

LEGISLATIVE STASIS: THE FAILURES OF LEGISLATION AND
LEGISLATIVE PROPOSALS PERMITTING THE USE OF ELECTRONIC
MONITORING DEVICES IN NURSING HOMES

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I. INTRODUCTION

On July 30, 2003, Willie Mae Ryan, an eighty-one-year-old nursing home resident in Fordyce, Arkansas, suffered a savage beating in her room.¹ Attackers, allegedly two nursing home employees, used brass knuckles to crush bones in Ryan's face.² Ryan died in at a nearby hospital about two weeks later.³ Although brutal attacks such as this may not be common in Arkansas nursing homes, nearly sixty nursing homes in Arkansas have been cited by inspectors for harming residents or placing residents in immediate jeopardy of harm.⁴ In response to Ryan's death and concerns regarding the

¹ *Nurses Aide Says She Held Woman Down During Beating*, AP ALERT—ARK., Aug. 4, 2004, available at WL 8/4/04 APALERTAR 04:54:52.

² *Id.* An eighteen-year-old nurse's aide, Shermika Rainey, pleaded guilty to conspiracy to commit murder and agreed to testify against a second defendant, Gayla Ann Wilson, a forty-four-year-old employee of the facility. *Id.* Rainey claimed that Wilson had recruited the younger girl to hold Ryan down while Wilson beat her, allegedly for being disrespectful to Wilson. *Arkansas: Aides Charged in Beating*, N.Y. TIMES, Aug. 19, 2003, at A16, available at 2003 WLNR 5635518. In two trials, juries failed to reach a verdict against Wilson, and prosecutors in June 2005 decided not to pursue a new trial. *Prosecutor Decides Against Third Trial in Death of Nursing-Home Resident*, AP ALERT—ARK., June 2, 2005, available at WL 6/2/05 APALERTAR 10:03:21.

³ *See Nurses Aide Says She Held Woman Down During Beating*, *supra* note 1.

⁴ *See* Member of the Family L.L.C., *National Nursing Home Watch List: Arkansas*, June 25, 2005, <http://www.memberofthefamily.net/ar.htm>; *see also* Rainer Sabin, "Granny Cam" Initiative Draws Support, AP ONLINE REGIONAL—U.S., Feb. 22, 2005, available at WL 2/22/05 APONLINEUS 13:03:20.

quality of care offered in Arkansas nursing homes, state representative Stephen Bright in 2005 introduced legislation named the “Willie Mae Ryan Nursing Home Patient Protection Act,” which would allow nursing home residents to place cameras in their rooms and would require nursing home facilities to allow residents to install these cameras.⁵ According to supporters, a monitoring device would allow families to watch how residents are treated, which could deter acts of abuse or negligence by nursing home staff members.⁶ Bright’s bill garnered support from several groups, including the American Association of Retired Persons,⁷ the Arkansas Advocates for Nursing Home Residents,⁸ and Ryan’s daughter.⁹ Even though the legislation was only permissive in nature, allowing residents and their families to install these devices if they so desired, the nursing home industry in Arkansas opposed the legislation.¹⁰ Despite negotiations between supporters of the bill and the nursing home industry,¹¹ which allowed the bill to pass in the Arkansas House of Representatives, the bill later failed to pass in the Arkansas Senate.¹² The result is that even if a nursing home resident wishes to install a camera in her room—a right that she would undoubtedly have in her own home—a nursing home facility could remove the camera at its discretion.

The proposal of the electronic monitoring legislation followed by legislative *inaction* is hardly unique to Arkansas. In an effort to combat incidents of abuse and neglect in nursing homes, several state legislatures in the early 2000s began to consider proposals that would allow nursing home

⁵H.R. 1392, 85th Gen. Assem., Reg. Sess. (Ark. 2005), WL 2005 AR H.B. 1392 (NS). Bright also introduced legislation in 2001 and 2003, but both bills died in their respective committees. See discussion *infra* Part III.F.2.

⁶See Sabin, *supra* note 4.

⁷*Id.*

⁸See Nancy Allison, *From the President’s Desk*, PROTECTING NURSING HOME RESIDENTS (Ark. Advocates for Nursing Home Residents, Little Rock, Ark.), March 2005, at 2, available at <http://www.aanhr.org/March2005.pdf>.

⁹Sabin, *supra* note 4.

¹⁰See James Jefferson, *Frustrated Sponsor Pulls “Granny Cam” Bill*, AP ALERT—ARK., Feb. 23, 2005, available at WL 2/23/05 APALERTAR 10:16:20.

¹¹Melissa Nelson, *Panel OKs Bill for Cameras in Ark. Nursing Homes*, AP ALERT—ARK., Mar. 10, 2005, available at 3/10/05 APALERTAR 22:11:39.

¹²*Bill To Put Video Cameras in Nursing Homes Fails*, AP ALERT—POLITICAL, Apr. 12, 2005, available at WL 4/12/05 APALERTPOLITICS 00:15:53.

residents to install electronic monitoring devices in their rooms.¹³ By 2001, several advocacy groups for the elderly and nursing home residents in particular generally supported legislation that would require nursing home facilities to allow residents to install electronic monitoring devices, also dubbed “granny cams,” in their rooms.¹⁴ Texas became the first state to enact such permissive legislation in 2001,¹⁵ followed by New Mexico in 2004.¹⁶ Based on the apparently significant level of support for this legislation, the Council of State Governments in 2002 recommended that states pass legislation based on the Texas model.¹⁷

In spite of the attention paid to this subject, most proposals have died in legislative committees.¹⁸ Moreover, permissive use of electronic monitoring devices in Texas and New Mexico has produced little or no evidence that either supports the use of these devices¹⁹ or sustains claims that electronic monitoring will cause more problems in nursing home facilities than it will curb incidents of abuse or neglect.²⁰ Although some states continued to consider this type of legislation in 2005,²¹ the prospect of the use of electronic monitoring as a tool to protect nursing home residents appears to be waning.

