

# Considerations for Allowing Video Camera Use by Residents in Extended Care Facilities

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In the wake of the COVID-19 pandemic, one of its many unfortunate consequences has been the inability of family to visit with nursing home residents.

Some homes have been able to set up areas through which a resident and family members can communicate, but the ability of family members to enter facilities, observe care, and otherwise apprise themselves of a family member's well-being are more limited.

The purpose of this article is to review the current status of Michigan law regarding the use of room video cameras in an extended care facility setting and to discuss various safeguards should a decision be made to allow their use.

Several states have passed legislation which either mandates the right of a resident or a resident's family to install a camera. Others have authorized administrative oversight regarding camera use.

Let's start with a review of the Michigan legislative history regarding room video cameras, the policy considerations attendant to those discussions, and the scope of other state's legislative positions on its use. We will then conclude with several considerations and recommendations should any Michigan facility opt to allow a room video camera.

## Michigan Legislative History

From 2002 to 2005, the Michigan Legislature considered several bills to authorize and regulate the use of videocams in an Extended Care Facility (ECF) patient's room. Those bills either did not make it out of committee or were not passed by the Legislature. An example of one such bill is HR4044, 93d Leg., 2005 1<sup>st</sup> Reg. SSS., available at: *wl mi-bills-old database*. These bills modeled much of the legislation considered across the country during this time period.

The major obstacles raised by service providers related to staffing, privacy concerns and the potential use of recorded information in litigation and the potential for increasing both insurance and litigation costs. Many ECF staff members have objected to the use of cameras because it makes a difficult situation more difficult. Many staff members object to the "constant eye" on them under all circumstances with the potential for statements or portions of a video recording to be used out of context.

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A fixed camera also records not only staff, who may not have consented to being videotaped, but also other residents. In most facilities, room doors may not be locked, and other non-consenting residents can end up on video.

Finally, the use of video in litigation may lead not only to an increase in the frequency of suits, but also to severity – in that the video may result in greater verdict potential. Allowing cameras in this setting, and not in others, such as operating rooms, creates additional risk exposure which may translate into higher premiums.

Currently, there is no federal statute that addresses the use of cameras in a situation in which a resident's stay may be funded in whole or in part through federal funds.

Michigan does prohibit the use of any device for recording, transmitting, photographing or eavesdropping in a "private place" without consent. MCL 750.539d. This statute makes it a felony to "install, place or use in any private place, without the consent of the person or persons entitled to privacy in that place, any device for observing, recording, transmitting, photographing or eavesdropping upon the sound or events in that place."

Although the statute is most likely not intended to deal with a situation in which a camera is placed in plain view, in a resident's room, the statute, itself, does not create any exception for use in a resident's room. Reliance on this statute as a basis to deny a request for camera placement is potentially misplaced. Most resident placement is governed by a contract that sets forth the rights and responsibilities of both the ECF and the resident or resident's family.

Many of these agreements are tailored to include lease-like language. The statute only prohibits the placement of a camera in a "private" place. The term "private" is not defined but may not extend to a location in which joint access is expected and allowed. As will be discussed below, if an ECF intends to prohibit these devices, it is best to put it in the controlling contract. If a facility intends to allow these devices, that document should clearly set forth the parameters under which they may be used.

Privacy rights are not always absolute. The right to privacy is primarily intended to "protect persons from unwanted disclosure of personal information." That right is balanced by the right of the public to know. Thus, an employee claiming a right to privacy may be held secondary to the right of a jury to see information regarding care.

#### Legislation

States that have addressed this topic have taken one of two paths.

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First, some states have authorized an administrative body to investigate and publish rules related to videocam use. Maryland is one such state.

Second, states beginning with Texas, passed legislation specifically authorizing camera use. The statute allows for both video and audio recording, and only the resident can authorize its use, or a guardian if incompetent.

The device must be placed in a prominent location and a notice must be posted at the ECF advising persons of the use of recording equipment in areas within the ECF. The camera must be placed in a fashion so that minimizes stray recordings.

If a resident is in a double room, the roommate must give consent, and that consent can be limited to audio or video only, or to limit the direction of the camera or other recording device. Considerations must be made to potentially move a non-consenting roommate if this allows for recording to be consented to. The law states that the recording is admissible as evidence in any civil or criminal hearing consistent with the state's rules of evidence.

Since the passage of this statute in 2001, several other states have adopted similar legislation, including Illinois, New Mexico, Washington, Oklahoma, Utah and Louisiana.

Facility Considerations

Statutes from other jurisdictions as well as the not yet passed Michigan statute define the parameters that any ECF should consider when a family makes a request to use a videocam. Facilities unwilling to allow the use of cameras or other recording devices should make that clear in its contract documents, thereby eliminating any misunderstanding. If a resident or family member tries to use a videocam, the agreement becomes the basis to deny the request or to issue a cease and desist letter.

If the ECF is willing to entertain the use of recording devices, several issues should be considered.

Where no statute exists, any issue regarding privacy can be eliminated through the provision of consent. The ECF can consent to the use of the videocam and make certain that each of its employees consent to the placement of the device.

Like those jurisdictions that have statutes regarding camera use, the ECF should consider doing the following:

1. Require the device be placed in such a way as to minimize the recording of either roommates or other residents. Fixing the camera in such a way as to only show a limited area within a room, such as the bed or an adjacent chair, should be required and monitored.

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2. The family must agree to not disseminate any footage on any internet site or to the media. The ECF should make clear that anything recorded is not “public” and can only be used for limited purposes, such as care conference meetings, discussions with staff or administrators, or should it occur, litigation.
3. Any inadvertent recording of non-consenting persons, including non-consenting staff, other residents or family members of other residents is to be immediately destroyed, absent an extenuating reason.
4. If feasible, the ECF should insist on using its recording device, and the facility should maintain, but make available, any recordings. With shared internet-based cloud services, the ECF has access to the same (and more) recordings than that which may be relied upon by a resident or resident's family.
5. Copies of any recordings made and preserved are to be provided to the facility if the facility does not maintain control of the device and any recordings from it.
6. If a resident is in a double room, permission to use any recording device must be conditioned on the roommate granting consent. If not, the facility may, but should not require itself, to provide an accommodation by moving the resident to a different room.

The ECF needs to review its agreement with its resident. If the agreement is a “lease” arrangement, then there is a transfer of a property interest to the resident which would give some rights to control the property, including the potential use of a videocam. As such, any dispute regarding the use of videocams in an ECF, would fall within the terms of the lease.

If the resident is present pursuant to a fee for services arrangement, then the ECF can argue that property remains solely in its control. Regardless, under any scenario in which the ECF is willing to allow video or audio recording in a resident's room, the parameters of use should be clearly spelled out in that agreement or a supplemental document.

The decision to allow a video camera in a resident's room is one which should be made only after significant deliberation. In some circumstances, a resident's family may believe that the use of a camera should be routine; others may do so out of concern based on past experiences. Yet others may choose to use one for potential legal reasons.

Because these cameras are not mandated, whether to allow them upon a family's request or on a case-by-case basis could result in significant consequences.