FEBRUARY 2015

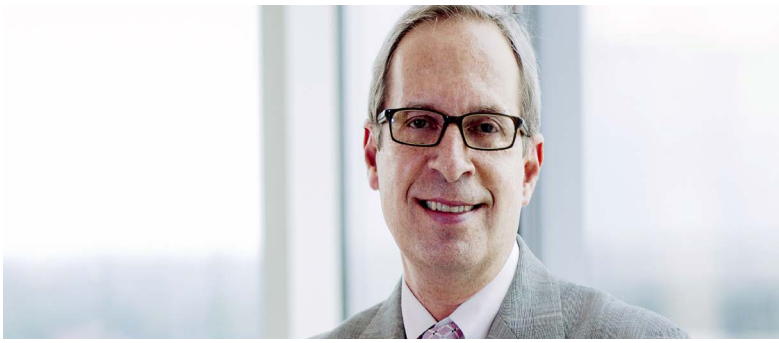
p.s. Poyner Spruill LLP
ATTORNEYS AT LAW

SHORTS ON LONG TERM CARE

Poyner Spruill LLP's International Award-winning Newsletter for the North Carolina LTC Community

Document Retention in a Long Term Care Facility

by Ken Burgess



Note: By popular demand, we are rerunning his article from a past issue of Shorts.

Deciding how long to hold on to specific records in your facility can be a challenging task, especially when so many different types of records cross your desk every day. If you're a pack rat like us, it's tempting to hold on to everything indefinitely – an option we know can be space and cost-prohibitive, especially within the nursing home environment. Our reluctance to dispose of records is also driven by several critical questions, such as: What if I need this record to defend our facility in a lawsuit? What if a state or government agency audits or investigates our facility for issues contained within this record?

This is why it makes sense from a compliance and risk management standpoint to have a comprehensive and consistently applied record retention policy that includes all forms of electronic data. There are many reasons to implement a record retention policy, including compliance with statutory or regulatory requirements, maintaining control of records during litigation and improving your responsiveness and efficiency in complying with discovery demands, and avoiding the disclosure of unnecessary or obsolete records.

An effective policy will also help you avoid liability for any inadvertent destruction of evidence when litigation or a government investigation is pending or reasonably foreseeable, such as when a subpoena has been served. Generally speaking, anytime your organization is aware (or should have been aware in the exercise of reasonable diligence) of a pending dispute like an audit, investigation or lawsuit, you will be required to retain any record potentially related to the matter. For this reason, you'll want to make sure that your record retention policy includes procedural steps for preserving relevant evidence and instructing employees not to delete or destroy relevant records (such as placing a Litigation Hold on records that are the subject of an investigation or lawsuit). As recent court cases illustrate, organizations can be subject to large sanctions for the destruction of records when litigation, government investigations, or other disputes are, or should have been, anticipated. If you inadvertently and in good faith dispose of relevant records as part of your fully implemented, consistently applied, active records management program, you are more likely to persuade a court or government investigator that missing records were not willfully destroyed. Courts generally do not look favorably on organizations that mismanage or dispose of records on an inconsistent basis, even if there was no bad faith motive in that inconsistency.

A good record retention policy will not only specify a record retention period for each type of relevant record (see chart on the last page for suggested, general purpose retention guidelines), but it will also establish a standard disposition policy. It may, for example, specify that the preferred method of disposition is shredding. A professional records management company or IT consultant can also assist you in managing and disposing of all records appropriately, including archived electronic files. As you develop your records disposal program, bear in mind that state and federal laws may dictate a certain type of records disposal process when certain information is included in a record. North Carolina law, for example, requires a written disposal procedure, certain diligence on records disposal vendors, and mandates a certain manner of disposal whenever personal information is included in your records. Finally, your record retention policy should identify a records custodian who is responsible for ensuring that the program is rigorously enforced from top management down.

