School. I am an
7 attorney, a retired university professor, and the
8 author of several legal texts widely used in this
9 country and abroad.

10 I started my career with regard
11 to museums in early 1970 when I joined the office of
12 the legal counsel, the office of the Smithsonian

13 Institution. I stayed there for some 16 years, until
14 I was invited to join the faculty as a full professor
15 at George Washington University. And there I ran
16 their graduate program of museum studies for about 12
17 years. That program, I'm proud to say, is the
18 highest ranking program in the United States.

19 During my legal career, I spent
20 about 20 years on handling an annual seminar
21 sponsored by the American Bar Association, American
22 Law Institute, and in which we toured the country
23 each year with a three-year seminar on the
24 outstanding legal problems facing museums. So I was
25 on the planning committee and spoke on that panel for

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MALARO - VOIR DIRE

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2 20 years.

3

I have also been a member of the

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4 American Board of the International Council of
5 Museums. I have been an advisor to the American
6 Association of Museums on their ethics policy, and
7 also I helped them frame their guidelines for
8 collections management for museums.

9 My books, I think are --
10 certainly my first book, which was a legal primer on
11 managing museum collections, which I published in
12 1985 and then the second edition came out in '98, is
13 probably the most used text in the country on all of
14 the legal and ethical issues that come up when
15 museums are borrowing, lending, and what not. And
16 the other book, as I say, which came out in 1994 is a
17 book really addressed to museum trustees on their
18 responsibilities, and just elucidating on some
19 standard problems that come before boards.

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20 I think perhaps I am -- the CV
21 shows that I've talked before just about every museum
22 group in the country and abroad. I've been invited
23 to speak in many countries. And I have also received
24 an Award of Distinction from the Smithsonian
25 Institution and several professional awards from the

1 MALARO - VOIR DIRE 5

2 museum profession. I think that's about it.

3 Q Professor Malaro, are you still teaching?

4 A I hold emeritus status at George Washington
5 University. I do teach occasionally and I am now
6 testing a distance learning course that I created for
7 them in the subject of legal and ethical issues.
8 And, in fact, we're testing it with the United States
9 Army, for all people manning the U.S. Army throughout
10 this country, to see how it works. Yes, I am still

11 very active.

12 Q And you continue to lecture?

13 A Yes.

14 Q And to write?

15 A Well, I write -- yes, I write articles and lots

16 of letters to editors, yes.

17 Q Professor Malaro, have you written about the

18 topic of deaccession?

19 A I certainly have, and I think that if you look

20 in publications of the American Association of

21 Museums, they list me as the authority on

22 deaccessioning.

23 But when I first went to the

24 Smithsonian, I wasn't there very long before I

25 realized that there was really no legal guidance for

1
2 most people in the museum profession with regard to
3 how to handle accessions, lending, borrowing, and
4 so forth. So I made it a point, for four or five
5 years, to learn as much as I could about that.

6 So when I my first book came out
7 in 1985, it was the first time all of those problems
8 had been laid out and discussed and in great detail
9 and footnoted. So yes, I know the subject. And I
10 was taught it mainly by talking to museum people of
11 all kinds, whether they were art museums, history
12 museums, anthropology museums, and what have you.

13 Q And so you testified a few minutes ago that you
14 have taught on the topic of deaccession?

15 A Oh, I have taught, yes. I started teaching at
16 GW while I was still at the Smithsonian. The

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17 students came to me. And then after, of course, I've
18 taught every semester. I've taught this. And there
19 is no program in the country that doesn't use my text
20 teaching that course. I mean, that course or
21 anything on the legal and the ethical -- and just
22 even understanding all of the ramifications of what
23 go on in a museum with regard to collection activity.
24 And the whole focus of the book, of course, is trying
25 to prevent problems by understanding the problems,

1 MALARO - VOIR DIRE 7

2 and with the footnotes that document the law and the
3 relevant ethics.

4 Q Professor Malaro, have you studied the various
5 ethics guidelines that are put forth by organizations
6 such as the AAMD and the AAM?

7 A Yes, I am quite familiar with them.

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8 Q You're familiar with those guidelines?

9 A Um-hmm.

10 Q Do your studies and lectures cover the issue of

11 an organization's mission and the intent of donors

12 who form such organizations?

13 A Yes. Certainly. You can't even begin the topic

14 without talking, you know, focusing on that. I've

15 taught that I don't know how many times. And not

16 only to students, but also to museum professionals.

17 Q Have you studied cases where charitable

18 institutions seek to deviate from the founder's

19 original mission?

20 A Yes. Certainly while I was at the Smithsonian,

21 also as much as I could when I was at the university.

22 We were monitoring those. We monitored them also for

23 the American Bar Association panel we ran every year.

24 So, not too much got by us, at least while I was
25 actively practicing. I don't know, in the last year

1 MALARO - VOIR DIRE 8

2 or two something could have slipped by, now that I'm
3 in retirement.

4 Q Have you studied cases where charitable
5 institutions seek to deviate?

6 A Yes.

7 Q And have these cases involved both legal and
8 nonlegal issues?

9 A Well, the profession would say they also include
10 ethical issues, yes. But I'm familiar with the law
11 and I am familiar with the museums' ethical position
12 on deaccessioning and why those terms are there.

13 As I said, I have -- I did sit on

14 the advisory panel when the AAM, the American
15 Association of Museums, rewrote -- revised their Code
16 of Ethics in the early 1990s. But I had already
17 written on it extensively, so I pretty much know the
18 cases.

19 Q And, by the way, Professor Malaro, there in fact
20 is a copy of Amicus Exhibit No. 50, your resume. And
21 you can identify that as your own, can you not?

22 A Yes. That's it.

23 Q Professor Malaro, are you being paid for your
24 testimony here today --

25 A No.

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MALARO - DIRECT

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2 Q -- or for work with respect to this case?

3 A No. I am volunteering my time because I think
4 it's a very important case -- a very, very important

5 case for the nonprofit sector. And I'd be happy to
6 elaborate on that later on.

7 MR. KLINE: Your Honor, I would
8 like to offer Professor Malaro as an expert on the
9 subject of deaccessioning.

10 THE COURT: All right.

11 Questions on qualifications,
12 Mr. Wellington?

13 MR. WELLINGTON: I'll reserve,
14 Your Honor.

15 THE COURT: Mr. Barth?

16 MR. BARTH: I'll reserve as well,
17 Your Honor.

18 THE COURT: Very well. Then you
19 may proceed.

20 DIRECT EXAMINATION

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21 BY MR. KLINE:

22 Q Professor Malaro, in your studies and writings,
23 have you been aware of the legal proceedings going on
24 in the Barnes Foundation cases over the last, say, 15
25 years or so?

1 MALARO - DIRECT 10

2 A Yes, I have. Certainly one cannot study museum
3 cases without bumping into the Barnes. I am perhaps
4 more familiar with some of the, say, the cases that
5 started under Mr. Glanton and this case. I was aware
6 of other legal activity before that, but I would say
7 more familiar with the more recent cases.

8 Q How did you become aware of these cases?

9 A That was my job. I mean, I followed everything
10 going on. And, as I say, every year we were putting
11 on this program for the American Bar Association. It

12 ran three days, and it was a national program. We
13 had to know what cases were going on because we were
14 presenting or forming panels. It would be my job to
15 help the small committee define what issues we were
16 taking and who was going to speak. So, yes, I was
17 always aware of the Barnes' problems.

18 Q Professor Malaro, have you followed the current
19 proceedings before this Court?

20 A Well, I know why the petitioners are here. Yes,
21 I do.

22 Q Have you reviewed Judge Ott's decision of
23 January 29, 2004 relative to this case?

24 A Yes, I have.

25 Q Can you describe for the Court your

2 understanding of what the trustees are seeking here?

3 A Well, the trustees are claiming that because of

4 severe financial problems, they have little

5 alternative but to come up with a way that they can

6 keep the Barnes solvent. And their plan is -- or

7 what they would like is the Court to give them

8 permission to change the location of the Barnes to

9 the center of Philadelphia, build an extensive museum

10 to house the work that was in the collections that

11 Dr. Barnes formed over his lifetime, and also the

12 gallery, to move that to that building also, with the

13 understanding that from the revenue from this and

14 all, they would be able to support the Barnes

15 gallery. That's, perhaps, the main point. I realize

16 also they're expanding the Board of Trustees and

17 asking for some other changes that relate to the

18 change, but I think the main thrust of it is moving
19 to the center of the city.

20 If you want my opinion on it, I
21 have no problem with going into it, but --

22 THE COURT: You'll have to wait
23 for a question.

24 THE WITNESS: All right. I'll
25 wait for that question.

1 MALARO - DIRECT 12

2 BY MR. KLINE:

3 Q Professor Malaro, are you familiar with this
4 Court's Order of March 17, 2001, where Judge Ott
5 determined that the nongallery art is not part of the
6 collection and not subject to the terms of the
7 indenture?

8 A Yes. I read that with great pleasure, yes.

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9 Q And you are aware that the Court --

10 MR. WELLINGTON: Excuse me, Your

11 Honor. I have a belated objection to the

12 characterization of Your Honor's Opinion, which I

13 think is misstated in that question.

14 THE COURT: Well, I think what

15 the witness has indicated is she's familiar with the

16 Opinion. How it's stated, of course, depends on

17 who's calling it what. I'm not insensitive -- I mean

18 I'm not sensitive about it.

19 MR. WELLINGTON: Thank you.

20 BY MR. KLINE:

21 Q Professor Malaro, are you aware that the Court

22 has raised the possibility that the property of the

23 Foundation might be sold to create an endowment as an

24 alternative to moving the gallery from its current

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25 home in Merion to the City of Philadelphia?

1 MALARO - DIRECT 13

2 A I am aware of that.

3 Q Professor Malaro, have you familiarized yourself

4 with the Barnes Foundation mission, as defined by

5 Dr. Barnes?

6 A I have read the articles of the incorporation

7 and the indenture that followed it. I've read some

8 remarks of Dr. Barnes during his life, and of course

9 I read some of the decisions. And I do have an

10 opinion of what the mission is.

11 Q Have you, Professor Malaro, reviewed the

12 indenture of Dr. Barnes dated December 6 of 1922?

