Interview with Joe Casion Transcript

John Winters: Hello, my name is John Winters and I am a 2L here at Albany Law School. I am here with [my colleague] Tim Goetzman, and Joe Casion [a partner] at Harter, Seacrest & Emery. He is an attorney who handles not-for-profit mergers. He is here to talk to us today about some of the legal issues that are involved in that process.

John Winters: So my first question is when and why would you advise not-for-profits to undergo organizational changes?

Joe Casion: Sure, thanks for having me John and Tim, it's nice to be here with you. So there are couple of scenarios in which things like mergers and other types of affiliation or organizational changes come up. The first one, which has been fairly unfortunately common during the past couple years, is financial challenges. Organizations that are experiencing financial distress are oftentimes looking for a stronger partner to affiliate with through some form or another. I would say financial distress is probably at the top of the list. The next most common reason why organizations are looking at an affiliation or merger is typically at a leadership transition. So, you know, the CEO or longtime executive, or executive director whatever their leadership title may be, or sometimes the founder of the organization is moving on or retiring. It makes more sense for the organization to partner with somebody than to simply find a replacement for him or her. Through that partnership they're able to continue delivering services, usually in a larger, stronger organization in the absence of that leader. So financial distress number one and leadership changes number two [reasons for merger or consolidation].

John Winters: So you mentioned financial distress as the most common reason for these kinds of transactions. Have you found that Covid has played any role in causing financial distress among not-for-profits?

Joe Casion: Definitely. Especially those organizations that receive a lot of government funding or the government is the payor. Think healthcare, educational, human services organizations. When the government doesn’t have resources or has its own financial challenges, it is not able to support those organizations to the degree necessary. Most government funding to any sort of not-for-profit does not cover their expenses – there is usually multiple sources of revenue – though the government may be a big one. Its those organizations that rely heavily on the government funding that … [have suffered the most financially] from Covid. The challenges that organizations have had to face, including people having to work remotely, PPE expenses,

ventilation/HVAC expenses, and all the other extra operating expenses that every other organization in the country has faced – nonprofit or otherwise.

John Winters: What are some of the disadvantages associated with not-for-profit's joining forces?

Joe Casion: The biggest one is lack or loss of identity following the combination or partnership. So, a nimble nonprofit with a great reputation for innovation and servicing needs in a region is combined with, let's say, a larger institutional nonprofit. The little nimble nonprofit can't do that sort of thing anymore – there is more bureaucracy, there is more hoops that they have to jump through in order to have their operations integrated with the larger institution. Even though they might preserve their name, their identity starts to get blended into the larger organization. Typically, the board, which plays a big part in a nonprofit's identity, fades; or only a few may join the board of the combined organization. That is probably the biggest disadvantage – losing that identity. There are tons of ways, however, to try and preserve and protect it. I've written a number of agreements and structured a number of transactions where the intent was to do that – the smaller organization retains some explicit decision-making authority over certain parts of operations. But maybe administration and back office – they ceded control of that to the larger organization.

John Winters: What are some of the different forms these kinds of transactions can take? I know we have mergers, consolidations, and fiscal sponsorships. Could you talk about other forms and their respective advantages and disadvantages?

Joe Casion: Let's just continue from our last question – we talked about loss or potential loss of identity. In a merger there is only one surviving organization, so sometimes you'll hear the phrase "merger of equals." That is not true. There is always going to be one surviving organization: legally speaking and practically speaking. That is one way to combine, simply where the stronger, bigger organization has the smaller, troubled organization merged into it, and then the larger organization is the surviving legal entity.

A consolidation is a … [INAUDIBLE] [where both organizations combine to create an entirely new legal entity]. Sometimes this can be a "merger of equals." …[INAUDIBLE].

The other ways you affiliate is typically a spectrum. Sometimes you start out with some shared services. So, one organization goes to another and says "we could really use some help with our administration, or bookkeeping, or IT. You have a strong team, so can you support us? We will pay you, but it is more cost efficient for us to outsource that service to you than to try to do it ourselves." So that's usually how it starts. That is one end of the spectrum. Then, it might move to a broader affiliation. "So besides IT, you are also really good at executing on this particular program that we both happen to take part in." [It could be any] – you know, pick your program,

it could be education, human services. One organization may have the facility, the other one may deliver services at home, but they are both part of the same program. [One might say] "maybe we should do that together and see if we can gain some efficiencies that way." So, we might start with organizations sharing services [on one side of the spectrum], and then move to affiliation [on the other side of the spectrum].