This Article focuses on the rise in advocacy in the use of electronic monitoring in nursing homes and the subsequent failure of legislation and legislative proposals to incorporate electronic monitoring as an effective tool against abuse and neglect in nursing homes. Part II examines the history of deficiencies in the quality of nursing home care, the increase in

¹³ See discussion *infra* Parts II.E, III. Three previous articles in legal scholarship have addressed several issues related to electronic monitoring. See Elizabeth Adelman, *Video Surveillance in Nursing Homes*, 12 ALB. L.J. & SCI. TECH. 821 (2002); Selket Nicole Cottle, Note, “Big Brother” and Grandma: An Argument for Video Surveillance in Nursing Homes, 12 ELDER L.J. 119 (2004); Tracey Kohl, Comment, *Watching Out for Grandma: Video Cameras in Nursing Homes May Help to Eliminate Abuse*, 30 FORDHAM URB. L.J. 2083 (2003). Numerous articles about this subject have also appeared in the general media.

¹⁴ See discussion *infra* Part II.E.

¹⁵ See discussion *infra* Part III.A.

¹⁶ See discussion *infra* Part III.E.

¹⁷ See discussion *infra* Part III.C.

¹⁸ See discussion *infra* Part III.B.F.

¹⁹ See discussion *infra* Part II.E.1.

²⁰ See discussion *infra* Part II.E.2.

²¹ In addition to Arkansas, the states of Michigan, Mississippi, Pennsylvania, and West Virginia considered bills in 2005 that would permit residents to install electronic monitoring devices. See discussion *infra* Part III.F.

frequency of reported incidents of abuse in nursing homes, and the introduction of electronic monitoring as a possible alternative that could improve the quality of life for nursing home residents. Part III summarizes efforts among state legislatures to enact statutes relating to electronic monitoring. Part IV details some concerns regarding electronic monitoring and electronic monitoring legislation, and Part V provides recommendations for further studies and legislative action.

II. DEFICIENCIES IN THE QUALITY OF NURSING HOME CARE, FREQUENCY OF ELDER ABUSE, AND CALLS FOR ELECTRONIC MONITORING OF NURSING HOME FACILITIES

Reports containing statistics regarding abuse of the elderly and abuse taking place in nursing homes have been staggering. One report, prepared by the minority staff of the Special Investigations Division of the House Committee on Government Reform, found that nearly one-third of the nursing homes in the U.S. had been cited for an abuse violation during a two-year period from 1999 through 2001.²² These numbers were consistent with statistics reported in earlier studies indicating that many thousands of elderly persons annually in the U.S. were subject to some form of abuse in a domestic setting.²³ The statistics also correlate with findings that chronic quality of care problems have existed in many nursing homes on a national basis, notwithstanding efforts by Congress and state governments to address these concerns.²⁴ The inability of state and federal governments to address these problems effectively has directly led to calls by elderly rights advocates for the installation of electronic surveillance devices in nursing homes.

This section explores background statistics and other information regarding abuse of the elderly and problems associated with the nursing

²²MINORITY STAFF OF SPEC. INVESTIGATIONS DIV. OF H. COMM. ON GOV'T REFORM, 107TH CONG., ABUSE OF RESIDENTS IS A MAJOR PROBLEM IN U.S. NURSING HOMES i (Comm. Print 2001) [hereinafter ABUSE OF RESIDENTS].

²³See NAT'L CTR. ON ELDER ABUSE AT THE AM. PUB. HUMAN SERVS. ASS'N, THE NATIONAL ELDER ABUSE INCIDENCE STUDY 1 (1998) [hereinafter ABUSE INCIDENCE STUDY] (reporting that 450,000 elderly persons in the United States were abused or neglected in 1996).

²⁴See OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH & HUMAN SERVS., NURSING HOME DEFICIENCY TRENDS AND SURVEY AND CERTIFICATION PROCESS CONSISTENCY iii (2003) [hereinafter DEFICIENCY TRENDS 2003]; OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH & HUMAN SERVS., NURSING HOME SURVEY AND CERTIFICATION: DEFICIENCY TRENDS 2 (1999) [hereinafter DEFICIENCY TRENDS 1999].

home care in the U.S. This section also summarizes calls for the installation of electronic monitoring devices, as well as issues that critics of electronic surveillance of nursing homes have raised.

A. Common Types of Elder Abuse

Elder abuse is as much a domestic violence problem as it is a nursing home problem. The National Center on Elder Abuse (NCEA) in 1998 prepared a report entitled *The National Elder Abuse Incidence Study* for the Administration for Children and Families and the Administration on Aging in the U.S. Department of Health and Human Services.²⁵ After reviewing applicable state definitions of elder abuse and after consulting with several experts on the subject, the NCEA prepared a list of definitions applicable to the elder abuse problems.²⁶ These definitions, as presented in the report's executive summary, are as follows:

Physical abuse was defined as the use of physical force that may result in bodily injury, physical pain, or impairment. Physical punishment of any kind were examples of physical abuse.