13 A Yes. In fact, that's critical. Yes, I have.

14 Q And have you reviewed his will and/or newspaper

15 articles relative to the mission of the Barnes

16 Foundati on?

17 A I have reviewed the will, and also some of the

18 articles, yes, that quote Dr. Barnes on occasi on.

19 Q Professor Mal aro, do you have a conclusi on as to

20 what the mi ssi on of the Barnes Foundati on is?

21 A Yes, I do. I believe that the mi ssi on is

22 clearly quite narrow, that what Dr. Barnes wanted was

23 for hi s foundati on to promul gate hi s parti cul ar

24 uni que method of teachi ng art appreci ati on in a

25 school format. I think that was made very clear in

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MALARO - DIRECT

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2 the indenture, which certainly narrowed the broad

3 language that you found in the articles of

4 incorporation. And he was very speci fi c that this

5 indenture was to form the bylaws of hi s organi zati on.

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6 And I think if I remember correctly, Article 5 of
7 those bylaws say these are my directives, these are
8 my express wishes, and none other.

9 So, I have felt all the time, you
10 know, that this is clearly -- and during his life, he
11 lived that. He spent all of his time building the
12 building, carving out the collection which was -- the
13 art that would be in that building. And upon his
14 death, that's all he seemed to care about. And in
15 his papers also he specified where the classrooms
16 were going to be, nothing more going on on the site.
17 So he had a complete vision of how that school was to
18 run. I don't think there can be -- reading it
19 objectively, I don't think it could be much other
20 way, in my opinion.

21 Q Professor Malaro, how do you see the trustees'

Volume IX

22 proposal to move the gallery from Merion to the City
23 of Philadelphia as fitting into that mission?

24 A Well, I don't see it fitting in, inasmuch as I
25 have -- I mean, I believe the mission of the --

1 MALARO - DIRECT 15

2 MR. WELLINGTON: Your Honor,
3 excuse me. I'm just going to object to that
4 question. And I have no difficulty at all with
5 Professor Malaro discussing the content of
6 deaccessioning. Discussing the issue of Dr. Barnes'
7 mission -- Your Honor, I'm going to withdraw it.
8 I'll just see where Mr. Kline is going.

9 I apologize. I was thinking
10 through my mind. I should have waited till I got to
11 the end of my thoughts.

12 THE COURT: All right. It didn't
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13 happen.

14 MR. WELLINGTON: My apologies to
15 the witness and to Mr. Kline.

16 THE COURT: I believe the
17 question you were addressing, Professor, is how do
18 you see the proposed move fitting in with your
19 understanding of the mission.

20 Agreed?

21 THE WITNESS: Well, you know my
22 understanding of the mission. I believe that, first
23 of all, moving the gallery to a new site I think will
24 change the whole ambience and Dr. Barnes' idea that
25 when people came on the premises, they would

1 MALARO - DIRECT 16

2 immediately have the idea of what he was going to do.

3 But the other factor is that the museum that will
4 be -- the large museum will overwhelm or at least put
5 in the background Dr. Barnes' purpose.

6 Dr. Barnes, from my reading, was
7 not -- he was not a museum lover -- I mean, the
8 walk-through museum lover. I think the reason he
9 started his particular philosophy was because he felt
10 there was a better way to approach teaching people
11 about art. I find it strange that the trustees are
12 suggesting that they are going to put up a very large
13 traditional museum and then have the gallery in one
14 corner because it will be lost, and also it will put
15 such a burden on the trustees to maintain that
16 building. They won't have much time for Dr. Barnes'
17 core purpose.

18 BY MR. KLINE:

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19 Q Professor Malaro, let me ask you --

20 A Let -- um-hmm.

21 Q I'm sorry.

22 A No. That's all right.

23 Q Professor Malaro, let me ask you this question:

24 How do the nongallery assets, that is the paintings

25 not hanging in the gallery, how did those things,

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MALARO - DIRECT

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2 those items fit into the mission of Dr. Barnes?

3 A In going through all of the papers --

4 MR. WELLINGTON: Your Honor,

5 objection. Lack of foundation.

6 THE COURT: I think that's a fair

7 criticism. I think you should establish her

8 understanding of what you mean by that, her

9 familiarity with it.

Volume IX

10 BY MR. KLINE:

11 Q Professor Malaro, you are familiar, having read
12 an awful lot about this case, that -- well, let me
13 put it another way. Are you familiar with the art
14 that hangs in the gallery at the Barnes Foundation?

15 A Yes. That is what was there when Dr. Barnes
16 died, and he specified it was to remain in place.

17 Q And the works of art or other items Dr. Barnes
18 collected during his life that are not paintings in
19 the gallery, do you understand that we refer to them
20 as nongallery assets or nongallery art?

21 A I believe in some of the petitioner's papers
22 they were objects in storage or that -- I understand
23 what you mean. But we'll call them nongallery art,
24 but I understand what you mean there, yes.

25 Q How do the nongallery assets fit into

1 MALARO - DIRECT 18

2 Dr. Barnes' mission?

3 MR. WELLINGTON: Same objection,

4 Your Honor. Absolutely no foundation with this

5 witness.

6 THE COURT: Well, I wouldn't

7 agree that there is no foundation. She has talked

8 about her reading of certain documents. I think it

9 would go to weight as opposed to admissibility, so I

10 will allow it.

11 You may answer that if you feel

12 capable of it, Professor.

13 THE WITNESS: I think the issue

14 here is whether those objects are encumbered in any

15 way, because that would be relevant to whether they

16 are a resource for the Foundation to use for
17 Dr. Barnes or whether they must be used in some other
18 fashion. Am I correct in that this, perhaps, is the
19 central point here?

20 The question, then, I think that
21 has been raised is whether these objects are subject
22 to the deaccessioning restrictions imposed by
23 professional ethical standards, and in my opinion
24 they are not. And I could elaborate on that.

25 The word deaccessioning has a

1 MALARO - DIRECT 19

2 very precise meaning in the museum profession, and it
3 means the formal process a museum goes through to
4 remove permanently an object from its collection. A
5 deaccessioning assumes that the object was first
6 accessioned. And perhaps accessioning is the most

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7 important thing that a museum does. And that is the
8 process where the museum determines that the object
9 in question fits into its mission, it fits into its
10 collecting goals, and it's suitable for the
11 collection. For that to happen, you have to have a
12 museum, you have to have a mission, and you have to
13 have collecting goals. And the reason that the
14 profession restricts deaccessioning is, one, if you
15 have accessioned the objects and represented to the
16 public that it is important to the public, then you
17 have to go through a formal process to explain why it
18 is not, by removing it.

19 Also, the profession believes
20 that the Board should not use the proceeds from
21 deaccessioning to support salaries and building --
22 bricks and mortar -- with the argument that in this

Volume IX

23 way, they would be selling the very purpose of the
24 collection in order to keep the shell going, just to
25 keep the staff going.

1 MALARO - DIRECT 20

2 None of this applies to the
3 nongallery objects in the Barnes. There is no
4 museum. There was no intellectual process going
5 through here. All the Barnes has is an inventory, if
6 you will. But it is not appropriate. It just --
7 nothing happened to be able to put those objects in
8 the status where they would apply.

9 And, also, we haven't even
10 established -- and I can find nothing in what I've
11 read -- where Dr. Barnes wanted a traditional museum.
12 So, I mean, it's puzzling me. I cannot follow the
13 reasoning that the petitioners are putting forth.

14 Somehow they've produced a museum and deaccessioning
15 objects that have no evidence of ever being
16 accessioned to support their position that these
17 cannot be used for the school, but must be used in a
18 museum or, you know, in the center of the city. I
19 just cannot fathom their reasoning.

20 In my opinion, those objects are
21 free of any legal or ethical restrictions and they
22 could certainly be used to further what is, I
23 believe, the core purpose that Dr. Barnes had in
24 mind.

25 BY MR. KLINE:

1 MALARO - DIRECT 21

2 Q In order to deaccession a work of art, you need
3 the item to first be accessioned?

4 A Well, you have to -- I mean, all of the
5 restrictions on deaccessioning grow out of the fact
6 that there is a museum you are gathering things for,
7 there has been a professional staff that has
8 articulated what the mission of that museum is and
9 what its collecting goals are, and then they've
10 decided this object is appropriate for that museum
11 and is worthy of maintaining, until the museum can
12 prove, through the deaccessioning process, that it is
13 no longer worthy.

14 You can't -- you have to begin at
15 the beginning. Dr. Barnes certainly was a collector.
16 He wasn't accessioning or doing -- he was collecting.
17 And the only thing he said about his objects were,
18 what's in the gallery when I die, is there. He
19 didn't put any restrictions on anything else. And I

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20 don't think, in my memory of property law, you cannot
21 infer an alienation on a piece of property. It has
22 to be specific. If you're saying that somehow these
23 suddenly have become museum objects, you're
24 alienating, you're saying they cannot be used freely.
25 And my recollection of the law is you have to have a

1 MALARO - DIRECT 22

2 specific utterance by the donor saying you cannot --
3 you know, these are unalienable. It's just not
4 there.

5 Q Professor Malaro, you said that in order to

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6 deaccession a piece of art or a work of art, you

7 first must accession it?

8 A Right.

9 Q Well, what is the process, would you please

10 explain to the Court, then, of deaccessioning? Now,

11 let's assume for the moment that a piece of work has,

12 in fact, been accessioned into a collection.

13 A Yes. They would have to come forward and

14 explain why the object was no longer useful to the

15 collection and, therefore, no longer could be used by

16 the museum in its mission. And they might be able to

17 show that because over time, many other objects

18 similar to that were given to it and were better; it

19 might be that the piece is deteriorated; it might be

20 that when they have looked at their collection, they

21 realized this really isn't fitting in the way we

22 thought. But sometimes it's because there is a
23 question of provenance and they have to get rid of
24 it.

25 But these all have to be

1 MALARO - DIRECT 23

2 documented. And then if the museum has the correct
3 policy, it will specify who in the museum has the
4 authority to make that final decision, after all of
5 this review has been done, a matter of public record,
6 what they do, and then the method they use to dispose
7 of it.

