

*Paul Hastings*

SUTHERLAND

## Surviving by Combining

**Darcy White/Adrienne Smith**  
**April 27, 2011**

**PROBONO**<sup>TM</sup>  
PARTNERSHIP / ATLANTA

## Mission of Pro Bono Partnership of Atlanta:

To provide free legal assistance to community-based nonprofits that serve low-income or disadvantaged individuals. We match eligible organizations with volunteer lawyers from the leading corporations and law firms in Atlanta who can assist nonprofits with their business law matters.

## Pro Bono Partnership of Atlanta Eligibility & Other Information

- **In order to be a client of Pro Bono Partnership of Atlanta, an organization must:**
  - ✓ Be a 501(c)(3) nonprofit organization.
  - ✓ Be located in or serve the greater Atlanta area.
  - ✓ Serve low-income or disadvantaged individuals.
  - ✓ Be unable to afford legal services.
- **Visit us on the web at [www.pbpatl.org](http://www.pbpatl.org)**
- **Host free monthly webinars on legal topics for nonprofits**
  - ✓ To view upcoming webinars or workshops, visit the [Workshops Page](#) on our website

## Issues Facing Nonprofits

- **Current extreme economic environment**
- **Highly-competitive market (there are more nonprofits than lawyers in the United States)**
- **Motivating and leading board members, staff and volunteers**
- **Fundraising difficulties**
- **Effectively managing the organization day-to-day**
- **Effectively planning for the future**

## Why Consider Combining?

- **Save your organization from extinction**
- **Improve market position**
- **Open the door to new opportunities**
- **Combined organizations with similar missions may be:**
  - ✓ More attractive to major donors/funders; and
  - ✓ Better able to serve their clients/community with more physical and personnel resources.

## Why Not Combine?

- **Loss of control**
- **Loss of organizational identity**
- **“Founderitis”**
- **“It’s not that bad...yet.”**
- **Better viable alternatives**
- **No good partners**
- **Savings of combined organization offset by the costs of the combination**

***The quest for organizational survival in a hostile environment should be secondary to the goal of advancing a useful social mission.***

***--Beyond Collaboration:***

***Strategic Restructuring of Nonprofit Organizations,  
David LaPiana***

## Types of Combinations or “Strategic Transactions”



## True Merger

- Typically only one of the original corporations will survive
- Thus there will be a true change in control
- Alternative is to have two entities merge into one newly created entity—though a new 501(c)(3) exemption would have to be obtained for the new entity
- All assets and liabilities of both entities will reside in the surviving corporation
- Accomplished pursuant to state law

## **Dissolution/Asset Transfer**

- **One entity will satisfy all its liabilities, transfer its assets to the other entity and then dissolve**
- **Approximately 8 out of 10 nonprofit “mergers” are actually dissolutions**
- **Beneficial to the “surviving” entity that structure leaves the surviving entity with the remaining assets of the “target” entity, but none of its liabilities (except in certain circumstances)**
- **Accomplished pursuant to state law**

## Other Types of Strategic Transactions

### ➤ **Back-Office Consolidation**

- ✓ Arrangement in which core administrative functions among nonprofits involved in similar work are shared

### ➤ **Joint Venture**

- ✓ Collaboration in which the character or location of control of two or more organizations are changed

### ➤ **Fiscal Sponsorship**

- ✓ Formal relationship to help formative nonprofits receive charitable dollars, develop an organizational structure and manage resources

### ➤ **Bankruptcy**

## Considerations for all Strategic Transactions

- **Engage competent counsel early in the process**
- **Do your “due diligence”**
  - ✓ Understand your partnering organization—especially liabilities
  - ✓ Understand that, even with an asset transfer, some successor liability may be imposed
  - ✓ Consider full financial audit
  - ✓ Are there endowments or restricted funds?
  - ✓ Are there members that will have to vote on the combination?
  - ✓ Where will there be “cultural” fit and where will there be “cultural” clash?

