News & Views from
Rath, Young and Pignatelli
Spring 2007

How's Your Health?

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NHMS CAP

Under the Golden Dome New Leadership - New Ideas

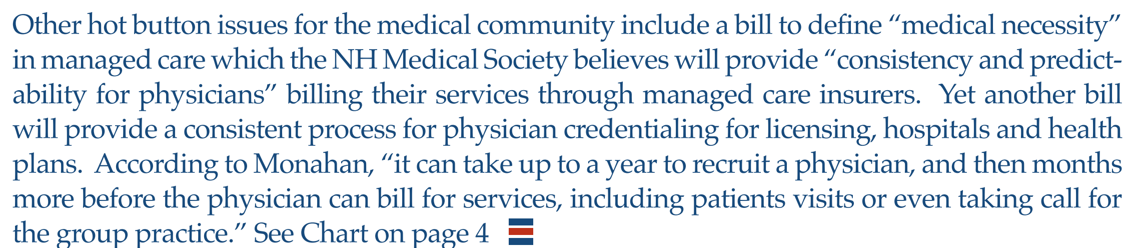
By Attorney Ann McLane Kuster

The New Hampshire Legislature convened in January for the 2007 Session with an entirely new leadership team in both the House and the Senate, led by Speaker of the House Terri Norelli (D-Portsmouth) and President of the Senate Sylvia Larsen (D-Concord). Indeed, Democrats hold the majority in both bodies of the NH Legislature for the first time in well over 100 years!

With all new Committee Chairs in both the House and Senate, processing the 1300 plus bills has been a challenge, but legislators are pitching in to the pile with energy and enthusiasm. According to Janet Monahan, Deputy Executive Vice President of the New Hampshire Medical Society, health care is high on the agenda for the new Democratic Majority in the State House.

"We expect public health issues to receive strong support this session," said Monahan, "including bills to promote a healthy workplace, such as the proposed ban on smoking in all bars and restaurants, and to preserve a healthy environment, such as the ban on burning construction and demolition debris."

Other hot button issues for the medical community include a bill to define "medical necessity" in managed care which the NH Medical Society believes will provide "consistency and predictability for physicians" billing their services through managed care insurers. Yet another bill will provide a consistent process for physician credentialing for licensing, hospitals and health plans. According to Monahan, "it can take up to a year to recruit a physician, and then months more before the physician can bill for services, including patients visits or even taking call for the group practice." See Chart on page 4



A Brief Guide to Business Entities

By Attorneys Christopher J. Sullivan and James H. Newsom

Today's businesses have multiple options in choosing the form of business entity. These options range from a sole proprietorship, a partnership, a limited liability company (LLC), to a corporation. The trick is selecting the right entity for your business needs.

Two principal factors have driven the development of various business organizations: the desire of owners to limit liability, and the desire to avoid multiple levels of taxation at the federal level. Some corporate forms favor one solution at the expense of the other. For example, sole proprietorships impose only one level of taxation (an owner reports the earnings of the entity on his or her personal return). However, sole proprietorships are exposed to unlimited liability. Corporations, on the other hand, offer the benefits of limited liability, but at the expense of multiple levels of taxation: for example, "C" corporations are taxed on their earnings, and individual owners are taxed again when those earnings are distributed as dividends.

In recent years, the LLC has emerged as a corporate form that often offers the best of both worlds – limited liability and a single level of federal taxation. Additionally, LLCs offer great flexibility to the owners in structuring their economic and management relationships. For example, LLCs are permitted to have profit and loss distributions that explicitly vary from the ownership or voting percentages – a critical difference from C and S corporations.

The chart on page 3 briefly summarizes your options and some of the factors to think about when forming a new entity, including cost of formation and operation, flexibility, and formality of operations.

For more information or assistance forming a new entity, please contact Christopher J. Sullivan or James H. Newsom at 226-2600 or cjs@rathlaw.com and jhn@rathlaw.com.

Events *Sponsored in part by Rath Young & Pignatelli*

- 2007 Franklin Pierce PIC Auction
- 2007 Special Appeal by the American Heart Association
- Concord Hospital Spring Event Benefiting Healthy Beginnings

Legal Update

By Attorney Lucy C. Hodder

Tax Relief and Health Care Act of 2006: Effects on Healthcare.

