

Nursing Facilities: Electronic Monitoring

Putting a family member in a nursing home can be upsetting – ask anyone who has done it. Ensuring that a family member receives good care while in the home can also be a concern. Enabling the family to electronically monitor their loved one in the home has been proposed as a way to help accomplish the latter.

In 2001, legislation was introduced in nine states to address electronic monitoring of nursing home patients by their relatives or legal guardian: Florida, Louisiana, Maryland, Massachusetts, North Carolina, New Jersey, Ohio, Pennsylvania and Texas. Only Florida and Texas enacted laws, but the others are worth mentioning as the issue is likely to recur in other state capitals in 2002 and beyond.

Florida enacted a provision in 2001 in an omnibus long-term care reform Act (SB 1202) that requires the state agency for health care administration and the state office of the attorney general to study the use of electronic monitoring devices in nursing homes.

Louisiana's House adopted HSR 26 which requests the House Health and Welfare Committee to study the use of electronic monitoring devices to allow a nursing home resident or the resident's legal representative to monitor the resident. HB 457, which permits a nursing home resident or the resident's legal representative to monitor the resident through the use of electronic monitoring devices, was scheduled for a hearing in January 2002.

Maryland HB 433 requires nursing homes to permit a resident or a resident's legal representative to monitor the resident with video cameras or other electronic monitoring devices. It requires the homes to provide power sources and mounting space to set up electronic monitoring devices. It prohibits the homes from refusing to admit an individual or removing a resident from the related institution because of a request to install an electronic monitoring device. The bill establishes penalties for violators and requires that tapes created from electronic monitoring be admissible in criminal and civil actions brought in state courts. This bill did not pass the Legislature in 2001. It was referred for interim study in 2001. It must be reintroduced in the next Legislature to remain viable. Maryland legislative staff said this legislation will not likely be introduced again in Maryland until after 2003. That will be after a report is due on a pilot program that was started in 2001 to set up monitors in three nursing homes that volunteered for the pilot.

New Jersey SB 2231 directs that a nursing home shall permit a resident to be monitored or the resident's legal representative to monitor the resident in the resident's room through the use of an electronic monitoring device in accordance with the provisions of the Act. A nursing home shall inform a resident and the resident's legal representative of the resident's right to electronic monitoring. New Jersey SB 2231 was in committee as of July 27, 2001.

North Carolina HB 996 permits residents of nursing homes or adult care homes, and their families to monitor the resident through the use of video cameras or other electronic monitoring devices at the expense of the resident; requires nursing homes and adult care homes to provide a power source and mounting space for electronic monitoring devices; prohibits nursing homes and adult care homes from refusing to admit residents because of a request to install electronic monitoring devices; and requires that tapes from monitoring devices be admissible in criminal and civil actions subject to the rules of evidence. HB 996 died in committee.

Ohio law currently specifies rights of a resident of a home, including the right to a safe and clean living environment, the right to make personal decisions, and the right to be free from abuse. "Home" includes facilities licensed by the Director of Health as nursing homes or residential care facilities; skilled nursing facilities certified under Medicare or Medicaid; and county homes. A resident who believes that the resident's rights have been violated may file a grievance with the home's grievance committee. Any other person may file a report with the Ohio Department of Health. If the grievance committee determines that a violation exists, the violation must be corrected within ten days. If the violation is not corrected, the grievance committee must refer the violation to the Department of Health. The Department of Health must investigate grievances or refer them to the attorney general for investigation. It also must investigate any reports it receives from people who are not residents of homes. Under certain circumstances the

Department may hold adjudicative hearings. If a home is found to have violated a resident's rights, it may be ordered to correct the violation and fined. The home may appeal the Department's order to a court of common pleas. The Department must refer any criminal matters to the county prosecuting attorney.