8 The AAM guidelines and the
9 guidelines for the AAMD are such that the proceeds --
10 well, the AAMD says the proceeds must be used to
11 replenish the collection. The guidelines of the

12 American Association of Museums is they must be used
13 to replenish the collection or care for it, because
14 they do realize that some organizations, they have
15 many too many objects, what they really need are the
16 resources to provide care, proper humidity
17 conditions, proper air conditioning, so the remaining
18 collection will be safe from deterioration.

19 Q So you testified, then, before an item of art
20 could be deaccessioned, it first must be accessioned
21 into the program or into the museum, and then it must
22 be -- a decision must be made that it could be, for
23 one reason or another, deaccessioned; is that
24 correct?

25 A That's correct.

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2 Q All right. Now, after a work of art has been

Volume IX

3 deaccessioned, what can the proceeds of that

4 deaccessioning be used for?

5 A Well, as I said -- I won't repeat that. And

6 these, again, are according to the ethical

7 guidelines, and they vary from profession to

8 profession.

9 The strictest rule is by the Art

10 Museum Directors Association, and that says the

11 proceeds can only be used to replenish the

12 collections. In other words, you must use that money

13 to purchase something else for the collection. And

14 again, that is all based on the idea they don't want

15 the collection being sold to support salaries, and

16 whatnot.

17 The American Association of

18 Museums, which represents all kinds of museums, had

19 to come up with another answer because, within the
20 text, within the definition of museums, we also have
21 zoos and zoological parks and botanical gardens, and
22 their collections reproduce and die. So, they have
23 added problems. And also, many perhaps more in the
24 area of historical museums, there might be a tendency
25 to overcollect, and find that they cannot care for

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MALARO - DIRECT

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2 the collection. And then they are forced to dispose
3 of some of the material in order to get enough funds
4 to put in, say, climate control so that the rest of
5 the collection doesn't deteriorate.

6

So there, under the AAM

7 guidelines, it can be used to replenish the
8 collection or direct care of the collection. But
9 those are the two avenues that the -- the two major

10 codes within the museum profession.

11 Q And in a few moments I'm going to ask you why
12 that doesn't apply to or does apply, in your opinion,
13 to the sale of art from the Barnes Foundation.

14 But first, you've referred to
15 these rules from the AAM and the AAMD. Can you tell
16 me what the penalty is for failing to adhere to such
17 guidelines?

18 A Well, the AAMD does -- their code says that if
19 you do not adhere to the code, they will,
20 essentially -- the other museums that subscribe to
21 the code will essentially blackball that museum. It
22 will not lend to that museum, it won't borrow from
23 that museum. In other words, they just ease it out
24 of back and forth museum work. To my knowledge, this

25 has never been done. Right now they're looking at

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MALARO - DIRECT

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2 one such case, but to my knowledge they've never done

3 it.

4

The American Association of

5 Museums' guidelines are strictly hortatory. All they

6 do is they expect -- they hope peer pressure will --

7 they have no method for trying cases or disciplining

8 cases. If the cases get really bad, they might be

9 talking to the local attorney general or something,

10 but in their code, they have no penalty.

11 Q We had testimony yesterday from Dr. Wade that if

12 Judge Ott orders the sale of the nongallery art, that

13 the Barnes Foundation effectively would be

14 blackballed. Is that your opinion, as well?

15 A No. Because I assume that there are people --

16 if push came to shove, there are lawyers that would
17 explain the situation to the AAMD.

18 Q Do you know whether the Barnes Foundation is a
19 member of the AAMD?

20 A I don't know. I don't really know. I did not
21 check that, no.

22 Q The guidelines that --

23 A But, of course, whoever was bringing the charge
24 would have to prove that the deaccessioning rule
25 applied, and I think they would have great

1 MALARO - DIRECT 27

2 difficulty.

3 Q The guidelines that you've just referred to from
4 the AAM and the AAMD, are they legally binding?

5 A No. They are really ethical rules. In other
6 words, as we say in the museum profession, just

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7 adhering to the law does not make you honorable, only
8 bearable. The ethical standard puts you up where the
9 public should respect what you're doing. So the
10 ethical standards, as a rule, expect more of the
11 museum.

12 Q When and why did deaccessioning become such a
13 critical issue for museums?

14 A Well, it has because many museums find
15 themselves in financial difficulties. Boards
16 sometimes need a lot of education and they don't get
17 it, or they're thinking just very short-term of their
18 time they're on the board. But it's very expensive
19 to keep a museum going.

20 As I told my -- when I speak,
21 nothing is free in a museum. You go get a marvelous
22 collection of art, but automatically you are

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23 starting, the bills are going up. Because you have
24 to document that, you have to care for it, you have
25 to know where it is every moment, you have to

1 MALARO - DIRECT 28

2 conserve it, you have to do research on it and keep
3 all of those papers, the borrowing and lending
4 process is costly. So, many museums forget that,
5 because it's so easy to say yes to a collection, and
6 then find that they can't maintain it.

7 So but it is always a tense
8 situation because, naturally, there is the fear that
9 the Board will start selling the collection in order
10 to keep the museum going. In other words, they'll
11 just sell it down, down, down, until there is nothing
12 left. So that is why there is always debates and a

13 lot of controversy when deaccessioning occurs. I
14 would say there are, in some cases. Other times,
15 museums, there are -- certainly in the art field,
16 museums are deaccessioning and selling and trading
17 works of art all the time. And there is nothing
18 wrong with that, as long as they have followed the
19 process, they have good reasons for perhaps
20 exchanging this work for another one which would be a
21 much -- which would enhance the collection. And I
22 should explain, too, that in museum work, collecting
23 is just not gathering objects. It's having certain
24 focus, what you want to do, and what you have to
25 collect in order to make that collection worthwhile

1

MALARO - DIRECT

29

2 to the scholar or the interested party. So it's a
3 very -- it's an intellectual process.

4 Q Well, Professor Malaro, I was just about ready
5 to ask you how the concerns about deaccessioning, how
6 concerns, rather, about deaccessioning relate to an
7 institution's mission.

8 A Well, one of the differences is in the nonprofit
9 sector. Every museum has a mission. And its sole --
10 and there is a duty of obedience for the Board, aside
11 from duty of care and the duty of loyalty. And then
12 the duty of obedience, it is to adhere to that
13 mission because the mission lets the public know what
14 they're doing and what they're -- so that is always
15 in the forefront. And when they set their collection
16 goals, it has to be within that mission. And
17 everything that they collect should advance that
18 mission. That's always on the table when you are
19 collecting in a museum, or should be.

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20 So, when you turn back -- my
21 problem here is my percepti on of Dr. Barnes' mi ssi on
22 is thi s very uni que educational experience that he
23 has wi th the mai n tool , i f you wi ll , the gallery, and
24 a whole ambi ence for putti ng thi s down and the idea
25 that it is an academi c exerci se wi th classes, and so

1 MALARO - DIRECT 30

2 forth. Nothing is to move in that gallery. There is
3 nothing about that gallery that is a museum, except
4 if you want to say that when you open the door and
5 let the public come in, it takes on a museum aspect
6 inasmuch as people are going around looking. But
7 that is only polite accommodati on, if you wi ll. The
8 main work of that organizati on is to teach the
9 students.

10 Now, I mean, you could -- we have
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11 many cases that come up in -- where there are museums
12 within universities. And the Board of Trustees of
13 the University says, "Oh, well, you know, we really
14 need to improve the stadium. Let's sell this
15 artwork." And the issue there, invariably, is was
16 that museum actually approved by the Board of
17 Trustees of the University and established as a
18 university and that representation made to everyone,
19 and they collected in that way? If it was, then the
20 university has to accept the fact that the museum
21 professional guidelines would apply to it. But if
22 that never happened, you know, it's just there, and
23 there was never an express statement by the Board of
24 Trustees of the whole university, the university
25 could sell that because their mission is to educate

1

2 students.

3

And when you come down to it, the

4

mission of the Barnes, I think, is first to the

5

students. That's their first beneficiary. Certainly

6

the public also benefits inasmuch as they can see the

7

work occasionally, and they benefit from teachers

8

being trained in a certain method. But mission is

9

all-important, and certainly all-important in this

10

case.

11

Q Professor Malaro, are you familiar with any

12

similar cases to the Barnes Foundation where Courts

13

have allowed the sale of an institution's works to

14

build an endowment?

15

A There are many cases that concern museums, and I

16

think some of them were cited in the press, the New

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17 York Historical Society, Shelburne Museum (ph), the
18 Museum of Northern Arizona, Rose (ph). I'm familiar
19 with all of those cases, but these were established
20 museums that had accessioned collections, and they
21 were in financial difficulties.

22 If there were problems, it was
23 the way the deaccessioning was being handled. There
24 was no question that it would apply. It's just that
25 we're not talking. This case right before this Court

1 MALARO - DIRECT 32

2 is not about a traditional -- a museum. It's about a
3 school that happens to use art in its teaching. And
4 I'm talking just about the art that's in the gallery.
5 Because I see -- I mean, as far as something that has
6 been imposed by the donor as a restriction, in any
7 event.

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8 Q Professor Malaro, I don't hear you disparaging
9 the ethics guidelines --

10 A Oh, no.

11 Q -- that are put forth by the AAM or AAMD, do I?

12 A No. Absolutely not. There is quite wisdom
13 behind them.

14 Q Are you saying, then, that the sale of assets at
15 the Barnes Foundation simply would not be subject to
16 deaccession --

17 A Well, not only would it not be subject, but the
18 role of the trustee is to carry out the mission. And
19 I'm saying the mission is quite narrow for the Barnes
20 collection, and they have a largess from the donor in
21 which to carry out that mission with no restrictions
22 on it. That's what I'm saying.

23 Q Professor Malaro, in your professional opinion,
Page 53

24 was the nongallery art at the Barnes Foundation
25 accessioned into the collection?

1 MALARO - DIRECT 33

2 A There was no -- as I explained, accessi oning
3 isn't writing it, taking an inventory. There was no
4 museum. I mean, there was -- I mean, there was no --
5 there was no mission of the museum. There were no
6 collecting goals. It wasn't there. So, you can't --
7 nor was there any -- I can find any directive from
8 Dr. Barnes saying there was to be this museum, and
9 perhaps giving it some sort of focus. There wasn't.
10 I mean, the petitioners appear to think that just
11 because they have a collection of art, it must be a
12 museum collection, even though the donor didn't
13 appear to want that and they really need it to carry

14 out the donor's wishes. They really need what it can

15 bring them to carry out the donor's wishes. And I --

16 THE COURT: I think you've

17 answered the question. It was no.

