

Serving Your “Berger” Well Done: A Recipe for Closing or Reconfiguring a Not-for-Profit Hospital in New York

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Introduction. The New York State Commission on Health Care Facilities in the 21st Century, better known as The Berger Commission (“Commission”), certainly stepped into one very hot kitchen when it undertook the task of serving up recommendations for closing, rightsizing and reconfiguring New York’s hospitals and nursing homes. After the New York State legislature accepted these recommendations and gave them the force of law, governing boards (each, a “Board”) of affected institutions across the state were required to complete the complex task of closing or reconfiguring their facilities.¹

This article will outline the steps that a New York not-for-profit hospital, such as those affected by the Berger Commission, must take to close a hospital facility. It is important to note that closing a hospital does not necessarily require dissolving the corporation, which may be retained for other purposes.² This article will, however, also discuss the key aspects of how New York not-for-profit corporations dissolve, merge or sell all or substantially all of their assets in order to present a more complete picture of the legal issues that arise in connection with these matters.

Furthermore, the restructuring arrangements that the Commission required involved a variety of affiliation arrangements, including integrating the governance of two or more institutions or creating a “parent/subsidiary” relationship through the use of a sole corporate member. Some of these transactions implicated regulatory, lender consent, antitrust and other related issues. Governing Boards faced with such mandates must carefully examine all of these concerns with the advice of counsel before embarking on any restructuring.

1. **NFPL Overview.** This section will review the Provisions of the New York Not-For-Profit Corporation Law (NFPL) governing certain major corporate changes by New York not-for-profit corporations (each, a NFP), including dissolution, merger and the sale of all or substantially all of a corporation’s assets. The key concept is that a NFP cannot take any of these steps without first obtaining the consent of a Justice of the New York Supreme Court (“Court”) by filing a verified petition (“Petition”) on notice to the Attorney General (AG). In any case, it is a “best practice” to pre-clear the filing with the AG to resolve any issues beforehand. This way, the AG can waive statutory notice

and mark the Petition “No Objection.” The Court will then generally approve the Petition as a matter of course.

a. Dissolution

- i. **Adopting Resolutions.** If the Board has decided to dissolve the existing corporation, it must adopt a resolution authorizing the corporation to dissolve and adopting a Plan of Dissolution (“Plan of Dissolution”). This resolution will have to be voted on and adopted by the Board and, if applicable, the corporation’s members.³ Essentially, the Plan of Dissolution must set forth:
 1. A list of the corporation’s assets, if any, along with their fair market value and a statement as to whether any of them are being held for a particular purpose (i.e., donor restricted or restricted by contract, grant or a similar agreement);
 2. A statement that (a) the corporation’s unrestricted assets, subject to its unpaid liabilities and any distributive rights of its members, will be distributed to one or more tax-exempt organization(s)⁴ having purposes substantially similar to the corporation’s and (b) any assets held for a specific purpose will continue to be used in accordance with the applicable gift or contractual instrument. The Plan of Dissolution must also include a copy of each such organization’s governing documents, financial reports for the last three years, and Internal Revenue Service determination letter stating that the organization is exempt from taxation, and an affidavit from a director and officer of the organization stating its charitable purposes and that it is currently exempt from taxation;⁵
 3. A list of the corporation’s liabilities, including an estimate of the

accounting and legal fees associated with the dissolution;

4. The consent of the New York State Department of Health (DOH) and the New York State Public Health Council and any other regulatory agency (e.g., the Office of Mental Health (OMH), the Office of Alcoholism and Substance Abuse Services (OASAS)) whose consent was required to form the corporation or whose consent was later required; and
5. The approval of the Court in the judicial district where the corporation is located.⁶

ii. **Carrying Out the Plan of Dissolution.**

The corporation must then carry out the Plan of Dissolution by paying its liabilities and distributing its assets within 270 days from the date the corporation has authorized the plan and obtained the consent of the Court and any required regulatory body.⁷ As discussed in further detail below, the Petition filed with the Court to obtain its approval must be made “on notice” to the AG. In the unlikely event of any dispute or competition regarding the distribution of the net assets, other parties, including any donors of restricted gifts, may need to be made a party to the proceeding. Once the corporation has carried out the Plan of Dissolution, it will prepare a Certificate of Dissolution,⁸ which, after receiving the consent of the New York State Department of Taxation and Finance, the corporation will file with the New York Department of State to formally effectuate the dissolution.⁹

