



# Nonprofit Mergers

Erin Gloeckner, Project Manager  
Nonprofit Risk Management Center  
Erin@nonprofitrisk.org  
202-785-3891

## What's Covered in this Webinar

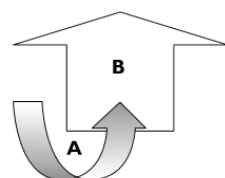
- The merger process
- Risks and challenges of mergers
- Tips to help you merge successfully
- Examples of successful nonprofit mergers

## What is a Nonprofit Merger?

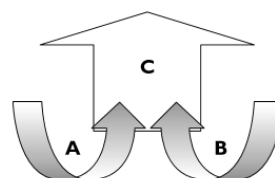
- Two or more nonprofits decide to combine all of their resources and assets into a single entity
  - Liabilities, assets, and obligations are combined
- This may simplify accounting and oversight, but it leads to a new set of challenges...

## Structure

- An acquisition can take many forms:
  - Merger
  - Consolidation
  - Acquisition of Assets
  - Joint Venture
- Determine your structure early - each method has different legal and tax requirements



Merger -  $A+B=B$



Consolidation -  $A+B=C$

## Reasons to Merge

- Increase financial or operational efficiencies
- Reach a larger constituency
- Greater access to funding
- Access new expertise and experience
- Clearer structure of authority
- Streamlined communication
- Greater manpower and outreach potential
- Larger potential impact on clients/community

## Who to Merge With

- A nonprofit you already have a relationship with
  - A partner NP from a past project or program
  - Relationship provides foundation for conversations about starting a merger

## Qualities to Assess in a Merger Partner

- History of previous relationships
- Mission and values compatibility
- Consistency of vision
- Receptivity to giving up some degree of autonomy
- Program strengths and weaknesses
- Organizational size and structure
- Complementarity of organization's culture
- Board/Trustee compatibility
- Management and staff leadership
- Human Resources integration
- Potential for operating efficiencies
- Financial status
- Predicted long-term survival
- Funders' support of the partnership
- Stakeholder perceptions of the merger
- Other assets

Source: Mandel Center for Nonprofit Organizations at Case Western Reserve University  
<http://msass.case.edu/wp-content/uploads/2013/03/MergingNonprofitOrgs.pdf>

## Big Risks of Merging

- Financial:
  - May strengthen financial standing in the long run
  - Up-front costs of merging can be high
    - Legal filings, new branding, human resources, audits...
  - What to do with restricted funds?
- Resistance from stakeholders
  - Board members, employees, general public...
- Conflicts of interest

## Risk of Resistance

**“Mergers are made for financial reasons  
but fail for people reasons.”**

– Bill Strathmann, Network for Good

Source: Nonprofit Mergers & Alliances – Don't Try This at Home  
<http://www.frogloop.com/care2blog/2009/5/20/nonprofit-mergers-and-alliances-dont-try-this-at-home.html#ixzz33V1zokus>

## Risk of Resistance

### Executive/staff resistance:

- Layoffs are key to realizing cost savings in a merger
- Displaced for-profit executives are often happy to exit after a merger - they can cash out company shares or take an exit bonus
- But many nonprofit executives have no financial cushion if they are forced out after a merger

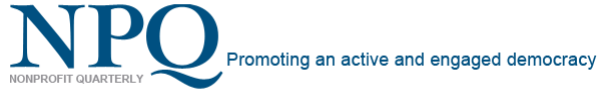
### Board resistance:

- A board member may object to a merger because it may diminish his or her role or pet project

Source: Nonprofit Mergers & Alliances – Don't Try This at Home  
<http://www.frogloop.com/care2blog/2009/5/20/nonprofit-mergers-and-alliances-dont-try-this-at-home.html#ixzz33V1zokus>

# Conflicts of Interest

JUNE 2, 2014



## The Merger That Might Have Been: Sanford Health and Fairview Health Services

WRITTEN BY MICHAEL WYLAND. CREATED ON FRIDAY, 19 APRIL 2013 13:00

We all know by now that entering into a merger discussion does not mean that a merger will occur. Issues of misalignment, or unclear long-term viability, or lack of community support can crop up in odd places. That's why it's worth examining both consummated and unconsummated merger talks for lessons that can be gleaned. In this case, two massive health organizations may have misunderstood the degree to which their publics needed to be kept informed and assured that their interests came first.