- The Act prevents the expected 5% reduction in the Physician Fee Schedule.
- Physicians who elect to participate in quality reporting beginning in July 2007 may qualify for a consolidated incentive payment. (Reports and commentary note that incentive payments may be as little as 1.5%.)
- The Act provides for voluntary quality reporting for hospital outpatient services and ambulatory surgical services that provide quality data in fiscal year 2009.
- Hospital outpatient data will be made public as part of the Hospital Compare Web site, www.hospitalcompare.hhs.gov/hospital/home2.asp.
- Last year, CMS stated that it would implement a policy to pay only the hospital for the technical component of the physician pathology services furnished to hospital patients. The Act, however, provides for a one-year extension to the Medicare Modernization Act that allows the carrier to continue to pay independent laboratories under the Medicare Physician Fee Schedule for the technical component of physician pathology services furnished to patients of a covered hospital. Therefore, independent laboratories which qualify to bill for these services may continue to bill for them for the time being.
- The Act increases the annual contribution limits for HSAs to $2,850 and makes the accounts more flexible.

Reminder: National Provider Identifier.
Providers who bill for Medicare services probably need a national provider identifier. Only three more months to apply!!! HIPAA requires providers to share their NPI with other providers, health plans, clearinghouses, and any entity that may need it for billing purposes.

Continued on page 5

Comparison of Business Entities Chart

Characteristics	Sole Proprietorship	General Partnership	Limited Liability Company N.H. RSA 304-C	"S" Corporation	"C" Corporation
Formation of Entity	No permission required	Agreement of parties involved. No permission required	File with state for permission	File with state for permission plus filing with IRS	File with state for permission
Duration of Entity (Continuity of Life)	Dependent on sole proprietor; ceases on death of proprietor	Dissolved by death of partner or bankruptcy; terminates if 50% or more of total interest in capital and profits is sold or exchanged within a 12-month period	Typically perpetual.	Perpetual / Indefinite	Perpetual / Indefinite
Liability of Owners for Business Debts	Sole proprietor has unlimited liability	General Partners have unlimited liability. [Limited Partnerships: General Partner has unlimited liability, Limited Partner limited to investment in partnership]	Members not personally liable for the debts of the corporation if the LLC properly structured RSA 304-C:25	Shareholders are not personably liable for the debts of the corporation; liability is generally limited to assets in corporation	Shareholders are not personably liable for the debts of the corporation; liability is generally limited to assets in corporation
Simplicity of Operation	Relatively few legal requirements	Relatively few legal requirements	Some formal requirements but less formal than corporations	Formality of board of directors, officers, annual meetings and annual reporting	Formality of board of directors, officers, annual meetings and annual reporting
Management of Entity	Centralized. Full control of management and operations	Typically each partner has an equal voice unless otherwise arranged. General partnership - not centralized; Limited partnership - generally centralized	Members have operating agreement that outlines management	Centralized. The corporation is managed by the Board of Directors who are elected by the shareholders, and by Corporate Officers.	Centralized. The corporation is managed by the Board of Directors who are elected by the shareholders, and by Corporate Officers.
Number of Shareholders Permitted	Not Applicable	Essentially unlimited	Unlimited	Generally, may not exceed 100	Unlimited
Double Taxation (Tax on Entity Itself and on Distributions to Owners)	No	No	No	No	Yes

Produced by Christopher J. Sullivan and James H. Newsom of Rath, Young and Pignatelli, P.C.

Stark Phase III Delayed

The Centers for Medicare and Medicaid Services (CMS) has extended its timeline for publication of the Phase III physician self-referral final rule to March 26, 2008. The delay is apparently due to the extensive public comments received on the Phase II interim final rule.

In the meantime, the Phase II interim final rule that was published on March 26, 2004 will remain in effect.

The Phase III rule is expected to address a number of topics, including:

- ❖ In office ancillary exception requirements
- ❖ Purchased service, purchased interpretation and contractual arrangement exceptions
- ❖ Further clarification of compensation arrangements based on a percentage of revenue.

