

Forming Provider Networks to Participate in VBP Arrangements

Webinar 9

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



for People with Serious Mental Illness

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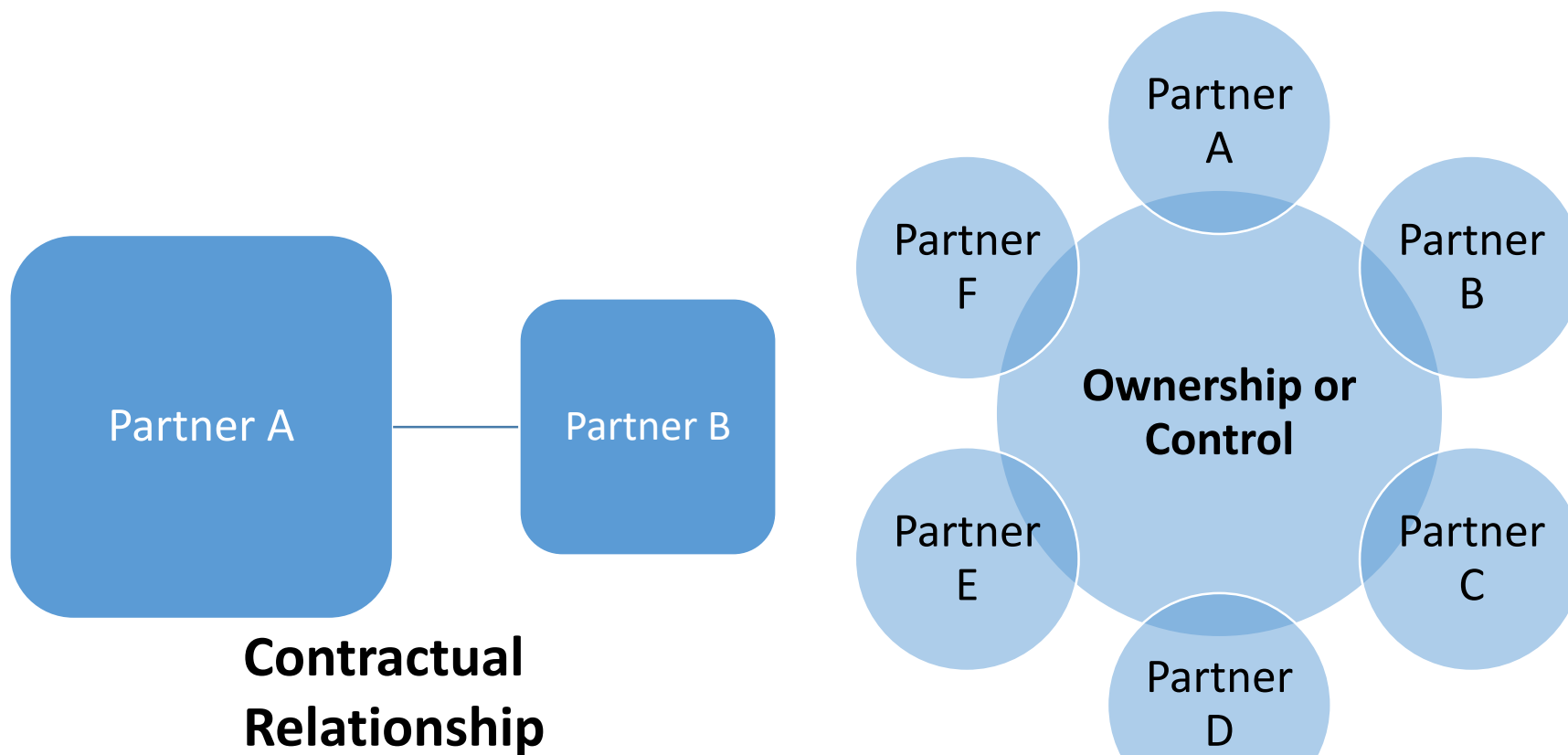
- Partner in FTLF's national health law practice.
- Counsels community-based providers of primary and behavioral health services, and their provider networks, on a wide range of health law issues, including fraud and abuse, reimbursement and payment, and antitrust and competition matters.
- Began his legal career in Washington, D.C. as a trial attorney in the Antitrust Division's Health Care Task Force at the U.S. Department of Justice.
- Served as Program and Policy Counsel at the Alliance of Community Health Plans, representing non-profit and provider-sponsored health plans before Congress and the Executive Branch.
- Received a B.A from Brandeis University, an M.P.H. from Boston University School of Public Health, and a J.D., cum laude, from Boston University School of Law.