## Considerations for all Strategic Transactions (cont.)

- **Fiduciary duties of directors**
  - ✓ Duty of loyalty
  - ✓ Duty of care
  - ✓ Mission, not money
- **Handling staffing issues**
- **Leadership succession**
  - ✓ Executive Director
  - ✓ Board Members/Chair
- **Education of community, donors, volunteers, etc.**

## Mergers- 501(c)3 Organizations

### ➤ Plan of Merger:

#### ✓ *Must set forth:*

- Name of each merging corporation; name of surviving corporation
- Terms/conditions of merger
- Manner (if any) of converting the memberships or shares in each of the entities into memberships or shares of the surviving corporation

#### ✓ *May set forth:*

- Amendments to the articles of incorporation, bylaws or other governing agreements of the surviving corporation
- Other provisions relating to the planned merger

## Mergers- 501(c)3 Organizations

### ➤ Approvals:

#### ✓ *Member Nonprofits:*

- Board of Directors
- Members, by 2/3 of the votes cast or a majority of the voting power, whichever is less
- Any person whose approval is required for an amendment to the articles of incorporation or bylaws

**NOTE: Remember to check the governing documents of the organization. A greater vote may be required.**

## Mergers- 501(c)3 Organizations

➤ **Approvals:**

- ✓ *Non-member Nonprofits:*
  - Majority of Directors

**NOTE: Remember to check the governing documents of the organization. A greater vote may be required.**



## Mergers- 501(c)3 Organizations

### ➤ Secretary of State Filing:

#### ✓ Articles of Merger:

- Plan of Merger
- If no members were entitled to vote, a statement that member approval was not needed and that director approval was obtained
- If member approval was required:
  - The designation, number of memberships outstanding, number of votes entitled to be cast and number of votes approving plan; and
  - The total number of votes cast for/against by each class or the total number of undisputed votes for cast by each class and a statement that the number cast was sufficient for approval
- If approval by some other person is required, a statement that approval was obtained

## Mergers- 501(c)3 Organizations

### ➤ Secretary of State Filing:

#### ✓ Certificate of Merger:

- Name and state of incorporation of each merging corporation
- Name of surviving corporation
- Any amendments to the articles of incorporation of the surviving corporation
- That executed plan of merger is on file
- That executed plan of merger will be furnished upon request
- If shareholder approval was not required, a statement stating so
- If shareholder approval was required, a statement that the merger was duly approved by shareholders

## Mergers- 501(c)3 Organizations

➤ **Merger Effective Date:**

- ✓ When the articles or certificate of merger is filed, unless a later date is specified in the certificate

## Mergers

### ➤ Notifications:

#### ✓ Notice of Merger

- Must be mailed no later than the next business day after the filing of the articles or certificate of merger
- Sent to the official organ of the county where the registered office of the surviving corporation is located
- Must be published once a week for 2 consecutive weeks

## Mergers- 501(c)3 Organizations

➤ **Notifications (for organizations other than Private Foundations):**

- ✓ IRS: file a final Form 990, 990-EZ or e-Postcard (990-N)
  - For 2009 tax year returns (filed in 2010 or 2011):
    - Gross receipts normally less than or equal to \$25,000, file the e-Postcard
    - Gross receipts greater than \$25,000 and less than \$500,000, and total assets less than \$1.25 million, file either the 990-EZ or the Form 990
    - Gross receipts \$500,000 or more or total assets greater than or equal to \$1.25 million, file the Form 990

## Mergers- 501(c)3 Organizations

➤ **Notifications (for organizations other than Private Foundations):**

✓ IRS:

- Timing: File 4 months and 15 days after the effective date of the merger
- Provide certified copy of certificate of merger, resolutions and plan of merger

✓ For additional information, see

<http://www.irs.gov/charities/article/0,,id=156422,00.html>

## Mergers- 501(c)3 Organizations

### ➤ Due Diligence

- ✓ Key areas to focus on (list is not exclusive):
  - Corporate documents, financial statements, tax materials, properties and lease documents, contracts and agreements, litigation, insurance, charitable matters, intellectual property, human resources and employee benefits

## Dissolution/Asset Transfer

### ➤ Plan of Dissolution:

- ✓ Provision for the payment of all liabilities/obligations
- ✓ Must return assets requiring return upon dissolution
- ✓ Assets held subject to limitations permitting use for only charitable purposes must be transferred to organizations engaged in substantially similar activities
- ✓ Other assets must be distributed in accordance with the governing documents and as provided in the plan of dissolution