For more information see 72 Fed. Reg. 13710 (March 23, 2007).

We are pleased to announce that

Kathryn H. Michaelis

and

Adam C. Varley

are joining the Firm.

Kathryn will concentrate her practice in the firm's Tax Practice Group. Kathryn comes to Rath, Young and Pignatelli with experience representing clients in tax matters in Chicago, Illinois, where she was a State and Local Tax Manager for PricewaterhouseCoopers and an Assistant Attorney General for the Illinois Department of Taxation. Kathryn received her J.D. and LL.M. from DePaul University College of Law.

Adam will concentrate his practice in the Insurance and Health Care Practice Groups. Adam is a 2004 graduate of Georgetown University Law Center and received his Bachelor in Political Science, magna cum laude, from the University of New Hampshire. Adam comes to us as a lateral from Greenberg Traurig, LLP, where he focused primarily on health insurance law.

Chart from page 1

2007 HEALTHCARE LEGISLATION	
HB 228, definition of "medical necessity" under the managed care law	Passed in the House. This bill codifies a definition of "medical necessity" for purposes of the managed care law.
HB 428, prohibiting the combustion of the wood component of construction and demolition debris	Passed in the House.
HB 455, repealing the law relative to screening panels for medical injury claims	Retained in House Judiciary – no further action this Session.
HB 597, expenditure caps for certificate of need	Pending in House Finance. The bill increases the threshold for capital expenditures by nursing homes and ambulatory surgical centers under the CON law.
HB 636, physician credentialing under the managed care law	Passed in the House. This bill allows the healthcare professional undergoing the formal credentialing process to provide services to patients and to be reimbursed under the managed care law.
HB 797, regulating mandatory overtime for nurses	House Labor voted 11-2 Ought To Pass.
SB 42, prohibiting smoking in restaurants	Passed the Senate. This bill prohibits smoking in restaurants, cocktail lounges and certain enclosed public places.
SB 129, requiring interpretation services for persons receiving medical treatment	Passed in the Senate. This bill requires hospitals to provide interpreters to persons not proficient in English upon request.
SB 167, licensure of medical assistants by the Board of Nursing	Passed in the Senate. This bill requires medical assistants to be licensed by the Board of Nursing.

For more information or to inquire about a specific bill in the 2007 session, please contact Ann McLane Kuster at 226-2600 or amk@rathlaw.com.

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CMS Update – August 2006

CMS Flip Flops on IDTF Rules

In November 2006, final regulations added new standards for enrollment of independent diagnostic testing facilities (IDTFs) in the Medicare program. Recently, CMS revised instructions in the Program Integrity Manual for IDTFs causing alarm for many ventures by prohibiting the sharing of equipment and space. CMS unexpectedly rescinded these instructions via a one-sentence transmittal on February 19, 2007. The previous rule changes, however, remain in effect.

IRS Discusses Draft of "Good Governance Practices" for Non-Profits.

The Internal Revenue Service released "Good Governance Practices for 501(c)(3) Organizations," suggesting that organizations review and consider certain practices to help ensure good governance. An organization that adopts some or all of the following practices would be more likely to successfully pursue its exempt purposes and earn public support:

- ❖ Adopt a "clearly articulated" mission statement, code of ethics and whistleblower policies;
- ❖ Adopt policies that help directors meet their duty to exercise due diligence, by ensuring the directors are informed about the charity's financial status, activities, mission, and goals;
- ❖ Adopt and regularly evaluate a conflict of interest policy and take other measures, including requiring written disclosure by directors and staff of any financial interest in any business entity that transacts business with the charity, to ensure the directors fulfill their duty of loyalty;
- ❖ Maintain transparency as to the organization's mission, activities, and financial affairs;
- ❖ Adopt and monitor policies to ensure legal, truthful, accurate, and candid fundraising activities that are conducted at a reasonable cost;
- ❖ Follow financial auditing protocols, including, for an organization with substantial assets or annual revenue, using an independent audit committee and an independent auditor that is changed periodically;
- ❖ Use reasonable compensation practices for officers and staff;
- ❖ Adopt written document retention policies establishing standards for document integrity, retention, and destruction (including electronic files).
- ❖ The IRS preliminary discussion draft is available at http://www.irs.gov/charities/charitable/article/0,,id=167626,00.html.

