

VBP CONTRACTING WEBINAR SERIES

Webinar 4 Forming Strong Community Partnerships for VBP Arrangements Part 1

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National Council for Behavioral Health
Montefiore Medical Center
Northwell Health
New York State Office of Mental Health
Netsmart Technologies



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- Partner in FTLF's national health law practice.
- Counsels health centers, behavioral health providers, and hospitals on a wide range of health law issues, including transactional matters.
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- This session is provided for general informational and educational purposes only and does not constitute the rendering of legal advice or opinions.
- The information is not intended to create, and the receipt does not constitute, an attorney-client relationship between presenter and participant.
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Agenda

- Contract Terms and Protections
 - Recruiting Partners
 - Non-Disclosure Agreements
 - Memorandum of Understandings
 - Joint Planning Process
 - Regulatory Approvals
- Your Questions and Comments!

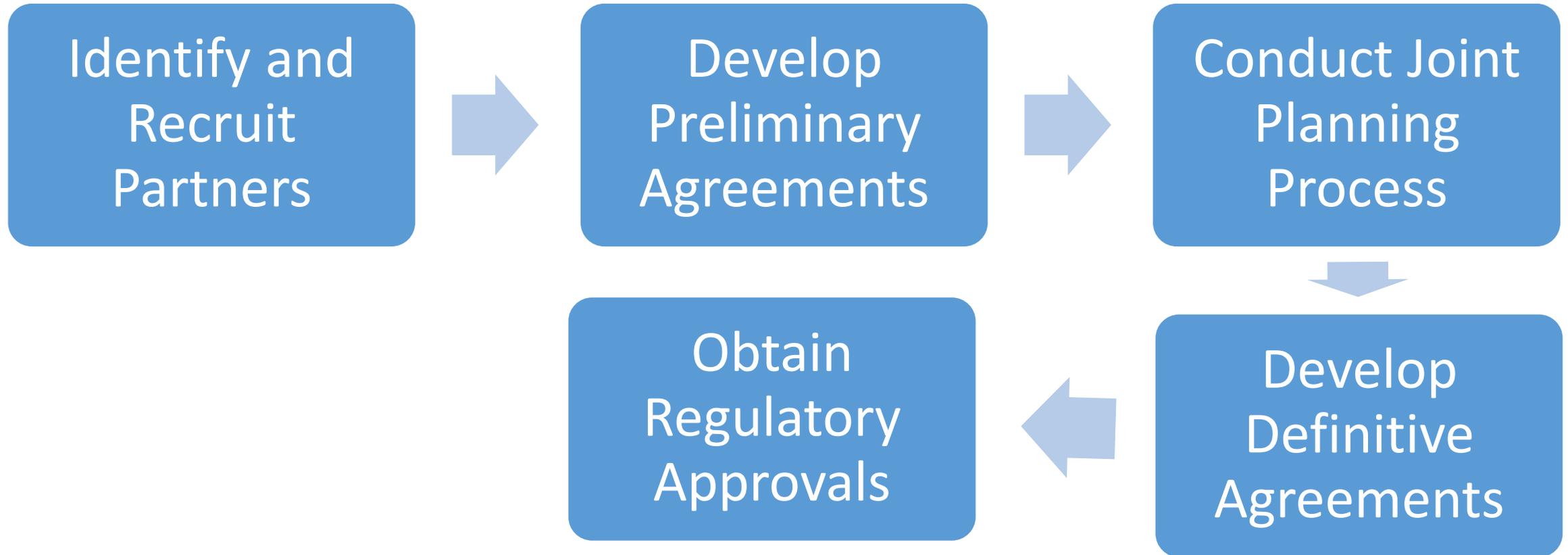
Definition of Partnerships

- For purposes of today's training, partnerships are formal arrangements between independent entities for the purpose of achieving a mutually shared goal that cannot be readily attained by independent efforts.
- Legal "form" of the partnership should follow the joint determination of the partnership's goals.
- Legal forms of partnerships range from the establishment of contractual arrangements between or among parties to more integrated approaches, such as mergers, acquisitions, and the creation of new legal entities.



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Steps to Partnership Formation



Step1: Recruit Partners

- Identify collaboration partners, considering:
 - Scope or goals of collaboration (if known)
 - Strategic plan
 - Service gaps and needs
 - Regional dynamics and politics
 - Existing relationships with community providers/agencies
- Compile information and facts about each partner
 - Number of patients served by payer type
 - Scope of services
 - Geographic service area

Step1: Recruit Partners

- Consider collaboration partners carefully
 - The negotiation and implementation of collaborative arrangements takes time and money, creates obligations, legal and otherwise
- Consider the value that each partner brings to the table
 - Consider conducting a needs analysis to determine what partners are necessary for the collaboration to succeed
 - Identify options for possible partners
 - “Shop” the collaboration with possible partners
- Develop ideas around the partnership
 - Define potential goals and objectives
 - Develop potential list of joint activities

Step 2: Develop Preliminary Agreements

Confidentiality / Non-Disclosure Agreement (“NDA”)

- Purpose: Designed to protect all parties to the negotiation from the unauthorized disclosure and use of confidential and/or proprietary information that may be exchanged during the planning processes, performance of due diligence reviews, and negotiation of definitive agreements.
- Avoid confidentiality agreements that unilaterally bind one party to negotiate exclusively with the other party, while the other party remains free to negotiate with others during the same period of time.