Sometimes there is a joint venture, which I would put in the middle of the spectrum. This is where the parties have not merged, not consolidated, may or may not have formed a new entity, but they have come up with some sort of written/contractual partnership agreement. They will be doing a lot together. Maybe a whole business line is in that joint venture, and they are truly collaborating one hundred percent on that, sharing the risk and reward of operating that particular joint venture together. So, if we go on the spectrum from beginning of shared services all the way over to merger, those are the types of ways organizations can partner. The upsides and downsides that we talked about earlier follow the spectrum. [For instance], when we start off with those simple shared services, its just a contract for services. There is no loss of identity or anything like that. As we move farther along the spectrum, the weaker partner (for lack of a better word) is ceding more and more control over its own destiny.

John Winters: I imagine joint ventures are much simpler as legal matter – is that correct?

Joe Casion: They are because it can be accomplished through an entity, so you could form a subsidiary LLC or nonprofit of the entities in which they are literally partners; or you can do it contractually through a contractual partnership. Joint ventures are what I would call a middle of the road approach, and often times a precursor to a merger or a dissolution/asset sale. I know we didn't talk about that, but it is also on the [far side] of the spectrum too. Those tend to be more truly distressed situations. But yeah, of the options we talked about on the spectrum, joint venture is in the middle. There is also no statutory process associated with [a contractual partnership] – it's really just a contract.

John Winters: Why would you advise an organization to hire a lawyer to help navigate the process? What are some things that could go wrong in attempting to navigate this process without the assistance of counsel?

Joe Casion: I think nonprofits can do a lot themselves with their financial advisors or even themselves – they can really identify the type of business relationship they want to have and negotiate the material terms ahead of time. Structuring though – that is where it is helpful to have the creativity of a lawyer who practices in this area is helpful because I might be able to come up with a way to get from point A to point B quicker than they might be thinking about. Simultaneously keep in mind what I think the biggest challenge is when organizations try to go it alone – third-party interests in their assets. What I mean by that is nonprofits often have

restricted funds, sometimes they have credit agreements. Depending on the nature of the transaction, it could implicate agency approvals at the state level, and if it's a large enough transaction, it will require the attorney general's approval. A lot of times, that [INAUDIBLE – need an attorney familiar with the law to obtain the requisite consents – it can become complex]. For example, an organization might think "we can just transfer our investment funds and our programs," but if the value of investment funds far outstrips the value of facilities, it turns out attorney general approval would be required. [Counsel can make sure things like this are done properly.] [Banks may have restrictions]. Broadly, third-party interests are the things that organizations that try to go it alone may miss, governmental or otherwise. There may be some obstacle like that.

John Winters: You mentioned financial distress is one of the main reasons that not-for-profits might consider merging, consolidating, or maybe starting a joint venture. Presumably, resources would be limited for these kinds of organizations. What tips can you give to keep legal fees low for smaller or struggling organizations?

Joe Casion: First and foremost, there are a lot of funders out there – state and otherwise that will provide resources to organizations that are looking to combine. For example, in my community the United Way of Greater Rochester. Organizations can also make applications to … [INAUDIBLE]. I also know there are governmental programs and other funders in other communities across our state that will help offset some of those costs.

The thing I think that the organization can save costs – a great deal of costs – is due diligence. This is a challenge (because its tough to do your job and a merger or similar transaction simultaneously). But if you've got a strong management team, part of the transactional process is due diligence. So things like "do our benefit plans match with theirs; are we able to get out of our lease; what other trip wires might we find/not accidently set-off?" Executives are able to do a lot of due diligence – they know the contracts and relationships with the NYS agencies. If they are able to do and run with most of that, that will save a tremendous amount of costs because the lawyer can just provide guidance on what you need. He might say "here is what I need you to secure." If you can go get it, it will save costs, even though this might be more work than the position entails. Overall, however, it will be less expensive.

To save money on legal fees: first, think about money that might be available from funders and governmental agencies. Two, think about how much you can use your existing internal resources to do due diligence in other parts of the transaction. Three, I know there are organizations like NYCON [New York Council of Nonprofits, Inc.] or similar organizations that offer reduced costs/affiliation guidance. In fact, I have worked with them a number of times on transactions, and they are a great resource.

John Winters: How do you suggest making sure that adequate due diligence has been done? What are some things that nonprofits can investigate?

Joe Casion: To make sure it is done and it is done right, you need a checklist. There are good ones and bad ones out there on the internet, like most things, but that is something I always start with. "Here is a list of the things that we need to review, identify, and understand." The list looks daunting, even the shortest ones are three or four pages. It covers everything from organizational documents to financial statements to environmental records, employee benefits, litigation, governmental funding – it tends get long. When people see this, they tend to get a little overwhelmed and ask, "O my gosh, how are we going to do all of this?" The answer is we are going to. It is not as bad as it looks. I can say with a high degree of confidence that most of those questions are going to be non-applicable; or you will start to answer them with the same things. This is what due diligence is designed to do – to ferret those things out. Once you start running into the same thing three times (like "oh we're going to need to go to the Department of Health to make sure that grant agreement can be assigned properly to our newly formed joint venture or merged entity"), then you know you've done your due diligence. It's just like legal research – when you keep running into the same cases or principles three or four times, you have exhausted your research – you're not going to find anything else.

