



Use of Electronic Monitoring and Recording Devices in Long-Term Care Settings

This paper reflects the understanding of the law being discussed and the position of the Ombudsman Program regarding resident rights in this context. This document is written from a resident rights perspective, which is the mandate of the Ombudsman Program. This document contains educational information meant to guide the conversation in a resident-focused way and should not be considered legal advice.

The use of cameras and other electronic monitoring or recording devices has become common in many people's day-to-day lives. These devices can take many forms, including digital assistants, video doorbells, nanny cams, smart phones, applications, smart watches, baby monitors, webcams, tracking devices, and more. Recognizing that technology is ever evolving, this list of examples is not exhaustive, and this document is intended to provide information on electronic devices of any kind. These devices have a variety of capabilities, including accessing and recording audio, visuals, or both. Some allow two-way communication while others track the location of an individual. Due to the increase in requests to use electronic monitoring and recording devices in long-term care settings, this paper focuses on devices which are placed in a private space or where there is an expectation of privacy from being monitored or recorded. Throughout this document, these electronic monitoring and recording devices will be referred to collectively as "electronic devices" or "device".

Because electronic devices have become prevalent and easy to use, there is often a desire for a resident, the resident's family, or their legal representative to install an electronic device in a resident's room at their long-term care home. Technology can offer great opportunities for social engagement, with easy access to music and movies or the ability to virtually connect with family and friends. With thoughtful choices, and knowledge of the resident's wishes, these devices can enhance the resident's quality of life. Sometimes electronic devices are placed for purposes of monitoring resident needs, verifying care and treatment, observing resident safety, or tracking the location of the resident. While electronic devices may provide insights into the resident's daily life and interactions with others, the trade-off could be the loss of the resident's privacy, dignity, and/or comfort.

State and federal regulations ensure all residents living in any type of long-term-care setting have the right to be treated with dignity and respect. These same regulations safeguard a resident's right to privacy and self-determination.¹ These rights are guaranteed, regardless of whether a resident has an activated power of attorney or guardian.

¹ See list of state and federal law and regulations at the end of this paper for reference.

It's important to remember that while living in a long-term care setting, a resident is in their home and maintains an expectation of privacy. This means that a resident should retain all the safety and freedoms anyone would expect in their home. Although adjustments may have to be made when living with others in a congregate setting, residents do not lose these rights because they live in a long-term care home. It is imperative that resident rights are always respected and upheld by every person involved in the resident's care.

Before deciding to place any electronic device, the resident, their family, the resident's legal representatives, and the long-term care home should discuss why they are considering the use of such equipment. There should be an understanding of the core concerns that are leading to this decision. Less invasive interventions should always be utilized first. Requesting a care conference, contacting the Ombudsman, or reaching out to a county Dementia Care Specialist may yield new, resident-focused ideas and interventions. Those making the decision (including the resident) should reflect upon whether use of the electronic device would improve the quality of the resident's life and, if so, if that benefit is worth the potential risks that could occur, including loss of privacy.

The Ombudsman Program advocates that before using any electronic devices, a resident should be aware of and be allowed to express their preferences about all the situations that may be recorded or monitored. Residents should consider how they may feel having their daily activities viewed, their conversations heard, or their location known by others. These electronic devices may capture personal cares, telephone and online discussions, visits with others, health care conversations, legal or other privileged conversations, and other private daily moments. Residents should be informed that conversations of any kind may not be private while the device is operating. The resident should be in control of whether the electronic device is in use during these conversations and have the ability to turn the device off if they wish. Consent to installation of an electronic device should not be perceived as blanket consent to record every conversation or interaction. The resident's personal preferences, history, relationships with others, and risk awareness all play a role in establishing understanding and consent regarding the placement of an electronic device. The Ombudsman Program has developed a discussion tool that the resident/resident representative can review to help determine if the resident would be comfortable with the electronic device in their home.

Placement of electronic devices with recording or visual components must be evaluated to ensure privacy during care and treatment. Bathrooms or other areas where intimate personal care occurs are not appropriate for placement of these devices. Residents should be able to turn off, or request to turn off the electronic device if and when they choose. Consider regularly scheduled times for the device to be on or off, based on resident wishes, needs, and preferences.

While a particular resident may have consented to the use of a device in their room, other residents must be protected to ensure their images are not being captured without



consent. All residents also have the right to privacy in their home, including during visits, medical treatment, or care. Electronic devices should not be placed where any hallways or other common areas may be viewed, or where conversations might be overheard. Signage should be used to notify others of the use of an electronic recording device, especially in any area where there is an expectation of privacy.² The long-term care setting may also have existing policies in place regarding the use of cameras and other electronic devices within the home, which should be taken into consideration before placing a device.