Sexual abuse was defined as non-consensual sexual contact of any kind with an elderly person.

Emotional or psychological abuse was defined as the infliction of anguish, pain, or distress.

Financial or material exploitation was defined as the illegal or improper use of an elder's funds, property, or assets.

Abandonment was defined as the desertion of an elderly person by an individual who had physical custody or otherwise had assumed responsibility for providing care for an elder or by a person with physical custody of an elder.

Neglect was defined as the refusal or failure to fulfill any part of a person's obligations or duties to an elder.

Self-neglect was characterized as the behaviors of an elderly person that threaten his/her own health or safety.

²⁵For statistics from this study, see discussion *infra* Part II.D.

²⁶See ABUSE INCIDENCE STUDY, *supra* note 23, at 11–12.

The definition of self-neglect excludes a situation in which a mentally competent older person (who understands the consequences of his/her decisions) makes a conscious and voluntary decision to engage in acts that threaten his/her health or safety.²⁷

For purposes of this Article, these definitions²⁸—which this Article assumes to be accurate—are sufficient to demonstrate the types of problems related to elder abuse in the U.S.

B. Federal Efforts—and Failures—to Improve Quality of Care at Nursing Homes

Efforts by Congress and federal agencies to improve the quality of care at nursing homes historically have been futile. The involvement of the federal government in the nursing home industry originated with the passage of the Social Security Act of 1935,²⁹ although state governmental units were still mostly responsible for regulatory oversight of nursing homes.³⁰ Studies during the mid-1950s indicated that few nursing homes at the time offered skilled nursing services.³¹ In 1955, the Council of State Governments released a study showing that a majority of nursing homes functioned under low standards of service and with relatively untrained personnel.³² Similarly, a 1957 report of a study conducted by the Commission on Chronic Illness found numerous problems with the quality

²⁷ *Id.*

²⁸ The lack of standardized definitions has posed problems for agencies and researchers in collecting and analyzing data related to elder abuse. See OFFICE OF EVALUATION & INSPECTIONS, DEP'T OF HEALTH & HUMAN SERVS., ABUSE COMPLAINTS OF NURSING HOME PATIENTS 3 (1999) [hereinafter ABUSE COMPLAINTS] (noting that definitions of abuse of elderly persons “vary between [s]tates regarding what constitutes abuse, neglect, or exploitation of an elderly individual”).

²⁹ Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.). For more detailed information regarding the history of federal involvement with nursing homes, see COMM. ON NURSING HOME REGULATION, INST. OF MED., IMPROVING THE QUALITY OF CARE IN NURSING HOMES 238–53 (1986) [hereinafter IMPROVING THE QUALITY OF CARE].

³⁰ See David A. Bohm, *Striving for Quality Care in America's Nursing Homes: Tracing the History of Nursing Homes and Noting the Effect of Recent Federal Government Initiatives To Ensure Quality Care in the Nursing Home Setting*, 4 DEPAUL J. HEALTH CARE L. 317, 329–31 (2001).

³¹ See IMPROVING THE QUALITY OF CARE, *supra* note 29, at 239.

³² *Id.* at 239–40.

of care given by nursing homes.³³ The Committee on Labor and Public Welfare of the U.S. Senate in 1959 established the Subcommittee on Problems of the Aged and Aging, which verified the extent of the problems in the quality of care and service offered by nursing homes.³⁴ The subcommittee reported statistics indicating that only 58% of the 290,979 nursing home beds in existence in 1959 provided an acceptable level of care.³⁵ Further, the subcommittee found it “ironic that among those to whom 20th century health progress has given the greatest gift—added years of life—should also be found the group of people who have been most seriously short-changed in our health, social, and economic planning.”³⁶ The subcommittee called upon not only the federal government, but also state and local entities to cure the crisis with the aging population:³⁷

The responsibility of seeking solutions to the many problems that are inherent in this population explosion is not one that can be handily assigned. It is not more the sole responsibility of the Federal Government than it is of the town where an aged person happens to reside. Rather, the challenging task is a matter of joint responsibility, utilizing all levels of government, private organizations, and individuals. Only through the partnership can we hope, in time, to solve the problems of aging.³⁸

Concerns regarding the quality of nursing homes continued to lead to legislative and administrative efforts for improvement during the next two decades. The development of the Medicaid and Medicare programs in 1965³⁹ led to new proposals regarding nursing home regulations.⁴⁰ However, these proposals faced difficulties related to implementation by

³³ *Id.* at 239.

³⁴ *See id.* at 240.

³⁵ SUBCOMM. ON PROBLEMS OF THE AGED & AGING, COMM. ON LABOR & PUB. WELFARE, THE AGED AND AGING IN THE UNITED STATES: A NATIONAL PROBLEM 136 (1960), *microformed on Law Books Recommended for Libraries* (William S. Hein & Co.).

³⁶ *Id.* at 131.

³⁷ *Id.* at 1.

³⁸ *Id.*

³⁹ *See* Health Insurance for the Aged Act, Pub. L. No. 89-97, 79 Stat. 290 (1965) (codified as amended in scattered sections of 42 U.S.C.).