## Dissolution/Asset Transfer

### ➤ Approvals:

- ✓ *Member Nonprofits:*
  - Board of Directors
  - Members, by majority vote
- ✓ *Non-member Nonprofits:*
  - Majority of Directors

**NOTE:** Remember to check the governing documents of the organization. A greater vote may be required.

## Dissolution/Asset Transfer

### ➤ Notifications:

- ✓ Notice of Intent to Dissolve:
  - Secretary of State:
    - Name of the Corporation
    - Date dissolution was authorized
    - If member approval was required, a statement that dissolution was duly approved by the members
  - Publication:
    - Must be delivered prior to filing of notice of intent to dissolve with Secretary of State
    - Sent to the official organ of the county where the registered office of the corporation is located
    - Must be published once a week for 2 consecutive weeks

## Dissolution/Asset Transfer

### ➤ Notifications:

- ✓ Secretary of State
  - Certificate that a request for publication has been made
- ✓ Attorney General
  - Written notice of intent to dissolve at or before the time of filing of articles of dissolution with the Secretary of State
  - May not transfer assets until 30 days after giving written notice
  - When all or substantially all of the assets have been transferred, must deliver to the Attorney General the transferees of assets (other than creditors). Must indicate what assets each transferee received.

## Dissolution/Asset Transfer

### ➤ Notifications:

- ✓ The dissolving corporation must notify known claimants in writing of the dissolution proceedings
- ✓ Specific procedures for notification are set forth in O.C.G.A. § 14-3-1407

## Dissolution/Asset Transfer

- **Notifications (for organizations other than Private Foundations):**
  - ✓ IRS: file a final Form 990, 990-EZ or e-Postcard (990-N)
    - For 2009 tax year returns (filed in 2010 or 2011):
      - Gross receipts normally less than or equal to \$25,000, file the e-Postcard
      - Gross receipts greater than \$25,000 and less than \$500,000, and total assets less than \$1.25 million, file either the 990-EZ or the Form 990
      - Gross receipts \$500,000 or more or total assets greater than or equal to \$1.25 million, file the Form 990

## Dissolution/Asset Transfer

➤ **Notifications (for organizations other than Private Foundations):**

✓ IRS:

- Timing: File 4 months and 15 days after the effective date of the dissolution
- Provide certified copy of articles of dissolution, resolutions and plans of liquidation

✓ For additional information, see

<http://www.irs.gov/charities/article/0,,id=156422,00.html>

## Dissolution/Asset Transfer

### ➤ Secretary of State Filing

- ✓ Articles of Dissolution: filed after all known debts and liabilities have been paid or adequate provision has been made for payment. Must include:
  - Name of Corporation
  - Date on which notice of intent to dissolve was filed and a statement that it has not been revoked
  - Statement that all known debts, liabilities and obligations have been paid and discharged
  - Statement that all remaining assets have been distributed in accordance with plan of distribution or deposited with the Office of Treasury and Fiscal Services
  - A statement that there are no pending actions against the corporation or that adequate provision has been made for satisfaction of any judgment
  - A statement that the Attorney General has been notified

## Dissolution/Asset Transfer

➤ **Dissolution Effective Date:**

- ✓ When the articles of dissolution are filed

➤ **Claims Against Corporation:**

- ✓ Corporation can limit exposure by publishing with its notice of intent to dissolve a request that persons with claims against the corporation present them in accordance with O.C.G.A. § 14-3-1408
- ✓ Claims must be filed within a specified time period
- ✓ Claims can be satisfied out of undistributed assets
- ✓ If assets have been distributed, a distributee's total liability for all claims may not exceed the amount of assets distributed to it



**Questions?**



*Paul Hastings*

SUTHERLAND

## **For More Information:**

If you would like more information about the services of Pro Bono Partnership of Atlanta, contact us at:

Phone: 404-407-5088

Fax: 404-853-8806

[Info@pbpatl.org](mailto:Info@pbpatl.org)

[www.pbpatl.org](http://www.pbpatl.org)