May 2, 2011

TO: CHA Members
FROM: Lois J. Richardson, Vice President, Legal Publications and Education
SUBJECT: Record Retention Policies and Requirements

Summary
A thorough record retention policy is a critical element of an effective compliance plan. This memorandum describes the essential elements of an effective record retention policy and CHA resources available to assist hospitals in developing record retention policies and procedures.

Background
The Federal Sentencing Guidelines for Organizations (Guidelines) guide judges in sentencing organizations for federal criminal violations, including violations of federal health care fraud and abuse laws. The Guidelines require an organization to have an effective compliance plan in order to receive the benefit of prosecutorial discretion from a federal prosecutor or sentencing mitigation from a federal judge. The Guidelines set forth the seven essential elements that must be part of every compliance program. The Office of Inspector General (OIG) has developed compliance program guidance (currently non-mandatory) for hospitals based upon the seven essential elements. The Affordable Care Act authorizes the OIG to make compliance plans mandatory for hospitals and other health care providers (the OIG has not yet done so).

Last year, the U.S. Sentencing Commission proposed to amend Section 8B2.1 of the Guidelines, titled Effective Compliance and Ethics Program. The proposed amendment focused on document retention policies and required that:

1. Executive management and members of the board of directors must be aware of the organization’s document retention policies and conform those policies to meet the goals of an effective compliance plan; and

2. As part of its periodic compliance plan assessment activity, the organization should verify that all employees are aware of the document retention policies and that those policies conform to the goals of an effective compliance plan.

The U.S. Sentencing Commission has not adopted these proposed amendments at this time. However, hospitals are advised to establish and implement written policies and procedures regarding the retention and disposal/destruction of records. The policy should address all types of records: corporate and administrative, business and finance, dietary, engineering, environmental services, human resources, imaging, laboratory, medical records, pharmacy, purchasing, etc.
Implementing an effective record retention policy will help the hospital achieve compliance with state licensure laws, federal health care program (Medicare, Medi-Cal) requirements, contractual obligations, accreditation organization requirements, and other statutes and regulations. The policies and procedures should be followed consistently to dispute any allegation that the provider withheld, hid, altered, or destroyed evidence relevant to a legal proceeding (“spoliation of evidence”). Spoliation of evidence is a crime in California and at the federal level.

Steps to Take in Developing Effective Record Retention Policies and Procedures
CHA recommends that hospitals take the following steps:

1. Designate an employee to be responsible for implementing and updating record retention policies and procedures, as well as training and monitoring employees to ensure consistent compliance throughout the organization.

2. Consider establishing a records management committee with representation from throughout the organization to update the policies and procedures as necessary, and to assist in implementation, training, and monitoring/auditing.

3. Establish a comprehensive record retention and disposal/destruction policy. Such a policy should contain at least the following elements:
   a. A statement as to the purpose of the policy;
   b. Whether the policy covers the entire organization or only certain departments;
   c. A statement that the destruction of records will be suspended upon receipt of legal process or other notice of pending or reasonably foreseeable investigations or litigation, whether government or private (“legal hold” or “litigation hold,” discussed below);
   d. A list of employees and/or departments responsible for maintaining and updating the policy;
   e. A list of employees and/or departments responsible for moving documents to long-term storage and destroying documents in accordance with the policy; and
   f. A retention period for each type of record generated or maintained by the hospital.

4. Train affected employees.

5. Monitor and audit for compliance with the hospital’s policies.

Record Retention Periods
The retention period for each type of record maintained by the hospital should be based on legal requirements and policy considerations (discussed below), frequency of use of a record, space constraints, and historical or research uses for the records.
Legal Requirements and Considerations
Many state and federal government agencies have promulgated regulations that specify how long hospitals and other health care providers must keep certain documents. Providers are required to comply with these retention periods. However, in many cases, compliance with these minimum retention requirements is inadequate to protect the health care provider in all situations. Additional considerations in determining an optimal record retention period include accreditation requirements, contractual obligations, and statutes of limitations.

A statute of limitations is the time period during which a lawsuit may be brought. Hospitals may need to produce records to defend themselves in a lawsuit; thus, it is helpful to know the various statutes of limitations that may apply in order to develop an effective retention policy. After the statute of limitations has run, it is too late for a plaintiff to bring a lawsuit, and related records will thus not be needed to defend any such suit.

Statutes of limitations commonly applicable in the California health care industry include actions for medical malpractice; personal injury (such as slip-and-fall injuries on hospital premises, car accidents by employees in hospital-owned vehicles, etc.); breach of contract; fraud and abuse; and Internal Revenue Service/tax actions.

Electronic Records
Retention policies for electronic records should focus on both transferring information for longer-term storage and on purging information from the system. Transfer to longer-term storage is the inevitable result of the limited online capacity of any system. Once information is fully transferred, it is no longer available to any terminal user and can be retrieved only through operator intervention. Providers must store the disks in a safe and secure place, and establish a system of access similar to that used in hard copy storage.

The question of purging information from the system is identical to that of discarding or destroying hard copy. The same record retention periods apply irrespective of whether a record is electronic, paper, microfiche, microfilm, etc.

Legal Hold
If a hospital has reason to believe that it may be sued or may be the subject of an audit or investigation, legal counsel should be consulted immediately to determine whether to initiate a legal hold. If a legal hold (also called a “litigation hold”) is initiated, the usual retention and disposal policies are suspended with respect to records relevant to the potential claim, dispute, lawsuit, audit or investigation. All potentially relevant records should be retained in their original form until legal counsel authorizes their destruction or deletion in accordance with the usual record retention schedule. This includes paper records as well as electronic data and documents (including e-mails). If a medical device, product, equipment, drug, other supply, or patient specimen may be involved, it should be sequestered. Employees and other personnel should be notified to suspend destruction of potentially relevant records, and all steps related to compliance with the legal hold should be documented.

The occurrence of any of the following should provoke the hospital to consider a legal hold:

1. Service of legal process (subpoena, summons, or the like)
2. Learning of an investigation or audit by a government agency, government contractor, or private entity
3. Receipt of a claim (formal or informal)

4. Receipt of a patient complaint (not including minor complaints)

5. A dispute

CHA Resources
CHA has developed a guide, the Record and Data Retention Schedule, that discusses in detail the legal requirements and considerations regarding record retention policies and lists the required and recommended time periods for the retention of various classes of records.

The first section of the Record and Data Retention Schedule discusses why hospitals and other health care providers need a record retention policy and the pertinent factors that should be considered when determining how long to keep various documents. The second section is a Recommended Retention Schedule. It contains tables listing typical records, provider types, any applicable legal citations, and recommended retention periods. The information in the guide applies to all records, regardless of media (paper, electronic, microfiche, microfilm, video/audio recording, magnetic tape, CDs, etc.). To learn more about the Record and Data Retention Schedule, visit www.calhospital.org/record-retention.

CHA members with questions regarding this memorandum or the content of the Record & Data Retention Schedule may contact me at (916) 552-7611 or lrichardson@calhospital.org.

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