Considering a Merger?

Erik Speakman
Speakman Management Consulting
Robyn Miller
Senior Corporate/Tax Counsel, Pro Bono Partnership of Atlanta

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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.
  - ✓ 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
- We host free monthly webinars on legal topics for nonprofits
  - ✓ To view upcoming webinars or workshops, visit the Workshops Page on our website
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Legal Information:

- ✓ **Focus of webcast is nonprofit organizations combining with other nonprofit organizations**.

- ✓ This webcast presents general guidelines for Georgia nonprofit organizations and should not be construed as legal advice. Always consult an attorney to address your particular situation.

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Agenda

- Circumstances that Raise Nonprofit Mergers
- Overview of Process for a Merger – 12 Steps!
- Merger & Other Combination Options - Legal
- Challenges and Lessons Learned

Definition of Merger

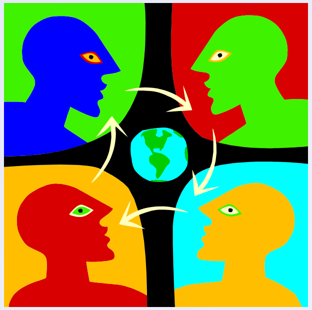
A combination of two things into one.

Changing Nonprofit Environment

- Rapid growth in the number of nonprofits – increasing competition.
- Increasingly complex and expanding needs.
- Increasing government devolution.
- Lack of corresponding increases in funding.
- Increasing funder pressure to collaborate.
- Difficulty in retaining staff and board leadership.
- Increasing public scrutiny,
  including the press

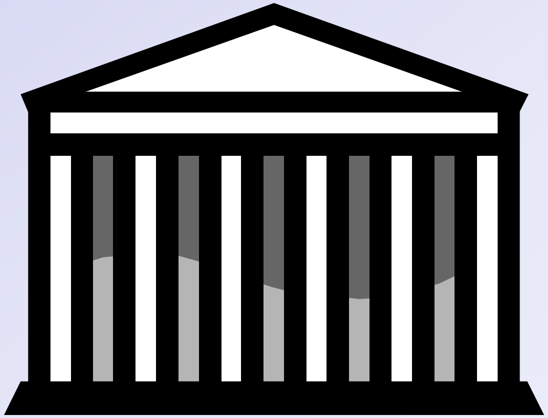
Some Benefits of Mergers

- Create more strategic funding sources.
- Create a broader continuum of services.
- Create more career opportunities for staff.
- Create operational economies of scale and efficiency.
- Gain greater public visibility and awareness.
- Larger market share and better market positioning.
- Integrate services.
- Greater political voice and influence.

