

NONPROFIT MERGERS & ABSORPTIONS

Presented By:



Part of the Recover, Rebuild, Renew Series

WHY HAVE THIS DISCUSSION?

- COVID has forced some nonprofits to reevaluate their long term sustainability, including assessing “exit strategies.”
- Pursuing any exit strategy has major legal consequences and obligations.
- Understanding the basic framework and vocabulary for legal business exit processes makes it easier for experts to help!

COMMON “MODELS”

- Joint Venture/Collaboration
- “Membership Substitution”
- Asset Acquisition
- LLC Acquisition
- “True” Merger

JV/COLLABORATION

- Contractual relationship
- Both organizations continue to exist
- Organizations share resources: staff, board members, etc.

MEMBERSHIP SUBSTITUTION

- The “target” organization (the organization to be acquired) remains a 501(c)(3) corporation, *but*
- The acquiring organization becomes the **sole member of the target.**
- Acquirer has sole authority to elect and remove board members.

ASSET ACQUISITION

- Acquiring organization receives the *assets* (real, personal, & intellectual property; cash; etc.) of the target organization
- But **liabilities** remain with the target. Target eventually dissolves.

LLC ACQUISITION

- The acquirer establishes a limited liability company (LLC) that acquires the target's assets.
- Target dissolves.
- Board members of target may sit on the LLC's board.

TRUE MERGER

- Two organizations combine, creating a new organization.
- Usually between two equally positioned organizations.
- Rare in the nonprofit sector; risky for organization in position to acquire.

CONSIDERATIONS

- **Identify the “stakeholders”** – who are the stakeholders? Founders, board members, management and staff, donors, and/or program recipients of each organization.
- **Alignment of interests?** – Different stakeholders may have different objectives and expectations about the combination (e.g., does the executive director of the target expect to be part of management of the acquirer?) Recognize this.
- **Language matters.** It may be important for the parties to refer to the combination as a “merger” even though the lawyers refer to it as an “asset acquisition”.

CONSIDERATIONS (Cont.)

- **Parties** — who is the “acquirer” and who is the “target”? What is the relationship? What are the power dynamics?
- **Process** — who needs to approve (board, voting members? Quorum, majority?)
- **Resources** — can we afford consultants (legal, tax, HR, risk/insurance, etc.)?
- **Staff** — retained, transferred, terminated?
- **Intellectual property** — who will own the IP and “know how” at the end of the deal?
- **Risk** — what are the risks? What becomes of existing obligations and liabilities? Are we insured?

NON-LEGAL CONSIDERATIONS

- **Consultants**—may be a great way to address process and build a structure. May help facilitate through issues, manage process, time constraints and power dynamics? (build into budget as suggested before)
- **Timing** — when to wait on certain to-do items? For example: naming or other hot topics that cause undue issues and conflict. Tail wagging the dog?
- **Define Success** — For merger process and outcome of the merged organization (Rubrics work well for this process – do together not along).
- **Staff** — would HR specific consultants help? HR Audit including a benefits analysis and how do benefits match our values? (ESC did ours and they were great)
- **DEIA** — review of DEIA goals and your separate or combined implementation strategy. Is there alignment? How improve?
- **Culture** – Culture eats strategy for breakfast. How is power shared or used by internal and external parties? How does the board work? What are the management styles?

NON-LEGAL CONSIDERATIONS

- **Getting Organized** – this can be done in advance. Where are all your corporate docs (By-law, incorporation docs, filings, certifications, financials. Get ready for the due diligence review.
- **Cost Savings** – some may suggest that there will be cost saving as with some for profit space mergers. Check this assumption. May cost more to merge as staff expands and gets more defined or increased to meet greater services or increased admin or fundraising support.
- **Board Plan** – how will the Board be managed during this process and after. Is there a board development and management plan as part of the pre, during the merger and post merger. Try to build relationships as part of process.
- **Timing** – it may take longer than you plan to implement these changes.
- **Communication Plan** – How and who is managing? Stay ahead of this.
- **Books** – There are a number of good books on this subject by some of the consultants that work in this space. *La Piana, Thomas McLaughlin “Non Profit Mergers and Alliance*

GETTING LEGAL HELP

You can now apply for legal services directly through our website!

1. Visit <https://artsandbusinesscouncil.org/apply-for-services> and select “Apply Now”
2. Complete the application. Please include: your contact information, a brief explanation of your legal issue, and the names of any other related or involved parties.
3. For *pro bono* legal services, please also complete the financial information, **including proof of organizational income** (990, profit & loss statement, balance sheet, etc.)
4. Submit!

We’re continuing to waive VLA service fees for organizations and individuals financially impacted by COVID-19!

Contact Us!

LUKE BLACKADAR

Director of Legal Services

luke@artsandbusinesscouncil.org

ARTS & BUSINESS COUNCIL OF GREATER BOSTON

VOLUNTEER LAWYERS FOR THE ARTS OF MASSACHUSETTS

(617) 350-7600 x7016

www.artsandbusinesscouncil.org

ABOUT THE VLA

The **Arts & Business Council of Greater Boston** provides legal, business, and educational programs to the creative community of MA through, among other programs, business training for artists, legal services, non-profit board training/placement, fiscal agency, estate planning, HR support, insurance programs, and corporate art lending.

<https://artsandbusinesscouncil.org>

The **Volunteer Lawyers for the Arts** provides legal services, advice, and education programming to artists and cultural organizations in Massachusetts.

<https://artsandbusinesscouncil.org/vla>