- b. **Merger.** While the specific technical requirements to merge or consolidate a NFP may differ from those required to dissolve one, the basic procedure is the same, namely, the filing of a Petition with the Court, on notice to the AG. In the merger context, the AG will review the Petition to assist the Court in determining whether all of the statutory requirements have been met and that the interests of the constituent corporations and the public will not be adversely affected.¹⁰
- c. **Sale of Assets.** In cases involving a NFP’s sale of all or substantially all of its assets,

the Court will seek to determine that the consideration and the terms of the transaction are fair and reasonable to the NFP and that the sale promotes the NFP’s purposes or the interests of its members.¹¹ Special rules apply to any sale involving insiders.¹² Although not explicitly required by statute, as a practical matter, the Court will reject a Petition not supported by an independent appraisal of the assets to be sold. Furthermore, the use of the sale proceeds must be consistent with the NFP’s purposes. Finally, if the NFP is insolvent or its assets are insufficient to fully satisfy its liabilities, all of its creditors must be served with a notice.¹³

d. **Appointment of Sole Corporate Member.**

Significantly, a 2001 Appellate Division case¹⁴ held that Court approval was *not* required for the proposed affiliation of two NFP New York hospitals where one sought to vest certain of its existing corporate powers in a newly formed sole corporate member. The AG took the position that the hospital could not do so without first seeking Court approval. Had the Appellate Division agreed, this case would have had a significant impact as many New York hospitals make use of this corporate structure.

2. **Assessing the Corporation’s Financial Condition.**

We will now focus on how the Board should analyze the corporation’s financial condition. Its assets will essentially fall into one of two categories, unrestricted or restricted as to use. For purposes of this article, an asset is restricted as to use if it was donated or granted to the corporation to be used for a particular purpose or subject to a particular restriction, such as a debt service reserve fund pursuant to tax-exempt bond obligations. Other examples include a gift of cash or securities that can only be used as endowment (i.e., that the principal may not be spent) or for a specific purpose, such as providing care for the indigent or supporting a particular hospital service or division. Unrestricted assets may be used for any lawful corporate purpose.

a. **Unrestricted Assets.**

- i. **Going Concern.** After taking an inventory of its assets, the corporation will initially have to determine which, if any, of its unrestricted assets or operations can be sold as a “going concern” (i.e., as a continuing viable business) having a

value greater than the sum of its “hard assets.” These might include, for example, outpatient clinics offering dialysis, detoxification or mental health services, etc.¹⁵

- ii. **Assets Subject to Secured Financing.** Certain assets, such as real estate or major pieces of equipment, may be encumbered in connection with a secured financing in favor of either a commercial lender or a governmental agency such as The Dormitory Authority of the State of New York. Naturally, these assets may only be sold once these lenders have been paid and have released their liens on the collateral, which may include designated funds, accounts receivable, etc.
- b. **Restricted Assets.** As discussed above, the AG has broad statutory authority to enforce the terms of restricted gifts, whether made on an *inter vivos* or testamentary basis.¹⁶ The net result is that the Board must ensure that the terms of these restricted gifts are maintained upon the transfer of these assets to another NFP. If, however, in connection with any dissolution, merger or sale of assets, the donor’s terms regarding the gift cannot be honored, the Board will have to commence what is known as a *cy pres* proceeding to obtain the Court’s consent to remove the restriction on the assets. The process will vary depending on how the gift was made.
 - i. **Inter Vivos Gifts.** NFPL § 522(a) provides that such restrictions can be lifted with the donor’s written consent or, if this consent cannot be obtained because the donor died, is disabled or is otherwise unavailable, the corporation may apply to the Court, on notice to the AG, for an order releasing the restriction, subject to the funds being used for the corporation’s existing purposes. Under the quasi *cy pres* standard, the Court may release a restriction, in whole or part, if it finds that the restriction is “obsolete, inappropriate, or impracticable.”¹⁷
 - ii. **Testamentary Gifts.** If a gift was made by will or testamentary trust, a restriction can only be lifted by the Surrogate’s Court, on notice to the AG, in accordance with the more stringent *cy pres* standard set forth in EPTL Article 8. In these cases, the