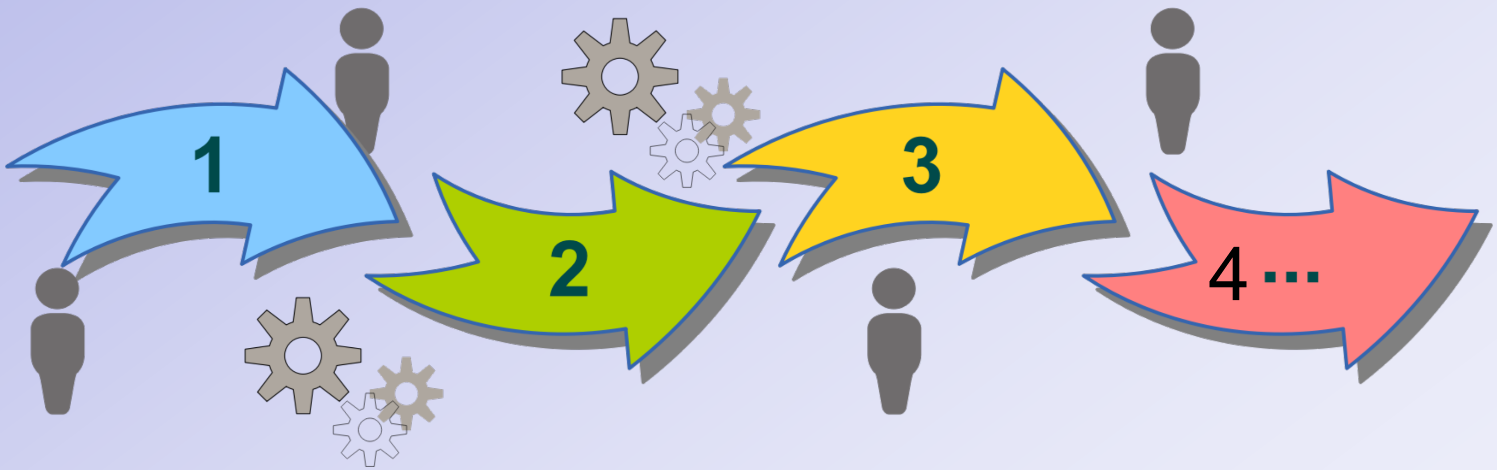


Architecture for Successful Merger

- Solid foundation in place
- Sound relationships among partners
- Worthwhile results
- Constituency for collaboration
- Collaborative leadership and principles



MORE FORMAL MERGER PROCESSES



Merger Process

- Phase 1 – Feasibility/Assessment Study
- Phase 2 – Negotiate a Merger
- Phase 3 - Plan for Restructuring & Legal Steps
- Phase 4 – Implementation of business combination

Getting Started

- Is the timing and reason right?
- Are you internally prepared for a merger assessment?
- What is the purpose?
- What is the best partner to meet the purpose?
- Is a merger feasible?

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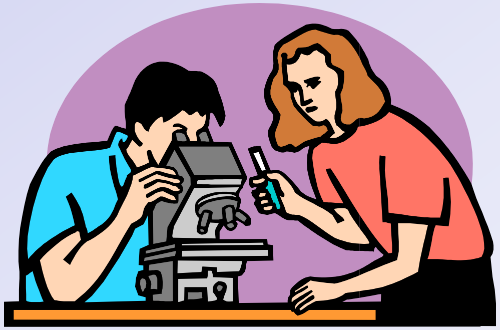
Phase 1 - Feasibility/Assessment

- Step 1 – Define the current internal and external situations; assess needs and opportunities
- Step 2 – Partner assessment for merger potential – limited due diligence
- Step 3 – Determine merger purpose and commit to negotiation



Internal Situation Analysis

- Purpose of the merger
  - ✓ Help your Theory of Change - Client or organizational issues to address through a merger
  - ✓ Outcomes desired from the merger
  - ✓ Criteria for partners and a successful merger
- Do you meet internal key success factors?
- Consensus on key issues and outcomes
- What you bring to the table – strengths – how does your partner benefit

Internal Key Success Factors

- Staff/board member champions the process – preferably board
- Positive past collaboration experiences
- Board support/encouragement
- Organizational risk taking
- Growth orientation
- Positive board-ED relationship

Partner Assessment

- ID potential partners based on your purpose
- Communicate interests
- Evaluate
  - ✓ Past experiences
  - ✓ Degree of trust
  - ✓ Complementary Partner strengths and weaknesses

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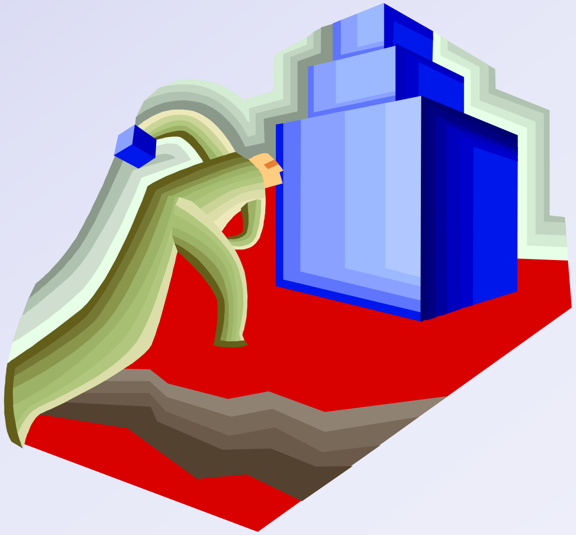
Purpose and Good Faith