The chart on the last page provides some general records categories and suggested retention periods for commonly used records within the nursing home context and may serve as a good starting point for creating a record retention policy uniquely suited to your facility. Please remember, however, that many different sources of law may suggest specific record retention periods for specific types of records that may not be incorporated in this list. These retention periods are provided for informational purposes only and are not an adequate substitute for legal advice based on your individual business needs and legal requirements.

301 Fayetteville St., Suite 1900, Raleigh, NC 27601/P.O. Box 1801, Raleigh, NC 27602-1801 P: 919.783.6400 F: 919.783.1075

Poyner Spruill LLP
ATTORNEYS AT LAW

FOR NURSING HOMES & ASSISTED LIVING COMMUNITIES

Medicare RAC Program Improvements Delayed Until 2016

By David Broyles

The Centers for Medicare and Medicaid Services (CMS) had planned to award new contracts to companies that act as Medicare's recovery audit contractors (now referred to as recovery auditors) (RAs) for operation of the Medicare recovery audit program by the end of 2014, which would have concluded the procurement process for new contracts that began in May, 2013. However, in a move all-too-familiar with providers, CMS announced recently that due to continued delays in awarding the new contracts, the existing contracts for the four private companies that act as Medicare's RAs would be extended through 2015 (CGI Federal, Connolly, HealthDataInsights and Performant Recovery). Among the new contracts delayed due to a post-award protest was the contract awarded December 30, 2014, to Connolly, LLC for DME and Home Health and Hospice providers. In addition, CMS modified the existing RA contracts to allow the existing Medicare RAs to restart certain reviews that had stopped in 2014 pursuant to the old contracts' terms, and to extend their work with CMS through April, 2017, to finalize all appeals and reconciliation.

Unfortunately, the contract extensions and modifications granted by CMS further delays its own efforts to usher in the next phase of the recovery audit program, and leaves providers waiting for long promised and much needed program improvements for at least another year. Looking ahead to the next phase of the recovery audit program, we have highlighted some of the program changes on page 3 that were published by CMS after evaluation of the many concerns raised about the existing program. The new requirements will be incorporated into all new RA contract awards, making them effective for any RA activities performed under new contracts entered into on or after December 30, 2014.

See Medicare RAC Program Improvements table, page 3.

Even after the new contracts incorporating these improvements are effective and begin to have an impact, past practices and trends with the recovery audit program are a good indicator that certain areas will continue to receive special attention by the RAs. Providers should closely monitor sources that reveal those trends and continue to focus on your facilities' practices which have previously been considered high risk areas by the RAs. These practices should be viewed as essential to your provider action plans to avoid being targeted and to ensure an effective response if you are audited. Whether your facilities are analyzing regulatory requirements and changes, reviewing compliance policies and procedures, formulating best practices, or making an assessment of any rights and duties or response plan post-audit notice, involvement of experienced legal counsel should be considered as an important resource.

David Broyles *may be reached at dbroyles@poynerspruill.com or 919.783.2923.*

Chris Brewer *may be reached at cbrewer@poynerspruill.com or 919.783.2891.*

SOURCE: CMS. - Full CMS table on RA program improvements can be found at: http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Recovery-Audit-Program/Downloads/RAC-Program-Improvements.pdf.

