



Ensuring Your Goals Align With a Potential Partner

Moving from Internal Discussion to a
Memorandum of Understanding

Brett R. Friedman
Ropes & Gray LLP

ROPES & GRAY

January 30, 2018

Introduction and Housekeeping

Housekeeping:

- Slides are posted at [MCTAC.org](https://mctac.org)
- Questions not addressed today will be:
 - Reviewed and incorporated into future trainings and presentations
 - Added to Q&A resources when possible

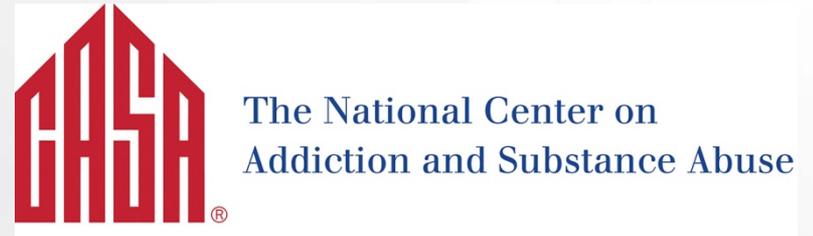
Reminder: Information and timelines are current as of the date of the presentation

What is MCTAC?

MCTAC is a training, consultation, and educational resource center that offers resources to *all mental health and substance use disorder providers in New York State*.

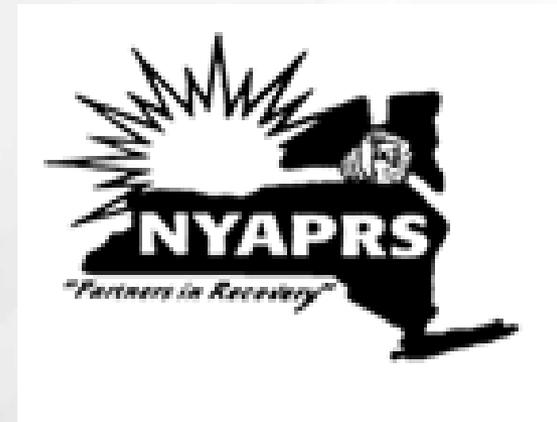
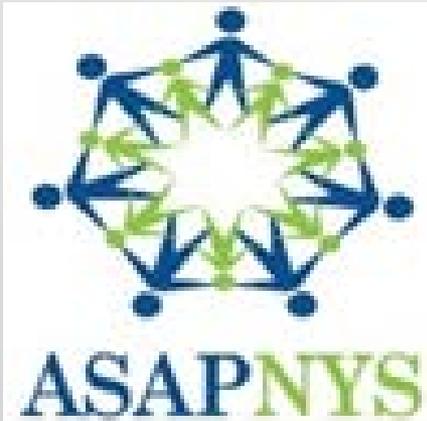
MCTAC's Goal

Provide training and intensive support on quality improvement strategies, including business, organizational and clinical practices to achieve the **overall goal of preparing and assisting providers with the transition to Medicaid Managed Care.**



CTAC & MCTAC Partners





Exploring Partnerships and Collaborations: Part Two

Strategy and Due Diligence

March 1st 12-1pm

With Joe Naughton-Travers from Open Minds

Register at www.ctacny.org

AGENDA

- **Introduction**
- **Planning for a Successful Partnership:
Getting from an “Idea” to an “MOU”**
- **Choosing a Model of Strategic Collaboration**
- **Steps for Reaching a Consensus:
Negotiating the MOU**

