The National Health Care Anti-Fraud Association (NHCAA) has estimated that between three and ten percent of all annual health care benefits paid nationwide are paid on fraudulent or abusive submissions. Some fraud analysts indicate that there is a higher percentage of fraud and abuse in dentistry than in areas of medical practice. As a result, there is potentially more scrutiny on dentistry with respect to fraudulent and abusive practices.

Against this backdrop, and with heightened scrutiny on health care fraud and abuse, it is more important than ever for all practitioners, including dentists, to be aware of how to avoid fraud and abuse pitfalls, and to know how to respond should they receive an audit or investigation from a governmental agency or insurance company.

The first step in avoiding fraud and abuse pitfalls is for practitioners to be aware of practices and conduct that are typically viewed as fraudulent and abusive. Generally, fraud is defined as any act of intentional deception or misrepresentation of treatment facts made for the purpose of gaining unauthorized benefits. Specific types and examples of fraudulent and abusive practices include the following:

a. Billing for services not performed. Although the problem is basically self-explanatory, certain situations can be more complicated. For example, if a crown is billed at the prep date rather than the cementation date, the question arises as to when the service was actually performed. Many insurance carriers consider the crown completed only after it is cemented. This example illustrates the importance of checking the applicable benefits manual. Upfront disclosure of the situation is typically the best practice for avoiding any problems with the carrier.

b. Upcoding. This occurs when a coding procedure with a more extensive degree of difficulty then what was actually performed is used.

c. Waiver of co-payments. Co-payments are considered an essential element of the cost structure of the policy between the insured and the insurance carrier. The waiver of co-payments arguably encourages more usage of the coverage by the insured than would normally occur. As a result, the cost structure of the insurance policy in question may become distorted.

d. Waiver of deductibles. As with co-payments, deductibles are also considered an essential element of an insurer’s cost structure, and their waiver arguably distorts such cost structure.

e. Altering dates of service. The date a service is performed relates directly to patient eligibility requirements and waiting periods and, therefore, it is considered fraudulent to submit a claim for treatment using a date other than the actual date of service.

f. Unbundling or improper use of codes. The American Dental Association defines unbundling as “the separating of a dental procedure into component parts with each part having a charge, so that the cumulative charge for the components is greater than the total charge to patients who are not beneficiaries of a dental benefit plan for the same procedure.” Therefore, it is improper for a practitioner to submit several codes when the procedure in question could have been billed under one code. An example of unbundling would be when a practitioner, instead of charging a global fee for the extraction of a tooth, submits separate codes for items incidental to and incurred in connection with the extraction, such as elevating the flap, curetting out the periapical tissue, incision, drainage, and suturing the socket.

g. Misrepresenting patient identities. This occurs when services are performed on one patient but a claim is sent in for a different person.

h. Not disclosing existence of additional primary coverage. Sending in multiple claims to different carriers as if they were each the primary carrier is considered fraudulent.

i. Performing unnecessary services. This is largely self-explanatory, though there often may be a legitimate debate as to the necessity of services in certain circumstances.

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j. Misrepresentation of services. This occurs if the appropriate code is changed to a different code to increase the amount of the claim.

k. Unlicensed employees. This occurs when hygienists, assistants or other staff are used to perform treatments in situations where such persons are not licensed or qualified and/or the procedure is billed improperly as if the procedure was actually performed by the practitioner.

In addition to being aware of these fraudulent or abusive practices noted above, there are other important steps that practitioners should take to guard against fraud and abuse issues.

One of the best protections that practitioners can take is to work with and monitor their staff closely. Without proper oversight, a practitioner may not be aware of a staff member who is improperly coding, whether intentionally or not. Additionally, practitioners should take steps to insure that staff is not incentivized to use higher or improper codes to increase the staff’s (incentive) compensation.

Practitioners should also look for “red flags”, such as overutilization of particular codes, providing all or most patients with the same or similar treatment, or consistently billing the highest level of codes. Doing these things, especially over a period of time, is likely to attract the attention of governmental or insurance carrier auditors. Most practices should typically show a broad mix of codes, both in terms of types and level of treatment. If a practitioner’s practice necessarily gravitates towards a high usage of a certain level or type of code, extra attention should be given to documenting the underlying basis for such coding.