Mergers involving multibillion-dollar corporations can be big news. Even in the nonprofit healthcare industry, where hospitals are merging with increasing frequency, some mergers are more significant than others. When the public learned in late March that Sioux Falls, SD-based Sanford Health was in merger talks with Minneapolis-based Fairview Health Services, it was big news across the Upper Midwest. The news was almost as big when Sanford Health abruptly halted the merger talks in early April, within days of the published reports.

Why did Sanford pull out of the talks? The prospect of the two \$3 billion hospital systems merging alarmed some Minnesota leaders. The Minnesota Attorney General, Lori Swanson, called a press conference in late March to express concerns about Fairview assets remaining in Minnesota after a merger, and speculated about the future of the University of Minnesota's teaching hospital, operated by Fairview, after a merger with an out-of-state entity. She convened a public hearing on short notice, on a Sunday in early April, and promised additional inquiry into the proposed merger. Two Minnesota state legislatures introduced a bill to

Source: <https://nonprofitquarterly.org/management/22159-the-merger-that-might-have-been-sanford-health-and-fairview-health-services.html>

# Conflicts of Interest

## ARC OF DENNY SANFORD BUSINESS TIES TO SANFORD HEALTH

**"Denny is a pure donor to us. He insists on NOT being involved with Sanford Health business, management or governance . . ."**

— Kelly Krabbenhoft, CEO of Sanford Health, on donor T. Denny Sanford



**T. DENNY SANFORD**

**\$600 million**

Since 2007, Denny Sanford has given more than \$600 million to Sanford Health, which changed its name from Sioux Valley Health.

South Dakota's largest hospital-clinic network has pulled out of merger talks with Fairview Health System, but still has expansion plans in Minnesota.

Source: Sanford Health, Star Tribune research

JENNIFER BJORHUS, TONY KENNEDY and MARK BOSWELL • Star Tribune



**SIOUX FALLS BUILDING**

Sanford Health bought a Sioux Falls office building owned by Premier Bankcard for \$3.75 million in 2008.



**DAVE KNUDSON**

A senior vice president at Sanford Health, Knudson is also Denny Sanford's personal lawyer and a director at two of Denny Sanford's banking businesses.

**DENNY SANFORD PREMIER CENTER**

Sanford Health contributed \$7 million to the new Sioux Falls events center, in a naming rights deal that also involved Sanford's Premier Bankcard and First Premier Bank. The building is now called the "Denny Sanford Premier Center."

**RUSHMORE SERVICE CENTER**

Sanford Health uses Denny Sanford's Rushmore for a portion of its debt collection.

**PREMIER BANKCARD**

Sanford Health has company credit cards with Denny Sanford's credit card operation.

**EMPLOYEE CREDIT UNION OUSTED**

The credit union at Sanford Health USD Medical Center in Sioux Falls was evicted in 2009, replaced by a branch of Sanford's First Premier Bank.



"Arc of Denny Sanford business ties to Sanford Health" <http://www.startribune.com/newsgraphics/204947631.html>

## Key Merger Concerns

- Considerations for organizational leadership
- Key points in negotiations
- Possibilities for how to structure the merge
- Mechanics of the merger
- Stakeholder relations

## Consider...

- What is your goal in merging?
- How will the organizations merge?
- What costs (and time) will you incur during the merge?
- What will happen to existing personnel or board members?
- How may they respond?
- And what state or federal laws may apply?

## Issues for Negotiation

- What to name the newly merged organization?
- What will the mission of the organization be?
- Who will serve as leader for the organization?
- Where will it be located?
- What positions and staff will be needed?
- How will the organizations be integrated?
- What key contracts may exist?
- What are the liabilities of both organizations and how will they be handled?

## Priority Issues

- Organization's leader
- Communication channels between personnel
- How to transfer and update assets, clientele, and liabilities
- Organizational structure and integration



## Mechanics of a Merger

1. Initial conversations
2. Planning phases
3. Finalizing the deal

## Part 1: Initial Conversations

- General, broad – save the details for later
- A **nondisclosure agreement** should be enacted in order to ensure the privacy of both organizations

## Nondisclosure Agreement

- Both organizations must access each other's information, some of which is confidential
- Nondisclosure Agreements protect the organizations should a merger not take place
- Nondisclosure Agreements also:
  - Lay out the foundations of the negotiation process
  - Establish parameters for information sharing
  - Help iron out the final details of a merger

