

Spring 2006

*This spring we advise  
you to look forward  
and not back!*

Our Tax Practice Group, with the addition of Attorney Madhuri Ravi, explains state and federal regulatory efforts to crack down on tax-exempt organizations and offers advice for the future. Our Health Care Practice Group welcomes Attorney Barbara Greenwood who reminds providers of ongoing HIPAA obligations and new advisories on fraud and abuse. Attorney Jill Dinneen, of our Business and Finance Practice Group offers advice to non-profits on best practices guided by Sarbanes-Oxley.

While Massachusetts passes a universal health care coverage law our New Hampshire legislature and state policy making groups are looking forward by encouraging transparency and investigating health care cost drivers. With additional articles on what physicians should know about HSAs, and new employment tips, we hope to keep our provider clients looking forward as well!



*Lucy C. Hodder*

# How's Your Health?



**News & Views from Rath, Young and Pignatelli**

## UNDER THE GOLD DOME

**News and Events from Concord and Washington**

By Attorney Ann McLane Kuster



In 2005, the New Hampshire Legislature focused on legislation to create review panels for medical malpractice claims. In 2006, the focus is on disclosure of health care cost drivers and quality indicators. The House recently passed legislation to create a commission to investigate cost drivers in providing health care. Legislation to require reporting of infection rates in hospitals to the Department of Health and Human Services will be sent to Governor John Lynch to be signed into law. In the interest of encouraging transparency and access for consumers to health care costs, the House voted to continue further study of a bill that would require health care providers to post or make available to consumers "a) the cash price they charge and (b) the average reimbursement rate they receive from insurance companies for each service or product they offer." We will closely follow these legislative efforts to analyze health care costs and will report to you on the outcome. 🏠

*For more information or to receive copies of new laws,  
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**RATH, YOUNG AND PIGNATELLI**  
*Professional Corporation*

# The Taxman Cometh? Increasing Scrutiny Of Hospitals And Other Tax-Exempt Organizations

By Attorney Madhuri Ravi



❖ **IRS Enforcement Efforts.** For many years, the Internal Revenue Service (IRS) concentrated on education rather than enforcement in the tax-exempt arena. Increasingly, tax-exempt organizations have been subject to detailed scrutiny of their activities. The IRS has announced that enforcement efforts, including audits, inquiries, and more detailed public reporting requirements will be the significant focus for years to come. For example, the IRS doubled the number of tax-exempt organizations it contacted in 2005 and has hired 105 new IRS agents to investigate the activities of tax-exempt organizations.

❖ **IRS Focus On Community Benefit Compliance.** In 2004 and 2005, the IRS focused on two areas—the executive compensation practices of tax-exempt organizations, including hospitals, and the use of tax-exempt bond financing. In 2006, the IRS will continue scrutiny of executive compensation practices and will also focus on a critical aspect of a hospital's tax-exempt status — community benefit compliance. Although hospitals are not obligated to provide specific levels of charity care to maintain tax-exempt status, they are required to demonstrate the provision of "community benefits."

empt organizations following the passage of legislation in 2004 requiring greater public disclosure of various tax-exempt activities. The current efforts of the Attorney General's Office are to assist tax-exempt organizations to design compliance initiatives. As a reminder, New Hampshire has specifically enacted "community benefits" legislation to ensure that exempt health care organizations provide community benefits "in recognition of the advantages" they enjoy. RSA 7:32-c.

Other states, including Kansas, Illinois, Minnesota, New York, and Wisconsin, also are subjecting tax-exempt organizations to increased scrutiny.

❖ **Local Efforts To Impose Property Taxation.** New Hampshire localities have much more discretion to impose local property taxation on tax-exempt organizations. Unlike the Business Profits Tax and Business Enterprise Tax, which generally exclude tax-exempt organizations, federal tax classification is not necessarily dispositive (see chart). Local authorities are increasingly attempting to subject tax-exempt organizations to property taxation. For example, Peterborough selectmen attempted to revoke the property tax exemption for the Mac Dowell Colony, a charitable organization that owns