If a practitioner does become the subject of an inquiry or audit, it is important that the practitioner respond and cooperate accordingly. Ignoring or otherwise refusing to cooperate with auditors will invariably make what is often a very manageable situation much worse. If there is confusion as to what the auditor is requiring, or as to the implications and impact of the audit, practitioners are strongly encouraged to consult with legal counsel familiar with and experienced in dealing with such audits.

Lastly, it is also very important for practitioners to heed warnings and educational correspondence from investigators and auditors. Once a practitioner is educated or warned regarding a particular practice or problem, any similar conduct in the future that once may have been previously been viewed as mere abuse or waste, would then likely be considered fraudulent following the warning. This is because the practitioner is presumed to have actual fraudulent intent for engaging in similar conduct in the future as a result of being previously warned. If a practitioner does not agree with a particular warning or educational correspondence, the practitioner should respond in writing to the auditor or investigator documenting the disagreement. If the issue cannot be resolved, practitioners are strongly urged to seek legal advice.

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Drones - A New Legal Frontier

By Drew D. Larson

T

echnological advances are constantly creating new markets that were inconceivable just years before. One example is the use of small unmanned aircraft systems or drones. Improvements in technology have made drones affordable for businesses and consumers, enabling many new uses. Examples include Amazon’s proposed Prime Air service, State Farm’s use of drones to assess roof damage, architect’s use for site planning, and farmers’ use of drones for field and crop analysis.

However, with new markets comes confusion regarding the applicability of existing laws and rules. For the last few years, the FAA and private industry have been debating the applicability of current FAA rules to the commercial use of drones, with the scope of the FAA’s authority being hotly contested. The FAA has also been tasked with drafting new rules for drones that are appropriate for this new market.

On February 15, 2015, the FAA issued proposed rules regarding the Operation and Certification of Small Unmanned Aircraft Systems (the “Proposed Rules”). The Proposed Rules provide a variety of requirements for commercial operators of drones, including:

• No flying drones over other people.
• The operator must keep the drone within visual line of sight.
• Only flying drones during daylight.
• Max speed of 100 mph and max altitude of 500 feet.
• Operators must complete a knowledge test prepared by the FAA every 24 months.
• Operators must obtain an unmanned aircraft operator certificate with a small UAS rating.
• Preflight inspections to ensure the drone is safe for operation.

It is important to emphasize that these rules are not final, and many comments are being submitted by various parties. Until the Proposed Rules are adopted, the FAA’s position is that it must preapprove the commercial use of drones on a case-by-case basis. However, there is some case authority indicating that certain uses of commercial drones are outside of the FAA’s current authority. There may also be local or state rules governing the use of drones within a particular jurisdiction.

In addition, on October 19, 2015, the FAA proposed requiring the registration of drones with the FAA, whether for commercial or recreational use. A task force is being appointed to consider appropriate rules, with a goal of releasing the new rules before the holiday season.

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Legal clarity in this area will continue to be an aspiration instead of a reality for the foreseeable future. If you are interested in using a drone in your business, make sure that you are familiar with the risks before acting. Your BrownWinick attorney is here to help answer any of your questions.

More information about the FAA’s Proposed Rules can be found at https://www.faa.gov/uas/nprm/.

Drew Larson is a member at BrownWinick and practices primarily in the areas of corporate formation and transactions, intellectual property, estate planning and tax. Drew can be reached at (515) 242-2485 or larson@brownwinick.com.

Our Firm Continues To Grow
To Serve Your Needs

In our continuing effort to provide clients with the best possible legal services, BrownWinick continues to grow by hiring outstanding attorneys. Our most recent hires are no exception.

Molly T. Driscoll joined BrownWinick as an Associate. Molly graduated from Loyola University of Chicago: Marcella Niehoff School of Nursing in 2006, receiving her B.S. in Nursing. Molly received her J.D. in 2014, high honors, from Drake University. She also received her Master of Public Administration in 2014 and was inducted into the Pi Alpha Alpha Honor Society for public affairs and administration. Molly has a general practice including, but not limited to, administrative law, business and corporate law, employment and labor law, health law and governmental relations.

Margaret A. Hibbs joined BrownWinick as an Associate. Maggie graduated from Luther College, magna cum laude, in 2009, receiving her B.A. in Political Science and was elected to Phi Beta Kappa. Maggie received her J.D. in 2014, with highest honors, from Drake University. Maggie has a general practice including, but not limited to, administrative law, agribusiness, business and corporate law, litigation, real estate and taxation.