## Nondisclosure Agreement Elements

- The NDA should include:
  - Groundwork for what confidential information is covered in the agreement and what information is public knowledge
  - An obligation not to use or disclose any confidential information of the other organization
  - An exception for disclosures that are required by applicable law or court order
- The NDA does not have to finalize merger structure...
  - But it should encourage clear and open communication to make for efficient negotiation

## 2. Planning Phases

- Timeline and responsibility checklist
- Letter of intent
- Due Diligence
- Definitive Agreement

## Timeline & Responsibility Checklist

Before getting down to details, both organizations should discuss and agree upon the following:

- What is the schedule for the merger and the negotiations?
- Who will have responsibilities in the merger and what will those be?
- Will there be a committee comprised of members from both organizations to negotiate the details?
- What documents or actions are required in the merger and when will they be completed in the schedule?

## Timeline Guidelines

- Set a timeline for finishing each stage of negotiations
- Be flexible in the case of unforeseeable contingencies
- Encourage efficiency by delegating which duties need to be completed by who, and by what date
- If you use a negotiation committee, set the meeting schedule and structure in advance

## Letter of Intent

- An LOI or term sheet is optional for organizations in a merger
- Helps plan the time and information sharing guidelines of the merger
- Gives structure to the negotiation process
- Typically non-binding in terms of the merger, but can be binding in respects to confidentiality and exclusivity

## Letter of Intent: The Great Debate

- Two competing views on LOIs:
  - Waste of resources
  - Necessity to protect resources
- Situation and context determine whether LOI is appropriate for you
- If you are uncertain how the merger will develop, an LOI can increase your confidence

## Due Diligence

- Crucial aspect of any merger
- Process of examining an organization to ensure that its operational, legal, and financial affairs are being accurately presented

## Due Diligence... Keep in Mind

- May take significant time and effort
  - Documents must be reviewed carefully to ensure both NPs are operating properly
  - Document review can provide insight into challenges that might remain after the merger
  - Review can show each NP what the other is doing more efficiently

## Two Key Factors of Due Diligence

- Due diligence reviews should help you determine:
  - Whether you and your partner can and should proceed with the merger
  - On what terms the merger should be centered

## What to Examine

- Identify documents you want to review
- Prepare a request list
- Ask for:
  - Organizational documents
  - Policies and Contracts
  - Tax documents
  - Insurance documents
  - Financial documents
  - Personnel documents

## Organizational Documents

- Possible documents for a due diligence review:
  - Articles of Incorporation
  - By-laws and all amendments
  - Current officers and directors
  - Board of Directors meeting minutes
  - Any subsidiaries, joint ventures or partnerships that may exist

## Policies and Contracts

- Possible documents for a due diligence review:
  - Copies of all operating licenses and permits
  - Any contracts or deeds relating to real estate or property owned
  - Statements describing any threatened or pending government investigations or litigations
  - Operational or financial policies and procedures
    - Finance, HR, technology, client relations/protection...

## Tax Documents

- Possible documents for a due diligence review:
  - IRS Determination Letter
  - State tax exemption letters
  - Last 3 years of federal information returns such as forms 990, 990-PF, etc.
  - Recent state and local tax returns
  - Employment tax filings
  - Communications with the IRS & state tax authorities
  - Information regarding unrelated business income
  - Tax liens



## Insurance Documents

- Possible documents for a due diligence review:
  - Copies of all insurance policies and coverage
  - Fire and extended property coverage
  - Workers compensation
  - Professional practice
  - Volunteers coverage
  - Public liability
  - Any claims or loss runs in the past 3 years

## Financial Documents

- Possible documents for a due diligence review:
  - Last 3 audit statements
  - Current financial statements
  - Capital budgets and operating costs for the year
  - Information on revenues and expenses
  - Projections and strategic plans
  - Internal controls
  - List of the organizations financial institutions
  - Funding sources
    - Individual donors
    - Foundation or corporate support
    - Government funding
    - Grants

## Personnel Documents

- Possible documents for a due diligence review:
  - Personnel policies or employee manual
  - Current employees and job descriptions
  - Information on employee benefit options
  - If applicable, information on recent union activities or actions
  - Lists of consultants and vendors used by the organization

## Potential Deal Breakers

- Potential deal breakers that may be found in due diligence include:
  - Accounting issues
  - Litigation
  - Regulatory and compliance issues
  - Tax issues
  - Third party consent issues

