Videotaping to Protect Nursing Facility Residents: A Legal Analysis

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In recent months, the use of video cameras in nursing facilities has received an increasing level of attention. USA Today ran a front-page article on resident advocates’ efforts to place video cameras in residents’ rooms. In Maryland and Texas, legislation was introduced to establish the right of a resident or a family member to place a video camera in the resident’s room.

In this journal’s November/December edition, Dr. Andrew Weinberg presented a case study involving the use of a hidden video camera. In Dr. Weinberg’s case study, a nursing facility resident had suffered more than 40 bruises, all of an unknown etiology, over a period of more than 18 months. Understandably concerned about these bruises and about other indications of inadequate care, the resident’s family surreptitiously placed a video camera in the resident’s room.

Four weeks of secret videotaping revealed a quality of care (if it can be called care) that was consistently negligent and oftentimes malicious. Nurse aides told the resident to “shut up,” threw a pillow at her, and hit her. Staff members laughed at the resident and ate food from her tray. On several occasions, transfers were performed by only one staff member although a two-person transfer was advisable.

Family members notified the facility administrator of the presence of the camera and the substance of the taped events. In response, the facility’s attorneys asked a local court to order the camera’s removal, but the court denied the request. The resident (and the camera) stayed in the facility and, according to the family, the quality of care improved markedly. A lawsuit was filed on the resident’s behalf against the facility and was settled, before trial, for more than 1 million dollars.

Although the case study does not explicitly recommend the use of video cameras, the case study does intimate that videotaping in some instances might lead to an improved quality of care. Importantly, however, the case study also recognizes that videotaping raises significant legal issues, and, to date, those legal issues have not been resolved.

The remainder of this article explores two legal issues — privacy rights and electronic eavesdropping statutes — that must be considered by anyone contemplating the use of a video camera in a nursing facility. Although these issues certainly are not the only relevant issues, they likely present the most legal danger to a prospective videotaper.

PRIVACY RIGHTS

The obvious legal problem in the use of a hidden camera is the fact that most subjects — principally facility employees, and possibly the resident’s roommate — have not consented to being videotaped. The taping thus invades somewhat the privacy of these individuals.

But not all invasions of privacy are legally actionable. For example, taping an individual in a personal bedroom is almost certainly an actionable violation of privacy rights, whereas taping that same individual at the front row of a baseball game is just as certainly a legally insignificant event.

The pivot point of the legal analysis is the taped individual’s reasonable expectation of privacy or the lack of same.

Cases Finding Violation of Privacy Rights

A significant number of litigated cases have resulted from undercover investigations conducted by the news media. In a recent case, an investigator for ABC News obtained employment in a “telepsychic” firm that provided psychic advice over the telephone on a pay-by-the-minute basis. The investigator secretly videotaped conversations with several co-workers, one of whom subsequently sued ABC.

The suit eventually reached the California Supreme Court, which ruled that a reasonable expectation of privacy is possible (but not automatic), even if a conversation is visible and audible to third parties. In addition, the court noted that a violation of privacy rights creates liability only if the violation is “highly offensive to a reasonable person,” and that, accordingly, a violator’s motives are relevant.

In a seminal media-related case decided in 1971, a patient/investigator for Life magazine presented himself to a “quack doctor” as a potential patient. During a consultation, the investigator secretly audiotaped the proceedings and took still photographs. The audiotaping and photography took place in...
the false doctor’s home, in which he maintained a gadget-filled office.

A federal appeals court found that the false doctor’s privacy rights had been violated. The court pointed out that the meeting had taken place in the false doctor’s home, which was not open to the public. The investigator had been admitted only because he had an invitation, and he had obtained that invitation through deceit.

Significantly, the court found a reasonable expectation of privacy even though the false doctor was audiotaped and photographed while in the company of strangers — investigators posing as first-time patients. The court noted that speaking or appearing in front of strangers does not constitute consent to audiotaping or photography.

The court also noted that it was irrelevant, for the purposes of a claimed violation of privacy rights, whether a surreptitiously obtained tape or photograph is ever distributed. The invasion has occurred even if the tape or photograph never is seen by anyone.