Tax	Simplified Description of Tax	Issues for Tax-Exempt Entities to Consider
Business Profits Tax (RSA 77-A)	8.5% Tax on Profits of Organization (i.e. Revenue Less Expenses)	All organizations expressly exempt from income taxation under the Internal Revenue Code.
Business Enterprise Tax (RSA 77-E)	0.75% Tax on Amount of Compensation Paid, Interest Paid, and Dividends Paid by Organization	Only organizations expressly exempt from income taxation under 501(c)(3). 501(c)(3) organizations who engage in unrelated business activity under section 513 are subject to BET on unrelated business activities.
Property Tax (generally, RSA 72)	Tax Based on Fair Market Value of Property to pay for county, local and education services	"Charitable" organizations exempt for buildings lands and personal property "used and occupied" directly for charitable purposes. Organization as "Not-for-profit" and federal tax classification (501(c)(3), etc.) explicitly irrelevant by statute (RSA 72:23-l). Organizations may be obligated for payments in lieu of taxes (PILOT's). RSA 72:23-n.
Meals and Rentals Tax (RSA 78-A)	8% Tax on "Taxable Meals" and "Taxable Rentals"	A variety of exemptions exist whereby meals served by nonprofit organizations and meals served to certain persons are exempt from tax paid by the consumer. RSA 78-A:3.

❖ **State Developments.** New Hampshire state officials are subjecting tax-exempt organizations to increased focus. The Charitable Trusts Division of the Attorney General's Office has increased tools to monitor tax-ex-

32 artist studios on 450 acres of land and has operated on a tax-exempt basis for nearly 100 years. The Mac Dowell Colony is actively challenging the revocation. Other traditionally exempt Peterborough properties were also

*Continued on next page*

reviewed, with some organizations settling for higher PILOT payments to avoid full property taxation.

❖ **State Legislative Developments.** Legislative scrutiny regarding property taxation increased this year. The New Hampshire House of Representatives passed HB 1631, a bill that would have revoked the property tax exempt status of the Appalachian Mountain Club, an organization that provides substantial public benefits in maintaining hundreds of miles of hiking trails in New Hampshire. The New Hampshire Senate voted HB 1631 "inexpedient to legislate," but legislation affecting tax-exempt status is likely to be considered in the future.

❖ **Recommendations.** Tax-exempt organizations should consider increasing their compliance budgets to ensure that they do not jeopardize their tax-exempt status at the federal level or run afoul of the sometimes different standards enforced at the state and local level. Waiting until the taxman cometh is risky, expensive, and potentially crippling to the organization's public reputation, mission and tax-exempt status. 🏠

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## The HIPAA Security Rule And Business Associate Agreements

*Are your business associate agreements fully compliant with HIPAA?*

By Attorney Barbara J. Greenwood



### ❖ Privacy Rule Requirements

By now, most providers and health plans have developed a form of business associate agreement that complies with the HIPAA Privacy Rule. The Privacy Rule permits "covered entities" to share protected health information, or "PHI," with business associates, so long as the parties have a business associate agreement in place containing appropriate safeguards to protect the confidentiality of the PHI. (Specific provisions are mandated by the Privacy Rule.)

### ❖ Security Rule Requirements

The HIPAA Security Rule, which came into force more recently than the Privacy Rule, requires that business associate agreements now include some additional provisions designed to safeguard electronic PHI, or "E PHI." E PHI is defined to mean individually identifiable information that is transmitted by electronic media or maintained in electronic media.

### ❖ Additional Required Provisions

In order for a covered entity to permit a business associate to create, receive, maintain or transmit E PHI on its behalf, the parties must have a business associate agreement that contains the additional new provisions mandated by the Security Rule. These provisions are fairly straightforward. The agreement must require the business associate to implement administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of E PHI that

it creates, receives, maintains, or transmits on behalf of the covered entity. The business associate must also agree to require that any agent or subcontractor to whom it provides E PHI agree to implement similar safeguards. The business associate must agree to report to the covered entity any "security incident" of which it becomes aware. (A "security incident" is defined as the attempted or successful unauthorized access, use, disclosure, modification, or destruction of information or interference with system operations in an information system.) The agreement must also authorize termination if the business associate violates a material term. (See 45 CFR 164.314.)

### ❖ Compliance Date

The date for compliance with the Security Rule for most covered entities was April 20, 2005. (The compliance date for small health plans was April 20, 2006.)

