SCHELL BRAY

SCHELL BRAY AYCOCK ABEL & LIVINGSTON PLLC
ATTORNEYS AND COUNSELORS AT LAW

Formalizing Accountable Care Community Partnerships

Ed Chaney

June 29, 2018

NC Institute of Medicine

Task Force on Accountable Care Communities

SCHELLBRAY

SCHELL BRAY AYCOCK ABEL & LIVINGSTON PLLC
ATTORNEYS AND COUNSELORS AT LAW

Overview

- No cookie-cutter solutions
  - Form will follow function… and other things
    - All of which can vary
- Presentation takeaways:
  - Key Considerations in Structuring Partnerships
  - Common Frameworks
- P.S. This is intended as general education and is not to be relied upon as specific legal advice

SCHELL BRAY

SCHELL BRAY AYCOCK ABEL & LIVINGSTON PLLC
ATTORNEYS AND COUNSELORS AT LAW

Key Considerations

- Autonomy vs. centralization
- Desired governance/control
- Tax status and income characterization
- Financing and cash flow
- Personnel and staffing
- Liability
- Medicare licensing and other regulatory considerations

SCHELL BRAY
SCHELL BRAY AYCOCK ABEL & LIVINGSTON PLLC
ATTORNEYS AND COUNSELORS AT LAW

Common Frameworks

- Contractual Collaborations
  - MOU (Memorandum of Understanding)
  - Shared services agreements
- Joint Ventures
- New Organization
  - Nonprofit Corporation/Unincorporated Association
  - Tax-exempt LLC

SCHELL BRAY

SCHELL BRAY AYCOCK ABEL & LIVINGSTON PLLC
ATTORNEYS AND COUNSELORS AT LAW

Contractual Collaborations: Basic

- Coordinated but independent partners
- Parties retain autonomy but agree on roles and responsibilities
- Typically little to some sharing of resources
- Often memorialized in a MOU, which may be non-binding

SCHELL BRAY
SCHELL BRAY AYCOCK ABEL & LIVINGSTON PLLC
ATTORNEYS AND COUNSELORS AT LAW

Contractual Collaborations: Basic

- Considerations
  - Most flexible but least formal of options
  - MOU can be broad/aspirational or exacting/specific
  - Can include coordinated decision making and information sharing
    - Usually not centralized management

Contractual Collabs: Advanced Track

SCHELL BRAY
SCHELL BRAY AYCOCK ABEL & LIVINGSTON PLLC
ATTORNEYS AND COUNSELORS AT LAW

- Increased coordination and resource sharing (including personnel)
- Usually multiple agreements
  - MOU
  - Administrative/management services
  - Leased/shared employees
- Finances and operations generally remain separate but more coordinated management/decisions
- Could increase liability risks among partners

SCHELL BRAY

SCHELL BRAY AYCOCK ABEL & LIVINGSTON PLLC
ATTORNEYS AND COUNSELORS AT LAW

Joint Venture

- No set definition: usually means partners coming together to carry out joint activities and share in financial gain or loss
- Can be created by contractual agreement, or by the formation of a new entity (usually an LLC)
  - Operational and management terms memorialized in LLC operating agreement
  - Ancillary agreements may be needed (e.g. management services)
- Can be among only tax-exempt entities or involve taxable/for-profit entities, within limits

SCHELL BRAY
SCHELL BRAY AYCOCK ABEL & LIVINGSTON PLLC
ATTORNEYS AND COUNSELORS AT LAW

Joint Venture

- Key Issues
  - Tax considerations
    - Preserving tax status
    - UBIT
  - Governance and Management
  - Financing and Economic
  - Licensing/regulatory

SCHELL BRAY

SCHELL BRAY AYCOCK ABEL & LIVINGSTON PLLC
ATTORNEYS AND COUNSELORS AT LAW

Joint Venture

Tax Considerations for Tax Exempts

- Treated as a “flow through” for tax purposes: income and activities attributed to owners
  - No subsidizing private interests (if present)
    - Ownership percentages, capital contributions, valuations, guarantees, indemnities
  - Revenue sharing/compensation of personnel subject to Section 4958 “Intermediate Sanctions”
  - Unrelated Business Income Tax

SCHELL BRAY

SCHELL BRAY AYCOCK ABEL & LIVINGSTON PLLC
ATTORNEYS AND COUNSELORS AT LAW

Joint Venture

JVs with for-profits/taxable entities

- Whole operations (Rev. Rul. 9815)
  - Characterized by turning all or substantially all of assets to JV with for-profit partner
  - Charity must retain enough control to ensure the charitability of the JV and deal terms cannot benefit private interests at expense of charity (no sweetheart deals)
    - E.g. control of governing board, requiring charitable mission be considered over profitability, independent management, reserving control or approval over certain critical decisions or unilateral decision making by charity

SCHELLBRAY

SCHELL BRAY AYCOCK ABEL & LIVINGSTON PLLC
ATTORNEYS AND COUNSELORS AT LAW

Joint Venture

JVs with for-profits/taxable entities

- Ancillary JV (Rev. Rul. 2004-51)
  - Comprises insubstantial amount of overall activity of charity, and JV activities are directly related
  - Must be arm's length agreements with terms at FMV (fair market value)
  - Charity controls the charitable aspects of the JV activities

SCHELL BRAY
SCHELL BRAY AYCOCK ABEL & LIVINGSTON PLLC
ATTORNEYS AND COUNSELORS AT LAW

Joint Venture

Governance/management

- Member vs Manager vs Quasi corporate structure
- Day to day management: in house or out sourced?
- Fiduciary duties?
- Compensation
- Control by tax-exempt organizations

SCHELL BRAY

SCHELL BRAY AYCOCK ABEL & LIVINGSTON PLLC
ATTORNEYS AND COUNSELORS AT LAW

Joint Venture

Financing and Economics

- Who contributes and how much?
- For-profits involved? See tax issues.
- May be eligible for philanthropic/social investment
- Revenue issues:
    - How is it earned, by whom, and is it shared?
    - Licensing?

SCHELL BRAY
SCHELL BRAY AYCOCK ABEL & LIVINGSTON PLLC
ATTORNEYS AND COUNSELORS AT LAW

New Organization

Rationale

- Need separate/independent governance
- Financing through direct grants and gifts
- Other tax or operational issues
- Possibly stronger liability protection

Types

- Tax exempt LLC (must meet certain qualifications)
- Nonprofit corporation or unincorporated association

SCHELL BRAY

SCHELL BRAY AYCOCK ABEL & LIVINGSTON PLLC
ATTORNEYS AND COUNSELORS AT LAW

Practical Advice

- Think big but start small
- Be deliberate
- Seek input from various internal stakeholders
- Don’t wait to involve legal, accounting and regulatory personnel and advisors

GREENSBORO | CHAPEL HILL

SCHELLBRAY

BUSINESS • REAL ESTATE • TRUSTS AND ESTATES