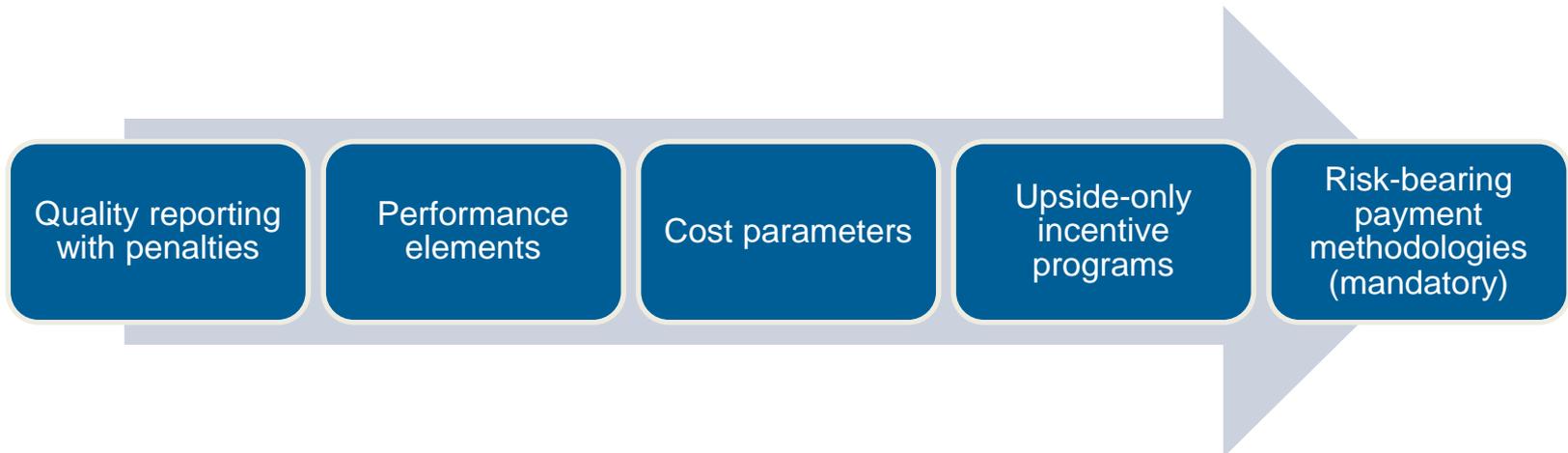
AGENDA

- **Introduction**
- **Planning for a Successful Partnership:
Getting from an “Idea” to an “MOU”**
- **Choosing a Model of Strategic Collaboration**
- **Steps for Reaching a Consensus:
Negotiating the MOU**

Introduction

- **Overview of the move to value-based care**

- Traditional reimbursement mechanisms are moving from “volume” to “value” across governmental and commercial payors
 - Early models emphasized data collection, data reporting, and cost tracking
 - Increasingly, providers are being asked to bear financial risk for overall cost of patient care
 - Successful providers will need to adapt



Introduction

- **Federal reimbursement changes**
 - 2010 ACA enables creation of payment reform pilot projects
 - Accountable Care Organization (“ACO”) Programs
 - Bundled or Episodic Payments Models
 - 2015 Medicare Access and CHIP Reauthorization Act (“MACRA”) incentivizes physician participation in value-based programs through enhancements to the Medicare Physician Fee Schedule
 - This year, CMS aims to spend 50% of its Medicare fee-for-service payments through alternative payment models and link 90% of its FFS payments to quality.

Introduction

- **New York State reimbursement changes: NYS 1115 DSRIP**
 - 2014 CMS waiver allows NYS to invest \$8 billion in comprehensive Medicaid delivery and payment reform primarily through a Delivery System Reform Incentive Payment (“DSRIP”) program
 - DSRIP program aims to promote community level collaboration, reduce avoidable hospital use by 25% over five years, and financially stabilize the State’s safety net.
 - DSRIP requires that Medicaid MCOs work with provider partnerships, called Performing Provider Systems (“PPSs”) to implement DSRIP projects.
 - PPSs include both major public hospitals and safety net providers, with a designated lead provider for the group.
 - Under the DSRIP program, NYS intends to move almost entirely to value-based care by 2020
 - **Phase I:** clinical delivery system improvement projects undertaken by PPSs in exchange for incentive payments
 - **Phase II:** transition by PPSs away from fee-for service to risk sharing arrangements