Medicare RAC Program Improvements

Reducing Provider Burden	
Provider Concern	**Benefit to Providers**
Additional documentation request (ADR) limits are the same for all providers of similar size and are not adjusted based on a provider's compliance with Medicare rules.	CMS will establish ADR limits based on a provider's compliance with Medicare rules. Providers with low denial rates will have lower ADR limits while providers with high denial rates will have higher ADR limits. The ADR limits will be adjusted as a provider's denial rate decreases, ensuring the providers that comply with Medicare rules have less Recovery Audit (Audit) reviews.
ADR limits are based on an entire facility, without regard to the differences in departments within the facility.	ADR limits are based on an entire facility, without regard to the differences in departments within the facility. CMS-established ADR limits will be diversified across all claim types of a facility (e.g. inpatient, outpatient). This ensures that a provider with multiple claim types is not disproportionately impacted by Audit review in one claim type vs. another (e.g. all of a provider's inpatient rehabilitation claims reviewed or all inpatient).
Providers who are not familiar with the Recovery Audit Program (RAP) immediately receive requests for the maximum number of medical records allowed.	CMS-established ADR limits will include instructions to incrementally apply the limits to new providers under review. This will ensure that a new provider is able to respond to the request timely considering staffing levels at the time.
Providers must wait 60 days before being notified of the outcome of their complex reviews.	Recovery Auditors (RAs) will have 30 days to complete complex reviews and notify a provider of their findings. This provides more immediate feedback to the provider.
Upon notification of an appeal by a provider, the RA is required to stop the discussion period.	RAs will not receive a contingency fee until after the second level of appeal is exhausted. Previously, RAs were paid immediately upon denial and recoupment of the claim. This delay in payment helps assure providers that the decision made by the RA was correct. Note: if claims are overturned on appeal, providers are paid interest calculated from the date of recoupment.
Enhancing Program Oversight CMS	
Provider Concern	**Benefit to Providers**
RAs focused much of their resources on inpatient hospital claims.	CMS will require the RAs to broaden their review topics to include all claim and provider types, and will be required to review certain topics based on a referral, such as an OIG report.
RAs are not penalized for high appeal overturn rates.	RAs will be required to maintain an overturn rate of less than 10% at the first level of appeal, excluding claims that were denied due to no or insufficient documentation or claims that were corrected during the appeal process. Failure to do so will result in CMS placing the RA on a corrective action plan, that could include decreasing the ADR limits, or ceasing certain reviews until the problem is corrected.
Providers are concerned with the accuracy of RA automated reviews and RAs are not penalized for low accuracy rates.	RAs will be required to maintain an accuracy rate of at least 95%. Failure to maintain an accuracy rate of 95% will result in a progressive reduction in ADR limits. CMS will continue to use a validation contractor to assess RA identifications and will improve the new issue review process to help ensure the accuracy of RA automated reviews.
Increasing Program Transparency	
Provider Concern	**Benefit to Providers**
Providers are unsure of who to contact when they have complaints/concerns about the RAP.	CMS established a Provider Relations Coordinator to offer more efficient resolutions to affected providers. This position gives providers a name and contact information when issues arise that cannot be solved by having discussions with the RA.
Providers are unclear about the information in the RA new issue website postings.	CMS will require the RAs to provide consistent and more detailed review information concerning new issues to their websites.

"Bring Your Own Device" To Work Programs:

Regulatory and Legal Risks and How To Minimize Them

by Tara Cho

If you've ever left your mobile phone on an airplane, in a restaurant, or somewhere other than in your possession, you know it's frightening enough to think of losing the device itself, which costs a premium, as well as your personal photos or information stored on the device. Now imagine if you lost your mobile phone, but it also had protected health information (PHI) associated with your health care work stored on it. The lost device suddenly presents the potential for reputational damage and legal or regulatory obligations, in addition to the inconvenience and cost of replacement.

Mobile phones are lightweight, palm sized, and cordless, which makes them convenient and easily portable. These same features make mobile phones highly susceptible to theft or loss. As such, there are serious compliance risks to consider and mitigate when allowing personal mobile device use for work purposes, or a bring your own device (BYOD) program, especially in a healthcare setting. Despite the known risks, current research shows that in some industries, up to 90% of employees are using their personal devices for work purposes whether "allowed" or not. For example, an assisted living nurse using a personal device for work purposes might send a text message to a patient's primary care physician (PCP) to obtain guidance or to provide an update. That communication includes PHI, raising compliance obligations, such as state laws or HIPAA security requirements. In the long term care setting, it's also a clear violation of applicable privacy laws and the Centers for Medicare and Medicaid Services will, and has been, citing such infractions on surveys. We suspect the Division of Health Service Regulation would do likewise under state law if this occurred in an adult care home.