## Unexpected Findings in Due Diligence

- If troubling or potentially inaccurate information is discovered during due diligence, communicate this to the other organization
- The problem may be fixable, and if not, one organization may compensate for it in the final merger agreement
- Compensation is done by covenants, specific provisions in the documents, and other methods

## Due Diligence Recommendation

- Findings may result in the decision to not proceed with the merger
- Recommendation: organizations only complete due diligence reviews when the potential merger seems likely to be pursued by both sides

## Definitive Agreement

- Draft a definitive agreement if both organizations decide to merge
- Outline the responsibilities of each organization as they become one entity
- The agreement should include:
  - Letter of Intent
  - Due diligence findings
  - Any board approvals

## Components of an Agreement

- Description of parties involved
- Economic and structural terms for the merger
- Definitions
  - Explain any confusing terminology or organizational shifts
  - These may stretch across all sections of the merger
- Representations and warranties
- Nondisclosure agreements
- Covenants
- Closing conditions
- Remedies and indemnification
- Miscellaneous provisions

## 3. Finalizing the Deal

- Approvals
- Tax changes
- Board member reassignment
- Post-merger operations

## Approvals

- Following a review of the due diligence reports, the merger will likely require a vote from one, if not all, of the following:
  - The board of directors of either, or both, nonprofits
  - Member approval by either, or both nonprofits
  - Regulatory approval by a government agency

## Board Approval

- The board should review:
  - The merger framework and documents outlining it
  - Due diligence findings
- Provide explanatory documents to board members to help them understand any confusing sections of the merger
- Without a vote of approval by the board, the merger may not be able to succeed

## Member Approval

- For nonprofits not needing a binding vote of the board of directors to approve a merger, they may have to seek:
  - A vote of the members
  - A vote of a representative committee for the members
- Considerations:
  - Hold additional meetings and info sessions to explain the merger framework to members
  - Provide members with non- confidential sections of the merger documents before meetings and votes

## Regulatory Approval

- May require further regulatory approval depending on the function of NPs involved
- This may come from federal, state, or local government
- Tips:
  - Appoint a particular person or committee to ensure regulatory approval happens
  - Create timetable for attaining regulatory approval

## State Filings

- Ensure that the new organization secures the proper state regulatory certification
  - This will prevent improper regulation and taxation
  - Plan for state certification in the merger framework
- The mission and structure of the new organization will determine whether:
  - The new organization must be certified
  - The new organization must file in an entirely new way from the old organizations

## Tax-Exempt Notices/Applications

- Appropriate paperwork must be filed with the state to ensure tax exempt status
  - This is governed by the merger framework, the mission and goals of the new organization, and the organizational structure
  - Especially important if you move into a new state or merge with an out-of-state partner
- There may also be federal paperwork to file to ensure the organization is certified as 501(c)(3)
- If the new organization is operating similarly to the old organizations, the filing likely can be accomplished according to the same processes the old organizations used

## Managing Board Member Reassignment

- At times, not all board members can be retained from the merging nonprofits
- Ensure that all those involved are properly notified of changes in duty and role
- If possible, give both boards of directors equal levels of input into the merger framework



## Duties of Board Members

- Lay out the duties of the new board members
- Also clarify duties of board members who will not be retained from the old organizations
- Establish clear lines of communication to ensure maximum operational efficiency

## Closing the Deal

- Secure the appropriate votes to approve the merger framework
- Amend the merger framework if necessary
  - This may include amendments to any and all parts of the framework, even the articles of incorporation
  - Ensure that the changes are approved by each old organization
- Once finalized, secure appropriate signatures and file the articles of incorporation with the proper state body

## Post-Merger Operations

- Notify all members, clients, and other stakeholders of the merger
- Development strategies to promote the new organization:
  - Website changes
  - Community outreach
  - Social Media campaigns
  - Branding

## A Merger Success Story

### **Boston Living Center, hit by 2010 scandal, eyes renewal through merger with Victory Programs**

Posted by Matt Rocheleau February 7, 2012 04:03 PM



Source: Boston.com

[http://www.boston.com/yourtown/news/back\\_bay/2012/02/hivaid\\_center\\_eyes\\_renewal\\_th.html?camp=pm](http://www.boston.com/yourtown/news/back_bay/2012/02/hivaid_center_eyes_renewal_th.html?camp=pm)