Introduction

- **The move to value-based care requires that providers:**
 - **Improve quality:** adhere to clinical care guidelines, optimize clinical coordination and documentation, enhance discharge and post-acute care management
 - **Reduce costs:** understand costs, promote clinician accountability, enhance discharge care management
 - **Proactively engage patients around clinical decision-making:** form care management teams that include the use of human capital and technological support for patient engagement (call centers, phone apps, etc.)
 - **Understand program measurements:** know the metrics on which you scored and the inputs into that measurement
 - **Invest in IT infrastructure:** utilize medical record systems and other data analytical tools to develop evidence-based protocols and measure clinical outcomes
 - **Understand the law:** know the regulatory requirements and develop an appropriate legal structure for partners
 - **Grow a network of partners:** choose partners with whom care can be effectively coordinated to optimize patient outcomes

Introduction

- **Why partnerships and collaboration are key to a successful transition to value-based care**
 - Access to clinical resources and promotion of effective care coordination and clinical integration
 - Access to operational, strategic and management resources, such as the ability to understanding strategic changes and negotiate complex third-party payer arrangements
 - Access to capital and increased risk tolerance
 - Leverage “size” of group
 - Large scale purchasing
 - Facilitation of network development for payers

AGENDA

- Introduction
- **Planning for a Successful Partnership:
Getting from an “Idea” to an “MOU”**
- Choosing a Model of Strategic Collaboration
- Steps for Reaching a Consensus:
Negotiating the MOU

Agenda

- Introduction
 - **Planning for a Successful Partnership: Getting from an “Idea” to an “MOU”**
 - Choosing a Model of Strategic Collaboration
 - Steps for Reaching a Consensus: Negotiating the MOU
 - Negotiating the Definitive Agreement
1. Get Organized
 2. Identify organizational goals
 3. Identify your organization’s value
 4. Identify and assess potential partners

Planning a Successful Partnership

1. Get organized

- An organized approach to a partnership includes:
 - Transparency
 - Predictability
 - Efficiency
- Identify the strategy team
 - Management
 - Members of the Board (“*ad hoc*” committees)
 - Attorneys
 - Consultants and advisors
- Prepare a general timeline and task list
 - Include relevant board meeting dates and deadlines
 - Allocate responsibilities and key workstreams

Planning a Successful Partnership

2. Identify organizational goals

- What are your “must haves”?
 - Return on investment
 - Mission continuity
 - Community commitment
- How much autonomy do you hope to maintain?
- What are your goals with respect to clinical programs and outcomes?
 - What clinical resources will you need to accomplish these goals
- What type of value-based arrangements would you like to pursue?
 - How much financial and clinical integration will this entail?
- What managerial and operational resources do you hope to obtain?
 - How does this impact autonomy?
 - What financial cost or commitment of assets will this entail?

Planning a Successful Partnership

3. Identify your organization's value

- Operating revenue/earnings and durability of revenue streams
- Patient demographics and service area
- Strategic alignment
- Clinical and programmatic expertise
- Services provided or supported
- Leadership
- Board composition
- Brand and community awareness