court may lift the restriction in whole or in part if the applicant demonstrates that “circumstances have so changed since the execution of [the gift instrument]” that it is “impracticable or impossible” to comply literally with its terms, and the modification, in the court’s judgment, will “most effectively accomplish” the gift’s original general purposes.¹⁸

- c. **The Corporation’s Liabilities.** Along with making an inventory of the corporation’s assets, the Board should assess the corporation’s liabilities to determine whether it is capable of satisfying them.¹⁹ To the extent that the corporation’s aggregate liabilities greatly exceed its assets, or it finds that it is otherwise unable to pay its debts as they become due, the Board may want to consider whether to negotiate an out-of-court workout or, in more severe cases, pursue a voluntary reorganization or liquidation under Chapter 11 of the U.S. Bankruptcy Code (“Chapter 11”).²⁰ At a minimum, the Board should thoroughly explore and discuss these options.
- d. **The Board’s Fiduciary Duties.** The overarching concern here is that, if a corporation is insolvent,²¹ or even in the grey area between solvency and insolvency known as the “zone of insolvency,” the Board’s fiduciary obligations expand to include not only the interests of the corporation (including its charitable mission), but also those of its creditors. Board members may also face liability from claims by the corporation’s creditors alleging “deepening insolvency.” This emerging, but not universally adopted, theory provides that decision-makers can be held liable for fraudulently prolonging the company’s life or concealing the incurrence of additional debt to the detriment of creditors. The underlying rationale is that deepening insolvency can undermine the corporation’s relationships with its customers, suppliers and employees and damage realizable asset values; the theory further asserts that this harm can be averted if the corporation is dissolved in a timely manner, rather than kept afloat with spurious debt. Liability for deepening insolvency has not been widely accepted. It is tempered by the business judgment rule, which requires officers and directors to perform their duties in good faith with the degree of care a prudent person similarly situated would use. Nonetheless, it is

imperative that the Board develop a detailed understanding of both the corporation's financial position and its future prospects so that it may proceed in the appropriate manner.

- e. **Bankruptcy: To File or Not to File.** The Board should thoroughly document, in writing, all aspects of its financial analysis to demonstrate that it made a good-faith investigation of all viable options and obtained the necessary professional advice to determine the best course of action. In the case of an insolvent corporation, filing for bankruptcy protection offers certain key advantages, such as the automatic stay, which prevents creditors from commencing or continuing any judicial, administrative or other proceedings to recover any debt that arose before the filing. This gives the corporation some "breathing room" and consolidates all of these disputes in a single forum. Bankruptcy also allows a debtor to reject executory contracts and unexpired leases, leaving the counterparties with an unsecured pre-petition claim for breach of contract. Finally, subject to certain conditions, the debtor may sell all or a portion of its assets "free and clear" of all liens, claims and interests. Bankruptcy also has a number of disadvantages. For example, the process is lengthy and entails significant fees for attorneys, consultants and accountants for both the corporation and the creditors' committees. In the final analysis, the Board will have to weigh all of the relevant factors, with appropriate legal and financial advice, to determine if a bankruptcy filing is the best choice for the institution.

3. Personnel-Related Issues

- a. **General.** The Board also will have to deal with a variety of issues in connection with the corporation's personnel, employed or otherwise. While we will review certain specific WARN requirements below, the key concept to bear in mind is to establish and maintain open lines of communication with management, the union leadership, if any, rank-and-file and credentialed providers. In addition to keeping all of these constituencies reasonably informed as to the institution's plans, the corporation may have to offer incentives such as retention bonuses, along with job placement and training services, to ensure that the hospital will have adequate staffing during the wind-down period. Finally,

the Board must deal with such related issues as the funding of employee severance and accumulated benefit obligations, including pension, health care, and other retirement benefits. Whether all of these obligations will or can be met will depend on the corporation's financial condition and whether it files for bankruptcy.