18 Next question.

19 BY MR. KLINE:

20 Q You are familiar, Professor Malaro, and aware of

21 Judge Ott's determination that the nongallery art is

22 not part of the collection; is that correct?

23 A Yes.

24 MR. WELLINGTON: Objection, Your

25 Honor.

1 MALARO - DIRECT 34

2 THE WITNESS: Yes. Yes.

3 MR. WELLINGTON: That is a

4 misstatement of the Court's Opinion. The Court has

Volume IX

5 never said the nongallery art is not part of the
6 collection.

7 MR. KLINE: I'll rephrase it.

8 THE COURT: All right.

9 BY MR. KLINE:

10 Q Professor Malaro, are you familiar with
11 Judge Ott's Order in 2001 relating to the Barnes
12 Foundation case?

13 A Yes.

14 Q Does Judge Ott's decision have an impact on your
15 opinion with respect to the deaccessioning of the
16 nongallery art?

17 A Well, yes. I found myself agreeing with what I
18 read on that point, that it was not part of the
19 gallery, would be under the restrictions that were
20 placed on the gallery art.

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21 Q Professor Malaro, do you have an opinion as to
22 whether the sale of nongallery assets violate the
23 ethics guidelines against deaccessioning?

24 A In my opinion they do not, because those
25 professional guidelines are not applicable.

1 MALARO - CROSS 35

2 Q Professor Malaro, do you perceive any legal
3 impediments to the sale of the nongallery assets?

4 A No, as long as they further the mission of the
5 Foundation.

6 Q And one final question, Professor Malaro. If
7 Judge Ott grants this petition, what is your
8 professional opinion about the broader ramifications
9 to the world of philanthropy?

10 MR. BARTH: I'm going to object

11 to that, Your Honor, because I don't think this
Page 57

12 witness has been qualified --

13 THE COURT: I'm going to sustain.

14 It's out of the scope of the proffer offered for the

15 witness.

16 MR. KLINE: Professor Malaro,

17 thank you.

18 THE COURT: Mr. Wellington?

19 MR. WELLINGTON: May I, Your

20 Honor?

21 THE COURT: Yes.

22 CROSS-EXAMINATION

23 BY MR. WELLINGTON:

24 Q Good afternoon, Professor.

25 A Good afternoon.

2 Q Do you prefer Professor Malaro?

3 A I don't know. I mean, now that I'm retired I

4 answer to anything. Mrs. Malaro is fine.

5 Q Mrs. Malaro. I just want to call you what you

6 are most comfortable with. I will continue with

7 Professor because Mr. Kline was doing so. My name,

8 by the way, is Ralph Wellington.

9 A All right, Mr. Wellington.

10 Q There are some things that you were discussing

11 in your direct that I maybe did not quite understand,

12 and I'm going to try to get some clarification if I

13 can. And then I have a number of other things I wish

14 to ask you.

15 One of the first things is this

16 issue of accessions. If I understood what you are

17 saying, the 9,000 or so works in the Barnes

Volume IX

18 collection, none of them have been accessioned?

19 A No, because that is a term used -- it has a

20 specific meaning within the museum profession, I mean

21 if you're using it as a museum term. And you can't

22 accession until a museum first has an art -- first of

23 all, you have to have a museum -- an articulated

24 mission and articulated collecting goals. In other

25 words, because the museum is working towards being

1 MALARO - CROSS 37

2 able to create a collection of objects that serve not

3 only today's people, but researchers later on. So,

4 there is a lot of intellectual input that goes into

5 deciding what a museum is going to collect, what

6 their goals are.

7 Q But, first of all, this is not a museum, is it,

8 Professor Malaro? You keep using the phrase

Volume IX

9 "museum."

10 A Well --

11 Q Excuse me. This is an educational institution
12 established by Dr. Barnes, correct?

13 A Right.

14 Q And Dr. Barnes personally selected, with the
15 advice of three people who helped him acquire these
16 pieces in particular, personally selected all of
17 these items that went into the Barnes collection,
18 correct?

19 A I imagine they probably did, yeah.

20 Q And since the Barnes collection is part of its
21 educational mission, do you not agree with me that,
22 in essence, it is bound by the ethical guidelines and
23 precepts, or should be guided by the ethical precepts
24 applicable to educational institutions and museums?

25 A No, I don't agree with that statement.

1 MALARO - CROSS

38

2 Q So we can throw ethics out the window?

3 A No. No. It isn't that simple. If I am a

4 collector, I might have expert advice in what I

5 collect, but I am perfectly free to do with that

6 whatever I want to do.

7 In this case, Dr. Barnes gave

8 much of this to the Foundation, but with the clear

9 instructions I have complete control over this while

10 I -- and I am going to mold a collection for my

11 school. The rest of it, he didn't even mention.

12 Now, when the Foundation looks at what its mission

13 is, it is to run the educational organization.

14 Q Professor, when you say Dr. Barnes didn't

15 menti on anything about "the rest," what are you

16 speaki ng of?

17 A I mean --

18 Q When you say "the rest," what are you speaki ng

19 of?

20 A He di d not speci fy what would be left over from

21 the other artwork that might be in the hands of the

22 Foundati on.

23 Q Are you speaki ng about -- when you say "the

24 rest," are you speaki ng about the nongallery art?

25 A Yes.

1

2 Q All right. Were you here thi s morning in court

3 when the archi vi st of the Barnes Foundati on pointed

4 out that Dr. Barnes speci fi call y acqui red, used in

5 the mai n permanent gallery, many of the very pi eces

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6 that are not currently in the nongallery, but that
7 are not -- that are now in the nongallery art? Were
8 you here this morning --

9 A No.

10 Q -- to his testimony about those archival
11 materials?

12 A No, but that wouldn't surprise me at all,
13 because Dr. Barnes made it clear that this -- for
14 him, this was -- he took many years to get his
15 collection perfect, trying this, trying that. He
16 just said when I die, it's there, because that, at
17 the time, is the best I can do.

18 Q Do you understand that even up to the day before
19 his death, he moved paintings in and out --

20 A That's --

21 Q -- of the museum --

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22 A But you --

23 Q -- of the gallery --

24 A It's the gallery --

25 Q Excuse me.

1 MALARO - CROSS 40

2 A It's the gallery --

3 Q Excuse me, Professor. If I might just finish my
4 question? Thank you.

5 Do you understand that up until
6 the day before he died, he would use all of the art
7 and move it in and out of the ensembles as he thought
8 in a particular day?

9 A That might be fine.

10 Q And do you also understand that having selected
11 all of the art, including what, on the unfortunate
12 day that he died, was hanging in the gallery and what

13 was not hanging in the gallery, that he also chose,
14 throughout his life, not to sell any of those pieces,
15 even though he did sell many other pieces?

16 A And he also mentioned in his indenture that
17 after his death --

18 MR. KLINE: Objection, Your
19 Honor. There is no foundation for that question.

20 THE COURT: Well, all he needs is
21 a good-faith basis to cross-examine, I believe. So
22 the objection is noted and it's overruled.

23 THE WITNESS: Where were we?

24 BY MR. WELLINGTON:

25 Q Would you like that question read back again,

1 MALARO - CROSS

41

2 Professor?

3 A Yes, I think I better have the question again.

4 Yeah.

5 MR. WELLINGTON: Could you please

6 read it back?

7 (The court reporter read back the

8 last question.)

9 BY MR. WELLINGTON:

10 Q That is very inartful. Would you like me to try

11 again?

12 MR. WELLINGTON: I hated to hear

13 that back. I'm sure the court reporter got it wrong.

14 THE COURT: I know she got it

15 right. And when you asked her to read it, I thought

16 to myself, you're going to wish you didn't ask her

17 that.

18 THE WITNESS: Do I have a second

19 chance with my answers?

20 THE COURT: Well, no. It's a

21 terribly unfair system in that regard. He gets a

22 chance, but you don't.

23 BY MR. WELLINGTON:

24 Q Dr. Barnes, during his life, both acquired and

25 sold many pieces of art. Do you understand that?

1 MALARO - CROSS

42

2 A Yes.

3 Q And he would change frequently what was hanging

4 in the permanent gallery after he'd constructed it

5 and what was not hanging. Do you understand that?

6 A Yes.

7 Q And it was to some degree -- well, it was in

8 fact fortuity, because of the way he was killed in an

9 accident, that what happened to be on that wall that

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10 day and not on that wall happened to be there?

11 A Um-hmm.

12 Q Do you understand that?

13 A Yes.

14 Q But from what I'm understanding you're saying,

15 is there an ethical difference, despite that, for

16 you, as to whether one can sell what's in the gallery

17 or sell what's not in the gallery?

18 A What is in the gallery is restricted by the

19 terms. It's a moot question.

20 Q So that, it's a legal -- you're saying it's

21 legally different?

22 A Well, it's legal inasmuch as the donor has

23 specified it is not. So it would be, unless it had

24 court -- go in for cy-pres or changed the mission of

25 -- the articulated mission.

1 MALARO - CROSS 43

2 Q But is there a difference -- you think -- is
3 there an ethical difference between putting aside the
4 legality as you interpret the indenture, is there an
5 ethical difference between the gallery works and the
6 nongallery works?

7 A Well --

8 Q Selling that.

9 A -- there is no ethical problem with the
10 nongallery works. And you can't compare them to what
11 is in the gallery, because the gallery has been
12 restricted by the donor.

13 Q I want to turn to some of the writings that you
14 have made over the years. You have been an expert in
15 this area for many, many years. You wrote a book

16 called Managing Museum Collections?

17 A Yes. Well, not -- I don't quite know what

18 you're quoting from.

19 Q Excuse me. It's called --

20 A Legal Primer on Managing Museum Collections.

21 Q A Legal Primer on Managing Museum Collections.

22 Is that it?

23 A Yes.

24 Q You can see that it's -- our law library in

25 Philadelphia has a copy of it, as of 1998. And I

1

MALARO - CROSS

44

2 want to turn to Page 230 of that, and this is -- this

3 chapter discusses the use of proceeds derived from

4 deaccession, doesn't it?