There is no quick and easy remedy to completely eliminate all risks associated with the use of mobile phones, particularly employee-owned devices. However, there are steps that can be taken to minimize those risks while allowing the use of mobile technology to provide enhanced and continuous care to patients. One such step is implementing a mobile device management (MDM) solution. An MDM solution allows a secure connection for employees to access work networks and information resources remotely, using an application installed on their personal device. That solution keeps "work applications" such as the employer's email program technically separated from "personal applications" like social media apps. In addition, an MDM solution allows the employer to force technical controls on the device, such as password requirements, encryption or the ability to remotely wipe all data from the device.

Recognizing that employers must relinquish ownership and technical control to make a BYOD program work, employers also must implement robust policies and procedural controls. For example:

- Permissible Uses. Document the permissible uses of personal devices for work purposes, including whether employees are ever permitted to transfer PHI or other types of sensitive personal information on a personal device and the employment terms associated with such uses.
- Device Security Controls. Document the policies that govern device controls (such as requiring employees to use passwords, up-to-date malware protection, device timeout, authentication or encryption on the device).
- Training and Sanctions. Enforce training requirements and frequency as part of the terms of use and implement clear sanctions policies for unauthorized access or use. Employers may also consider whether the same training and policies/procedures will apply to vendors or contractors.
- HR Policies. Review other important employment law considerations such as employee privacy rights, social media policies, and policies for removing applicable data from the devices of terminated or exiting employees.

There are many compliance considerations to keep in mind when deciding whether to implement a BYOD program. A comprehensive security framework, including technical controls, policies, procedures, and training, can reduce the high risks associated with the use of personal mobile devices for work purposes.

Tara Cho *may be reached at tcho@poynerspruill.com or 919.783.1079.*

NLRB Upends Legality of Employer Email Policies

by Kevin Ceglowski

On December 11, 2014, the National Labor Relations Board (NLRB) issued its opinion in Purple Communications, Inc. The NLRB decided employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems. The *Purple Communications* decision overruled the NLRB's previous decision in *Guard Publishing Co. d/b/a Register Guard*, which had established an employer may completely prohibit employees from using the employer's email system for reasons protected by the National Labor Relations Act (NLRA), even if they are otherwise permitted access to the system, without demonstrating any business justification, so long as the employer's ban is not applied discriminatorily.

In *Purple Communications*, the policy at issue said,

> Employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment in connection with any of the following activities (partial list included below):
>
> - Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.
> - Sending uninvited email of a personal nature.

This policy was challenged as an unlawful violation of employees' rights to engage in concerted activity as protected by the NLRA. The NLRB discussed the changing nature of work environments, including the increased prevalence of online communications, in deciding to overrule Register Guard. The NLRB held employers must allow employees who have access to company email systems to use those systems during nonworking time for union related activities and other concerted activity protected by the NLRA, unless there are special circumstances. The Purple Communications decision says, however, "we anticipate it will be the rare case where special circumstances justify a total ban on nonwork email use by employees."

Employers who have policies prohibiting all nonwork use of company email systems should immediately contact employment counsel to evaluate your options. Purple Communications does not require employers to grant employees access to its email system where it has chosen not to do so, and employers are not prohibited from establishing uniform and consistently enforced restrictions, such as prohibiting large attachments or audio/video segments, if the employer can demonstrate they would interfere with the email system's efficient functioning. Finally, employers should be attentive to future NLRB opinions that might expand the reasoning of Purple Communications to apply outside of the email context, such as to company phone systems or bulletin boards.

Kevin Ceglowski *may be reached at 919.783.2853 or kceglowski@poynerspruill.com.*

Ken's Quote of the Month

"We make a living by what we get,
but we make a life by what we give."

~ Winston Churchill

Poyner Spruill LLP
ATTORNEYS AT LAW

Hail To You, Nicaragua

by Ken Burgess

Poyner Spruill LLP
ATTORNEYS AT LAW

On Saturday, January 17, 2015, I stood at the hogares de ancianes, the home of the ancients, in Jinotepe, Nicaragua, surrounded by residents of the center that we helped build. Around me were my beloved North Carolina Nicaragua partner, Carron Suddreth of Wilkes Senior Village, and eight of our most dedicated supporters, all from the N.C. long term care community. On a cool and sunny Nicaragua day, we were surrounded by local dignitaries, residents of the renovated center, the center staff and many others, including Keren Brown Wilson, the founder of the Jessie F. Richardson Foundation the sponsor of everything we were seeing and the celebration that was about to begin.