Planning a Successful Partnership

4. Identify and assess potential partners

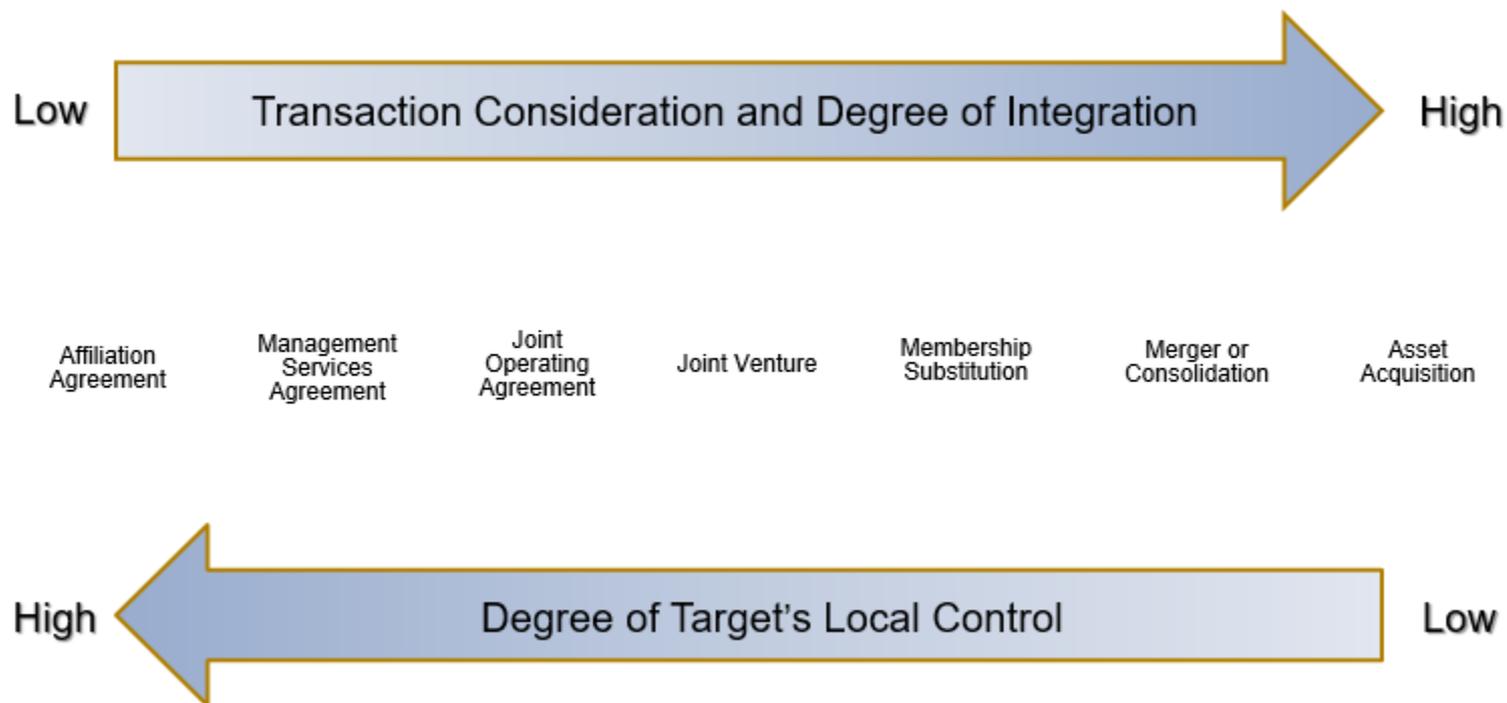
- For each potential partner, assess the following, keeping in mind organizational goals:
 - Network development: geographic service area and services provided
 - Operational resources and efficiencies
 - Quality and care management
 - Leadership and governance
 - Financial position
 - Brand recognition
 - Mission and cultural fit

AGENDA

- Introduction
- Planning for a Successful Partnership:
Getting from an “Idea” to an “MOU”
- **Choosing a Model of Strategic Collaboration**
- Steps for Reaching a Consensus:
Negotiating the MOU

Choosing a Model of Strategic Collaboration

- Collaborative models sit on a spectrum from loose affiliations with almost complete retention of autonomy to complete clinical integration.