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NDA: Key Legal Terms

- **Definitions.** Definitions of “confidential” and “proprietary” information, as well as information that is not considered confidential/proprietary (i.e., information in the public domain).
- **Uses and Disclosures.** Allowable uses and disclosures of confidential and proprietary information.
- **Prohibitions.** Prohibitions and limitations of all non-specified uses and disclosures without the written consent of the other party(s).
- **Return of Information.** The prompt return of confidential and proprietary information, if the parties decide not to move forward, or upon request.
- **Remedies.** Remedies for the unauthorized disclosure of confidential or proprietary information by a party, its officers, employees, and/or agents, including the right to enjoin the other party(s) from any disclosure of confidential and proprietary information.
- **Survival.** Survival of confidentiality obligations after termination or expiration of the agreement.

Step 2: Develop Preliminary Agreements

Non-binding Memorandum of Agreement (MOA)

- Sets forth non-binding agreement “in principle” regarding:
 - Overarching goals of the collaboration
 - Planning process
 - Key terms of the collaboration
 - Responsibility for costs and expenses incurred during planning
- Terms of final agreement should be subject to satisfactory due diligence and approval of respective Boards of Directors

MOA: Key Legal Terms

- **Scope.** Proposed scope of joint activities
- **Time fame.** Time-line for discussions
- **Planning Team.** Management and staff members who will represent each party in the planning process (i.e., the planning team)
- **Consultants.** Types of consultants (if any) that will be hired, by which party, and whose expense
- **Exclusivity.** Limitations, if any, that will apply during the planning and negotiation period with respect to the ability of the parties to negotiate with other parties regarding the subject
- **Disclosures.** Requirements for disclosure to one another of pertinent negotiations

MOA: Key Legal Terms (continued)

- **Expenses.** Expectations of each party, financially and otherwise
- **Support.** Identification of financial and technical resources need to support development activities including both internal and external funding resources
- **Term and Termination.** Other critical terms of the proposed collaboration, including a party's right to terminate the MOU (as well as subsequent negotiations) for various reasons
- **Mutuality.** All commitments should be mutual and must be compliant with applicable laws and regulations

Step 3: Conduct Joint Planning Process

- Establish and conduct planning process
 - Define goals, determining value, and strategic plan
 - Identify proposed scope of joint activities
 - Establish timeline for negotiations and planning
 - Define critical terms of proposed collaboration
 - Form planning teams (e.g., clinical, operational, financial)
 - Involve boards of directors through updates and input
 - Engage legal counsel and financial consultants as necessary

Step 3: Conduct Joint Planning Process

- Forming a Planning Committee
 - Consists of equal number of appropriate senior-level personnel designated by each party, representing key areas relevant to partnership, e.g., clinical, financial, operational, strategic planning, etc.
 - Each party should retain sole discretion to designate its respective representatives, though representatives should be senior in order to maximize likelihood that the parties' respective decision-making bodies will approve or seriously consider the planning committee's recommendations

Step 3: Conduct Joint Planning Process

- Conducting Regular Planning Meetings
 - The planning committee should meet at regularly scheduled times and dates to:
 - Review and analyze the specific collaborative options identified during discussions and make recommendations with respect to the feasibility of implementing such options
 - Discuss progress of current collaborative activities, if any, and address and resolve issues related to such activities; and
 - Identify new opportunities available to the parties and initiate feasibility studies.

Step 3: Conduct Joint Planning Process

- Feasibility Studies

- A feasibility study can be prepared under the direction of the planning committee by an external consultant or by a member of the planning committee.
- The feasibility study should address:
 - The potential opportunity and why it is important to the partners
 - The anticipated investment and resources necessary to implement the collaboration
 - Potential options for obtaining the resources necessary for the collaboration to proceed
 - Potential obstacles for the collaboration and how they might be overcome

Step 3: Conduct Joint Planning Process

- Establishing Subcommittees or Task Forces
 - As necessary, the joint planning committee may establish subcommittees or task forces to perform detailed analyses and to make recommendations to the committee regarding specific issues or matters.
 - Subcommittees could be formed to explore clinical, financial, operational, or legal matters that relate to the proposed collaboration.
 - For example, a subcommittee could be formed to identify specific clinical programs or protocols that have been proven to result in cost-savings related to the total costs of care.
 - Such subcommittees should operate under specified charges and timelines to ensure efficient and effective progress is made.

