



Atlanta



Austin



Chicago



Dallas



Hong Kong



Houston

LLB&L

Locke Lord Bissell & Liddell ^{LLP}

Models in Collaboration: Words of Wisdom for Non-Profits *Kansas Housing Conference*

by
Cynthia L. Bast

August 11, 2011



London



Los Angeles



New Orleans



New York



Sacramento



San Francisco



Washington, DC

Ways to Consolidate

- Two categories of consolidation:
 - Merger
 - Contractual consolidation

Ways to Consolidate

- **Merger**

- Merger of one entity into another $A + B = A$

- “Newco” merger $A + B = C$

Ways to Consolidate

- Merger of one entity into another
 - One entity ceases to exist and is completely subsumed into the other entity. The merging entity ceases to exist, without a requirement for dissolution or any other act.
 - Often, the “weaker” entity merges into the “stronger” entity.
 - The surviving entity (A) receives all the assets and liabilities of the merging entity (B) and adds them to its own.

Ways to Consolidate

- Merger of one entity into another
- ADVANTAGES:
 - Truly consolidates by using one set of resources, instead of two, to fulfill the mission.
 - Allows two entities who might have competed previously to cooperate and maximize their potential.
- DISADVANTAGES:
 - One entity loses its identity – may be difficult to accept for board members, key employees, donors.
 - Integration of staff, board, etc. may be key to success.
 - Can be time consuming and may be expensive.

Ways to Consolidate

- Newco merger
 - A brand new entity is created (C). Both entities (A and B) merge into the new entity. A and B cease to exist, without a requirement for dissolution or any other act.
 - The new entity (C) receives all the assets and liabilities of both A and B.

Ways to Consolidate

- Newco merger
- ADVANTAGES:
 - Puts both entities on equal footing – neither one is subsumed into the other.
 - Provides a fresh start. Newco can be structured as needed to maximize potential going forward.
- DISADVANTAGES:
 - Both entities may lose identity.
 - Integration of staff, board, etc. may be key to success.
 - Can also be time consuming and expensive.

Ways to Consolidate

- **Contractual consolidation**
 - Asset acquisition
 - Other kinds of agreements, like project sponsorship, administrative oversight

Ways to Consolidate

- **Asset acquisition**

- One entity (A) acquires all or some portion of the assets of the other entity (B). This can include real property assets, personal property assets, employees, office equipment, bank accounts, programs.
- Purchasing entity does not necessarily acquire the liabilities of the selling entity.
- If the selling entity transfers all of its assets, the transaction may be followed by the dissolution of the selling entity. (This is more like a merger.)

Ways to Consolidate

- **Asset acquisition**
- **ADVANTAGES:**
 - Purchasing entity can avoid taking on the liabilities of selling entity.
 - May allow a struggling nonprofit to reorder its priorities and retool itself.
 - If purchasing entity only acquires some of the entity's assets, the selling entity can maintain its identity, board, etc.
 - May be fewer governmental approvals/filings.
- **DISADVANTAGES:**
 - Selling entity loses control of the assets and their use.
 - Selling entity may be dissolved and effectively go out of business.

Ways to Consolidate

- Other agreements
 - Can be virtually anything that allows the parties to work together.
 - Has a defined term.

Ways to Consolidate

- Other agreements
- ADVANTAGES:
 - Is not “forever” like a merger. (Could lead to a merger if the parties work particularly well together.)
 - Neither party takes on the liabilities of the other. Financial records remain separate.
 - May keep a non-profit alive when it otherwise may not be able to continue.
 - May not require as many consents as a merger.
 - May not take as long to complete the transaction.

Ways to Consolidate

- Other agreements
- DISADVANTAGES:
 - If one non-profit is troubled, this approach may not be enough to ensure survival. While it may appear the organization “needs” one thing, in reality, it may need something else. It may have leadership or other issues that are the “real” problem.
 - Community confusion resulting from one organization implementing the programs of the other.
 - Mission creep. When one organization administers the programs of another, it may do so in a way that fulfills its own mission more than the mission of the organization that has contracted with it.