Choosing a Model of Strategic Collaboration

■ Business considerations

- Tax considerations
- Allocation of purchase price (if any)
- Need for infusion of capital
- Retention of autonomy

■ Regulatory considerations

- Licensure and control
- Stark Law and Anti-Kickback Statute
- CHOW
 - CMS approvals
 - State approvals: licensing authority, court/AG (non-profits), CON

Choosing a Model of Strategic Collaboration

- A CON application is required for a change of ownership of any of the following:
 - Article 28 Providers
 - Hospitals, nursing homes, diagnostic and treatment centers, ambulatory surgical centers
 - Article 36 Providers
 - Certified Home Health Agencies, Long Term Home Health Care Programs
 - Article 40 Providers
 - Hospices
 - Article 7 Providers
 - Adult care facilities
 - Adult Day Health Care Programs
 - Similar requirements exist for other types of licensed providers
 - OMH (PAR, E-Z PAR)
 - OASAS (Change in Ownership)
 - OPWDD (CON)

Choosing a Model of Strategic Collaboration

- **“Loose” affiliation models**

- Affiliation agreement or “independent practice association” (IPA) model
 - Increasingly common
 - Preserves entity autonomy and separation
- Management services agreement
- Joint operating agreement
- Joint venture

- **Considerations**

- Control and autonomy
- Need for infusion of capital – human and financial
- Licensure and control
- Stark Law and Anti-Kickback Statute
- Antitrust law

Choosing a Model of Strategic Collaboration

- **Integrated models**

- Membership substitution
- Merger or consolidation
- Asset acquisition

- **Considerations**

- Retention of autonomy
- CHOW
 - CMS approval
 - State approval: CON, licensing authority, Court/AG (non-profits)

AGENDA

- Introduction
- Planning for a Successful Partnership:
Getting from an “Idea” to an “MOU”
- Choosing a Model of Strategic Collaboration
- **Steps for Reaching a Consensus:
Negotiating the MOU**

Steps for Reaching a Consensus

- **What is a Memorandum of Understanding?**
 - May also be referred to as a “Letter of Intent” or a “term sheet.” There is not a substantive distinction among the labels and they can be used interchangeably.
 - MOUs are typically non-binding, with certain binding provisions.
- **Binding provisions are limited and may include:**
 - Term
 - Confidentiality (if not in separate agreement)
 - Exclusivity
 - Coverage of costs
 - Governing law
- **Non-binding provisions typically include key terms of the transaction, which are inherently subject to change.**

Steps for Reaching a Consensus

- **Key terms usually included in the MOU:**
 - Transaction Structure, including “phases” and break points
 - Governance structure and obligations
 - Board composition, reserved rights, length of transition period (if any)
 - Purchase Price/Capital Commitment
 - Management/Employees
 - Post-Closing Commitments
 - Keep your “must haves” in mind!

Steps for Reaching a Consensus

- **Should we negotiate this term as a part of the MOU or wait for the definitive agreement?**
 - Sellers lose leverage after signing an MOU with exclusivity
 - Resolving major issues up front saves time and money
 - But beware - although non-binding, it is very difficult to re-negotiate terms agreed to in the MoU
 - Parties risk losing credibility in negotiations, both with each other and their respective boards
 - Exception for items discovered in due diligence or regulatory hurdles
- **Deciding whether to include the purchase price/capital commitments in the MOU**
 - Important consideration for both for-profit and non-profit
 - Possibly seek valuation
 - Use of auctions to determine the best value
 - Tip: Sometimes the best purchase price is inherently non-financial, particularly for not-for-profit corporations.

Steps for Reaching a Consensus

- **Full due diligence**
- **Antitrust considerations:**
 - Parties remain competitors
 - Tip: Use “clean rooms” and “clean teams” for competitively sensitive information
 - Preparation of documents in anticipation of the transaction
 - Possible disclosure under Hart-Scott Rodino Act
 - No “gun jumping”
 - Use of consultants

External contact slide



Brett Friedman
New York, NY
Brett.Friedman@ropesgray.com
212.596.9486

Questions and Discussion



Please email additional questions to mctacplusinfo@nyu.edu and register for future events at <http://www.ctacny.org> under “Upcoming Events”