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(Legal) Form Follows Function

- **Have a general sense of the activities likely to be performed by the partners/partnership in order to select the appropriate type of legal relationship or structure.**
- Key considerations for selecting the appropriate legal structure for your partnership will ultimately depend upon:
 - the number of legal entities involved
 - financial/legal risks of the partnership activities
 - whether the proposed activities are already being provided by one or more of the partners or are new activities
 - licensure or regulatory requirements
 - anticipated sources for capital investments
 - governance considerations

Legal Relationships/structure



Formation of New Legal Entity

- **Two or more parties may establish a new legal entity to conduct activities under shared ownership or control.**
- The benefits of forming a new legal entity include:
 - Shielding each partner from liability for debts, obligations and other liabilities of the network and other partners
 - Partners retain control over their own organizational operations because shared control only extends to network's joint activities
 - Partners maintain their independence and autonomy while working together
 - Partners can pool resources to make joint investments in information technology, clinical or financial expertise, or equipment

Functions of Provider Networks

Shared Support Services

- IT Support for Electronic Health Record (EHR)
- Health Information Exchange (HIE)
- Credentialing practitioners; exclusion/debarment background checks
- Third-Party Billing

Managed Care Contracting Services

- Marketing network of health care providers/agencies
- Facilitating managed care contracting
- Negotiating contracts (see slides on antitrust considerations!)

Provider Networks

Many terms are used to describe provider networks:

- Independent Practice Association (IPA)
- Management Services Organization (MSO)
- Administrative Services Organizations (ASO)
- Clinically Integrated Network (CIN)
- Accountable Care Organization (ACO)
- Group Purchasing Organization (GPO)

Note: In New York State, some terms above are subject to regulatory approval.

Choice of Legal Entity

- Legal entities generally available under state law:
 - Business corporation (For-Profit)
 - Non-profit organization
 - Limited Liability Company (LLC)
- This choice is critical as there are many advantages and disadvantages inherent in each type of structure.
- The selected option should reflect the goals and purposes of the new entity and the owners'/founders' expectations regarding governance, capital/financing, the parties' intent regarding receiving a return on investment (i.e., distribution of surpluses) and taxation.

Comparison of LLC and Non-Profit Entities

	LLC	NON-PROFIT 501(C)(3) ORGANIZATION
PURPOSE	Any lawful purpose	Charitable purposes
CAPITAL (PRIMARY SOURCE)	Private parties	Grants, tax-deductible contributions, loans
OWNERSHIP	Direct ownership as “members”; freely transferable (per terms of Operating Agreement)	No “owners”
PROFITS	Can retain or distribute dividends to owners	Corporation must retain surplus; no private inurement; can make unrestricted gifts to other charitable entities in furtherance of own charitable purposes

Governance Structure Considerations

- Many options for structuring governing board or board of managers (subject to state law):
 - Each founding member receives the same number of seats on the governing board, regardless of the individual member's size, contributions to the network, revenue, patient base, etc.
 - Board seats may be allocated in proportion to the amount of equity held by each member.
 - Board seats apportioned to assure representation of sub-groups of the network
 - If the network includes non-providers, the board seats could be allocated to ensure that the provider members retain majority decision-making authority.
 - All board seats are voted on democratically by the entire membership, but each member is not guaranteed a seat.