Legal Considerations in Due Diligence

- Organizational documents
- Federal tax exempt status
- Employment issues
 - Contracts
 - Policies
 - Lawsuits/Complaints
 - Benefits

Legal Considerations in Due Diligence

- Real property
- Personal property
- Financial agreements
- Lawsuits
- Insurance
- Consents

Legal Documentation

- All Transactions
 - Confidentiality Agreement
 - Applies to virtually any kind of transaction. Would be used early in the process.
 - Should bind the board and staff members involved in the discussions.

Legal Documentation

- All Transactions
 - Letter of Intent
 - Applies to virtually any kind of transaction.
 - Gives a timeline and framework for the due diligence process. Business terms may be nonbinding but exclusivity may be binding.
 - Letter of intent should obtain board approval.

Legal Documentation

- All Transactions
 - Corporate Resolutions
 - Minutes or written consent of board/members, as appropriate, to approve the transaction. May be more than one set of resolutions, to approve various stages of the transaction as it moves forward.
 - Should include:
 - WHAT is being authorized
 - WHO is authorized to make decisions/sign documents
 - WHETHER there are any conditions on the grant of authority
 - Final approval of the plan of merger by the board, then submitted to the members (if any) for approval.

Legal Documentation

- Merger Documents
 - Agreement and Plan of Merger
 - Structure of merger
 - Approvals by members/board
 - Conversion of membership interests, if applicable
 - Representations and warranties – can provide structure for due diligence
 - How employee and benefit issues will be addressed
 - How boards will be combined

Legal Documentation

- Merger Documents
 - Agreement and Plan of Merger
 - Recitals of consents obtained or how they will be obtained
 - Any issues with regard to treatment of assets
 - Plans for modifications to organizational documents
 - Name change
 - Change in board configuration
 - Changes to membership categories
 - Conditions and timeline to closing

Legal Documentation

- Merger Documents
 - Certificate/Articles of Merger (filed with Secretary of State)
 - Amendment to Bylaws
 - Amendments of key agreements
 - Employment
 - Financing

Merger becomes effective upon filing of Certificate/Articles of Merger.

Legal Documentation

- Newco Merger Documents
 - Agreement and Plan of Merger (see above)
 - Articles of Incorporation for Newco (filed with Secretary of State)
 - Bylaws for Newco
 - Certificate/Articles of Merger for both merging entities (filed with Secretary of State)
 - Amendments of key agreements (see above)

Legal Documentation

- Asset Acquisition Agreement
 - Master Asset Acquisition Agreement
 - Importance of schedules
 - Representations and warranties
 - Approvals by members/board
 - Recitals of consents obtained or how they will be obtained
 - Conditions and timeline to closing

Legal Documentation

- Asset Acquisition Agreement
 - Deeds/Bill of Sale for real and personal property
 - Assignment of leases
 - Assignment of contracts
 - Amendments of key agreements
 - Employment
 - Financing

Legal Documentation

- Other Contractual Arrangements

Elements of the contract would include:

- Clear description of the services to be provided and to whom. How they measured, and duration of performance. Discretion in performance versus strict guidelines.
- Who receives funds (donations, grants, etc.) and how those funds are utilized or paid.

Legal Documentation

- Other Contractual Arrangements

Elements of the contract would include:

- Indemnification between parties. Insurance coverage to support indemnification.
- Who gets to use what assets – do any assets need to be leased or assigned?
- Allocation of expenses among the parties.

Legal Documentation

- Other Contractual Arrangements

Elements of the contract would include:

- What happens if the parties disagree or if one defaults in performance?
- How does the agreement terminate and what payments are made upon termination?

THANK YOU

Cynthia L. Bast

Locke Lord Bissell & Liddell LLP
100 Congress Avenue, Suite 300
Austin, Texas 78701
(512) 305-4707
cbast@lockelord.com