### ❖ Review / Update Your Forms

Covered entities that share E PHI with their business associates would be well-advised to review existing business associate agreements for compliance with the HIPAA Security Rule, and to update their form of business associate agreement so that it complies with the Security Rule. 🏠

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## Fraud & Abuse Corner

### New OIG Advisory Opinions Raise Red Flags

By Attorneys Lucy C. Hodder and Barbara J. Greenwood



The federal Office of Inspector General, Health and Human Services often publishes opinions on whether certain health care arrangements and joint ventures between providers violate the Anti-Kickback Statute and thus could result in criminal or civil penalties. The OIG recently published two important advisory opinions warning providers not to provide free assessments, and finding that joint ventures with physicians cannot avoid the Anti-Kickback Statute by simply carving out Medicare patients.

#### ❖ No Free Assessments

In a recent advisory opinion, the Office of Inspector General concluded that a home health agency could not provide free assessments to patients. OIG Advisory Opinion No. 06-01 concerns a home health agency's practice of providing prospective customers with a free preoperative home safety assessment. The OIG concluded that the practice potentially violated the Anti-Kickback Statute and the civil monetary penalty provision for violations of the prohibition against inducements to Medicare beneficiaries.

#### ❖ Joint Ventures:

##### **Carving Out Medicare Patients Does Not Solve The Anti-Kickback Problem**

In an extremely sweeping opinion, the OIG's office recently decided that if Medicare providers are involved in a joint venture involving private pay patients (i.e., carving out federal program beneficiaries) the venture may still violate the Anti-Kickback Statute. The OIG will examine the entire relationship between the parties to determine whether the joint venture is a sham, and intended to induce referrals.

*"The OIG has a long-standing concern about arrangements pursuant to which parties "carve out" referrals of Federal health care beneficiaries or business generated by Federal health care programs from otherwise questionable financial arrangements."*

OIG Advisory Opinion No. 06-02 concerns a Durable Medical Equipment company's proposed arrange-

ment to supply DME and trained technicians to physician practices, through two programs. One program was for patients who were only private pay, and the other included federal beneficiaries, such as Medicare patients. The OIG insisted on considering the two programs together, and concluded that both programs posed a significant risk of fraud and abuse.

Even though there were no Medicare patients included in the first program, the OIG characterized it as a problematic "contractual joint venture" of the sort addressed in the April 2003 Special Advisory Bulletin, noting the OIG's long-standing concern about arrangements where the parties "carve out" referrals of federal health care beneficiaries from otherwise questionable financial arrangements. The OIG suggested that the physicians' potential profits under the first program might be disguised remuneration for steering federal health care beneficiaries to the DME company.

*"Simply put, the source of the funding for a potential kickback payment is not determinative of the intent of the payment."*

The OIG was not comforted by the fact that there were safe harbor protections (such as lease and personal services arrangements) available for the component parts, and nevertheless decided safe harbors could not cure a problematic "contractual joint venture."

While arguably expansive, this position certainly raises issues for providers seeking to structure complex joint ventures. Providers who participate in joint ventures which carve out Medicare patients should carefully review such arrangements. 🏠

For copies of these and other OIG Advisory Opinions including A0#06-03 regarding drug manufacturer's patient assistance program and A0#06-04 regarding charitable organizations' financial assistance to beneficiaries go to <http://oig.hhs.gov/fraud/advisoryopinions/opinions.html>

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## It's A New Day For Corporate Governance For Nonprofits

By Attorney Jill Dinneen

### ❖ Sarbanes-Oxley "Best Practices"

In the wake of Enron and other corporate scandals, the Sarbanes-Oxley Act of 2002 was enacted by Congress. Nonprofit, or "voluntary," corporations in the terminology of New Hampshire's RSA 292, are not subject to the corporate governance requirements imposed on publicly traded companies by the Sarbanes-Oxley Act. However, since so much public scrutiny has been focused on the requirements of Sarbanes-Oxley, its standards have become familiar to those interested in corporate governance issues. Therefore, it seems likely that the Sarbanes-Oxley standards may be applied to companies not subject to its requirements as part of a general "best practices" approach to corporate governance.

### ❖ Senate Finance Committee Hearings

The Senate Finance Committee, which has been conducting hearings and commissioning studies on nonprofit corporate governance issues since 2004, is focusing on accountability in the nonprofit sector. The Committee is seeking ways to stop and prevent abuses by directors, staff leaders, donors, and those doing business with nonprofit organizations, possibly through new laws or regulations.