Although courts have noted that audiotaping is more intrusive than video-only taping, a violation of privacy rights may occur even if the tape is video-only. The Hawaii Supreme Court so ruled in finding that postal employees had a reasonable expectation of privacy in their break room.

Cases Finding No Violation of Privacy Rights

In a case with a factual pattern similar to that of the false doctor case, a federal appeals court found no reasonable expectation of privacy by employees of a chain of eyecare clinics. Investigators from ABC TV’s PrimeTime Live obtained access to the clinics by posing as patients and then videotaped within the clinics with hidden cameras. The chain and individual ophthalmologists sued ABC, but the federal appeals court ruled that the investigators had neither committed trespass nor violated the privacy rights of the suing ophthalmologists.

The court’s analysis relied, in large part, on facts suggesting that the clinic employees did not have a reasonable expectation of privacy in the area in which the taping took place. The court noted that the taping was done in an area of the clinic accessible to the public, ie, the clinic’s patients. The court also pointed out that the only recorded conversations were those between the clinic employees and the patients/investigators. In a divergence from the reasoning of the false doctor case, the court found that employees likely could not have a reasonable expectation of privacy regarding conversations conducted with virtual strangers, specifically the investigators posing as first-time, walk-in patients.

Not surprisingly, a reasonable expectation of privacy is difficult to maintain after receiving notice that taping is being conducted. Thus, when a phone company had notified its employees of both the existence of cameras and the cameras’ field of vision, a federal appeals court ruled that the company’s continuous video surveillance of its employees did not violate the employees’ rights. The court noted that the tapeing had no audio capabilities.

ELECTRONIC EAVESDROPPING STATUTES

Federal and most (if not all) state laws assess criminal penalties for the unauthorized recording of conversations. Because these laws contain various exclusions and limitations, however, they may not apply in the nursing facility scenarios envisioned by this article. Video-only tapings, for example, generally do not violate the relevant criminal statutes.

Federal and most state laws do not apply if the individual taping the conversation is a participant in the conversation and the purpose of the taping is not criminal or malicious. For this reason, the federal appellate court in the eyecare clinic case found no violation of the electronic eavesdropping statutes. The court found that the ABC investigators were participants in the recorded conversations, and the recording was not done for the purpose of committing a crime (federal law) or “injurious acts” (Wisconsin law). As noted, however, not all state laws have such limitations; for that reason, Linda Tripp faced criminal charges under Maryland law as a result of her taping of conversations with Monica Lewinsky.

Electronics eavesdropping statutes generally apply only to conversations that are audible or visible to a third party. Relevant federal and California law, for example, apply only when a conversation’s participants reasonably believe that the conversation cannot be overheard by a third party.

ANALYSIS OF POTENTIAL LEGAL LIABILITY

Secret Videotaping

Assume first the facts set forth in Dr. Weinberg’s case study: A resident named Lilly Harris is suffering from dementia, and a videocamera is secretly placed in her room by a family member. Is the family member subject to civil liability for violating the privacy rights of videotaped individuals? And/or is the family member risking criminal prosecution à la Linda Tripp by recording conversations without the individuals’ consent?

Taping of Roommate

From the family member’s perspective, the risk is greatest if Ms. Harris has a roommate, because the roommate doubtlessly has a certain reasonable expectation of privacy. Although the roommate’s level of privacy is not equivalent to the privacy that she would receive at home because the room is open to facility staff members and Ms. Harris’ visitors, the room certainly is inaccessible to the general public. Furthermore, pursuant to federal regulations and standard nursing practices, a nursing facility room provides each resident with the ability to have total visual privacy.

The family member might point out that (1) the camera is recording only what Ms. Harris’ family members could see and hear during a visit, and (2) a family member has the right under federal regulations to visit a resident at any hour of the day or night. Therefore, the family member might conclude, the roommate could not have a reasonable expectation of privacy regarding any events that are audible or visible to the camera (assuming that the camera is placed in Ms. Harris’ half of the room).
The family member's argument might be viable if the camera were hidden on a family member's body during visits, following the reasoning of the eyecare clinic case. But how could the roommate not have a reasonable expectation of privacy if (for example) she were alone in her room and the door was closed. She would have every reason to believe that she would not be videotaped while undressed or audiotaped while having a delicate conversation with her son. Taping of such events would almost certainly constitute an actionable violation of the roommate's privacy rights, regardless of how honorable the motives of Ms. Harris' family member.