⁴⁰ *See* IMPROVING THE QUALITY OF CARE, *supra* note 29, at 241–44; *see also* Jennifer Gimler Brady, *Long-Term Care Under Fire: A Case for Rational Enforcement*, 18 J. CONTEMP. HEALTH L. & POL’Y 1, 6–11 (2001).

federal agencies, and many states opposed the revised federal requirements.⁴¹ President Richard Nixon in 1971 pledged to improve nursing homes, leading to the implementation of an initiative designed to improve nursing facilities in the nation.⁴² New regulations regarding federal nursing home policies were approved in 1974,⁴³ but the level of state compliance continued to vary widely.⁴⁴ Other programs, such as the long-term care ombudsman program,⁴⁵ were also established during the 1970s.⁴⁶

Despite these efforts over a series of decades, stories circulated in the 1980s about nursing homes operating at unacceptable quality levels, including instances of unnecessary death and abuse.⁴⁷ In 1986, the Committee on Nursing Home Regulation of the Institute of Medicine (IOM)⁴⁸ issued a report recognizing that many nursing homes provided substandard care:

In the past 15 years many studies of nursing home care have identified both grossly inadequate care and abuse of residents. Most of the studies revealing substantial

⁴¹ See *id.* at 243–44 (noting that in 1971, Elliot Richardson, Secretary of Health, Education, and Welfare, said that thirty-nine states were not complying with federal procedural requirements).

⁴² See *id.*, *supra* note 29, at 243–44.

⁴³ Proposed regulations were issued by the Social Security Administration in July 1973. Federal Health Insurance for the Aged: Skilled Nursing Facilities, 38 Fed. Reg. 18,620 (proposed July 12, 1973) (to be codified at 20 C.F.R. pt. 405; Medical Assistance Program: Standards and Provider Certification, 38 Fed. Reg. 18,616 (proposed July 12, 1973)) (to be codified at 45 C.F.R. pts. 205, 249, 250). Final regulations were issued in January 1974. Medical Assistance Program: Intermediate Care Facility Services, 39 Fed. Reg. 2220 (Jan. 17, 1974) (to be codified at 45 C.F.R. pts. 205, 249, 250); Skilled Nursing Facilities: Standards for Certification and Participation in Medicare and Medicaid Programs, 39 Fed. Reg. 2238 (Jan. 17, 1974) (to be codified at 20 C.F.R. pt. 405).

⁴⁴ See IMPROVING THE QUALITY OF CARE, *supra* note 29, at 245.

⁴⁵ Current federal provisions regarding state long-term ombudsman programs are codified at 42 U.S.C. §§ 3027(a)(9), 3058g (2000).

⁴⁶ For additional information regarding state ombudsman programs, see Elizabeth B. Herrington, Note, *Strengthening the Older Americans Act's Long-Term Care Provisions: A Call for Further Improvement of Important State Ombudsman Programs*, 5 ELDER L.J. 321, 332–35 (1997); Nina Santo, Comment, *Breaking the Silence: Strategies for Combating Elder Abuse in California*, 31 MCGEORGE L. REV. 801, 810–11 (2000).

⁴⁷ See Charles Grassley, *The Resurrection of Nursing Home Reform: A Historical Account of the Recent Revival of the Quality of Care Standards for Long-Term Care Facilities Established in the Omnibus Reconciliation Act of 1987*, 7 ELDER L.J. 267, 268 (1999).

⁴⁸ For information about the Institute of Medicine, see *id.* at 269 n.10.

evidence of appallingly bad care in most of the country have dealt with conditions during the 1970s. However, testimony in public meetings . . . , news reports . . . , recent state studies of nursing homes, and committee-conducted case studies of selected state programs have established that the problems identified earlier continue to exist in some facilities: neglect and abuse leading to premature death, permanent injury, increased disability, and unnecessary fear and suffering on the part of residents.⁴⁹

The committee found, however, that “disturbing practices” among nursing homes occurred less frequently than they had in earlier periods of time.⁵⁰ Nevertheless, the committee observed that conditions of nursing homes could be improved:⁵¹

A lower standard of medical and nursing practice should not be accepted for nursing home residents than is accepted for the elderly in the community. Given the fragility of nursing home residents and their dependence on medical care for a satisfactory life, practice standards should be higher. Thus, physicians, as well as nurses, have substantial responsibility for quality of care in nursing homes.⁵²

The committee ultimately concluded that federal regulations should be strengthened in order to “achieve substantial improvement in quality of care in many nursing homes in all states.”⁵³

A report issued in 1987 by the U.S. General Accounting Office (GAO) substantiated many of the findings from the IOM.⁵⁴ Among the GAO’s principal findings were the following: noncompliance with federal regulations were widespread;⁵⁵ nursing homes with serious compliance deficiencies were able to avoid penalties, such as decertification from the

⁴⁹IMPROVING THE QUALITY OF CARE, *supra* note 29, at 3.

⁵⁰*Id.*

⁵¹*Id.* at 4.

⁵²*Id.*

⁵³*Id.* at 21.

⁵⁴*See* U.S. GEN. ACCOUNTING OFFICE, MEDICARE AND MEDICAID: STRONGER ENFORCEMENT OF NURSING HOME REQUIREMENTS NEEDED 3–5 (1987) [hereinafter STRONGER ENFORCEMENT]; *see also* Grassley, *supra* note 47, at 270.

⁵⁵STRONGER ENFORCEMENT, *supra* note 54, at 3.