Another Wrinkle in the ASC-Hospital Relationship

When Dr. Alan Gordon, an ophthalmologist in Pennsylvania, took steps to open an ASC, the hospital revoked his staff privileges. Competing ophthalmologists complained Dr. Gordon was contacting their patients to get their business and disparaging them. The hospital conducted a peer review of Dr. Gordon and his privileges were then revoked. He was only allowed to remain on staff if he met very restrictive conditions.

Dr. Gordon sued, claiming the peer review actions were a violation of antitrust laws. Peer review actions are protected from liability by the HCQIA, the Health Care Quality Improvement Act. Congress encouraged good faith "peer review" and granted immunity in order to encourage peer review of physicians' competence and/or professional conduct. The HCQIA, however, does not grant immunity when peer review action is based on a physician's competitive acts, and Dr. Gordon alleged this peer review action was based on just that.

Nonetheless, the Third Circuit, in *Gordon v. Lewistown Hospital*, 423 F.3d 184 (3d Cir. 2005), held that the hospital's peer review actions were immune from antitrust liability. The Court also allowed the hospital to restrict Dr. Gordon's privileges because the ASC was not open yet, thus not a true competitor. The United States Supreme Court denied review in December.

Peer Review Not Protected In Disciplinary Proceeding

A physician in Florida voluntarily surrendered his medical staff privileges while under, or to avoid, an investigation into his professional conduct. The Florida Department of Health & Human Services issued a subpoena for the hospital peer review records to use in a disciplinary proceeding against the physician. Despite a state law prohibiting discovery of peer review records, the Court said the hospital had to produce the otherwise confidential documents. See Doe v. Dept. of Health (Fla. Dist. Ct. App. Dec. 27, 2006).

NH law generally protects from discovery records of quality assurance committees of hospitals, surgical centers, health care clinics and physician practices when formed and acting in accordance with the law and regulations.

For more information please contact Lucy C. Hodder, Chair of the Health Care Practice Group at 226-2600 or lch@rathlaw.com.

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New Leadership - New Ideas
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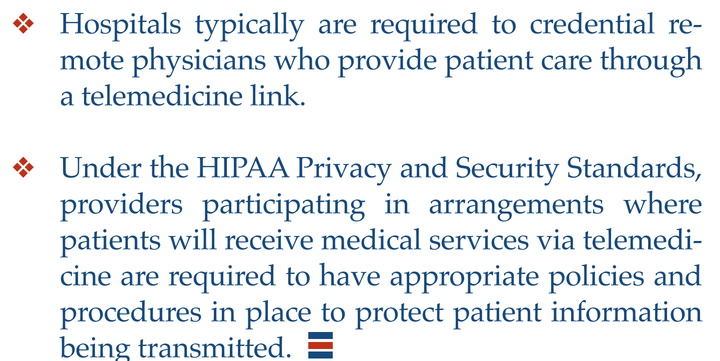
Barbara Greenwood Presents at Rural Health Conference

Barbara Greenwood presented on telemedicine at the HFMA conference, "Operating in the Rural Health Care Environment: Financial Survival Strategies," held January 16-18 in Manchester, New Hampshire.

"Telemedicine" means the direct provision of clinical care (diagnosing, treating) with the patient at a distance. Barbara's presentation focused on regulatory and contractual issues for rural providers participating in telemedicine arrangements in Northern New England. The issues include licensing, credentialing, and privacy and security requirements. For example:

- New Hampshire, Vermont and Maine all require that physicians obtain full and unrestricted state medical licenses before providing medical services via telemedicine to a patient located in the state. All three states have an exception for occasional consultation.



- Hospitals typically are required to credential remote physicians who provide patient care through a telemedicine link.
- Under the HIPAA Privacy and Security Standards, providers participating in arrangements where patients will receive medical services via telemedicine are required to have appropriate policies and procedures in place to protect patient information being transmitted.

For more information please contact Barbara J. Greenwood at 226-2600 or bjg@rathlaw.com.

Visit us at www.rathlaw.com to learn more about Rath, Young & Pignatelli