Furthermore, the audiotaping of the roommate might also subject Ms. Harris' family member to criminal liability under the federal or relevant state electronics eavesdropping statutes. In general, the escape hatches in these laws apply only when the taping party is a participant to the conversation or the conversation is audible to a third party. Neither of these exceptions would apply (for example) to a closed-door conversation between the roommate and her son.

For all these reasons, Ms. Harris' family member would risk both civil and criminal liability by secretly videotaping the roommate. The family member could eliminate the risk of civil or criminal liability vis-à-vis the roommate by obtaining the roommate's written consent to the otherwise-secret videotaping. This consent could be given by the roommate's legal representative if the roommate no longer had the mental capacity to grant consent.

Alternatively, Ms. Harris' family member could reduce the risk by pointing the camera so that it did not record any events occurring in the roommate's half of the room. To avoid the inadvertent recording of conversations occurring in the roommate's half of the room, the family member could use a directional "shotgun" microphone that records only sounds that occur in a certain arc in front of the microphone.

**Taping of employees**

Nursing facility employees have a meager expectation of privacy in a resident's room. Nurses and nurse aides enter a resident room to assist the residents, then move on to assist other residents in other rooms. Housekeeping personnel collect dirty linen and/or clean the room, then also move on to other resident rooms. In general, employees in resident rooms perform no tasks that would be considered private from the employee's point of view. In addition, employees in resident rooms realize that they can be interrupted at any time.

In resident rooms, most of the employees' conversations are conducted with residents, and those conversations generally do not concern matters that are private from the employee's point of view. It can be imagined that an employee might conduct a highly personal conversation in a resident's room with a resident or another employee, but such a conversation certainly would be the exception rather than the rule.

For these reasons, an employee has little expectation of privacy in a resident’s room. As a result, an employee secretly videotaped in Ms. Harris' room likely would not have a viable legal claim for violation of privacy rights.

Nonetheless, the audio component of such videotaping might violate relevant electronic eavesdropping statutes. Although, as discussed above, these statutes generally do not apply if a conversation's participant is aware of the taping or if the conversation is audible to third parties, the statutes likely would apply to a quiet conversation between an employee and the roommate or between two employees. Of course, Ms. Harris' family member could eliminate the risk of criminal prosecution by conducting video-only taping.

**Open Videotaping**

Ms. Harris' family member could dramatically reduce the risk of liability by conducting open videotaping, ie, by placing the videocamera in plain sight with a notice that videotaping was being conducted on an around-the-clock basis. With such clear notice of ongoing taping, employees almost certainly could not claim a reasonable expectation of privacy. Furthermore, the risk of criminal prosecution would diminish because participants in conversations would be on notice that those conversations were likely audible to third parties.

Notice of videotaping, however, would not eliminate the potential violation of the roommate's privacy rights. The taping potentially (depending on the camera angle and the audio technology) would capture the roommate while she was dressing, sleeping, and talking to her friends and family members. If the roommate were restricted to her bed, the taping might capture every second of her day, 7 days a week, 52 weeks a year. Such intrusive and extensive taping raises the specter of George Orwell's Big Brother and, regardless of the honorable motives of Ms. Harris' family member, almost certainly would be considered a violation of the roommate's privacy.

Of course, as was true with the hidden camera, the family member could lessen the potential liability by aiming the camera away from the roommate and by using audio technology that would record only sounds from Ms. Harris' half of the room. Judicious camera placement and discriminating audio technology, along with prominent notice of ongoing taping, would lessen or possibly negate any risk that the roommate could claim a violation of privacy.

**RIGHT OF RESIDENT OR FAMILY MEMBER TO CONDUCT VIDEOTAPING IN RESIDENT’S ROOM**

The possibility of open videotaping raises another legal issue: can a nursing facility bar a resident or family member from conducting videotaping in a resident's room? Or, to put the question another way, does a resident or a family member have a right to videotape? Previously mentioned legislation in Maryland and Texas would have established such a right; neither bill passed, although Maryland has designated a committee to study the issue.