Individuals who share a room must ensure that their roommate's right to privacy is not violated. If an electronic device is considered, the roommate must consent to its presence, be aware of its placement, and have input on the use of the device if it is capable of capturing images or recordings of the roommate. Both residents should be assessed to ensure they understand any benefits and/or consequences of the device's use, both intended and unintended.

It is important to understand the nature of the technology that may be used, including who will have access to the footage or feed. The number of people who have access to the digitally captured material should be limited to protect the resident's privacy and dignity, and the resident should be informed of who those people will be. This would include limiting who can start, stop, or view the footage. Additionally, there are increased security risks with the use of electronic devices. There have been instances of hackers gaining access to visual and audio feeds, which are then shared. Evaluate how the recording may be transmitted or shared to minimize opportunities for privacy violations. Evaluate the security features of each device carefully and research the device and manufacturer to understand how the data captured is stored and protected. It is also important to note that two-way communication devices may cause confusion to some residents. Hearing voices from an unseen person, whether family, digital assistant, or hacker, can be frightening for some, for example someone with dementia or other cognitive impairment.

If the decision is made to install an electronic device, it should become part of the resident's care plan, which delineates what needs the device is being used to meet. Use of the device should be reviewed regularly by the resident, their representative, and the facility to ensure it is still appropriate and beneficial. Ideally, placement of an electronic device should be time-limited, based on the identified purpose or intent for use. Less intrusive options should be re-examined regularly, such as during care conferences, to see if alternative options are more appropriate to meet the resident's goals and preferences. The resident may also withdraw consent for placement of the electronic device at any time.

Any discussion of electronic devices and privacy must also consider the prevalence and ease of internet sharing. Residents or their families may be active on social media

² Refer to Wis. Stats. §§ 968.31 and 942.08 and/or consult with your own legal counsel regarding state and federal requirement related to third party recording, privacy, and obtaining of consent.



networks, discussion forums, or other online platforms. Any posting of a resident's name or photo should be done only with that resident's consent.

Persons living in any long-term care setting should be involved in all decisions regarding the use of electronic devices, including how their use improves or impacts their quality of life and care. All individuals involved should diligently weigh the pros and cons associated with their usage. These devices should not be considered a replacement for personal involvement, visitation, and direct communications between facility staff, families, friends, and residents. These devices should also not be considered or used as an alternative to proper care and treatment or as a replacement for adequate staffing.

This document cannot address every situation which may occur. There may be other situations not addressed by this informational paper. Long-term care providers are encouraged to consult with their own legal counsel regarding these issues.

For questions about this document, or to access the Ombudsman Program, you can reach us at 1-800-815-0015 or via e-mail at BOALTC@wisconsin.gov. For additional information, please refer to the Ombudsman Program's companion document, "Determining Privacy & Protection: Use of Electronic Monitoring and Recording Devices in Resident Rooms in Long-Term Care Settings."



RESOURCES

“A Process for Care Planning for Resident Choice,” Rothschild Person-Centered Care Planning Task Force

(<https://www.pioneernetwork.net/wp-content/uploads/2016/10/Process-for-Care-Planning-for-Resident-Choice-.pdf>)

“Protecting Resident Privacy and Prohibiting Mental Abuse Related to Photographs and Audio/Video Recordings by Nursing Home Staff,” CMS Memo S&C: 16-33-NH

(<https://www.cms.gov/medicare/provider-enrollment-and-certification/surveycertificationgeninfo/downloads/survey-and-cert-letter-16-33.pdf>)

“Balancing Privacy & Protection: Surveillance Cameras in Nursing home Residents’ Rooms,” The Consumer Voice

(<https://ltcombudsman.org/uploads/files/issues/cv-ncea-surveillance-factsheet-web.pdf>)

STATUTES & REGULATIONS

Licensed Adult Family Homes (AFHs):

Wis. Admin. Code § DHS 88.10

Community-Based Residential Facilities (CBRFs):

Wis. Stat. Ch. § 50.09

Wis. Admin. Code §§ DHS 83.01(2), 83.32

Residential Care Apartment Complexes (RCACs):

Wis. Admin. Code § DHS 89.34

Nursing Homes (NH):

42 CFR § 483.10

Wis. Stat. Ch. § 50.09

Wis. Admin. Code § DHS 132.31

Individuals receiving services for mental illness, developmental disabilities, alcoholism, or drug dependency may have additional protections:

Wis. Stat. § 51.61

Wis. Admin. Code §§ DHS 94.02, 94.18

Wire, electronic, or oral communications & privacy:

Wis. Stats. §§ 968.31, 942.08, 942.09