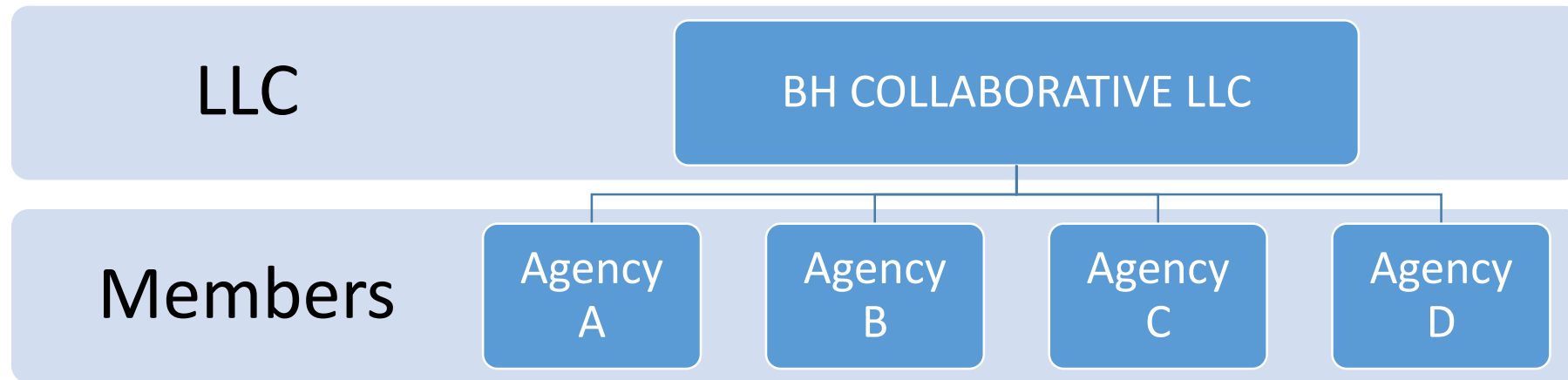
Limited Liability Company (LLC)

- Limited Liability Companies (LLC)
- Hybrid form that includes the liability protections offered by a corporation and the tax benefits of a partnership
- Flexible ownership and management
 - Owners of the LLC are called “members”
 - Members file articles of organization with the state
 - Members sign an operating agreement, which specifies the rights and responsibilities of the parties involved
 - New owner can be added at any time without filing new articles of organization with the Secretary of State.
- Tax benefits for charitable organizations
 - Income, if any, is not taxed at corporate level but only when distributed to owner(s)
 - If LLC’s activity furthers and is consistent with provider’s tax-exempt purposes, then taxation of distribution can be avoided altogether

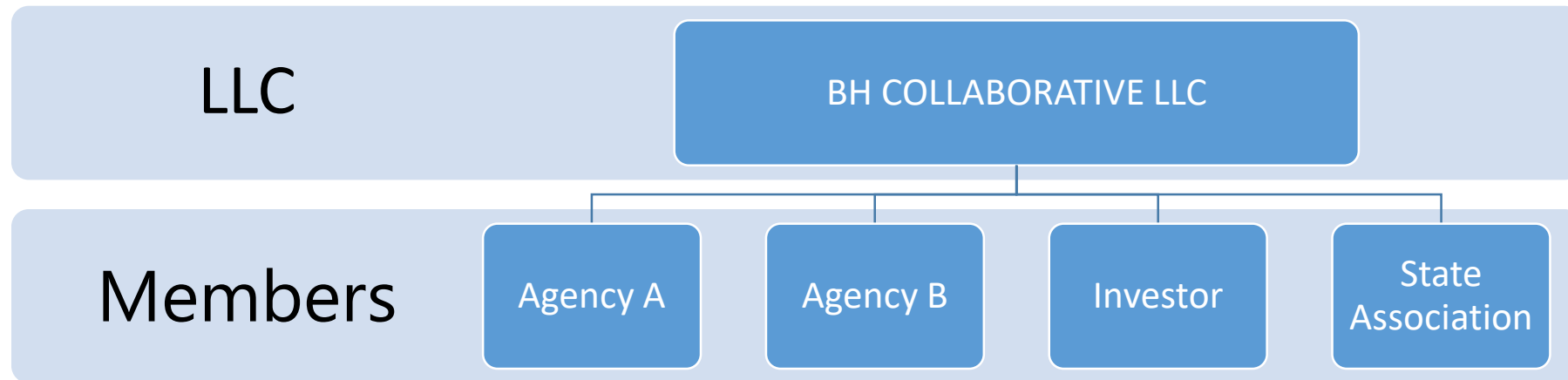
Type 1: Member-Managed LLC

- Type of Entity: Limited Liability Company (LLC)
- Governance:
 - Single class of ownership / membership
 - Operating Agreement defines eligibility for membership as a licensed/certified agency
 - Each member makes a capital investment
 - Network is directly governed by members
 - Each member is entitled to equal voting power
 - Supermajority required to add new members or modify Operating Agreement