Ohio HB 216 extends residents' rights to include the right, on request, to the use of electronic monitoring devices in a resident's room. To exercise this right, a resident or resident's sponsor must pay the costs of the devices and installation; arrange the device so as to protect the privacy of others to the extent reasonably possible; and have a notice of electronic monitoring posted on the resident's room door. Under the bill, "electronic monitoring device" means video surveillance cameras, audio devices, video telephones, Internet video surveillance devices, or any other device designed to capture the audio recordings or visual images of its surroundings.

Under Ohio's bill, a home must allow a resident to use an electronic monitoring device and provide reasonable physical accommodations for the device, including a secure place to mount the device and access to a power source. A home may not refuse to admit an individual as a resident and may not discharge a resident due to a request to use an electronic monitoring device. The home's administrator may require requests for installation of electronic monitoring devices to be made in writing. If a home fails to honor a resident's right to use electronic monitoring devices, the resident has the same recourse as provided in current law when other resident's rights are violated: the resident may file a grievance with the home's grievance committee, which is required to refer it to the Department of Health if a violation is found and is not corrected. Ohio HB 216 was in committee as of August 24, 2001.

This SSL draft is based on Texas SB 177, an Act that permits audio or video monitoring of a resident's room in a nursing home facility and provides the parameters for both the resident and the nursing home to follow in relation to monitoring.

Submitted as:

Texas

SB 177 (enrolled version)

Status: enacted into law in 2001.

Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [*Short Title.*] This Act may cited as "An Act Relating to Electronic Monitoring Devices
2 in the Rooms of Residents of Convalescent or Nursing Homes or Related Institutions."

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Section 2. [*Definitions.*] As used in this Act:

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(a) "Authorized electronic monitoring" means the placement of an electronic monitoring device in
6 the room of a resident of an institution and making tapes or recordings with the device after making a
7 request to the institution to allow electronic monitoring.

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(b) "Electronic monitoring device:"

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(1) includes:

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(A) video surveillance cameras installed in the room of a resident; and

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(B) audio devices installed in the room of a resident designed to acquire
12 communications or other sounds occurring in the room; and

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(2) does not include an electronic, mechanical, or other device that is specifically used for
14 the nonconsensual interception of wire or electronic communications.

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Section 3. [*Criminal and Civil Liability.*]

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(a) It is a defense to prosecution under [insert citation], or any other statute of this state under
18 which it is an offense to intercept a communication or disclose or use an intercepted communication, that
19 the communication was intercepted by an electronic monitoring device placed in the room of a resident of

20 an institution.

21 (b) This Act does not affect whether a person may be held to be civilly liable under other law in
22 connection with placing an electronic monitoring device in the room of a resident of an institution or in
23 connection with using or disclosing a tape or recording made by the device except:

24 (1) as specifically provided by this Act; or

25 (2) to the extent that liability is affected by:

26 (A) a consent or waiver signed under this Act; or

27 (B) the fact that authorized electronic monitoring is required to be conducted with
28 notice to people who enter a resident's room.

29 (c) A communication or other sound acquired by an audio electronic monitoring device installed
30 under the provisions of this Act concerning authorized electronic monitoring is not considered to be:

31 (1) an oral communication as defined by [insert citation]; or

32 (2) a communication as defined [insert citation].

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34 Section 4. [*Covert Use of Electronic Monitoring Device; Liability of Department or Institution.*]

35 (a) For purposes of this Act, the placement and use of an electronic monitoring device in the room
36 of a resident is considered to be covert if:

37 (1) the placement and use of the device is not open and obvious; and

38 (2) the institution and the [department] are not informed about the device by the resident,
39 by a person who placed the device in the room, or by a person who is using the device.

40 (b) The [department] and the institution may not be held to be civilly liable in connection with the
41 covert placement or use of an electronic monitoring device in the room of a resident.