Benjamin R. Merrill joined BrownWinick as an Associate. Ben graduated from Saint John’s University in Collegeville, Minnesota. He received his B.A. in Political Science, with minors in French and Economics, in 2005. Ben received his J.D. in 2008, with honors, from Drake University. Ben practices primarily in the area of litigation, representing clients in federal, state, and administrative proceedings involving business disputes, workers’ compensation, employment and labor law, construction law and agribusiness.

Amanda G. Jansen joined BrownWinick as a Member. Amanda received her B.A. from the University of Iowa in 2001 and then went to Drake University, where she received her J.D. in 2004 with highest honors, Order of the Coif. While at Drake, Amanda completed an internship with United States District Court Judge James E. Gritzner in 2002. After graduation from law school, Amanda served for two years as a judicial law clerk at the Iowa Supreme Court for Justice Mark S. Cady. Amanda works primarily in the Employment and Labor Law practice area.

Sheila K. Tipton joined BrownWinick as a Member and is Chair of the Firm’s Energy Practice Group. Sheila earned her B.S. degree in 1973 from Ohio University and her J.D. degree, with honors, from Drake University in 1980. Prior to joining BrownWinick, Sheila served as a Member of the Iowa Utilities Board from August, 2013 to April, 2015. Sheila primarily practices in the areas of administrative law and the law of essential infrastructure, representing energy, telecommunications and water public utilities, renewable energy developers and customers, as well as other business entities.

Christopher A. Proskey joined BrownWinick as a Member. Chris received his B.S. in Industrial and Manufacturing Systems Engineering from Iowa State University in 2001; his M.B.A., from the University of Minnesota’s Carlson School of Management in 2006. In 2007, Chris received his J.D., with honors, from Drake University. Chris is a registered patent attorney with a practice focused on patents, trademarks and intellectual property rights.

Corrin N. Hatala joined BrownWinick as an Associate. Corrin graduated from Iowa State University in 2012, receiving her B.S. in Journalism and Mass Communication, with minors in History and Political Science. In 2015, Corrin received her J.D., with highest honors, from Drake University. Corrin has a general practice including, but not limited to, administrative law, agribusiness, business and corporate law, employment and labor law, litigation and real estate law.

Bryan M. Ingram joined BrownWinick as an Associate. Bryan graduated from Simpson College, magna cum laude, in 2012, receiving his B.A. in English, with a minor in Sociology/Social Work. In 2015, Bryan received his J.D., with high honors, from Drake University. Bryan has a general practice including, but not limited to, litigation, patent, trademark and copyright, environmental law, agribusiness, corporate finance and securities.
Thomas J. Ogden joined BrownWinick as an Associate. Thomas graduated from Hillsdale College, cum laude, in 2010, receiving his B.A. with departmental honors in Political Economy. In 2014, Thomas received his J.D. from the University of Virginia School of Law. Prior to joining BrownWinick, Thomas served as a law clerk to the Honorable Steven M. Colloton of the United States Court of Appeals for the Eighth Circuit. His practice focuses primarily in the litigation area.

Thomas A. Evans joined BrownWinick as a Member. Tom received his B.A. in Political Science and American History from the University of New Hampshire in 1974. In 1977, Tom received his J.D. from Drake University. Prior to joining BrownWinick, Tom served as General Counsel for the Iowa Board of Regents. Tom practices primarily in the labor and employment area, with expertise in the collective bargaining area.

We are extremely pleased that these highly qualified and talented individuals have joined BrownWinick.

Outstanding Achievements

David M. Breiner was named a member of BrownWinick as of January 1, 2015. David joined BrownWinick in 2011. His practice includes patent application preparation and prosecution.

Karen L. Karr was named a member of BrownWinick as of January 1, 2015. Karen joined BrownWinick in 2008. She practices primarily in the areas of real estate and business and corporate law.

Matthew H. McKinney was named a member of BrownWinick as of January 1, 2015. Matt joined BrownWinick in 2010. He practices primarily in the areas of government relations and complex business litigation.

Brant D. Kahler was named a member of BrownWinick as of July 1, 2015. Brant joined BrownWinick in 2009. He practices primarily in the area of litigation.