### ❖ Corporate Governance Issues

The corporate governance reforms required by Sarbanes-Oxley seem a likely source for new "best practices" in the nonprofit arena. For nonprofit corporations, ethical corporate governance and transparency – two of the primary goals of Sarbanes-Oxley – are of special concern. Just as publicly traded companies have obligations to the investing public, nonprofit corporations must be able to assure potential donors that they are well-run, ethical corporations. In New Hampshire, the Attorney General has the responsibility of overseeing nonprofits and has the power to step in where necessary. For example, in 2004, St. Paul's School agreed to allow New Hampshire Attorney General Kelly A. Ayotte's office to review its finances until 2008. As part of the agreement, the Attorney General's Office also reviewed and made recommendations to improve corporate governance of St. Paul's. The

recommendations acknowledged that although Sarbanes-Oxley does not apply to nonprofits, it provides a guide for best practices.

### ❖ Reviewing Your Corporate Governance Policies

Independent Sector's Panel on Nonprofits has been working with the Senate Finance Committee to make recommendations to strengthen governance, ethical practice and accountability. As part of the Panel's proposals, in an initial review of corporate governance policies, there are three key areas nonprofits should consider: *Continued on page 7*

## NEW CON BOARD MEMBER

Rath, Young and Pignatelli would like to congratulate Mr. Robert Chase of Laconia on his appointment to the Health Services Planning & Review Board. Mr. Chase is the Administrator of Merrimack County Nursing Home, and serves on the Executive Committee of the New Hampshire Association of Counties. He is a past recipient of the New Hampshire Association of Counties Nursing Home Administrator of the Year Award.



## Employment Law Reminders

By Attorney Lucy C. Hodder

### ❖ Be Careful of Payroll Deductions.

The New Hampshire Department of Labor is very strict about when an employer can withhold amounts from an employee's wages. Effective January 1, 2006, an employer can withhold wages to repay a legitimate loan, or a wage overpayment if authorized. Be careful when structuring a loan repayment deduction, as the DOL disfavors them and specific agreement language must be included in the loan documents. As Cynthia Flynn, the Department's Wage Hour Administrator, loves to say, "if employees want a loan, send them to the bank!"

### ❖ Remember Your Safety Committee and Filings.

Pursuant to 281-A:64, all employers with 10 or more employees must prepare a current written safety program. The programs must be filed biennially with the commissioner on January 1<sup>st</sup>. Employer programs must, in addition to the specific rules and

regulations regarding worker safety, include the process of warnings, job suspension, and job termination for violations of the safety rules and regulations set forth in the program. Every employer of 5 or more employees must establish and administer a joint loss management committee that meets regularly to develop and carry out workplace safety programs, alternative work programs that allow and encourage injured employees to return to work, and programs for continuing education of employers and employees on the subject of workplace safety. See <http://www.labor.state.nh.us/forms.asp>

❖ **Leave for Crime Victims.** New Hampshire now has a Crime Victim Employment Leave Act, RSA 275:61 through 65, which requires that employers with 25 or more employees allow those who are victims of any offense legally designated as a felony or misdemeanor to leave work

to attend court and other legal or investigative proceedings associated with prosecuting the crime.

❖ **Independent Contractor Agreement Review.** The New Hampshire legislature is poised to pass legislation intended to ensure that independent contractors are NOT actually employees by defining the requirements that must be set forth in independent contractor agreements. See SB 267. All employers who have contracts with individuals that purport to be independent contractors should have such contracts and services reviewed for compliance. The Department of Employment Security is not friendly to employers who misclassify employees as contractors. 📌

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## What Physicians Should Know About HSAs and High Deductible Health Insurance

By Attorneys Steven J. Lauwers and James L. Zemp



### ❖ What is an HSA?

In 2004, Congress established health savings accounts (HSAs) to encourage consumers to use tax-advantaged savings accounts with high-deductible health insurance plans to pay qualified medical expenses. Under these plans, the high deductible must be at least \$1,050 for a single person and \$2,100 for a family. Both employers and employees can contribute to HSAs on a pretax basis up to limits set by the U.S. Treasury, but neither is required to do so.