We were there to help dedicate the newly-renovated hogare, eight years in the making.

As I looked around, I remembered my first trip to Jinotepe and the hogare in 2006, when residents were ill-clothed and hungry; the roof was unattached; electric wiring dangled from the ceiling, no potable water and staff that were untrained and often unpaid. I looked over at my Nicaraguan attorney friend, Alma, who, along with a couple of other local women who decided years ago they wanted more for the poor elders of their country. I remembered how Alma found Keren Wilson, Keren found me, I found Carron Suddreth, and Carron and I together found dozens of members of the North Carolina long term care community who always said "yes" when we asked for supplies or money for the hogare.

As the priest stood to begin the ceremony, I looked a few rows back and saw Cheryl Clapp Coleman of Clapp's Nursing Center; Denise Clapp Campbell of Clapps's Convalescent Nursing Home; Larry Lollis and Rob Arnold of Grove Medical Supply; Jeff Schneider of Legacy Consultant Pharmacy; and Alicia and Kris Huffman of Wilkes Senior Village. I felt such a surge of gratitude and joy. Each of these wonderful North Carolinians had left their homes and businesses to join us in Jinotepe to witness the dedication of the new center. To my left was the beautiful stucco memorial to all the donors to the center, many of whom are from North Carolina. I thought of all the donors who couldn't be there, Autumn Corporation; White Oak Manor; Culinary Food Services; the Beaver Foundation; Peak Resources; Jim and Kim Schmidlin and many others I'm sure I'm forgetting.

Then I looked at the newly renovated, expanded hogare, at the staff, the residents, and visitors. It was simply a beautiful thing to behold.

Then it started. The Nicaraguan national anthem played and the residents sang it with all the pride we Americans feel when the Star Spangled Banner cranks up.

Hail to you, Nicaragua
The cannon's voice no longer roars
Nor does the blood of our brothers
Stain your glorious colored flag
Peace shines in beauty in your skies
Nothing dims your immortal glory
For work is what earns your laurels
And honour is your triumphal ensign

I have to tell you, my tears were flowing. Eight years after Keren Wilson and I and a bunch of local volunteers sat on a dusty dry patch of land in the hogare yard and dreamed of renovating the place—just enough to make it safe—while residents and chickens and goats wandered around us without purpose, it was finally here. That patch of dust is now a lovely tile terrace with a big screen TV where the residents gather all day. The residents look healthy because they have three meals a day. The center has essentially been entirely replaced, doubled in size and is beautiful. The staff are all trained, paid and seem very happy.

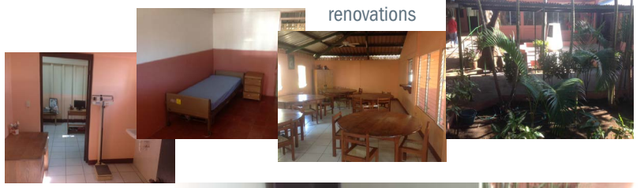
Bigger than all of that, the hogare isn't just a center for abandoned Nicaraguan elders anymore. It's now the first national training center for the care of elders in Central America, complete with a medical clinic; activity room; therapy room; training room; new working kitchen; working laundry and a well-stocked pharmacy, which is the hogare's first micro-enterprise. Local citizens can purchase certain medications from the center at low cost, which provides a small part of the $15,000 per month in operating costs the hogare needs. My friend Alma, the tireless volunteer who's also a busy lawyer, told me her dream is coming true—a future for the poor elders of her country, not just the elders of Jinotepe.