- b. **WARN Act.** The Federal Worker Adjustment and Retraining Notification Act (WARN)²² essentially requires employers with 100 or more full-time employees to provide its workers with at least 60 days written notice if there will be a:
 - i. "Plant Closing" (i.e., the closing of an "employment site" or one or more its facilities or operating units) resulting in an "employment loss" for 50 or more full-time employees during any 30-day period; or
 - ii. "Mass Layoff" which does not result from a Plant Closing, but which will result in an employment loss at the employment site during any 30-day period for 500 or more full-time employees, or for 50-499 such employees if they make up at least 33% of the employer's active workforce.²³

4. Closing the Hospital Facility

- a. **Plan of Closure.** The "road map" for closing the facility's various services must be set forth in a "Plan of Closure" ("Plan of Closure"), which must be filed with, and approved by, DOH (and any other applicable licensing agency) at least 90 days before the planned date of closure.²⁴ While the regulatory requirements regarding the Plan of Closure only explicitly cover patient notification and the maintenance and storage of medical records, each of which is discussed in further detail below, experience indicates the plan must also provide the following type of information in order to gain approval:
 - i. How the corporation approved the Plan of Closure;
 - ii. The date the hospital will close its various services (e.g., Emergency (ED), Inpatient admissions, Detoxification, Methadone, Mental Health, Family Medicine, Dialysis, Dental and Pharmacy);
 - iii. How the facility will arrange for transfer of its inpatients and referral of its outpatients

- to nearby hospitals and other suitable facilities;
- iv. How the facility will ensure the safety of those persons presenting at the ED because they, or the persons transporting them, were not aware that it had been closed;²⁵
 - v. How the facility will ensure patient, physician and regulatory access to, and maintain the confidentiality of, all hospital medical records;²⁶
 - vi. The disposition of all pathology samples;²⁷
 - vii. The plan for limiting the intake of new patients during the notice period and how patients will be advised of the availability of alternate services;
 - viii. The disposition of all medications, supplies, medical waste, infectious, radioactive and hazardous materials and equipment and fixtures; and
 - ix. Notification regarding the hospital's closure, which should be sent to:
 1. All active hospital inpatients and outpatients, including their physician and next-of-kin, where appropriate;
 2. All hospital employees and their union representatives;
 3. The office of the "chief elected official" of the local government unit in which the facility is located and the State Relocation Worker's Unit (each required under WARN);
 4. All medical staff members;
 5. All applicable local/regional police and fire departments, EMS providers, as well as the local Department of Transportation or Public Works so that all blue Hospital signs directing traffic to the facility are removed;
 6. All local/regional hospitals, medical societies, social service agencies and community boards;²⁸ and
 7. Any medical schools and other hospitals with which it operates any medical residency or other graduate medical education program.²⁹

5. Other Post-Closure Matters

- a. **Financial.** The hospital will have to adopt a post-closure operating budget, and arrange to keep appropriate office space and administrative and clerical personnel as may be necessary to manage its accounts receivable, accounts payable and other post-closure wind-down operations. The hospital may also wish to engage, or continue to retain, its current collection agency to assist with this effort.
- b. **Operational.** The hospital should also maintain an IT infrastructure sufficient to support its wind-down activities. Winding down also will require management to assign or terminate, if possible, any real estate or equipment leases, and arrange for the sale or transfer of the corporation's assets, as set forth in the Plan. The hospital must also arrange for storage of the corporation's business, financial and employee records, as matters may arise after closure requiring reference back to the records.
- c. **Physical Plant.** Management must secure all of the hospital's facilities (e.g., fence the campus, padlock the buildings and board any accessible windows), as may be appropriate under the circumstances. The hospital may also have to retain security guards and a telephone operator or set up an answering machine system to handle phone calls.
- d. **Filings, Notifications.** Management will also have to ensure that final audited financial statements and Charities Registration Statements are prepared and filed with the AG,³⁰ that a final Medicare cost report is filed with CMS³¹ and that final Medicaid and Bad Debt and Charity Care Reports are filed with DOH.³² Finally, the hospital will have to notify vendors and suppliers of the closure, as well as any commercial and Medicaid payors.
- e. **Surrender of Operating Certificate and Licenses.** Once the hospital facility is closed, it must surrender its Operating Certificate to DOH and any other licenses (e.g., laboratory, pharmacy, radiology facilities) to the appropriate regulatory bodies.³³
- f. **Insurance.** The Board should also check with its insurance broker to make certain that the corporation's real and personal property is properly insured until sold or otherwise transferred and that general and professional