Medicare and Medicaid programs;⁵⁶ nursing homes with less serious deficiencies were not penalized;⁵⁷ state and federal agencies did not adequately comply with federal regulations regarding the recertification of nursing homes with repeated noncompliance;⁵⁸ and that alternative penalties in the federal regulations were needed.⁵⁹ As of November 1985, according to the GAO's report, more than one-third of federally-certified nursing homes failed to meet one or more standards set forth in federal regulations.⁶⁰ Among its recommendations, the GAO advocated for the passage of legislation that was designed to revise substantially the existing federal regulations.⁶¹

These reports led directly to the enactment of the Omnibus Reconciliation Act of 1987 (OBRA),⁶² which "comprehensively revised the statutory authority applicable to long-term care facilities participating in Medicare and Medicaid programs."⁶³ The provisions of OBRA focused on three major areas, including the following: (1) the statute established requirements for long-term care facilities participating in the federal health programs;⁶⁴ (2) the statute established survey and certificate processes used to evaluate compliance of participation requirements;⁶⁵ and (3) the statute established sanctions and enforcement procedures designed to address noncompliance with the participation requirements.⁶⁶ The sanctions provided in OBRA represented Congress' response to the findings of the IOM in 1986 that former standards failed to impose effective penalties on nursing homes that were not in compliance with regulations:⁶⁷

⁵⁶ *Id.* at 3–4.

⁵⁷ *Id.* at 4.

⁵⁸ *Id.*

⁵⁹ *Id.* at 5.

⁶⁰ *Id.* at 19.

⁶¹ *Id.* at 41.

⁶² 42 U.S.C.A. § 1395i-3 (West Supp. 2007); *id.* § 1396r (West Supp. 2007).

⁶³ Grassley, *supra* note 47, at 270.

⁶⁴ 42 U.S.C. § 1395i-3(b) (2000); *see also* Brady, *supra* note 40, at 11; Grassley, *supra* note 47, at 270.

⁶⁵ 42 U.S.C. § 1395i-3(g); *see also* Brady, *supra* note 40, at 11; Grassley, *supra* note 47, at 270.

⁶⁶ 42 U.S.C. § 1395i-3(h); *see also* Brady, *supra* note 40, at 11; Grassley, *supra* note 47, at 270.

⁶⁷ *See* IMPROVING THE QUALITY OF CARE, *supra* note 29, at 155–56; *see also* Grassley, *supra* note 47, at 274–75.

Congress intended the new OBRA . . . sanctions, particularly civil monetary penalties, to provide strong incentive for nursing homes to achieve and maintain compliance with the conditions of Medicare and Medicaid. The sanctions were implemented through regulations that reflected [the Health Care Financing Administration's] approach to the conditions of participation—that all standards must be met and enforced, but the significance of a particular violation depends on the circumstances and actual or potential effect on residents.⁶⁸

Beginning in 1988, the Health Care Financing Administration (HCFA)—the predecessor to the Centers for Medicare and Medicaid Services—began promulgating regulations pursuant to the directives contained in OBRA.⁶⁹ Regulations relating to enforcement procedures, however, were not implemented until 1995⁷⁰ due to a large number of comments made during the rulemaking process and to the controversial nature of these provisions.⁷¹ The delay in the promulgation and enforcement of these regulations significantly hindered the effect that OBRA had on the quality of care in nursing homes:

Despite the existence of [OBRA] on the books, federal regulations regarding the enforcement process were not promulgated until seven years after the statute's enactment. This delay played a significant part in watering down the impact Congress intended when it enacted OBRA in 1987. Enforcement during that time period became associated with cooperation, collaboration, and consultation, rather

⁶⁸Brady, *supra* note 40, at 16.

⁶⁹*See* 53 Fed. Reg. 22,850 (June 17, 1988) (codified at 42 C.F.R. pt. 488). At the time that Congress was considering the passage of OBRA, the HCFA had issued a series of proposed rules related to the conditions for participation in Medicare and Medicaid and to the survey and certification of health care facilities. *See id.* The first regulations that the HCFA promulgated after the enactment of OBRA added Part 488 to Title 42 of the Code of Federal Regulations. *See id.* at 22,859–3,100. These 1988 regulations primarily pertained to survey requirements. *See id.* at 22,850–51. Some provisions did not become effective until 1990 due to the effective date set forth in OBRA itself. *See id.* at 22,850.

⁷⁰The enforcement provisions did not become effective until the *State Operations Manual*, produced by the HCFA, became effective on July 1, 1995. *See* DEFICIENCY TRENDS 1999, *supra* note 24, at 7; *see also* Brady, *supra* note 40, at 11.

⁷¹*See* Brady, *supra* note 40, at 11.

than censure and punishment for providing substandard care.⁷²

C. Recent Findings Show Continued Deficiencies in Nursing Home Care

Despite Congress' intentions in 1987, OBRA did not resolve many of the concerns raised by the reports released during the 1980s. In 1998, the Special Committee on Aging of the U.S. Senate heard testimony from William J. Scanlon, Director of the Health Financing and Systems Issues of the Health, Education, and Human Services Division of the GAO, regarding serious deficiencies in the quality of care offered by nursing homes in California.⁷³ The division reviewed a sample of sixty-two residents who died in 1993 in California nursing homes.⁷⁴ Thirty-four of these residents received unacceptable care, including care that endangered the health and safety of the residents.⁷⁵ The surveyors also reviewed records of 1370 nursing homes in California and cited 407 of the homes for serious violations of federal regulations.⁷⁶ Scanlon's testimony concluded that among the problems with these homes included the following: the on-site reviews of nursing homes were predictable, meaning that homes had ample opportunity to "reduce the level of problems that may normally exist at other times";⁷⁷ the homes maintained questionable records;⁷⁸ survey protocols used by the HFCA were inadequate for identifying potential care problems;⁷⁹ and the enforcement policies used by the HFCA were ineffective in bringing nursing homes with deficiencies into compliance.⁸⁰

⁷² Grassley, *supra* note 47, at 275.