Drew D. Larson was named a member of BrownWinick as of July 1, 2015. Drew joined BrownWinick in 2009. He practices in the areas of corporate formation and transactions, intellectual property, estate planning and tax.

BrownWinick Attorneys Recognized in The Best Lawyers in America® 2016

BrownWinick is proud to announce that 24 attorneys were recently selected by their peers for inclusion in Best Lawyers in America® 2016, the oldest and most respected peer-review publication in the legal profession.

The lawyers included are:

Ronni F. Begleiter
Employee Benefits (ERISA) Law
Trusts & Estates

Marc T. Beltrame
Government Relations Practice

Michael R. Blaser
Business Organizations, including LLCs & Partnerships

William C. Brown
Litigation & Controversy-Tax
Tax Law

Paul E. Carey
Tax Law

Elizabeth A. Coonan
Workers’ Compensation Law-Employers

Catherine C. Cownie
Health Care Law

Michael A. Dee
Commercial Litigation

Douglas E. Gross
Government Relations Practice

Kelly D. Hamborg
Health Care Law

Alice E. Helle
Employee Benefits (ERISA) Law

Thomas D. Johnson
Mergers & Acquisitions Law

Ann Holden Kendell
Employment Law-Management
Labor Law-Management
Litigation-Labor & Employment

Megan Erickson Moritz
Litigation–Labor & Employment

G. Brian Pingel
Litigation-Intellectual Property

Trademark Law

James L. Pray
Environmental Law

Brian P. Rickert
Construction Law

Christopher R. Sackett
Business Organizations, including LLCs & Partnerships

Steven C. Schoenebaum
Government Relations Practice

Brenton D. Soderstrum
Construction Law

Philip E. Stoffregen
Communications Law

Energy Law

Sheila K. Tipton
Administrative / Regulatory Law

Communications Law

Energy Law

Water Law

Camille L. Urban
Copyright Law

Patent Law

Trademark Law

Adam Van Dike
Real Estate Law

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Since it was first published in 1983, Best Lawyers has become universally regarded as the definitive guide to legal excellence. Best Lawyers is based on an exhaustive peer-review survey. Over 52,000 leading attorneys cast more than 5.5 million votes on the legal abilities of other lawyers in their practice areas. Lawyers are not required or allowed to pay a fee to be listed; therefore, inclusion in Best Lawyers is considered a singular honor. Corporate Counsel magazine has called Best Lawyers “the most respected referral list of attorneys in practice.”

BrownWinick Attorneys Named Best Lawyers in America® “Lawyers of the Year” for 2016

The Best Lawyers in America®, the oldest and most respected peer-review publication in the legal profession, has named three BrownWinick attorneys as Best Lawyers “Lawyers of the Year” for 2016.

Brian P. Rickert has been named Best Lawyers’ 2016 Des Moines Construction Law “Lawyer of the Year.”

Ronni F. Begleiter has been named Best Lawyers’ 2016 Des Moines Employee Benefits (ERISA) Law “Lawyer of the Year.”

Steven C. Schoenebaum has been named Best Lawyers’ 2016 Des Moines Government Relations Practice “Lawyer of the Year.”

After more than a quarter of a century in publication, Best Lawyers is designating “Lawyers of the Year” in high-profile legal specialties in large legal communities. Only a single lawyer in each specialty in each community is being honored as the “Lawyer of the Year.”

Best Lawyers compiles its lists of outstanding attorneys by conducting exhaustive peer-review surveys in which thousands of leading lawyers confidentially evaluate their professional peers. The lawyers being honored as “Lawyers of the Year” have received particularly high ratings by earning a high level of respect among their peers for their abilities, professionalism, and integrity.

BrownWinick Attorneys Featured in 2015 Great Plains Super Lawyers and 2015 Great Plains Rising Stars

Seven BrownWinick attorneys were selected for inclusion in the 2015 Great Plains Super Lawyers online listing:

- Ronni F. Begleiter: Employee Benefits
- William C. Brown: Tax
- Michael A. Dee: Business Litigation
- Alice E. Helle: Employee Benefits

Ten BrownWinick attorneys were selected for inclusion in the 2015 Great Plains Rising Stars online listing:

