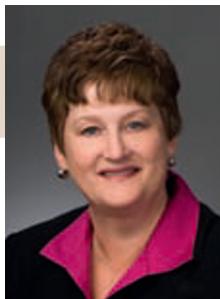


Legal Issues

By Janet K. Feldkamp, JD, RN, LNHA



Cameras, Citations, and Abuse Investigations

Most Americans are subject to electronic surveillance almost every day. Video cameras monitor the roadways, the malls, high-rise workplaces – and postacute and long-term care facilities. Electronic surveillance is commonplace in entrance-exit areas and other common spaces of postacute/long-term care (PA/LTC) facilities, but recent media attention has been drawn to surveillance cameras in resident rooms.

Covert video monitoring has been used by many parents to monitor babysitters. The “nannycam” videos have chronicled horrifying behavior by some caregivers for all the world to see on the internet and news-magazine television programs. But in many states, controversy continues to surround the use of covert cameras in nursing facilities.

A few do have statutes that explicitly allow covert cameras in PA/LTC facilities, as long as the placement is done under the direction of a resident’s family. Other states are reluctant to allow surveillance in residents’ rooms, even under that condition, because of privacy and dignity concerns.

“Grannycam” exposure of alleged negligence and abuse in one nursing home has caught the public’s attention in Ohio. In June, Ohio’s attorney general, director of aging, and the director of health conducted a news conference to announce significant enforcement actions against a Zanesville, Ohio, facility, including proposals to terminate Medicare and Medicaid participation and revoke its license to operate. This type of announcement of an enforcement action against a nursing facility was unusual, as all three state agency department heads traveled to the facility to do it.

In another highly unusual move, the director of health released the citations at the press conference, although all nursing facility citations are publicly accessible by written request to the state regulatory agency and are now available at the federal government’s Nursing Home Compare website (www.medicare.gov/nhcompare/home).

The facility in question had been on the Centers for Medicare & Medicaid Services’ (CMS) special focus list for more than 50 months and had received many extra CMS visits, including several complaint visits, as it attempted to graduate from the regulatory list. One of the facility’s latest citations referred to a “review of video surveillance logs submitted by the Attorney General’s Office to the State Survey Agency.”

Since then, news media have reported that the Ohio attorney general placed the covert cameras in the facility with resident-family permission but without awareness of employees or even

the facility’s administration. This is the first time, at least in Ohio, that such information has been used to support a citation of noncompliance with CMS regulations.

Various local and regional newspapers have expressed differing views on the value and appropriateness of covert cameras. They also have reported that the attorney general and other regulators have placed cameras in other Ohio facilities and may use surveillance footage as evidence in potential regulatory, civil, and criminal actions.

Nevertheless, videotaping in residents’ rooms without the knowledge of clinical caregivers or residents raises certain legal issues, such as whether or not a search warrant is required for installation of the cameras. Most nursing facilities strive for consistent provision of quality care, but the review of every moment of a resident’s day can encourage scrutiny and interpretation of actions by the facility and individual caregivers. In Ohio, a state regulatory agency has now utilized this type of information as support for CMS citations for poor care. Could video footage soon be used to support charges of false billing for care shown to be undelivered?

This discussion is germane not only in Ohio. The debate about placement of covert cameras in resident rooms will continue because many families and much of the public stridently believe that video surveillance can protect frail elderly residents. Meanwhile, owners of nursing homes and others believe that

video surveillance violates the rights of a facility’s residents who did not give consent to taping but will nevertheless be on camera at times.

Even the consenting resident’s rights and dignity may be violated when a camera views intimate personal care. Some providers have raised other challenges to taping, such as it being an unwarranted search when a governmental agency installs a camera without caregivers’ knowledge.

Various Health and Human Services Departmental Appeals Board decisions have discussed video surveillance in nursing facilities in differing ways. An administrative law judge in the 2003 case *Capital Health Healthcare Center v. CMS* endorsed exit-way video monitoring to avoid elopements. The judge upheld an immediate jeopardy citation of the nursing home because a resident eloped from the building during a fire alarm that unlocked the exit doors, yet staff didn’t know it for up to 3 hours.

However, another administrative law judge, hearing the 2010 case *Charlotte Harbor Healthcare v. CMS*, disapproved of surveillance cameras installed in three resident rooms following a rash of thefts in one facility. It received an immediate jeopardy citation for failure to protect the residents’ rights to a dignified existence and privacy, in part because the monitors could be viewed by anyone entering the administrator’s office. The citation indicated that neither the families nor the residents were aware of the cameras’ placement. This

immediate jeopardy was also upheld by the Departmental Appeals Board.

Video cameras have the potential for either positive or negative effects on the well-being and care of residents in nursing facilities. Residents have the right to be protected from abuse and neglect and to live in a safe environment. Facilities, families, and advocates can and probably will continue to debate whether or not surveillance cameras should ever be in residents’ rooms, especially whether the equipment should be allowed without the facility and its employees being aware of the video coverage.

In my opinion, medical directors and other facility professionals should always be informed when they are being taped. As professionals, they must take responsibility for delivering resident care that meets professional standards, whether or not it is on video. Additionally, billing for this care must be accurate and supported by documentation other than video footage. 

This column is not to be substituted for legal advice. The writer, JANET K. FELDKAMP, practices in various aspects of health care, including long-term care survey and certification, certificate of need, health care acquisitions, physician and nurse practice, managed care and nursing related issues, and fraud and abuse. She is affiliated with Benesch Friedlander Coplan & Aronoff LLP of Columbus, Ohio. You can comment on this and other columns at www.caringfortheages.com, under “Views.”