⁷³ *California Nursing Homes: Federal and State Oversight Inadequate to Protect Residents in Homes with Serious Care Violations, Testimony Before the S. Spec. Comm. on Aging*, 105th Cong. 1 (1998) (statement of William J. Scanlon, Director, Health Fin. & Sys. Issues, Health, Educ. & Human Servs. Div., GAO).

⁷⁴ *Id.* at 4.

⁷⁵ *Id.*

⁷⁶ *Id.* at 5.

⁷⁷ *Id.* at 7.

⁷⁸ *Id.* at 8.

⁷⁹ *Id.* at 9.

⁸⁰ *Id.* at 10 ("HCFA enforcement policies have led to relatively few federal disciplinary actions taken against these homes in California").

Reports have indicated that many nursing homes have continued to be deficient in several categories.⁸¹ A report by the Office of Inspector General (OIG) in 1999 showed that although overall deficiencies between 1997 and 1998⁸² decreased, “quality of care” deficiencies⁸³ increased, and other serious deficiencies persisted at high levels.⁸⁴ Moreover, the OIG noted that 463 nursing homes had been cited for the same deficiencies over four previous surveys.⁸⁵ Data released in a 2003 report by the OIG showed that the total number of nursing homes with at least one deficiency increased between 1998 and 2001 by eight percent,⁸⁶ including an increase in the number of homes with a deficiency in a category related to substandard quality of care.⁸⁷

⁸¹Data related to deficiencies is compiled in the Online Survey, Certification, and Reporting System (OSCAR), now maintained by the Centers for Medicare and Medicaid Services (formerly the HCFA). Survey requirements include seventeen categories under which nursing homes are reviewed, including the following: resident rights; admission, transfer, and discharge rights; resident behavior and facility practices; quality of life; resident assessment; quality of care; nursing services; dietary services; physician services; rehabilitation services; dental services; pharmacy services; infection control; physical environment; administration; laboratory; and “other.” See DEFICIENCY TRENDS 1999, *supra* note 24, at 9–10; see also CHARLENE HARRINGTON ET AL., NURSING FACILITIES, STAFFING, RESIDENTS, AND FACILITY DEFICIENCIES, 1995 THROUGH 2001 (2002) (reporting data regarding various reported deficiencies in nursing homes from a study conducted by the Department of Social and Behavioral Sciences at the University of California, San Francisco).

⁸²The OIG considered several sources of data for its report, with the sources covering certain periods of time between 1997 and 1998. See DEFICIENCY TRENDS 1999, *supra* note 24, at 12.

⁸³A combination of deficiencies in certain categories is deemed to constitute substandard quality of care. See *id.* at 10. This has been described as follows:

When a facility has one or more deficiencies related to resident behavior and facility practices, quality of life, or quality of care that constitute either immediate jeopardy to resident health and safety; a pattern of or widespread actual harm that is not immediate jeopardy; or a widespread potential for more than minimal harm, but less than immediate jeopardy with no actual harm it is considered *substantial quality of care*.

Id.

⁸⁴*Id.* at 14–20.

⁸⁵*Id.* at 20–22.

⁸⁶DEFICIENCY TRENDS 2003, *supra* note 24, at 7–8.

⁸⁷*Id.* at 8–10.

D. Studies Establish and Confirm Elder Abuse Pervasiveness

Corresponding with reports of widespread deficiencies in the quality of care offered by nursing homes were concerns regarding abuse of nursing home residents.⁸⁸ The first national incidence estimates of elderly abuse focused on domestic settings, rather than institutional settings.⁸⁹ *The National Elder Abuse Incidence Study*, released by the NCEA,⁹⁰ revealed that an estimated 449,924 elderly persons were abused in domestic settings in 1996 alone.⁹¹ These numbers and statistics from other studies demonstrated a dramatic increase from prior years. For instance, the NCEA published data indicating that state adult protective services (APS) agencies received 117,000 reports of domestic elder and adult abuse in 1986, the first year that it compiled these numbers.⁹² The number of APS reports, according to the NCEA, grew to 293,000 in 1996, representing a 150% increase.⁹³ This data continued to grow during the 1990s, with states receiving an estimated 470,709 reports of abuse of elders and adults in 1999.⁹⁴

With these statistics as a backdrop, the Special Committee on Aging of the U.S. Senate in June 2001 conducted hearings entitled, *Saving Our Seniors: Preventing Elder Abuse, Neglect, and Exploitation*. Members of the committee recognized the difficulties in fighting this abuse:

[The] challenges facing us in fighting elderly abuse are formidable. Our investigations have revealed that State efforts to address these situations are often ineffective. The perpetrators are seldom prosecuted and front-line responders often lack the training needed to adequately

⁸⁸ See ABUSE COMPLAINTS, *supra* note 28, at 4.

⁸⁹ See *id.*

⁹⁰ Congress requires the Assistant Secretary for Aging of the Administration on Aging, through the National Center on Elder Abuse, to “annually compile, publish, and disseminate a summary of recently conducted research on elder abuse, neglect, and exploitation.” 42 U.S.C. § 3012(d)(2) (2000).