NC Volunteers

I've now been to Nicaragua five times since 2006. Each time, I've written about my travels and this amazing adventure I've been on in *Shorts*. Thanks to each of you who haveve asked me over and over again, "How's the Nicaragua project?" and "When will it be finished?" Truth is, it will never be finished. There will always be a need there—now it's a training site and there is work to be done yet.

Before renovations

After renovations



The old mud pit is now a resident courtyard.

We have finished this stage and the main capital improvements are complete. Next, the residents need new beds, more supplies and a consistent stream of operating income, but they're working on those things. I've had a very, very small role in all of this but feel blessed to have been part of it. The North Carolina long term care community has been a huge part of this success story.

In 2006, after my first trip, we hosted a small fundraiser at my law office and raised $6,000. A few more small events followed. In 2010, Carron Suddreth grabbed me and said, "I want to help." Since that time, we've hosted parties; held auctions; written a few checks ourselves and started the annual JFR Foundation Golf Tournament. Our first year, we raised $16,000. The second year, we raised $34,000. Last year, we raised $101,000. Our tournament this year is set for May 7 at the Rock Barn County Club in Concord, North Carolina. I'm not sure what our goal is. Carron hasn't told me yet – but she will. We would love to see you there as a sponsor or just to come play.

In the years since that first little party in 2006, we've raised over $200,000 for the Jinotepe hogare, all from the North Carolina long term care community. The funds for this last phase of the new national training center came entirely from our North Carolina partners. You guys are awesome!

On behalf of our North Carolina JFR Foundation contingent, the elders and volunteers of Jinotepe, and the people of Nicaragua, thank you for all you've done to help make this dream come true.

Hail to you, Nicaragua and hail to you, North Carolina long term care providers!

Ken Burgess *may be reached at kburgess@poynerspruill.com or 919.783.2917.*

Cheryl Clapp Coleman giving gifts to residents.

JDR Founder, Keren Brown Wilson, Ken Burgess and Alma

Poyner Spruill LLP
ATTORNEYS AT LAW

Document Retention in a Long Term Care Facility cont. from page 1

Type of Record	Suggested Retention Period
Clinical/Medical/Infection Control Records	5 years after discharge of an adult patient. If the patient is a minor when discharged, the facility shall ensure that the records are kept on file until his or her 19th birthday and then for an additional 5 years. If a facility discontinues operation, records must be stored in a business offering retrieval services for at least 11 years after the closure date.
HIPAA-Related Records	6 years from the date most recently in effect for HIPAA-mandated records such as policies or procedures, notices of privacy practices, consents, authorizations, and accountings of PHI disclosures
Governance (board minutes, bylaws, foundation documents)	Typically retained permanently
Quality Assurance, Safety Committee, and Abuse Investigation Records	Retain for 5 years
Finance/Accounting	Medicare specifies a retention requirement of 4 years; the recently revised Medicaid Provider Participation Agreements specify a minimum retention period of 6 years for all Medicaid finance and accounting records; it is common to retain these records for 7 years due to certain tax and financial reporting obligations at the federal level
Employment Application, Résumé, Hire/Promotion/Demotion/Transfer Decision, Request for Accommodation, Evaluations, FMLA Records	4 years after date of termination/resignation
I-9 Immigration Forms	3 years after hiring or 1 year after termination, whichever is later
Wage Records (rates of pay, time earning sheets, etc.)	5 years after the calendar year in which compensation was paid
Most OSHA/Safety Records (including inspection/training records)	5 years following end of calendar year covered by the record (some specific types of OSHA records have much longer retention period, such as exposure records and employees' medical files)
Contracts with Vendors/Suppliers	For contracts valued at $10,000 or more over a 12-month period, Medicare regulations specify a retention period of 4 years after the service(s) is furnished under the contract or subcontract; state laws imposing statutes of limitation on contracts actions may be as long as 15 years, however
Tax Records	7 years after taxes at issue were due or paid, whichever is later
Compliance Records (committee minutes, reports to the board, internal audits, etc.)	Based on a survey AHCA performed in 2007, 10 years appears to be the most common retention period for these records