- Rebecca A. Brommel: Business Litigation
- Robert D. Hodges: Tax
- Elizabeth A. Coonan: Employment & Labor
- Amanda G. Jansen: Employment & Labor
- Catherine C. Cownie: Health Care
- Drew D. Larson: Business/Corporate
- Megan E. Moritz: Employment & Labor
- Adam J. Freed: Health Care
- Robert D. Hodges: Tax
- Amanda G. Jansen: Employment & Labor

Super Lawyers, a Thomson Reuters Business, is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The annual selections are made using a patented multiphase process that includes a statewide survey of lawyers, an independent research evaluation of candidates and peer review by practice areas. The result is a credible, comprehensive and diverse listing of exceptional attorneys. Each year, no more than five percent of the lawyers in the state are selected by the research team at Super Lawyers to receive this honor.

For the Rising Stars list, the same as the Super Lawyers selection process, with a few exceptions. To be eligible for inclusion in Rising Stars, a candidate must be either 40 years old or younger or in practice for 10 years or less and no more than 2.5 percent of the qualified lawyers in the state are selected to the Rising Stars list.

The Great Plains Super Lawyers and Rising Stars includes the states of North Dakota, South Dakota, Iowa and Nebraska.
News from the IP Department

Patent Trolls
By David M. Breiner

Patent trolls are the bane of many a business. Too often, small business owners are targeted for doing nothing more than using off-the-shelf products. This of course, is bad not only for small businesses but consumers as well. According to Senator Chuck Grassley, abusive patent litigation costs consumers and businesses billions of dollars each year. Some organizations, for example, the RPX Corporation, estimate patent trolls cost operating companies $12.2 billion in 2014 alone. In an effort to stop abusive patent litigation, Senator Grassley, along with Senators Patrick Leahy, John Cornyn and Chuck Schumer, introduced the bipartisan Protecting American Talent and Entrepreneurship Act (“PATENT Act”), the third major patent reform bill introduced this year.

The PATENT Act contains many provisions aimed at curbing abusive litigation. Three of the more interesting provisions include a change in pleading standards (SEC. 3), protection for customers (SEC. 4), and creation of risk for bad actors (SEC. 7). From the bill’s summary:

SEC. 3. PLEADING AND EARLY DISCLOSURE REQUIREMENTS: Form 18 is eliminated. Plaintiffs must identify each patent and claim allegedly infringed, which products or processes are infringing, and describe the alleged infringement. Allows plaintiffs to describe information in general terms if it is not accessible to them. Clarifies that pleadings can be amended and allows for confidential information to be filed under seal. Exempts 271(e) (Hatch-Waxman and biosimilars) proceedings under current law. Fee Recovery: Requires a plaintiff to identify interested parties in the litigation, and provides a process for a court to recover fees where the abusive litigant is judgement-proof. If a plaintiff cannot certify it has sufficient funds to satisfy a fee award, it must notify interested parties, who can opt out of their interest. Permits a court to exempt institutions of higher education and qualifying parties in the interest of justice.

The PATENT Act has both supporters and critics. Erich Anders, Vice President and Deputy General Counsel at Microsoft, for example, stated “[t]he PATENT Act avoids measures that would erode the value of patents and undermine incentives to innovation.” The Association of American Universities (“AAU”) similarly praised the PATENT Act as a “measured approach to addressing the abusive litigation practices of patent trolls while protecting the integrity of our patent system.” The Innovation Alliance, however, opposes the PATENT Act believing it would “cripple the ability of legitimate U.S. patent owners to protect their ideas from infringers, both in the United States and overseas.” Similarly, the Biotechnology Industry Organization criticized the PATENT Act for failing to address other abuses of the patent system such as abuse of the USPTO’s inter partes review (IPR) proceedings against patent owners.

It will certainly be interesting to follow the PATENT Act as it traverses the legislative process. Hopefully, the final product will be one that truly curbs abusive patent litigation while preserving legitimate patent holders’ rights. Anyone interested in the PATENT Act can find the bill, in its entirety, available at http://www.judiciary.senate.gov/imo/media/doc/PATENT%20Act.pdf.

David Breiner is a member at BrownWinick and his practice includes patent application preparation and prosecution. David can be reached at (515) 242-2411 or breiner@brownwinick.com.

Health Law News

BrownWinick’s Dental Law Group
www.brownwinick.com/dental

BrownWinick’s Health Law Blog Site
www.brownwinick.com/BLOGHealthLaw

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