So, start with a list; don't be overwhelmed by it; and be confident that you'll get to the bottom of it. You'll know you've gotten to the bottom when you start to see things come up multiple times.

John Winters: Why would not-for-profit decide to merge, consolidate, or enter into a joint venture over dissolution? Surely, there is some situations, even if a non-for-profit can find another entity with which to merge/consolidate/enter into a joint venture, where it is still preferable to dissolve. When would you advise dissolution over these options?

Joe Casion: When we are trying to fix a potential problem or a known problem. The issue with a merger is that everything in the entity that is being merged out of existence goes over into the surviving entity – good, bad, and otherwise. This includes legal claims, debt, possible regulatory violations … etc. They are automatically assumed by the surviving entity, which is then responsible for the "legacy," if you will, of the organization that merged into it. To possibly alleviate that successor liability, we might contemplate a different form of transaction. Dissolving and transferring the assets; liquidating and transferring the assets – all of those types of things are going to require attorney general approval though. You cannot use that to avoid a known problem – if there is a liability, it has got to be taken care of – there has to be a solution to that first. Sometimes that solution is bankruptcy. Sometimes, bankruptcy is combined with the dissolution and liquidation process. But let's say it's not certain – there might be a problem: "we don't know," or "we think took care of it." Those things that start to pop up in due

diligence (after finding them three or four times), you start to say, “I don’t want that uncertainty in my merged entity, so I am going to do an asset transfer, liquidation and dissolution into the surviving organization**.**” It is like the difference between an asset deal and a stock deal in the business context. In a stock deal, you take all of the liabilities, both known and unknown. In an asset deal, you only take those liabilities that you expressly assume. The same principle applies in nonprofit transactions.

John Winters: What steps would you advise not-for-profits to take when planning for a possible future dissolution? What does a good dissolution plan look like?

Joe Casion: One that has a lot of options. The ones that I see that become problematic is when there is only one identified successor. The dissolution provisions go right into the certificate of incorporation. You have to predetermine who your assets will go to in the event you dissolve and liquidate. *But* you do not have to be specific. You can say “as the court or attorney general may determine” so long as that organization has compatible purposes, tax exempt status, and a few other things. It’s about a paragraph long and it’s a fairly common statement in most certificates of incorporation. That one, I can deal with. If we haven’t made any promises subordinate to the certificate of incorporation about where the assets will go, presuming they are not secured and we don’t have go through bankruptcy or they are restricted and have to go back to the donor or some other organization, we have a lot of flexibility. We can choose multiple organizations; we can decide our fate. Those organizations that lock into a specific, designated entity – either in their organizing instruments or in their certificate of incorporation, bylaws, or some other subordinate instrument – they don’t have a choice. They might have already sealed their fate. Let’s keep our options open because if our only choice is to transfer all of our assets to an organization we are not on good terms with, and we really have no other options, we cannot merge because they would get all of our stuff or something like that – we have boxed ourselves in. Some of these organizations were formed a long time ago, sometimes as part of a network or a statewide system, or something like that. One of the first things I usually ask when I have a new nonprofit client is to take a look at their certificate of incorporation just to see if there is something strange like that, that I need to be aware and to make sure they understand that it is there and it’s intentional, and still viable. It’s like a “prenuptial” for nonprofit corporations.

John Winters: We thank you for your time. Is there anything else important that you might want to mention before we finish up?

Joe Casion: Yes. Even though our topic was just mergers and consolidations, we really went all over the map. There are a lot of solutions up to and including merger and consolidation that organizations should be aware of and should explore to be in control of their own destiny. But they cannot wait too long! Once that distress starts, once that leadership transition takes place,

once the writing is on the wall that change is forthcoming, the organization needs to take proactive steps to explore its options in order to stay in control of its fate.

John Winters: How can a nonprofit contact you if they are seeking a lawyer's help?

Joe Casion: Thank you both. This was a pleasure. This is a topic that I am very passionate about and interested in. People can look me up on our website, and find my contact information there:

HSElaw.com

Otherwise, contact me through LinkedIn. I am always happy to speak to people, and I do not charge for initial consultations. I will always talk to people in these kinds of situations. I myself, volunteered for a lot of organizations and went through this as a volunteer, and often times, I am working with volunteers – I always want to be able to help people out, hopefully in that first phone call, and set them on a path that is not too expensive and gets them to the objective that they are seeking.