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43 Section 5. [*Required Form on Admission.*] The [department] by rule shall prescribe a form that
44 must be completed and signed on a resident's admission to an institution by or on behalf of the resident.
45 The form must state:

46 (1) that a person who places an electronic monitoring device in the room of a resident or
47 who uses or discloses a tape or other recording made by the device may be civilly liable for any unlawful
48 violation of the privacy rights of another;

49 (2) that a person who covertly places an electronic monitoring device in the room of a
50 resident or who consents to or acquiesces in the covert placement of the device in the room of a resident
51 has waived any privacy right the person may have had in connection with images or sounds that may be
52 acquired by the device;

53 (3) that a resident or the resident's guardian or legal representative is entitled to conduct
54 authorized electronic monitoring under this Act, and that if the institution refuses to permit the electronic
55 monitoring or fails to make reasonable physical accommodations for the authorized electronic monitoring
56 that the person should contact the state [department of human services];

57 (4) the basic procedures that must be followed to request authorized electronic monitoring;

58 (5) the manner in which this Act affects the legal requirement to report abuse or neglect
59 when electronic monitoring is being conducted; and

60 (6) any other information regarding covert or authorized electronic monitoring that the
61 [department] considers advisable to include on the form.

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63 Section 6. [*Authorized Electronic Monitoring: Who May Request.*]

64 (a) If a resident has capacity to request electronic monitoring and has not been judicially declared
65 to lack the required capacity, only the resident may request authorized electronic monitoring under this
66 Act, notwithstanding the terms of any durable power of attorney or similar instrument.

67 (b) If a resident has been judicially declared to lack the capacity required for taking an action such
68 as requesting electronic monitoring, only the guardian of the resident may request electronic monitoring
69 under this Act.

70 (c) If a resident does not have capacity to request electronic monitoring but has not been judicially

71 declared to lack the required capacity, only the legal representative of the resident may request electronic
72 monitoring under this Act. The [department] by rule shall prescribe:

73 (1) guidelines that will assist institutions, family members of residents, advocates for
74 residents, and other interested people to determine when a resident lacks the required capacity; and

75 (2) who may be considered to be a resident's legal representative for purposes of this Act,
76 including:

77 (A) people who may be considered the legal representative under the terms of an
78 instrument executed by the resident when the resident had capacity; and

79 (B) people who may become the legal representative for the limited purpose of
80 this Act under a procedure prescribed by the [department].

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82 Section 7. [*Authorized Electronic Monitoring: Form of Request; Consent of Other Residents in*
83 *Room.*]

84 (a) A resident or the guardian or legal representative of a resident who wishes to conduct
85 authorized electronic monitoring must make the request to the institution on a form prescribed by the
86 [department].

87 (b) The form prescribed by the [department] must require the resident or the resident's guardian or
88 legal representative to:

89 (1) release the institution from any civil liability for a violation of the resident's privacy
90 rights in connection with the use of the electronic monitoring device;

91 (2) choose, when the electronic monitoring device is a video surveillance camera,
92 whether the camera will always be unobstructed or whether the camera should be obstructed in specified
93 circumstances to protect the dignity of the resident; and

94 (3) obtain the consent of other residents in the room, using a form prescribed for this
95 purpose by the [department], if the resident resides in a multiperson room.

96 (c) Consent under Subsection (b)(3) may be given only:

97 (1) by the other resident or residents in the room;

98 (2) by the guardian of a person described by Subdivision (1), if the person has been
99 judicially declared to lack the required capacity; or

100 (3) by the legal representative who under Section 6 (c) of this Act may request electronic
101 monitoring on behalf of a person described by Subdivision (1), if the person does not have capacity to sign
102 the form but has not been judicially declared to lack the required capacity.

103 (d) The form prescribed by the [department] under Subsection (b)(3) must condition the consent of
104 another resident in the room on the other resident also releasing the institution from any civil liability for a
105 violation of the person's privacy rights in connection with the use of the electronic monitoring device.

106 (e) Another resident in the room may:

107 (1) when the proposed electronic monitoring device is a video surveillance camera,
108 condition consent on the camera being pointed away from the consenting resident; and

109 (2) condition consent on the use of an audio electronic monitoring device being limited or
110 prohibited.

111 (f) If authorized electronic monitoring is being conducted in the room of a resident and another
112 resident is moved into the room who has not yet consented to the electronic monitoring, authorized
113 electronic monitoring must cease until the new resident has consented in accordance with this section.