- Develop a Merger Task Force
- Board Authorization/resolution to negotiate
  - ✓ Timeframe
  - ✓ Purpose of merger
  - ✓ Key partnership criteria
  - ✓ Commitment to communication
  - ✓ Nondisclosure agreement



Nondisclosure Agreements

- Protects confidential business information
- Don’t share business practices, donor contacts, financials, trade secrets, etc. without an NDA
- Sooner these are in place, the better; Early in Phase 1

Phase 2 – Negotiate a Merger

- Step 4 – Complete due diligence and enter into Letter of Intent (Legal Counsel)
- Step 5 – Merger Task Force negotiates key issues.
- Step 6 – Socialize the recommendations with entire board & key stakeholders.
- Step 7 – Merger Task Force develops a Plan and Agreement voted on by boards. (Legal Counsel)

Legal Counsel

- Seek counsel after the initial high-level due diligence is complete
  - ✓ Discuss merger options
  - ✓ Prepare Letter of Intent
    - Nonbinding
    - Limited time
    - Ultimate goal
  - ✓ Legal due diligence
  - ✓ Prepare appropriate resolutions, documents and filings based on selected merger option
- Each entity needs its own legal counsel

Common Issues

- Governance Issues – control
- Financial Issues
- Program Issues
- Human Resources Issues
- Capital Issues
- Communication Issues

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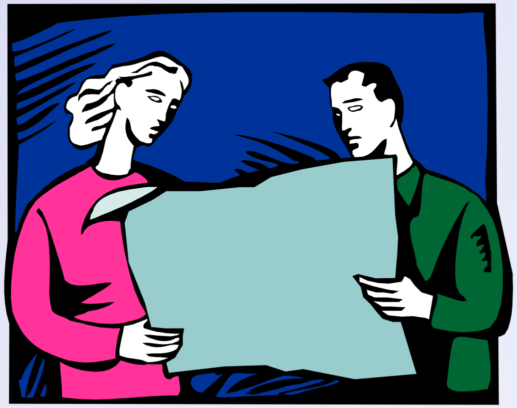
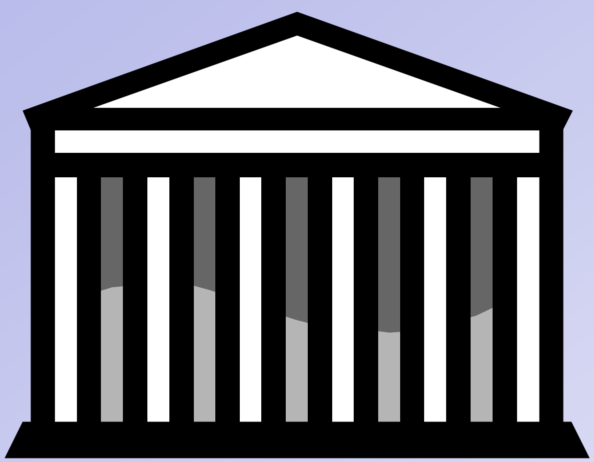
Phase 3 - Plan for Merger

- Step 8 – Develop the merger implementation plan
- Step 9 – Develop structures and processes for implementation
- Step 10 – Complete merger



Phase 3 Details



- Refine legal structure
- Develop governance structure
- Create a Transition Team
- Create need Board/staff Working Task Forces
- Create merger legal documents depending on structure