### ❖ HSAs are Gaining Momentum

Over the past two years, HSA enrollment has exceeded 3.1 million members. By 2015, that number should reach 30 million. This trend is part of a more fundamental market shift toward consumer-driven health care. Consumers are bearing more financial risk and responsibility in medical purchasing decisions. The intent is to provide consumers with clear financial benefits and burdens so they will make more informed and efficient health care decisions.

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## ❖ Effect on the Doctor-Patient Relationship?

HSAs and their associated high-deductible health plans encourage patients to be more connected to their health care purchasing decisions. The goal is for patients to become more active participants in their medical management. While some changes in behavior are clearly desirable (e.g. smoking cessation, weight loss), it will be important to educate patients on the importance of check-ups and other preventive care. It is also likely that patients will seek more detailed information about the cost of procedures before agreeing to them.

## ❖ Collecting Deductibles

As more patients carry insurance coverage with high deductibles, it will be important for medical providers to rethink how they will collect these deductibles and co-payments from their patients. A good first step is reviewing your health plan contracts for any limitations on medical providers receiving patient payments. Next, find out what online resources the health insurer offers to access patient deductible records.

Keep in mind that for treatment under a health plan, collections should be at the contracted rate. Some providers have adopted a policy of collecting the money at the time of service unless the patient advises that they have met the deductible. In any case, it is advisable to communicate clearly and have the patient sign off on understanding your billing process. Finally, it will be more valuable than ever to keep updated records of other insurance to which your patients may be entitled (e.g. spousal benefits, Medicare).

## ❖ Do Not Offer Tax Advice

Part of an HSA's attraction is its tax benefits. Generally, contributions to HSAs are tax-deductible, while withdrawals for qualified medical expenses and earnings on HSA investments are tax-free. Yet, there are many details and nuances in the tax code that are beyond this discussion. They should not be tackled by anyone other than the patient's tax advisor. We strongly advise that you avoid answering any tax questions raised by your patients, and document the fact you did. 🏠

For more information, please contact Steven J. Lauwers at [sjl@rathlaw.com](mailto:sjl@rathlaw.com) or James L. Zemp at [jlz@rathlaw.com](mailto:jlz@rathlaw.com) or 603-226-2600.

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## It's A New Day For Corporate Governance For Nonprofits

❖ **Conflict of Interest Policy.** First, every organization should adopt and enforce a code of ethics and conflict of interest policy tailored to its specific needs and its state laws. In the nonprofit arena, it is not at all unusual for board members and staff leaders have interests in other organizations and businesses that can be of great benefit to a nonprofit organization, but these overlapping interests can lead to inappropriate transactions if everyone involved is not aware of the potential conflict of interest and how the organization manages such conflicts. New Hampshire law, in RSA 7:19-a, already mandates nonprofits to adopt policies pertaining to conflicts of interest, and requires directors, officers and trustees to disclose conflicts of interest for the approval by disinterested parties.

❖ **Financial Literacy & Audit Committee.** Second, boards of directors must be aware of their fiduciary duties to the organization. As a best practice, nonprofit organizations should:

- ❖ Ensure that they have individuals with some financial literacy on their board of directors; and
- ❖ Consider establishing a separate audit committee to assist the board in overseeing the audit process and to ensure that all financial matters of the organization are conducted legally, ethically and in accordance with proper accounting rules.

❖ **Financial Whistle-Blower Policy.** Third, all nonprofit organizations should establish policies and procedures that encourage and protect individuals who come forward with credible information on illegal practices or violations of adopted policies of the organization. Information from "whistle-blowers" is critical for boards and staff managers to correct or stop wrongdoing before further harm is done to the organization. 🏠