5 A Right.

6 Q And I've noted here that the ultimate purpose of

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7 a nonprofit is to carry out its particular mission
8 for the public it serves. For a museum, the mission
9 invariably centers on the maintenance and effective
10 use of its collection. Correct?

11 A Yes.

12 Q And that's what -- you were sort of reaffirming
13 that today?

14 A Um-hmm. Um-hmm.

15 Q For the nonprofit, the sale of assets can mean
16 the disposal of part of its very reason for being.
17 When this is the situation, there has to be a very
18 strong justification, not just a business gamble,
19 that a sale for other than collection improvement is
20 in the best interests of the public served. Do you
21 still believe today what you wrote there?

22 A Well, I have -- we're talking now -- yes --

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23 about the museum that gets into serious financial
24 straits, and it has a very large collection, and
25 there is no way it can keep going, so it is seeking

1 MALARO - CROSS 45

2 to sell some of those objects to try and see if it
3 can salvage the situation. Most of those situations
4 go before the attorney general in the state, and at
5 that point the attorney general doesn't have too much
6 option. Because clearly, there is going to need a
7 tremendous -- the organization has overcollected. So
8 they work out the best situation they can by
9 determining is there anything that's really
10 extraneous in the collection, and so forth. But that
11 is a unique situation that where, yes, the -- legally
12 perhaps the museum can do it, but because of the
13 ethical ramifications, the attorney general steps in

14 and tries to represent the public fairly.

15 Q So you still do ascribe to the statement that we
16 just read?

17 A Well, I think I would, yes.

18 Q And you wrote, Professional codes of ethics set
19 standards that are deemed important in order to
20 uphold the integrity of the profession. The goals of
21 such codes is to encourage conduct that warrants the
22 confidence of the public. Legal standards are more
23 mundane. They set minimum standards below which one
24 is liable for civil or criminal sanctions. As one
25 would expect, ethical standards invariably are more

1

MALARO - CROSS

46

2 demanding than legal standards. And that's a

3 distinction you testified to when Mr. Kline was

4 exami ni ng you?

5 A Right.

6 Q Now, you have mentioned that the di fferent --

7 and we went through thi s wi th Dr. Wade yesterday,

8 that di fferent signi ficant ethi cal -- excuse me.

9 Di fferent organi zati ons have di fferent poli ci es. The

10 AAM poli cy is, as I thi nk you sai d, restri cted to say

11 i f you sel l, you can onl y use the proceeds for

12 acqui si ti on?

13 A That' s AAM. That' s the Ameri can Associ ati on of

14 Art Museum Di rectors. The AAM is the l arge st that

15 covers al l ki nds of museums. The Art Museum

16 Di rectors Code is the more stringe nt, that you can

17 onl y use i t to repleni sh the col lecti on.

18 Q And i n 1994, thi s was expanded. The AAM was

19 expanded to i ncl ude both care --

20 A Right. Direct care --

21 Q -- and acquisition?

22 A Right.

23 Q Correct?

24 A Right.

25 Q Now, you mentioned --

1 MALARO - CROSS 47

2 THE COURT: Mr. Wellington, may I
3 inquire? Is this second sheet from the same source?

4 MR. WELLINGTON: Yes. This is

5 Page 231 of Professor Malaro's book.

6 BY MR. WELLINGTON:

7 Q You mentioned the New York Historical Society as
8 an example of a cultural institution that was in such
9 dire financial straits that it was on the verge of
10 bankruptcy, correct?

11 A Yes.

12 Q Now, I think you said in that situation where
13 there is no other avenue available -- I was going to
14 say ethics be damned -- you may have an to sell, an
15 institution may have to sell to raise funds because
16 it has no other alternative?

17 A I would say that that was a sensible conclusion,
18 yes.

19 Q Okay. Now, but even in that -- and when there
20 was a proposal by the New York Historical Society to
21 sell for the purpose of operating funds, that created
22 a brouhaha within the community, didn't it?

23 A Well, it was a museum. And it is up to the
24 press and the legal decisions to distinguish these
25 cases. I mean, one cannot make decisions according

2 to when the public isn't well-informed on what's at
3 stake.

4 Q And so what ultimately happened with the New
5 York Historical Society deaccessioning?

6 A If you remember, the attorney general -- there
7 was a complete inventory of the collection, and
8 decisions made on if they could dispose of material
9 that was not relevant to the art history. And the
10 attorney general gave permission for that to be sold,
11 and that was used to help really improve the care of
12 the collection and the innards of the museum, the air
13 conditioning and so forth, and so on. And the museum
14 did get back on its feet. The Society did get back
15 on its feet, but its collection was pared
16 considerably. But it was done as an intellectual

17 exercise of what they could afford to dispose of.

18 Q But as your book points out, even in that
19 situation of the dire straits where they were facing
20 insolvency, when ultimately the attorney general
21 involved in there and the public and the museum, the
22 decision was made that they could not sell any of the
23 artifacts for anything other than acquisition and
24 care, they could not --

25 A No. No.

1 MALARO - CROSS 49

2 Q -- use them for --

3 A No. No. No. No. Because they had to be -- if
4 I remember correctly, they could have been used to
5 pay salaries because at that point, they could not
6 afford -- they were bankrupt, and they needed people
7 to do this work. So clearly, it went to the attorney

8 general because there was so much -- it was such a
9 drastic situation.

10 Q Well, on Page 232 of your book, you discuss what
11 the use of proceeds were in connection with that New
12 York Historical Society matter and you quote the
13 settlement on the next page, that Proceeds from the
14 sale of deaccessioned objects or collections may be
15 used for acquisitions, direct care of the
16 collections, and collections management.

17 A And curatorial -- staff salaries and other
18 expenses incurred in the conservation --

19 Q But should not be used for building operations,
20 utilities, guard service, janitorial services, public
21 programs, et cetera. In other words --

22 A Yes, but you forgot to underline --

23 THE COURT: May I simply remind
Page 80

24 Mr. Wellington, who I know knows this, but I have to
25 remind you, Professor, this young lady who must take

1 MALARO - CROSS 50

2 down every word said can't take two people --

3 THE WITNESS: Correct.

4 THE COURT: -- speaking at the

5 same time. So if Mr. Wellington is completing a

6 question, you've got to wait till he's done before

7 you start to answer. I know there is a tendency to

8 want to, but you've got to wait.

9 Conversely, Mr. Wellington, if

10 she's answering, I would prefer you wait for her to

11 finish if you're not objecting, and then begin your

12 next question.

13 MR. WELLINGTON: Of course, Your

14 Honor.

15 THE COURT: Because if this young
16 lady quits, we all have to leave. All right. Thank
17 you.

18 BY MR. WELLINGTON:

19 Q The point I was just making here was even in
20 that situation, the use of selling the collection for
21 the use of operating expenses was disallowed?

22 A They allowed curatorial staff and staff
23 salaries, which normally the American Association of
24 Museums would not allow.

25 Q But it would be allowed by the other --

1 MALARO - CROSS 51

2 A Because --

3 Q -- because it's part of the collection care,
4 isn't it?

- 5 A Well, you see, this is a point that was debated
- 6 when the ethical code was done, and it was decided
- 7 that you couldn't use salaries because that could --
- 8 it's not just the curator who takes care of it, but
- 9 also the collection manager and the people who move
- 10 the objects from here to there. So that would open
- 11 the door. So here, the attorney general specified
- 12 that they could apply it to these.
- 13 Q To collection care?
- 14 A To -- which would include salaries.
- 15 Q Yes, but not to general operating expenses,
- 16 correct?
- 17 A Because they could -- they could --
- 18 Q It would open -- yes.
- 19 A All right.
- 20 Q And on the next page of your book, you say As of

21 the late 1990s, a museum planning to use
22 deaccessioned proceeds for operating expenses should
23 expect considerable opposition, and rightly so. At a
24 minimum, such a museum should be prepared to explain
25 to its public why the use is necessary, and then you

1 MALARO - CROSS 52

2 say i.e., all other avenues have been exhausted. Do
3 you see that?

4 A Yes.

5 Q Now, Professor, isn't that exactly what has
6 happened here, that the Board of Trustees of the
7 Barnes Foundation has come to the Court, explained
8 why it is doing it, what the other avenue is, the
9 other avenue being a philanthropic gift of a promised
10 \$150 million to avoid selling. So, does it not have
11 another avenue?

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12 A No. As I have explained before, the objects
13 that are not in the gallery are not museum objects.
14 There is plenty of -- they can be used for what I
15 say, what I read as the purpose of the Foundation.
16 It is very simple. You don't have to put an elephant
17 up. You don't have to build a huge museum to support
18 the Barnes Foundation. The resources are there.

19 Q By resources, you mean by selling the works?

20 A By selling objects that in no way are a museum
21 collection.

22 Q And who is to make the -- who has the -- who is
23 given the public trust responsibility to determine
24 whether the collection is part of --

25 A Well, it's --

1

MALARO - CROSS

53

2 Q -- part of --

3 THE COURT: I don't think he
4 finished yet.

5 BY MR. WELLINGTON:

6 Q -- part of the mission? Is that not the Board
7 of Trustees?

8 A The Board of Trustees would certainly -- one
9 would hope they thought about that. And the Board
10 also is under duty of obedience. But in this case,
11 they're in court on a cy-pres or equitable deviation,
12 and they have the burden of proving that this is the
13 only way. And I'm saying, if you look at the law, it
14 isn't the only way.

15 Q Right. I think you're saying, right, it's not
16 illegal to sell some of the collision?

17 A It's not illegal, nor is it unethical.

18 Q Now, going back to Page 231 of your book, you
19 have a footnote here on the bottom that talks about a
20 prior -- the footnote is referenced from the
21 statement up here: Meanwhile, other smaller
22 collections -- collecting organizations were also
23 engaged in efforts to implement deaccession plans to
24 raise money for operating expenses. Each argued that
25 it could not continue to function or function

1 MALARO - CROSS 54

2 effectively unless money was drawn from collections.

3 Now, so you're referring here to
4 the Barnes Foundation as a collecting organization,
5 correct?

6 A Yeah. Let's see. Where are we? New York
7 Historical Society.

8 Q I'm sorry. We're --

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9 A Let's put this in context here.