⁹¹ ABUSE INCIDENCE STUDY, *supra* note 23, at 4. The study estimated that 551,011 elderly persons were abused when self-neglected elderly were added to the estimates. *Id.*

⁹² SAVING OUR SENIORS: PREVENTING ELDER ABUSE, NEGLECT, AND EXPLOITATION: HEARING BEFORE THE SPEC. COMM. ON AGING, 107th Cong. 41 (2001), GPO Access [hereinafter SAVING OUR SENIORS] (statement of Sra C. Aravanis, Director, Nat’l Ctr. on Elder Abuse).

⁹³ *Id.*

⁹⁴ *Id.*

address the problem. Various Government agencies all too often fail to work in a collaborative and focused manner.⁹⁵

Not surprisingly, later studies revealed widespread abuse in nursing homes. In a report entitled *Abuse of Residents Is a Major Problem in U.S. Nursing Homes*, the minority staff of the Special Investigations Division of the House Committee on Government Reform reviewed the results of state nursing home inspections contained in the Online Survey, Certification, and Reporting database,⁹⁶ the nursing home complaint databases,⁹⁷ and samples of inspection reports prepared by state nursing home inspectors.⁹⁸ The staff determined that 5283 of about 17,000 nursing homes in the United States had been cited for an abuse violation between January 1, 1999 and January 1, 2001.⁹⁹ Many of these abuse violations caused harm to residents, including 1345 homes that were cited for abuse violations that caused actual harm to the residents and 256 homes that were cited for violations that caused serious injury or potential death.¹⁰⁰ A number of these homes had multiple abuse violations,¹⁰¹ including 305 homes that had three or more violations and 192 that had been cited for five or more abuse violations.¹⁰² Moreover, the study determined that the incidence of abuse violations had risen dramatically between 1996 and 2000.¹⁰³

Although the results of the study were consistent with earlier reports of elder abuse, the high percentage of nursing homes that had been cited for violations was eye-opening.¹⁰⁴ The report appeared to confirm the many

⁹⁵ SAVING OUR SENIORS, *supra* note 92, at 3 (statement of Sen. Larry E. Craig).

⁹⁶ See sources cited *supra* note 81.

⁹⁷ The nursing home complaint database is compiled separately from the OSCAR database. See ABUSE OF RESIDENTS, *supra* note 22, at 2.

⁹⁸ *Id.* at 3–4.

⁹⁹ *Id.* at 4–5.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 6. The report found that 1327 homes had been cited for more than one abuse violation. *Id.*

¹⁰² *Id.*

¹⁰³ See *id.* at 6–7.

¹⁰⁴ The results of the report were widely reported nationally in the general media. See, e.g., *Nursing Home Abuse Increasing*, CBS NEWS, July 31, 2001, available at <http://www.cbsnews.com/stories/2001/07/30/national/main304038.shtml>; Tynisa E. Trapps, *Nursing Home Abuse Rising Across Nation*, L.A. TIMES, July 31, 2001, at A8, available at LEXIS, News Library, LAT File.

stories regarding the treatment of residents at long-term nursing facilities.¹⁰⁵ In March 2002, the GAO conducted a study of investigations of alleged physical and sexual abuse in Georgia, Illinois, and Pennsylvania, which each have relatively large nursing home populations.¹⁰⁶ The resulting report, entitled *Nursing Homes: More Can Be Done To Protect Residents from Abuse*, discovered numerous problems in the prevention of nursing home abuse, including the following: law enforcement is unable to respond immediately to abuse allegations due to delays in reporting incidents;¹⁰⁷ nursing home staff members who commit acts of abuse are difficult to prosecute;¹⁰⁸ and measures taken to safeguard residents from abusive nursing home employees have been ineffective.¹⁰⁹

¹⁰⁵Prior to 2001, most studies of abuse taking place in nursing homes focused on individual stories or small-scale studies. See ELDER ABUSE IN RESIDENTIAL LONG-TERM CARE FACILITIES: WHAT IS KNOWN ABOUT PREVALENCE, CAUSES AND PREVENTION: TESTIMONY BEFORE THE U.S. S. COMM. ON FINANCE, 107th Cong. 2 (2002) (testimony of Catherine Hawes, Professor, Dep't of Health Policy & Mgmt., Tex. A&M Univ. Sys. Health Science Ctr.). "For decades, nursing homes have been plagued with reports suggesting widespread and serious maltreatment of residents, including abuse, neglect, and theft of personal property. In addition, a number of case studies, participant-observation studies, interviews with nursing home staff, and interviews with residents and ombudsman provided some evidence of abuse." *Id.*

¹⁰⁶U.S. GEN. ACCOUNTING OFFICE, NURSING HOMES: MORE CAN BE DONE TO PROTECT RESIDENTS FROM ABUSE 3 (2002).

¹⁰⁷*Id.* at 9–14. Reasons for these delays include the following: the police are not notified immediately of abuse or are not routinely involved in survey agency investigations; abuse allegations are not immediately reported to state survey agencies; and multiple factors lead to untimely reporting, such as failure of staff members to report allegations to nursing home management and difficulty of witnesses, residents, and family members to identify the proper agency to notify regarding abuse allegations. *Id.*

¹⁰⁸*Id.* at 14–17. The report identified the following reasons for the difficulty in prosecuting allegations of abuse: policies of individual states regarding referrals to law enforcement varied and limited prosecutions and the lack of witnesses reduced the likelihood of successful prosecutions. *Id.*