## Why the Merger Worked: Boston Living Center + Victory Programs

- Complimentary missions and clientele
- Mutual benefits from the sharing of assets
- Both partners retained some autonomy
- BLC + VP had previously partnered on programs
- Unanimous approval from both boards
- Victory Programs had success with past mergers
- Financial support for the merger from the Catalyst Fund (Funder of nonprofit collaborations in Boston area)

## Another Successful Merger

### The Boston Globe

#### Pine Street Inn, hopeFound merging to serve homeless

Focus to be on long-term housing

By Matt Rocheleau | GLOBE CORRESPONDENT JANUARY 30, 2012

Two nonprofit agencies with a combined 70 years experience aiding Boston's homeless will soon merge, uniting their similar, but complementary services, in an effort to simplify the process for finding their clients permanent housing.

South End-based Pine Street Inn and hopeFound will announce the move this afternoon following a deal signed last week by each agency's board after a year of discussions between the two administrations, officials said.

Source: The Boston Globe

[http://www.bostonglobe.com/metro/2012/01/30/boston-homeless-service-agencies-pine-street-inn-hopefound-merge/UT80ngArgS2q6Eo3XULRnJ/story.html?s\\_campaign=sm\\_tw](http://www.bostonglobe.com/metro/2012/01/30/boston-homeless-service-agencies-pine-street-inn-hopefound-merge/UT80ngArgS2q6Eo3XULRnJ/story.html?s_campaign=sm_tw)

## Case Study on Pine Street Inn Merger



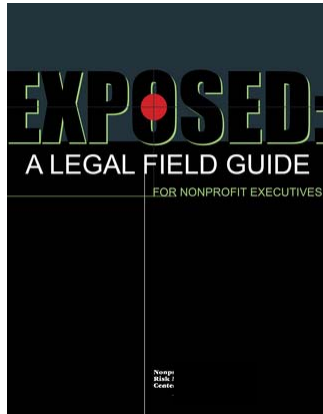
Source: Nonprofit Finance Fund

[http://nonprofitfinancefund.org/files/catalyst\\_fund\\_case\\_study\\_1-30-13.pdf](http://nonprofitfinancefund.org/files/catalyst_fund_case_study_1-30-13.pdf)

## Why the Merger Worked: Pine Street Inn & hopeFound

- Similar missions and clientele
- No overlapping services – program variety would enhance both organizations
- Merged for the right reasons – to advance mission and support stakeholders
- Thorough due diligence and feasibility studies
- Sought input from other NPs who had considered merging
- Smooth executive transition
- Financial support for the merger from the Catalyst Fund

## Want More Merger Help?



- Reserve a copy of the new edition of *Exposed: A Legal Field Guide for Nonprofit Executives*
- New chapter on mergers & acquisitions
- **[www.nonprofitrisk.org](http://www.nonprofitrisk.org)**

## Support for Merging Nonprofits

- SeaChange-Lodestar Fund for Nonprofit Collaboration (<http://seachangeap.org/lines-of-business/nonprofit-collaboration/>)
- Surdna Foundation ([www.surdna.org](http://www.surdna.org))
- The Catalyst Fund (Boston area - <http://nonprofitfinancefund.org/northeast/new-england-catalyst-fund>)
- New York Merger, Acquisition, and Collaboration Fund (NYC area - <http://www.nymac.org/>)
- Other funding groups exist across the US!

## Other Resources

- “All About Mergers of Nonprofit Organizations” by Jerald A. Jacobs
  - <http://www.pillsburylaw.com/publications/all-about-mergers-of-nonprofit-organizations>
- “Merging Wisely” by David La Piana
  - [http://www.ssireview.org/articles/entry/merging\\_wisely](http://www.ssireview.org/articles/entry/merging_wisely)
- “Merger Myths” by Thomas McLaughlin
  - <http://nonprofitfinancefund.org/files/docs/2010/4-2009NPTimes.pdf>
- “Merge Minnesota,” a merger aid project from MAP for Nonprofits
  - [http://nonprofitfinancefund.org/files/images/initiatives/mergeminnestota\\_mapfor nonprofits.pdf](http://nonprofitfinancefund.org/files/images/initiatives/mergeminnestota_mapfor nonprofits.pdf)
- “Merging Nonprofit Organizations” from the Mandel Center for Nonprofits at Case Western Reserve University
  - <http://msass.case.edu/wp-content/uploads/2013/03/MergingNonprofitOrgs.pdf>

## Thank You!

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