10 Q Right there. I'm sorry.

11 A All right. Meanwhile, other smaller collecting
12 organizations -- let me see if I can find it on my
13 monitor.

14 All right. Yes. Okay.

15 Q And then in the footnote you refer to three or
16 four situations, including the Barnes Foundation,
17 which you've referred to as a collecting
18 organization?

19 A Well, all I could say was what they claimed. I
20 didn't -- I think it -- elsewhere in the book I do
21 mention the Barnes Foundation is not a museum. But
22 I, perhaps, should have specified, but I didn't in
23 the footnote because the footnote was long enough.

24 Q That's fine. That's fine. What I wanted to

25 mention here is you say -- and you're referring to a

1 MALARO - CROSS 55

2 petition in 1991, this petition to sell part of the

3 Barnes art collection to raise operating expenses was

4 withdrawn after significant public outcry. The

5 objects at issue were also subject to donor-imposed

6 restrictions.

7 A And I would have to --

8 Q Now --

9 A Yeah.

10 Q So when you were writing your book, you believed

11 that the objects we're talking about were subject to

12 donor-imposed restrictions from sale, were you not?

13 A I would have to admit that in that case I was

14 thinking of the gallery, the art collection. I was

15 not -- and this was -- certainly it also, a

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16 representation in the press that this was -- it was
17 the gallery collection. But I should have, perhaps,
18 been more specific, but elsewhere in the book, I was.

19 THE COURT: Actually, in fairness
20 to the witness, Mr. Wellington, she's right. That
21 petition, although it predated my service in the
22 Orphans' Court, I believe did deal with the proposed
23 sale of gallery paintings.

24 MR. WELLINGTON: I think it was
25 nonspecific, Your Honor. But it predates my

1 MALARO - CROSS 56

2 involvement as well, Your Honor.

3 THE WITNESS: Well, I'd say if
4 the lawyers can't agree, I think I was within my
5 rights to be perhaps vague.

6 BY MR. WELLINGTON:

7 Q I'm not suggesting you were not within your
8 rights, Professor.

9 THE COURT: It just seems like
10 I've been handling this forever.

11 BY MR. WELLINGTON:

12 Q You say down here the objects at issue were also
13 subject -- when you say the donor-imposed
14 restrictions, those would be legal issues?

15 A Yes.

16 Q And when you say "also," it's because they were
17 also subject to ethical restrictions, weren't they?

18 A You know, I really think you're straining,
19 Mr. Wellington. I really think you're straining.

20 Q Okay. I'm just looking at your words.

21 A Well, I don't believe that "also" means that one

22 is less -- you know, it's just of less weight. I

23 just happened to phrase it that way.

24 Q Okay. You used, in response to one of Mr. Cyr's

25 questions, one of my favorite quotes that I have read

1

MALARO - CROSS

57

2 of yours, and that was "The law is not designed to

3 make us honorable, only bearable." And you wrote a

4 paper called Deaccessioning, the American

5 Perspective, in 1991, did you not?

6 A Yes. I believe that that appears in a chapter

7 in some publication, yes.

8 Q And you do a definition of deaccessioning here

9 which says it is the permanent removal of an object

10 that was once accessioned into a museum collection;

11 accordingly, the term does not apply when an object

12 is placed on loan by a museum, nor does it apply if

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13 the object in question was never accessioned. Is
14 that the discussion you and I were having earlier,
15 particularly the last phrase?

16 A Yes.

17 Q Why the things that Dr. Barnes collected, in
18 your view, are not accessioned in a technical sense?

19 A Yes. And museums have things that are not
20 accessioned.

21 Q I'm sorry?

22 A Museums also have things that are not
23 accessioned objects, objects that they use to put out
24 in the gallery, say chairs and decorative objects
25 that give the proper ambience for the pictures.

1 MALARO - CROSS 58

2 Those are not accessioned. They are inventoried, but
3 they're not accessioned.

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4 Q Again, I'm still -- maybe it's just a language,
5 because I'm not a professional in your field. I
6 don't pretend to be. But, for example, all of the
7 nongallery works have a specific number, the Barnes
8 Foundation accession number placed on it by
9 Dr. Albert Barnes himself. But that wouldn't, in
10 your view, mean that he had acquired them for the
11 collection in an accession sense?

12 A No. My husband is an expert photographer and he
13 has numbers on all of his framed works, but we're not
14 accessioning them. I mean, it is the common method
15 that anyone that has a number of art objects uses in
16 order to keep track of them.

17 Q Okay. Now, of course, your husband, does he --
18 never mind. Never mind. Maybe we'll see some of his

19 work some day. Excuse me.

20 Down here, the law is not

21 designed to make us honorable -- only bearable, and

22 therefore, we often engage in some highly

23 questionable conduct and yet stay within the law.

24 Correct?

25 A Yes.

1

2 Q Did you mean by that statement that selling part

3 of a collection, even though legal, would be

4 questionable conduct?

5 A No.

6 Q What did you mean by that statement?

7 A I mean that the rules on deaccessioning don't

8 apply to this material.

9 Q And then the next page of this, you sort of do a

10 summary. What all this means is that whether a
11 museum in the United States engages in deaccessioning
12 is pretty much left to its governing board, acting in
13 the light of its own particular circumstances,
14 correct?

15 A Yeah. Remember, this article is being written
16 for an international art audience, and most countries
17 do not have a nonprofit sector, most collections are
18 owned by the government. And they are rarely --
19 they're never accessioned. The government just
20 collects. So this is -- put into context, I am
21 writing for an international audience.

22 Q Thank you. I was going to ask a question about
23 that statement. The question was, it is true, is it
24 not, that the responsibility for determining
25 deaccessioning issues is really the responsibility of

1

MALARO - CROSS

60

2 the governing board of a nonprofit in its own

3 particular circumstances --

4 A Yeah.

5 Q -- in general? Yes or no? Is that correct?

6 A The Board sets policy which is normally prepared

7 by a professional staff, and the Board also has

8 responsibilities of care, loyalty, and obedience to

9 the mission.

10 Q And the Board here has decided it is not in the

11 interest or furtherance of the mission to sell works

12 selected by Dr. Barnes in its judgment, correct?

13 A It is here to ask, under a cy-pres or equitable

14 deviation, to prove that this is the only way they --

15 first of all, that they have the correct mission, and

16 this is the only way that they can carry out the

17 mission.

18 Q My question, Professor -- and maybe I wasn't
19 clear. My question is this Board, three of whom its
20 members have testified here, have explained the
21 reasons why it has concluded that in the -- in their
22 effort to carry out the mission of Dr. Barnes as they
23 see it, selling the collection put together is not
24 the right thing to do. Do you understand that that
25 board has concluded that?

1

MALARO - CROSS

61

2 A They are here trying to convince the Court, yes.

3 Q Okay. Have you reviewed the testimony of any of
4 the three board members who have testified at this
5 hearing, Professor Malaro?

6 A No.

7 Q Have you been told by anyone what the reasoning
8 they testified in this court to be?

9 A Um-hmm.

10 Q But you have --

11 A No, I have not, and I'm -- but I'm sure that I
12 don't really have to. The judge has heard that and
13 he's heard mine. No, but I did not hear it.

14 Q On the following page of this article we are
15 reviewing you reaffirm something that the AAMD
16 states, which is that Deaccessioning should be
17 related to policy, not to the exigencies of the
18 moment. And that's a general -- that is a good
19 policy guideline for boards, isn't it?

20 A Well, if the Board really is operating probably
21 in a museum, they have formulated a very careful
22 collection management policy which in advance, before

23 any such situations come up, they set forth the
24 procedure that will be used when a deaccession
25 question comes forward, the questions that need to be

1 MALARO - CROSS 62

2 answered -- first of all, the information that has to
3 be gathered, the questions that have to be answered,
4 and who has the final authority to say yes or no, and
5 also the records that have to be kept.

6 So, when I'm saying it can't be
7 done at the spur of the moment, one never can be
8 objective when one is up against the wall. If you're
9 prudent -- and trustees should be prudent -- they
10 have to make sure there is a policy in advance.
11 Okay?

12 Q Do you remember a few years ago -- this goes
13 back to the mid nineties -- being on a forum at -- I

14 think it was at the Franklin Institute here in
15 Philadelphia. In fact, Richard Glanton was on the
16 panel with you.

17 A Oh, I think I vaguely remember, yes.

18 Q And my favorite paper, the Philadelphia
19 Inquirer, wrote an article about that on April 21,
20 '95, final edition, and you're quoted in here. And I
21 want to ask you whether or not -- you're quoted as
22 saying, What happens when a museum begins to review
23 its collection not as its reason for being but as a
24 source of revenue? In Malaro's view, nothing good.
25 By viewing objects in its care as a means to leverage

1 MALARO - CROSS 63

2 operating funds, a nonprofit museum places itself
3 directly into the marketplace. Once sipping from the
4 cup of profits, a museum develops a taste for

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5 maximizing revenue. At that, Malaro said -- and that
6 is like cozying up to a growing monster. Nonprofits,
7 she argued, are singular. They occupy a unique place
8 within the economy and society, neither public nor
9 private. The uniqueness is threatened, however, when
10 market and political pressures take precedence in the
11 museum's affairs. Does that fairly represent some of
12 the comments you made at that --

13 A At that time, we were not talking about
14 deaccessioning. We were talking about what is called
15 lending for profit.

16 Q How do you feel about that?

17 A Well, you can imagine. When I first started as
18 a lawyer for museums and for many years, museums, if
19 they lent, they only lent at cost. Every museum

20 depends on borrowing and lending, because they lend
21 one day and they borrow the next day. And this was
22 always carried on strictly at cost. The only charge
23 the museum would assess against a borrower would be
24 packing and shipping, insurance, and perhaps some
25 conservation work if it was needed.

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MALARO - CROSS

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2

At this time, the issue of

3

lending for profit really came up in the museum

4

profession because of the Barnes' decision to tour

5

its work for very large money. To this day, I think

6

it is not a good practice because what you borrow one

7

day, the other museum has -- what you lend one day,

8

when you go to borrow, the other museum is going to

9

ask for the X number of dollars back.

10

Also, you are dealing with

11 foreign countries, and you have no assurance they're
12 going to be there again. But that was the topic we
13 were talking about, so it's not really relevant here.