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Phase 4 - Implementation

- Step 11 –Implementation and cultural integration
  - ✓ Board & organizational Integration
  - ✓ Working Task Forces meeting regularly
  - ✓ Transition Team to oversee/coordinate implementation
  - ✓ Cultural integration - jointly create new values/norms
- Step 12 – Monitor and evaluate
  - ✓ Measure/evaluate outcomes
  - ✓ Celebrate successes

Merger Structure Options

- Asset Transfer & Dissolution (not a true merger)
- Consolidation – both entities merge into new entity
- Parent – Subsidiary relationship created
- Merger of entities

Asset Transfer and Dissolution

- Entity A's assets transferred to Entity B and Entity A dissolves
- Entity B can select assets and liabilities it acquires – Avoiding being burdened with liabilities of Entity A
- May need assignments of revenue-generating contracts
- Employment issues to be addressed

Consolidation

- Entity A & Entity B merge into newly created Entity C
- Entity C must obtain § 501(c)(3) status first
- All assets and liabilities of Entities A & B are part of Entity C
- Bequest, devise, gift, grant, or promise in a will or other instrument of donation, subscription, or conveyance transfers to Entity C unless instrument says otherwise
- Entities A & B disappear in consolidation
- Fresh start = new board, new employee structure, etc.

Parent – Subsidiary

- A CONTROL CHANGE
- Revise Entity A's Articles of Inc. making Entity B sole member of Entity A
- Board of Entity A replaced with directors or officers of Entity B
  - ✓ Entity A becomes a subsidiary of Entity B
  - ✓ Each entity intact
  - ✓ Assets and liabilities remain in each entity
  - ✓ Employees remain in each entity

Legal Merger

- Entity A mergers into Entity B
  - All assets & liabilities of A transferred/assumed by B
  - No need to dissolve A; disappears throughs merger process
  - Difficult to unwind

Merger – Legal Issues

- Full combination
- Full due diligence!
- Liabilities
- Corporate structure – members and directors
- Tax status of remaining entity
- Employment alignment
- Restricted funds
- Contract restrictions
- Regulatory approvals

Merger Legal Steps

- Nondisclosure agreement
- Letter of Intent
- Legal Due Diligence
- Plan of Merger
- Articles/Certificate of Merger
  - ✓ May include revisions to articles of incorporation and bylaws of surviving entity

Funders Perspective

- 53% of <u>all</u> foundations report rarely or never supporting collaboration; only 13% often or always
- Nonprofits report that foundations currently play a limited role in most collaborations
- Foundations report supporting all types of collaboration
- As CEOs, foundations' appetite is relatively higher for the more integrated forms of collaboration
- Foundations report that most collaborations are successful for grantees
- Foundations see joint programs as the most successful; nonprofits see it as the least successful
- Foundations report nonprofits aren't asking for help

Common Merger Mistakes

- Conducting formal discussions without board approval.
- Merger negotiations without purpose clarity.
- Lack of resources invested in the process – including someone dedicated to implementation/integration
- Lack of clearly defined roles, responsibilities and boundaries.
- Not acting like equals.
- Not addressing the key issues/concerns- including fear of job lost, and control, impact to programs/clients, & culture differences
- Withholding organization information from other entity.
- Allowing the process to take too long/ or too much inactivity between meetings.
- Inadequate number of engaged key stakeholders, especially staff.
- Not involving third-party neutral assistance.

Other Lessons Learned

- Mergers take time and resources – but investing proper time/resources up front makes implementation more successful
- People issues more important than tasks - human integration is harder than system integration
- Progress more rapidly and effectively when people focused on mission/purpose than their own organization
- Merging does not require loss of brand & control
- Funders have a critical role to play in the process - Language of collaboration/partnership is confusing
- Can be a highly effective capacity-building tool
- Provide an incredible bang for the buck.

For More Information:

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

www.pbpatl.org
Phone: (404) 618-0900
info@pbpatl.org