liability insurance is in place to cover claims that will likely arise after the facility is closed.³⁴ Lastly, we strongly recommend that the Board keep a Directors' and Officers' liability policy in place until it has filed the corporation's Certificate of Dissolution.³⁵

Conclusion. Closing or restructuring a New York not-for-profit hospital is a complex undertaking. The Board must be sure that it complies with myriad federal and state regulations while simultaneously honoring its fiduciary obligations to the corporation, its charitable mission and, if applicable, its creditors.

Endnotes

1. The Commission's enabling legislation is set forth in Chapter 63 of the Laws of 2005.
2. Obviously, only certain of the matters discussed will apply if the Board is implementing Commission recommendations to reconfigure or merge, rather than close, a particular hospital or if the Board develops a new business plan for the existing corporation going forward. As discussed below, the legal process of securing the consent to dissolve, merge (NFPL Article 9) or sell all or substantially all of a not-for-profit corporation's assets (NFPL §§ 510-511) is essentially the same. Furthermore, while this article will, for the sake of clarity, focus on closing a hospital, the same principles are generally applicable to a not-for-profit nursing home as well.
3. The specific voting requirements to approve the Plan are set forth in § 1002 of the Not-For-Profit Corporation Law (NFPL). Alternatively, these may be set forth in the corporation's bylaws ("Bylaws") or certificate of incorporation (COI), subject to the requirements of NFPL § 1002.
4. Often the COI will designate who receives the assets upon dissolution. While such a designation is usually followed by the Court, it is not binding, and the Court retains the final say in the matter.
5. See NFPL § 1001(d)(3).
6. The specific requirements for the contents and authorization of a Plan of Dissolution are set forth in NFPL § 1001 and NFPL § 1002, respectively.
7. NFPL § 1002-a(a). The statute allows for an extension of up to one year to effectuate a Plan of Dissolution.
8. The specific requirements for a Certificate of Dissolution are set forth in NFPL § 1003.
9. The corporation's rights and remedies which survive dissolution are set forth in NFPL § 1006. It is also important to note that the Court retains broad jurisdiction over the corporation even after the filing of the Certificate of Dissolution. See NFPL § 1008.
10. See NFPL § 907(e).
11. See NFPL § 511(d).
12. See NFPL § 715.
13. See NFPL § 511(c).
14. *Nathan Littauer Hosp. Ass'n v. Spitzer*, 287 A.D.2d 202, 734 N.Y.S.2d 671 (3d Dep't 2001), *leave to appeal denied*, 2002 N.Y. LEXIS 940 (N.Y. April 30, 2002).
15. Any of these sales will require the approval of a regulatory agency (e.g., DOH, OMH or OASAS) having jurisdiction over the particular service. Significantly, such a sale may not be permitted based upon DOH regulatory criteria and "need" determination despite the presence of a willing buyer.
16. See Estates, Powers and Trusts Law (EPTL) §§ 8-1.1; 8-1.4 and NFPL §§ 513; 522.
17. Of course, the issue of "existing purposes" is moot in the case of a dissolution.
18. EPTL § 8-1.1(c)(1). The leading cases in this area are *In re Donald F. Othmer*, 710 N.Y.S.2d 848 (Surr. Ct., Kings County 2000) and *In re Mildred Topp Othmer*, N.Y.L.J., Oct., 21, 1999, p. 29 (Surr. Ct., N.Y. County Oct. 15, 1999). Here, the court granted *cy pres* relief to Long Island College Hospital (LICH) such that LICH was permitted to use restricted endowment funds to secure almost \$90 million of new financing for necessary capital improvements and immediate working capital needs.
19. NFPL § 1007 may be useful where the corporation is uncertain as to what claims its creditors may assert. This section essentially provides that before filing its certificate of dissolution, a not-for-profit corporation may give a notice requiring all creditors to present their claims in writing at a specified place and by a specified date. The corporation must publish the notice in a local newspaper and must also mail a copy to each person believed to be a creditor. This procedure does not waive the corporation's right to contest any claim which may be asserted, and it may submit any disputed claim to the Court for determination in accordance with NFPL § 1008.
20. The Bankruptcy Code ("Code") is codified in Title 11 of the United States Code (U.S.C.).
21. While it is beyond the scope of this article to present a detailed definition of insolvency, it is worth noting that it can be measured on a "balance sheet" (i.e., that an entity's liabilities exceed its assets) or "cash flow" (i.e., that the entity's cash flow is insufficient to cover its current obligations) basis.
22. 29 U.S.C. §§ 2101 *et seq.* The applicable regulations are set forth at 20 C.F.R. Part 639.
23. Job losses within any 90-day period are aggregated for WARN notification purposes unless the employer demonstrates that these job losses were the result of separate and distinct actions and causes. Certain other rules apply if a business is sold. Due to WARN's complexity, it is essential that the Board obtain the advice of counsel to determine their obligations, if any, under WARN.
24. 10 N.Y.C.R.R. § 401.3(g). The Board may amend the Plan of Closure to reflect any unexpected changes in the closure process.
25. The hospital could, for example, keep a physician, physician extender, nurse or security guard in the ED, maintain an ambulance, or otherwise notify the public. The steps chosen would, of course, depend on the circumstances of each hospital and its surrounding community.
26. The hospital can address this concern by entering into an agreement with a health care information management company that can store and ensure access to the facility's medical records. Alternatively, another nearby facility may be willing to assume custody of the records. The hospital should also advise its current patients, as well as any patients treated over the past six months, as to how they may access these records.
27. The rules regarding the retention of pathology reports and specimens are set forth in 10 N.Y.C.R.R. § 58-1.11(d). Notably, some of these materials must be kept for as long as 25 years.
28. The hospital may also elect to retain a public relations firm, send a press release to the local/regional newspapers, including any foreign language papers read by minority populations in the community, post notices in and outside the hospital regarding the impending closure and reach out to the community in such other ways as the Board sees fit.