Example 1: Member-Managed LLC



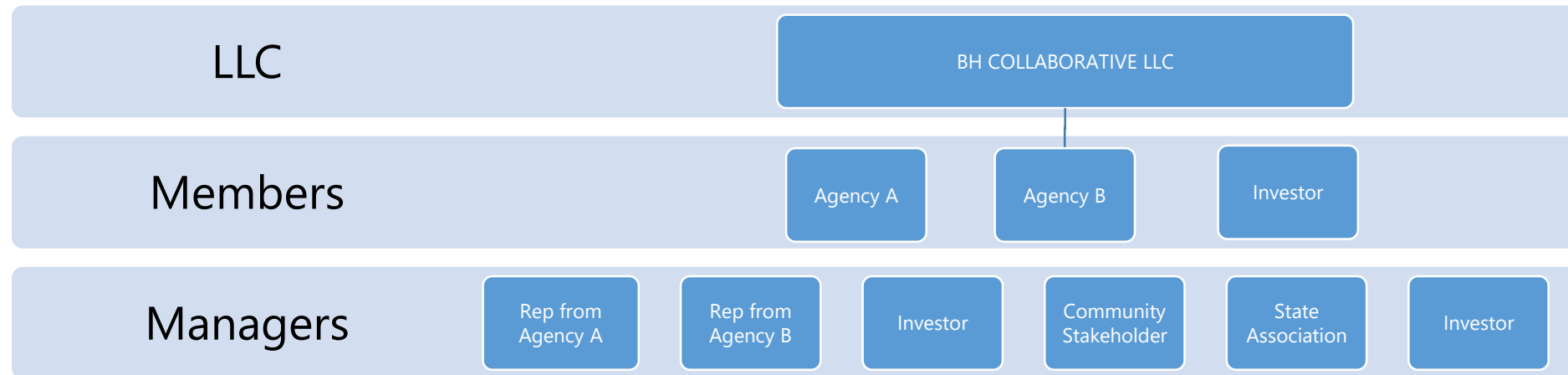
Example 2: Member-Managed LLC



Type 2: Manager-Managed LLC

- Type of Entity: Limited liability company (LLC)
- Governance:
 - Single class of ownership / membership
 - Operating Agreement defines eligibility for membership as certified/licensed agency
 - Each member makes a capital investment
 - Network governed by board of managers (functions similar to board of directors)
 - Each member (owner) automatically entitled to one seat on board of managers
 - Could permit non-members (non-owners) to participate in governance without ownership/equity in the LLC
 - Supermajority required to add new members or modify Operating Agreement

Example 3: Manager-Managed LLC



Comparison of LLC Governance Models

	MEMBER-MANAGED	MANAGER-MANAGED (BOARD OF MANAGERS)
BENEFITS	<p>Keeps membership small</p> <p>Ownership and management are composed of same entities/individuals</p>	<p>Can offer way for non-owners to participate in governance role without having an ownership interest</p>
DISADVANTAGES	<p>Does not allow governance role for non-owners</p>	<p>More complicated structure, with two distinct bodies to govern organization, one composed of owners and the other composed of managers</p>

Caution: Antitrust Risks

Stu's Views

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Give me
one good reason
we shouldn't
promote
teamwork.

The
government
calls it
"antitrust".



In general, providers must make independent, unilateral decisions on contractual terms and negotiate separately in order to comply with state and federal antitrust laws.



Antitrust Legal Standards

Per-Se Illegal (*e.g.*, price-fixing, market allocation)

“Rule of Reason” test determines whether arrangement is lawful:

- The joint activity of the network is likely to produce significant efficiencies that benefit consumers and
- Price agreements by the network providers are reasonably necessary to realize those efficiencies.