14 Q But you were not in favor of the Barnes'
15 decision to put some of its works onto tour?

16 A I think when you stop and think what it will do
17 to the museum profession and what it does to smaller
18 museums that can't afford this -- plus it does put
19 them in the marketplace. You know, right now, some
20 of them are lending to commercial outfits. But
21 that's not within the scope of this.

22 Q And you were also at that time opposed to
23 selling any of the Barnes collection?

24 A I don't know. I think we were talking there
25 about lending for profit.

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2 Q But I meant the few years before when you wrote
3 this other article --

4 A No. No.

5 Q We looked at that other article. Were you in
6 favor --

7 A No.

8 Q Excuse me.

9 A I guess not -- only the material that was
10 restricted.

11 Q There is another article that you wrote, and
12 this one is called Deaccessioning in Hard Times,
13 Maria (sic) C. Malaro, 1992. And you mentioned that
14 you do a lot for the ABA, and this was one of your
15 ABA articles, I believe. Do you recall that article?

16 A Well, I've done many. But I'm sure if it has my
17 name on it, I must have done it, yes.

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18 Q And much of what I've highlighted here is some
19 of the general precepts that we've already been over,
20 and I won't bore us all with those again.

21 You then talk about several
22 examples. You do talk about the Rose Art Museum at
23 Brandeis. You talk about the Reading Public Museum
24 and Art Gallery. You point out that ultimately,
25 their proposal to sell art was met with such

1 MALARO - CROSS 66

2 outrage -- or public outcry that that eventually was
3 withdrawn, correct?

4 A Yes.

5 Q And then you talk about -- excuse me -- the
6 Barnes Foundation case -- excuse me -- as well.
7 Again, this goes back I think to the 1991 decision.

8 And in referring to that issue, you say The trustees
9 sought broader powers of investment, more flexibility
10 in setting visiting hours, and permission to sell
11 artworks in order to strengthen the endowment fund.
12 There was considerable criticism from the museum
13 profession of the last item, the proposed
14 deaccessioning plan. And that ultimately was
15 withdrawn. And then you comment, What began as a
16 petition to alter the terms of Dr. Barnes' trust has
17 developed into a probe of the overall conduct of the
18 trustees themselves. So far, events indicate that
19 the Board of the Barnes Foundation has not been
20 sensitive to the responsibilities of the Barnes
21 Trust. If this litigation produces some sound
22 guidance for museum trustees regarding the care to be
23 taken when deciding issues central to their mission,

24 it will serve a most useful purpose. What did you
25 mean by the last sentence in particular, Professor?

1 MALARO - CROSS 67

2 A Well, I think that it's the concern of -- again,
3 I'm talking to many lawyers in the audience that
4 advise museums, as well as major offices of museums.
5 It is the problem of having the Board really
6 understand what the ethical problems are and the
7 legal problems are. Sometimes they're very, very
8 well-intentioned. And I was just making an
9 observation there that they didn't seem to be getting
10 the best advice. At least it appeared at that time.

11 Q Professor Malaro, shifting to a little bit
12 different subject -- and I won't be too much longer,
13 I appreciate your patience. One of the other
14 subjects that you've written about in this

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15 deaccessioning -- in this museum management area is
16 the difference between corporate sponsorship and
17 corporate philanthropy, correct?

18 A Yes.

19 Q And that's been a passion of yours that I've
20 seen in many of your works. In the Washington Post
21 just a year or so ago, there was an article
22 addressing you on this in which you addressed this
23 subject, and you talk about Nonprofits are fragile,
24 they need to be led by people who understand that how
25 a nonprofit raises its money dramatically affects its

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MALARO - CROSS

68

2 ability to carry out its mission. True philanthropy
3 is giving without attaching strings that inhibit the
4 independent judgement of the nonprofit --

5

MR. KLINE: Objection, Your
Page 109

6 Honor.

7 BY MR. WELLINGTON:

8 Q The sector cannot provide its distinctive

9 services if true philanthropy dies or becomes --

10 MR. KLINE: Objection, Your

11 Honor.

12 THE COURT: Hold on.

13 You're going to scope.

14 I did sustain an objection by

15 Mr. Kline -- I'm sorry -- of yours to a question by

16 Mr. Kline that seemed to go outside the scope of the

17 proffered expertise of this witness, and I do believe

18 that his objection is similar to yours. Unless you

19 can show me how you're tying in what appears to me to

20 be an expertise of a different kind than what she has

21 been called to comment upon. Am I missing something?

22 MR. BARTH: Well, Your Honor, I

23 would just --

24 THE COURT: Well, I think he's

25 the one who's asked the question. He's the one that

1 MALARO - CROSS 69

2 ought to address the objection.

3 MR. BARTH: No. I simply wish to

4 point out to the Court that I'm the person that made

5 that objection, for whatever it may be worth.

6 THE COURT: Fair enough. And I

7 didn't mean to not give you authorship. It doesn't

8 change what I think was a proper sustaining of your

9 objection, because I think this is of the same ilk

10 and ought to be sustained unless, as I said,

11 Mr. Wellington, you can show me how this ties in to

12 the stated expertise.

13 MR. WELLINGTON: Your Honor, I

14 actually understand the objection and although I

15 could argue it and try to go through some documents,

16 I don't think it's worth the effort and I'm happy to

17 withdraw that question and the document.

18 THE COURT: All right.

19 MR. WELLINGTON: Let me, if you

20 will give me a moment, I will see what else I might

21 have here.

22 Your Honor, I apologize, but I

23 may be close to the end.

24 THE COURT: You don't have to

25 apologize.

1 MALARO - CROSS

70

2 MR. WELLINGTON: Since my next 15

3 minutes was just taken away, Your Honor --

4 THE COURT: I didn't mean to
5 couple that statement with your other statement. You
6 may always ask for a few moments to compile thoughts.

7 BY MR. WELLINGTON:

8 Q You mentioned -- Mr. Kline asked you if you knew
9 why the petitioners were here, and I think you said
10 you answered that. Are you aware, when Amici sought
11 to enter this proceeding, they sought to enter it to
12 protect the petitioners, the Barnes Foundation, from
13 selling any of the art?

14 MR. KLINE: Objection, Your
15 Honor. Relevance.

16 THE COURT: Yeah, I'm inclined to
17 sustain that, Mr. Wellington. And I'm thinking
18 through my mind as to how you could tie it, and I

19 can't think of how. So I'm going to sustain the
20 objection. I know where you're going, and I don't
21 think it has a part of this proceeding.

22 BY MR. WELLINGTON:

23 Q The ultimate question, I guess as I understand
24 you dealing with it or struggling with it, Professor,
25 is you have concluded, I gather, that if the Barnes

1 MALARO - CROSS 71

2 Foundation is in dire financial straits, it is a
3 better thing to sell part of the collection than to
4 move the gallery; is that correct?

5 A My concern is far greater than that. I mean, it
6 is not -- it is a clear -- the correct articulation
7 or a thoughtful articulation of what is the goal of
8 the organization and what logically follows from

9 that.

10 Q I'm sorry. I just couldn't hear that.

11 MR. WELLINGTON: Could you read

12 that back, please?

13 THE WITNESS: I said a prime

14 concern is the careful articulation of what the

15 mission of the organization -- of what the mission

16 is, what Dr. Barnes wanted, because that is critical

17 in all of this. And the -- I can only read that

18 mission one way, despite how many times I have read

19 the documents. And based on that, it is -- there

20 certainly are assets there that Dr. Barnes has left

21 to them, and there is no reason, ethically or

22 legally, why those objects cannot be used to further

23 the school.

24 BY MR. WELLINGTON:

25 Q And the mission that you understand -- excuse

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MALARO - CROSS

72

2 me -- that the documents from which you've derived

3 your understanding of Dr. Barnes' mission is the

4 indenture?

5 A I looked at the articles of incorporation, the

6 immediate indenture documents, the instructions that

7 they -- are part of the bylaws, the will, his remarks

8 during his life, and what he actually did between the

9 time he founded -- he incorporated the Foundation and

10 his sudden death, yeah.

11 Q And are you aware that -- if you reviewed all

12 those materials, you're aware that Dr. Barnes

13 expressly gave to the Barnes Foundation in his will

14 the Ker-Feal property and collection to be part of --

15 or, excuse me -- to become a living history museum

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16 and part of the Foundation's educational mission?

17 A I mean, again, my reading of that was this -- he
18 gave it to them, but they never really got around to
19 doing much with it.

20 Q Well, I have a different question. My question
21 is are you aware that he gave it to them?

22 A I'm aware that he gave it to them.

23 Q In your definition of accessioning, would that
24 be an accessioning by the Foundation of Ker-Feal and
25 the collection there?

1 MALARO - CROSS 73

2 A No, because no museum would accession it until
3 they have determined how they were going to use it,
4 because you have to have a purpose, you have to have
5 collecting goals. So they have not yet arrived at
6 that stage.

7 Q Well, there has been a lot of testimony over two
8 weeks in this hearing by the executive director, the
9 director of education, the chairman of board, and
10 other trustees as to how they in fact are trying to
11 use these very assets that Dr. Barnes collected.
12 Have you reviewed any of that explanation of their
13 mission?

14 A No. I have just seen the testimony in the
15 hearings prior to this, prior to the judge's January
16 Opinion. I have not heard what has gone on in the
17 last couple of days, no. I know nothing about that.

18 All I can say is it's difficult
19 to go through that when you don't have any mission
20 statement, there is no -- and even more important --
21 you know, and another question is why are they not

22 using it for what clearly Dr. Barnes wanted, because
23 there is no legal impediment or ethical impediment
24 for them not to? And I think that is what they have
25 to answer.

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MALARO - CROSS

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2 Q Well, if you've researched as you say you have,
3 you are aware the Barnes Foundation does have a
4 mission statement, are you not?

5 A I think they probably use the one from the
6 articles of incorporation.

7 Q No. They have a mission statement. Have you
8 read --

9 A No.

10 Q -- the mission statement?

11 A I cannot say right off that I can remember. I
12 can't believe that I haven't, but I cannot remember it

13 at the moment.

14 MR. WELLINGTON: Thank you very

15 much, Professor.