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29. The hospital will also have to make arrangements to transfer any current medical residents to other teaching hospitals and its residency records to a successor entity willing to accept them or to the repository at the Federation of State Medical Boards (FSMB). That service is described on FSMB's website: http://www.fsmb.org/fcvs_closedprograms.html.
30. 13 N.Y.C.R.R. § 91.9.
31. 42 C.F.R. § 413.20. The hospital must also file a final Form 855A with CMS to dis-enroll from Medicare.
32. Public Health Law § 2807-k (12).
33. Laboratory and radiology licenses are surrendered to offices within DOH, while pharmacy licenses must be sent to the Drug Enforcement Administration (*see* 21 C.F.R. Part 1301) and the New York State Board of Pharmacy (*see* § 63.6 of the Regulations of the Commissioner of Education).
34. If the hospital secured this coverage through a "claims made" policy, it will have to obtain a "tail" endorsement to cover any claims asserted after the policy is cancelled upon the hospital's closure. A "tail" is not required if the hospital was covered under an "occurrence" policy. Again, however, such matters may be resolved in Bankruptcy Court if the closure is coupled with a bankruptcy filing.
35. NFPL § 1006(b) provides that the corporation's dissolution "shall not affect any remedy available . . . against such corporation, its directors [or] officers . . . for any right or claim existing or any liability incurred before such dissolution" (emphasis added).

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