Antitrust “Safety Zones”

- DOJ/FTC Statements of Enforcement Policy in Health Care (1996)
 - <http://www.ftc.gov/bc/healthcare/industryguide/policy/statement8.htm>
- Medicare Shared Savings Program (MSSP)

Negotiating Managed Care Contracts

- Can a provider network negotiate fee-for-service (i.e., non-risk) contracts with MCOs?
 - ***Generally, no as it would constitute price-fixing.***
- But the answer can change:
 - If the network is not composed of competitors (or potential competitors)
 - If the network is “financially integrated” (see next slide)
 - If the network is “clinically integrated” and the joint negotiation is necessary to make the clinically integrated activities work
 - If the network participates as an ACO in the Medicare Shared Savings Program (MSSP)

DOJ/FTC Health Care Enforcement Policy

Statement 9: Multiprovider Networks

Examples of “**substantial financial risk-sharing**” include:

- capitation payments
- global fee arrangements
- fee withholds
- cost or utilization based bonuses or penalties for participants, as a group, to achieve specified cost-containment goals
- a fixed, predetermined payment to provide a complex or extended course of treatment that requires the substantial coordination of care by different types of providers offering a complementary mix of services

Tip: The Enforcement Agencies encourage multiprovider networks which are uncertain whether their proposed arrangements constitute substantial financial risk sharing to take advantage of the Agencies' expedited business review and advisory opinion procedures.

Value-Based Payment Methodologies

- ***Do federal antitrust laws permit provider networks to jointly negotiate value-based payments?***

Level 0 VBP*	Level 1 VBP	Level 2 VBP	Level 3 VBP
FFS with bonus and/or withhold based on quality scores	FFS with upside-only shared savings available when outcome scores are sufficient	FFS with risk sharing (upside available only when outcome scores are sufficient)	Prospective capitation PMPM or Bundle (with outcome-based component)
<ul style="list-style-type: none"> • Providers share risk jointly to earn bonus payments based on group performance • Providers do not share risk for FFS payments 	<ul style="list-style-type: none"> • Providers share risk jointly to earn shared savings payments based on network performance • Providers do not share risk for FFS payments 	<ul style="list-style-type: none"> • Providers share risk jointly to earn shared savings payments or owe shared risk payments to MCO based on network performance • Providers do not share risk for FFS payments 	<ul style="list-style-type: none"> • Network agrees to furnish services under capitated rate • Providers can receive FFS payments from network for individual services
Upside Risk Only	↑ Upside Risk Only	↑↓ Upside & Downside Risk	↑↓ Upside & Downside Risk

Value-Based Payment Methodologies

- Legal Test: Do the network members share “substantial financial risk” under value-based payment methodologies?
 - Providers jointly share financial risk for bonus payments (Level 0), shared savings payments (Level 1), shared risk payments (Level 2) and capitation payments (Level 3) based on group/network performance, i.e., the value-based components of VBP methodologies.
 - Providers do not share financial risk for FFS payments, i.e., the non-value-based component of the VBP methodologies.
- Conclusion: The network may negotiate the value-based components of VBP methodologies where those components involve sharing financial risk based on overall network performance. Networks may not negotiate FFS payments.

Non-Integrated Networks

Non-integrated provider networks do not meet legal standards for financial or clinical integration

Non-integrated provider networks may *facilitate* (but not negotiate) contracts involving base reimbursement rates if they carefully comply with the “Messenger Model”

Messenger Model

Provider Network, as the messenger, transmits proposed rates to each provider in network



Each provider determines whether to accept (or reject) MCO's payment terms



Provider Network communicates each provider's decision back to MCO

Combination Approach?

Base Reimbursement

Messenger Model

- Network members accept FFS/APM rates offered by MCO (without engaging in any negotiation).
- No downside risk because NYS currently mandates payment levels for behavioral health services to Medicaid enrollees.

VBP Arrangement

Financial Risk-Sharing

- Network negotiates value-based components (e.g., bonus payments, shared savings, shared risk) with MCO
- Value-based components won or lost based on group performance as a whole
- Network distributes value-based payments, if any, to providers, pursuant to methodology agreed by the members of the network.

Additional Webinars in this Series

The final webinar in this series, [Contracting for EHR Systems](#), is scheduled for 1:00 - 2:00pm ET on Wednesday, September 26.

To view additional webinars in this series as well as other upcoming webinars, please visit the Care Transitions Network website below for more information:

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



Thank you!

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