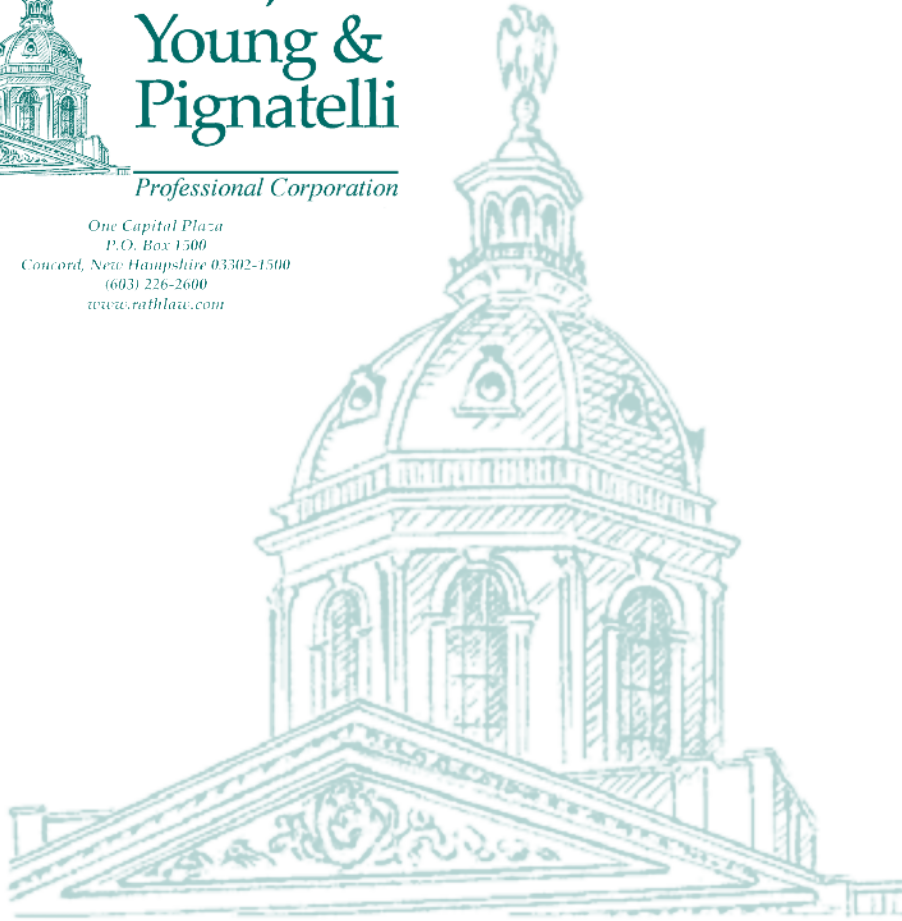
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## NEW FACES AT RATH, YOUNG & PIGNATELLI



### **JILL DINNEEN**

*Business & Finance Practice Group*

We welcome Jill Dinneen, who joined our firm January 30th after relocating to New Hampshire from New York City. In New York, Jill was an associate at Thelen Reid & Priest LLP where her practice included mergers & acquisitions, debt and equity financing

transactions and securities law. She also devoted a large portion of her practice to advising companies on general corporate matters, and in particular, corporate governance and Sarbanes-Oxley. As corporate governance becomes a hot topic in the nonprofit sector, Jill is able to offer advice on a wide range of corporate governance issues. Jill is a member of the New Hampshire bar (2005) and the New York bar (2000). You can contact Jill Dinneen at [jd@rathlaw.com](mailto:jd@rathlaw.com) or by calling 603-226-2600.



### **BARBARA J. GREENWOOD**

*Health Care Practice Group*

We welcome Barbara J. Greenwood to our law firm and the Health Care Practice Group. Barbara joins us from Devine, Millimet in Manchester, where she practiced for three years. Prior to that, she

practiced with the Philadelphia-based firm of Drinker Biddle & Reath. Barbara's practice focuses on counseling healthcare providers on a wide range of regulatory compliance issues including fraud and abuse, licensing and accreditation, and privacy, and assisting providers with developing and negotiating collaborative ventures and various types of agreements. You can contact Barbara J. Greenwood at [bjg@rathlaw.com](mailto:bjg@rathlaw.com) or by calling 603-226-2600.



### **MADHURI RAVI**

*Tax Practice Group*

We welcome Madhuri Ravi to our law firm. Madhuri joined Rath, Young and Pignatelli's Tax Practice Group after working in the State and Practice Local Taxation Group at Pricewaterhousecoopers. She received her LLM

in Taxation from Boston University and is licensed to practice law in Massachusetts and New York only. During law school she clerked for the medical malpractice defense group at Neil, Dymott, Frank, Harrison & McFall, P.C. a firm in San Diego, California. From her background she is able to offer practical legal advice on state taxation issues. You can contact Madhuri Ravi at [mr@rathlaw.com](mailto:mr@rathlaw.com) or by calling 603-226-2600.