114 (g) The [department] may include other information that the [department] considers to be
115 appropriate on either of the forms that the [department] is required to prescribe under this Section.

116 (h) The [department] may adopt rules prescribing the place or places that a form signed under this
117 section must be maintained and the period for which it must be maintained.

118 (i) Authorized electronic monitoring:

119 (1) may not commence until all request and consent forms required by this Section have
120 been completed and returned to the institution; and

121 (2) must be conducted in accordance with any limitation placed on the monitoring as a

122 condition of the consent given by or on behalf of another resident in the room.

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Section 8. [*Authorized Electronic Monitoring: General Provisions.*]

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(a) An institution shall permit a resident or the resident's guardian or legal representative to monitor the room of the resident through the use of electronic monitoring devices.

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(b) The institution shall require a resident who conducts authorized electronic monitoring or the resident's guardian or legal representative to post and maintain a conspicuous notice at the entrance to the resident's room. The notice must state that the room is being monitored by an electronic monitoring device.

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(c) Authorized electronic monitoring conducted under this Act is not compulsory and may be conducted only at the request of the resident or the resident's guardian or legal representative.

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(d) An institution may not refuse to admit an individual to residency in the institution and may not remove a resident from the institution because of a request to conduct authorized electronic monitoring. An institution may not remove a resident from the institution because covert electronic monitoring is being conducted by or on behalf of a resident.

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(e) An institution shall make reasonable physical accommodation for authorized electronic monitoring, including:

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(1) providing a reasonably secure place to mount the video surveillance camera or other electronic monitoring device; and

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(2) providing access to power sources for the video surveillance camera or other electronic monitoring device.

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(f) The resident or the resident's guardian or legal representative must pay for all costs associated with conducting electronic monitoring, other than the costs of electricity. The resident or the resident's guardian or legal representative is responsible for:

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(1) all costs associated with installation of equipment; and

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(2) maintaining the equipment.

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(g) An institution may require an electronic monitoring device to be installed in a manner that is safe for residents, employees, or visitors who may be moving about the room. The [department] may adopt rules regarding the safe placement of an electronic monitoring device.

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(h) If authorized electronic monitoring is conducted, the institution may require the resident or the resident's guardian or legal representative to conduct the electronic monitoring in plain view.

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(i) An institution may but is not required to place a resident in a different room to accommodate a request to conduct authorized electronic monitoring.

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Section 9. [*Reporting Abuse and Neglect.*]

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(a) For purposes of the duty to report abuse or neglect under [insert citation] and the criminal penalty for the failure to report abuse or neglect under [insert citation], a person who is conducting electronic monitoring on behalf of a resident under this Act is considered to have viewed or listened to a tape or recording made by the electronic monitoring device on or before the 14th day after the date the tape or recording is made.

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(b) If a resident who has capacity to determine that the resident has been abused or neglected and who is conducting electronic monitoring under this Act gives a tape or recording made by the electronic monitoring device to a person and directs the person to view or listen to the tape or recording to determine whether abuse or neglect has occurred, the person to whom the resident gives the tape or recording is considered to have viewed or listened to the tape or recording on or before the seventh day after the date the person receives the tape or recording for purposes of the duty to report abuse or neglect under [insert citation] and of the criminal penalty for the failure to report abuse or neglect under [insert citation].

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(c) A person is required to report abuse based on the person's viewing of or listening to a tape or recording only if the incident of abuse is acquired on the tape or recording. A person is required to report neglect based on the person's viewing of or listening to a tape or recording only if it is clear from viewing or listening to the tape or recording that neglect has occurred.

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173 (d) If abuse or neglect of the resident is reported to the institution and the institution requests a
174 copy of any relevant tape or recording made by an electronic monitoring device, the person who possesses
175 the tape or recording shall provide the institution with a copy at the institution's expense.
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177 Section 10. [*Use of Tape or Recording by Agency or Court.*]

178 (a) Subject to applicable rules of evidence and procedure and the requirements of this section, a
179 tape or recording created through the use of covert or authorized electronic monitoring described by this
180 Act may be admitted into evidence in a civil or criminal court action or administrative proceeding.