Step 3: Conduct Joint Planning Process

- Assuring Board Oversight
 - To fulfill their fiduciary and oversight responsibilities, each partner's board should monitor the proceedings by receiving and reviewing regular reports from the respective management teams regarding the development and negotiation of the proposed partnership.
 - The board of directors should review the proposed partnership to determine whether it furthers the mission of the organization, proposes terms favorable to the organization, and implements the organization's strategic plan.

Key Planning Considerations

- All collaborations, regardless of the degree of integration, require the parties to engage in thorough reviews of clinical, operational, financial and legal considerations.
- The following are some examples of the considerations that should be analyzed, discussed, and resolved while planning the collaboration.
- While some of these reviews will occur during the drafting of definitive agreements, initial assessments of many areas should be conducted as part of the planning process.

Clinical/Operation Considerations

- Evaluation of whether the partners' missions and work environments can blend successfully
- Evaluation of whether the proposed collaboration achieves the goals and objectives of the collaboration
- Ensuring patient continuity of care and confidentiality, and preparation and sharing of medical records
- Evaluation of whether there is appropriate infrastructure, including space, equipment, information systems, and electronic medical records, or whether infrastructure must be updated/replaced.
- Development of communication plans to inform the staffs, patients, and community about the pending collaborative activities.
- Addressing internal/external "politics."

Financial Considerations

- Development of appropriate financial analyses – pro forma cost report analysis (identification of revenue and expenses).
- Understanding billing rules and requirements, as well as other reimbursement rules that will impact revenues, expenses, and the financial viability of the proposed collaboration
- Implementation of financial control systems
- Cost of integrating operations
- Evaluation of whether the collaboration will require ongoing financial support, capital investment, and/or other resources.



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Legal Considerations

- Legal considerations will vary based on the specific activities contemplated by the collaboration partners, but may include:
 - Antitrust law
 - Medicaid and Medicare licensing, certification, enrollment and reimbursement rules
 - Professional licensure and certification rules
 - Federal tax considerations
 - Fraud and abuse laws (anti-kickback, false claims)
 - HIPAA and Part 2 confidentiality requirements
 - Similar state laws and regulations
 - State law related to corporations, LLCs, IPAs, ACOs

Step 4: Establish Definitive Agreements

- Definitive legal agreements can take many forms, including:
 - Single contract or multiple contracts
 - Partnership or shareholder agreements
 - Limited liability company operating agreements
 - Articles of incorporation/organization
 - Bylaws
- Terms should permit the parties to modify the agreements over time and change the collaboration, as may be appropriate, or even terminate the collaboration if the goals of the parties are not being met.

Step 5: Obtain Regulatory Approvals

- Prior to executing the definitive documents, the parties must satisfy (or obtain assurance of satisfaction of) all relevant regulatory approvals, as necessary for the collaboration.
- Common regulatory approvals include:
 - Complying with applicable state licensure and certification requirements, and securing, if necessary, a change in the agency's license or certification
 - Submitting application for approval as an IPA from regulatory agencies prior to submission to secretary of state
 - Securing advance rulings, advisory opinions, and other regulatory approvals, as may be relevant from other federal and state regulators



Collaboration Tips

- Establish a core group of representatives to coordinate the evaluation and implementation process
- Consider hiring an external consultant, not affiliated with any party, to manage and facilitate the collaboration process
- Develop an internal and external communications plan
- Ask the hard questions early (e.g. how much will it cost? who will pay for it? how much time will it require? what is the expected ROI?)
- Jointly develop a timeline (leave ample time for business planning, drafting of definitive agreements, and regulatory approval!)
- Throughout the process, consult legal and business consultants as necessary to ensure compliance with all federal, state and local laws, regulations and requirements and to develop a financially prudent and sound business model.

Questions and Comments

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Additional Webinars in this Series

All Webinars Scheduled for 1:00-2:00pm ET

Webinar 5: [Forming Community Partnerships to Participate in VBP Arrangements](#); Wednesday, July 18

Webinar 6: [Data Sharing and Confidentiality Part 1](#); Wednesday, August 1

Webinar 7: [Data Sharing and Confidentiality Part 2](#); Wednesday, August 15

Webinar 8: [Employment & Professional Services Agreements](#); Wednesday, August 29

Webinar 9: [Forming Provider Networks to Participate in VBP Arrangements](#); Wednesday, September 12

Webinar 10: [TBD](#); Wednesday, September 26

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<https://www.thenationalcouncil.org/care-transitions-network-people-serious-mental-illness/technical-assistance/webinars/>



Thank you!

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