16 THE COURT: Mr. Barth?

17 MR. BARTH: Thank you, Your

18 Honor.

19 BY MR. BARTH:

20 Q Good afternoon, Professor Malaro.

21 A Good afternoon.

22 Q I think we have met before at the very

23 conference that Mr. Wellington referred to at the

24 Philadelphia Franklin Institute. I think it was an

25 Alley Abba Gathering on Museum Law (ph).

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MALARO - CROSS

75

2 A It might well have been.

3 Q Or problems in museum administration, and I know

4 you've talked about that frequently.

5 May I ask you initially -- and,

6 of course, we have corresponded and spoken on the

7 telephone, have we not?

8 A Right.

9 Q May I just ask you initially whether or not --

10 whether the students, the Amici approached you to

11 testify or you approached them and volunteered to

12 testify?

13 A No. They approached me, and I did not say I

14 would for some time.

15 Q Okay. And you would readily concede, I believe,

16 that you are not an expert on financing or

17 fundraising?

18 A No.

19 THE COURT: No you won't concede,
Page 121

20 or no you're not?

21 THE WITNESS: That's right. No,

22 I am not an expert on fundraising.

23 BY MR. BARTH:

24 Q Thank you.

25 Now, let me ask you some

1 MALARO - CROSS 76

2 questions about your discussion on accessioning and

3 deaccessioning. It was pretty technical, and I think

4 it was done in terms of a museum's operation, was it

5 not?

6 A Well, yes, because those are museum terms.

7 Q And I believe the essence of what you said was

8 that if something is not accessioned, it can't be

9 deaccessioned, and therefore, it is an -- and if it

10 is an asset of the institution, it can be sold

11 without violating any of those ethical principles?

12 A Yes, assuming -- yes. Assuming there are no

13 legal restrictions, yes.

14 Q Are you saying then, do I understand you

15 correctly to infer by that, that since the gallery

16 collection itself was not formally accessioned, there

17 is no reason why it could not be sold?

18 A It has the little problem of the mandatory

19 restrictions imposed by Dr. Barnes. It has legal

20 problems.

21 Q Okay. And that restriction is what's in the

22 indenture, and that arises at the moment of his

23 death, because that was what was hanging in the

24 gallery at that time?

25 A Um-hmm. Yes.

1

2 Q Okay, but let me ask you this. You said that

3 the essence of a -- forgive me.

4 That objects are accessioned to

5 help further an institution's mission, and that's why

6 they're valuable and should not be disposed of?

7 A Well, yes. They are -- they serve the

8 collecting goals of the museum because the museum

9 uses the objects.

10 Q Well, let me ask you, then, if the mission of an

11 institution is educational and the particular assets

12 in question serve that educational mission, whether

13 or not they are accessioned or not accessioned

14 formally, should they nevertheless be retained

15 because they do further that mission?

16 A We're talking about -- you're trying to ask me

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17 why aren't universities like museums?

18 Q No.

19 A I'm just -- we're talking -- the term

20 "accession" and "deaccession" apply to museums. You

21 wouldn't even find the word deaccession in the

22 dictionary many years ago.

23 Q But --

24 A But, so we can't talk about should these apply

25 to organization that are not museums.

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MALARO - CROSS

78

2 Q Well, let's forget about the word accession and

3 deaccession, technically at all. If something is

4 important to the mission of an institution, should

5 that particular something be sold?

6 A You're going to have to be a bit more -- I mean,

7 we're talking about a nonprofit organization in this

8 case.

9 Q Essentially, we're talking about the Barnes
10 Foundation. We're talking about a collection both in
11 the gallery and out of the gallery which is used in
12 the furtherance of its educational mission. If that
13 is -- if you will grant me that that is why those
14 particular objects or how those particular objects
15 are used, how could that or why would it be proper to
16 sell them?

17 A I think we've gone through this. I've gone
18 through this in great detail with Mr. Wellington.

19 Q Well, perhaps we have, but I don't know if
20 you've answered that question quite as directly as
21 I've put it.

22 A I don't know whether -- the Barnes collection,

23 and the Barnes has the gallery collection which was
24 frozen in place at Dr. Barnes' death, and that is
25 governed by his legal restrictions. The other

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2 material has no restrictions on it because it isn't
3 part of a museum collection because the Barnes isn't
4 a museum.

5

The Barnes -- I mean, if I'm -- I

6 started out by saying, if you -- my reading of the
7 documents is that Dr. Barnes created a unique
8 educational organization that utilized a collection
9 that was to stay in place in order to teach art
10 appreciation. It was a school. It was a school. It
11 is not a museum.

12 Q Okay. It's not a museum.

13 A No.

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14 Q Fine. It's a school.

15 A It's a school.

16 Q And he created the collection to use as a tool
17 in carrying out its educational function?

18 A Right.

19 Q So that educational -- those particular tools
20 are integral to that educational function, much as
21 biology slides are integral to a medical school?

22 Forget about the analogy, but
23 would you agree that it's integral to the educational
24 function?

25 A Are you suggesting -- I am not suggesting that

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2 if a university has a collection of biology slides,
3 they can't get rid of them. I'm not saying that.

4 You might be, but I'm not.

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5 Q My question, essentially, is how can the Barnes
6 Foundation, which is based upon this collection,
7 teach or carry out its mission if it's allowed to get
8 rid of that collection?

9 A Dr. Barnes, if I remember correctly, suggested
10 that they could sell a lot of the material.

11 Q Okay. In some of the testimony you were asked
12 to consider other cases that have come before the
13 Courts regarding sales -- where sales were allowed.
14 And in my career, I have been involved in some of
15 them other than the Barnes, one of the ones you
16 footnoted in your book. But would you agree that the
17 ethical standards are an ideal that certainly the
18 profession, the Attorney General, and perhaps even
19 the Courts should try to live up to?

20 A Well, I think they are, inasmuch as they try and

21 preserve the integrity of the museum. In other
22 words, they're there also to benefit the public so
23 that the museum is prudent in what it does. And
24 also, that it is -- it merits the -- well, the public
25 at least can have great confidence in it because it

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2 does act properly and in accordance with law and
3 equity as far as it possibly can. We all recognize
4 unfortunate circumstances arise. But it is, yes, a
5 guide that we aspire to.

6 Q Okay. But we do agree that these principles do
7 not have the force of law and museums, if push comes
8 to shove, can sell parts of their collection or, in
9 your terminology, deaccession its works?

10 A Yes.

11 Q But would you also agree that if there is a
12 viable alternative, even though legally that
13 particular route should not be followed -- now, I'll
14 admit we can all debate on what constitutes a viable
15 alternative, but would you grant me that?

16 A Well, this is assuming that the material we're
17 talking about is a museum collection. But it is not
18 a museum collection. The rule, the ethical rules
19 don't apply. It isn't an ethical question.

20 Q But don't the underlying reasons for the ethical
21 rules equally apply --

22 A No.

23 Q -- in situations where it's not a museum?

24 A No, they don't.

25 Q Okay. My final question, I guess, is a question

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2 of how the collection relates to the mission of the
3 institution. Am I correct in seeing -- in stating
4 that you view the collection in this particular case
5 as an available financial asset to be used by the
6 institution in furthering its mission?

7 A You mean the collection -- you mean by that, not
8 what is in the gallery? What --

9 Q Well, I understand you to mean that all of it is
10 used as an asset, but in this particular case, the
11 gallery collection is subject to some other legal
12 restriction?

13 A Yes, because it is core to the educational
14 program.

15 Q Now -- I'm sorry.

16 A In other words, Dr. Barnes left that as very
17 visible evidence of what -- I mean how he hoped to

18 demonstrate by using actual works of art and their
19 placement and so forth. So he left it as a good
20 example, clear example. That's all. So it is
21 important to those that follow him to have that
22 available. That's all he was doing. Because he
23 said -- all he said was just make sure that stays.

24 Q Okay.

25 A He didn't say anything.

1

2 Q If he said in other context that these other
3 things are also important, would you extend that sort
4 of protection to them as well, even though they don't
5 appear in the indenture?

6 A I would have to see the indenture, because the
7 way I learned property law is you cannot impose a
8 restriction on an alienation of property unless it's

9 specific in the instrument.

10 Q So you do agree that you see the nongallery
11 collection as an available financial asset for the
12 carrying out of the mission?

13 A Carrying out what I describe as the mission,
14 yeah.

15 Q Okay. And would you also concede that the Board
16 sees the nongallery collection as an integral means
17 to successfully carrying out the educational mission
18 by its use in the educational process?

19 A Well, I don't want to make a -- I don't want to
20 give an opinion on that. I don't know. I didn't
21 hear the Board -- no, I don't.

22 MR. BARTH: All right. Thank you
23 very much, Professor.

24 THE COURT: Mr. Kline, will there
25 be redirect?

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2 MR. KLINE: Your Honor, there
3 will be no redirect.

4 THE COURT: Very well.

5 Thank you, Professor. I
6 appreciate you coming here today.

7 THE WITNESS: Thank you.

8 MR. WELLINGTON: Thank you,
9 Professor.

10 (Witness excused.)

11 - - -

12 THE COURT: Mr. Wellington, what
13 is your pleasure, in light of the hour?

14 MR. WELLINGTON: My suggestion,

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15 Your Honor, would be that we were planning to stop
16 now or 15 minutes later, and rather than be in the
17 middle of it -- we have one or two witnesses on
18 Monday, and then that's it.

19 THE COURT: Right. I know
20 Dr. Watson, you have on Monday.

21 MR. WELLINGTON: And Ms. Camp.

22 THE COURT: And Ms. Camp. And
23 that will rest your case?

24 MR. WELLINGTON: Yes.

25 THE COURT: Perhaps we could

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2 spend a few minutes discussing in the robing room the
3 logistics of that, and I'll have a chance to see
4 whether or not the students think we could finish on

5 Monday, and if not, where we could pick up that extra
6 time.

7 MR. WELLINGTON: Fine, Your
8 Honor.

9 THE COURT: Let's retire to
10 there.

11 (At 3:15 p.m., proceedings were
12 adjourned until Monday, September 27, 2004, at 9:30
13 a.m.)

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C E R T I F I C A T E

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I hereby certify that the

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5 proceedings and evidence are contained fully and
6 accurately in the notes taken by me in the above cause
7 and that this is a correct transcript of the same.

8

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Amy Beth Boyer, R. P. R.
Official Court Reporter

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Received and directed to be filed

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this day of , 2004.

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Stanley R. Ott, Judge

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