181 (b) A court or administrative agency may not admit into evidence a tape or recording created
182 through the use of covert or authorized electronic monitoring or take or authorize action based on the tape
183 or recording unless:

184 (1) if the tape or recording is a video tape or recording, the tape or recording shows the
185 time and date that the events acquired on the tape or recording occurred;

186 (2) the contents of the tape or recording have not been edited or artificially enhanced; and

187 (3) if the contents of the tape or recording have been transferred from the original format
188 to another technological format, the transfer was done by a qualified professional and the contents of the
189 tape or recording were not altered.

190 (c) A person who sends more than one tape or recording to the [department] shall identify for the
191 [department] each tape or recording on which the person believes that an incident of abuse or evidence of
192 neglect may be found. The [department] may adopt rules encouraging people who send a tape or
193 recording to the [department] to identify the place on the tape or recording that an incident of abuse or
194 evidence of neglect may be found.
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196 Section 11. [*Notice at Entrance to Institution.*] Each institution shall post a notice at the entrance
197 to the institution stating that the rooms of some residents may be being monitored electronically by or on
198 behalf of the residents and that the monitoring is not necessarily open and obvious. The [department] by
199 rule shall prescribe the format and the precise content of the notice.
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201 Section 12. [*Enforcement.*]

202 (a) The [department] may impose appropriate sanctions under this Act on an administrator of an
203 institution who knowingly:

204 (1) refuses to permit a resident or the resident's guardian or legal representative to conduct
205 authorized electronic monitoring;

206 (2) refuses to admit an individual to residency or allows the removal of a resident from the
207 institution because of a request to conduct authorized electronic monitoring;

208 (3) allows the removal of a resident from the institution because covert electronic
209 monitoring is being conducted by or on behalf of the resident; or

210 (4) violates another provision of this Act.

211 (b) The [department] may assess an administrative penalty under [insert citation] against an
212 institution that:

213 (1) refuses to permit a resident or the resident's guardian or legal representative to conduct
214 authorized electronic monitoring;

215 (2) refuses to admit an individual to residency or allows the removal of a resident from the
216 institution because of a request to conduct authorized electronic monitoring;

217 (3) allows the removal of a resident from the institution because covert electronic monitoring is
218 being conducted by or on behalf of the resident; or

219 (4) violates another provision of this Act.
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221 Section 13. [*Criminal Offense.*]

222 (a) A person who intentionally hampers, obstructs, tampers with, or destroys an electronic
223 monitoring device installed in a resident's room in accordance with this Act or a tape or recording made

224 by the device commits an offense. An offense under this Section is a [Class B misdemeanor].
225 (b) It is a defense to prosecution under Subsection (a) that the person took the action with the
226 effective consent of the resident on whose behalf the electronic monitoring device was installed or the
227 resident's guardian or legal representative.
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229 Section 14. [*Statement of Resident Rights.*] The [department's] Statement of Resident Rights as
230 adopted under [insert citation] shall include language to address the resident's right to place in the
231 resident's room an electronic monitoring device that is owned and operated by the resident or provided by
232 the resident's guardian or legal representative.
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234 Section 15. [*Monitoring.*] The [committee] shall monitor the implementation of this Act and study
235 the impact of that law on the [department], institutions, and residents.
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237 Section 16. [*Forms.*]
238 The [department of human services] shall devise a procedure under which current residents of
239 convalescent and nursing homes and related institutions, or, when appropriate, another person on a
240 resident's behalf, are encouraged to sign the form that is required to be signed on admission under Section
241 5 of this Act.
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243 Section 17. [*Severability.*] [Insert severability clause.]
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245 Section 18. [*Repealer.*] [Insert repealer clause.]
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247 Section 19. [*Effective Date.*] [Insert effective date.]