At this time, no federal or state law addresses this issue directly. In federal law, the most relevant regulation states that "[t]he resident has the right to retain and use personal possessions, including some furnishings, and appropriate clothing, as space permits, unless to do so would infringe upon the rights or health and safety of other residents."

This regulation suggests that a nursing facility would not be able to bar a resident or family member from videotaping in the resident's room, assuming either that the roommate consented or that the videotaping was done in such a way that...
the roommate generally was not seen or heard on the tape. If, for example, Ms. Harris could have a decorative doll on her shelf, why should she not be able to have a videocamera on the shelf instead? And why should the facility care? The camera would capture only what a visiting family member could see, or (more to the point) what Ms. Harris could see and report herself were she not suffering from dementia.

As explained above, open videotaping probably does not violate employees’ privacy rights. In any case, the nursing facility itself is a business entity, most likely a partnership or a corporation, that cannot be videotaped, does not have the same privacy rights as an individual, and cannot assert the privacy rights of individual employees. Any lawsuit involving the employees’ privacy rights would have to be brought by the employees themselves, not by the nursing facility.

Aside from a possible violation of privacy rights, the videotaping causes no damage to the facility or its employees. The taping is not used to steal the facility’s trade secrets or to identify and poach the facility’s valued employees. The taping simply records what happens in one resident room so that a resident’s family can be sure that the resident is receiving adequate care.

Accordingly, open videotaping is the safest course of action for a resident or family member. The risk of civil or criminal liability can be relatively remote, as discussed above. Furthermore, assuming that the roommate’s rights are appropriately protected, federal regulations give the resident the right to retain the camera like any other personal possession.

One final advantage of open videotaping deserves mention. Regardless of the relevant law, some judges may look askance at hidden videotaping’s “gotcha!” mentality, which may seem to be driven by a desire for a hefty personal injury judgment. By contrast, open videotaping is more obviously aimed at the protection of a resident. In Dr. Weinberg’s case study, open videotaping arguably could have prevented much of the abuse that was instead chronicled by the hidden taping.

NON-LEGAL CONCERNS

As explained above, videotaping probably is a viable option for a resident’s family member. But this legal conclusion opens up a round of non-legal questions, concerning whether videotaping is advisable for a family — or for society.

The above legal analyses essentially ignored the resident’s privacy interests, assuming implicitly that consent to videotaping would be obtained from the resident or resident’s legal representative, or that the resident would not have the mental capacity to mount a strong objection to the videotaping. For these reasons, in the vast majority of families and situations, a videotaping family member could expect no legal problems resulting from a violation of the resident’s privacy rights.

But these assumptions, probably accurate from the perspective of legal risk-weighing, improperly dehumanize the resident. A nursing facility resident, like any other individual, probably would prefer that her dressing and bathing (or, indeed, her entire day) not be captured on around-the-clock videotaping. Before deciding to begin videotaping, family members should ask and answer one important question: “What would the resident want in this situation?”

From a societal perspective, it is important that videotaping not be oversold. In Dr. Weinberg’s case study, the hidden camera exposed nurse aides whose behavior was practically criminal. In most cases, however, a poor quality of care generally is not the handiwork of a deviant nurse aide; rather, poor care results from understaffing and inadequate training. This type of poor care may or may not be exposed by a family member’s videocamera, particularly in the case of a resident who spends much of the day away from her room.

In short, videotaping is not a panacea. In certain circumstances, videotaping may improve the quality of care received by a resident by exposing staff misconduct and/or keeping staff members on their toes. Videotaping, however, cannot be considered in any way a substitute for a family’s frequent and attentive visits, a staff’s diligent nursing care, or a facility management’s professional training and supervision.

REFERENCES

6. Restatement (Second) of Torts, section 652B (definition of privacy rights violation).
12. Ricks v. State, 537 A.2d 612 (Maryland Court of Appeals 1988) (Maryland electronic eavesdropping statute found inapplicable to video-only taping).
13. United States Code, Title 18, sections 2510, and 2511 (federal electronic eavesdropping statutes).
14. Wisconsin Statutes, section 968.31 (Wisconsin electronic eavesdropping statute).
20. Code of Federal Regulations, Title 42, sections 483.70 (resident’s right to full visual privacy).
21. Code of Federal Regulations, Title 42, section 483.10 (resident's right to have video camera on personal possessions in the resident’s room).