¹⁰⁹*Id.* at 17–25. The report cites a number of contributing factors regarding the ineffectiveness of these measures, including the following: employment requirements and background checks do not ensure the residents' protection; nursing homes are rarely sanctioned for improperly responding to abuse; nurse aide registries do not ensure the protection of residents; inconsistent treatment of nurse aids poses a risk to nursing home residents; delays in annotating the residents' records leaves the residents vulnerable; and inaccuracies in nurse aid registry Web sites may compromise the residents' safety. *Id.*

Testimony from the GAO at a hearing before the U.S. Senate's Special Committee on Aging raised additional points.¹¹⁰ The testimony concluded as follows:

The problem of resident abuse in nursing homes is serious but of unknown magnitude, with certain limitations in the adequacy of protections in the states we visited. Nurse aide registries provide information on only one type of employee, are difficult to keep current, and do not capture offenses committed in other states. At the same time, local law enforcement authorities are seldom involved in nursing home abuse cases and therefore are not in a position to help protect this at-risk population.¹¹¹

E. Use of Electronic Surveillance in Nursing Homes

1. Electronic Surveillance as a Weapon Against Nursing Home Abuse

A common response to the problems of nursing home abuse has come in the form of calls for more effective government regulation of nursing homes.¹¹² After several decades of failed efforts to reform government regulations of these homes, however, commentators began to question whether this extensive regulation was beneficial at all.¹¹³ Advocates for the rights of the elderly began devising new strategies for protecting the rights

¹¹⁰SAFEGUARDING OUR SENIORS: PROTECTING THE ELDERLY FROM PHYSICAL AND SEXUAL ABUSE IN NURSING HOMES: HEARING BEFORE THE SPEC. COMM. ON AGING, 107th Cong. 36-51 (2002) (testimony of Leslie G. Aronovitz, Director, Health Care—Program Administration & Integrity Issues, U.S. Gen. Accounting Office).

¹¹¹*Id.* at 51. The issues raised in the GAO's testimony included the following: (1) the ambiguous and hidden nature of nursing home abuse made the extent of abuse problem difficult to measure, *id.* at 41-44; (2) gaps existed in efforts to prevent or deter resident abuse, *id.* at 44-48; and law enforcement's involvement in protecting residents from abuse was limited, *id.* at 48-50.

¹¹²*See, e.g.,* IMPROVING THE QUALITY OF CARE, *supra* note 29, at 21-22 (indicating, in a 1986 report, that more effective government regulation at the federal level was essential for improving quality in nursing homes).

¹¹³*See* Bohm, *supra* note 30, at 318 (questioning "whether a seemingly endless amount of regulations further guarantees or ensures that quality care will be administered within the nursing home industry"). *But see* John Braithwaite, *The Nursing Home Industry*, 18 CRIME & JUST. 11, 24-25 (1993) (concluding after conducting an international comparative study that "the United States has tougher nursing home enforcement than any country we know").

of elders. Private groups, such as the Illinois-based Nursing Home Monitors, began in the mid-1990s to advocate the installation of the so-called granny cams in the rooms of nursing home residents, as well as common areas.¹¹⁴

Promotion of the use of electronic monitoring devices began to receive national press coverage in 2001. Representatives of such groups as the American Association of Retired Persons (AARP) and the National Citizens' Coalition for Nursing Home Reform showed support for the idea of installing the cameras in residents' rooms, especially when the decision to the install a camera is that of the residents himself or herself.¹¹⁵ Several nursing home administrators who voluntarily installed cameras in their facilities likewise supported the idea, noting that their liability insurance rates dropped.¹¹⁶ Supporters have also claimed that the surveillance offers numerous other benefits, including a reduction in theft rates, higher rates of occupancy, increased profits, increased productivity among employees, a lower rate of turnover, and piece of mind for families.¹¹⁷ Legal scholarship on the subject has generally supported the concept of installing these cameras.¹¹⁸

2. Issues Raised Regarding Electronic Monitoring

Representatives of the nursing home industry have consistently voiced their opposition to proposals that would allow the installation of electronic surveillance devices anywhere in a nursing home.¹¹⁹ The reasons most often cited by the nursing home industry's opposition to these proposals include the following: an increase in litigation, leading to an increase in

¹¹⁴See Jim Killackey, *Cameras Urged for Surveillance in Nursing Homes*, DAILY OKLAHOMAN, May 11, 2001, at 4A, available at LEXIS, News Library, DLYOKN File.

¹¹⁵See Greg Gittrich, *Live, from the Nursing Home, It's Granny-Cam*, N.Y. DAILY NEWS, July 9, 2001, at 2, available at LEXIS, News Library, DLYNWS File; Patrick Kampert, *Video Watchdog*, CHI. TRIB., Mar. 24, 2002, at 1, available at LEXIS, News Library, CHTRIB File.

¹¹⁶See *id.*; see also Katherine Spitz, *Computers, Cameras, Sensors and Cell Phones Work Together to Monitor Elderly Living at Home*, AKRON BEACON J., Nov. 9, 2003, available at 2003 WLNR 14410850.

¹¹⁷Killackey, *supra* note 114.

¹¹⁸See Adelman, *supra* note 13, at 821; Cottle, *supra* note 13, at 146–48; Kohl, *supra* note 13, at 2106.

¹¹⁹See Lloyd Dunkelberger, *Bill Would Allow "Granny Cams,"* SARASOTA HERALD-TRIBUNE, Mar. 25, 2001, at A16, available at LEXIS, News Library, SARHTR File (quoting a nursing home's representative as saying, "We're inadvertently bringing in Big Brother to watch us to the point where it will be detrimental to the welfare of nursing homes.").

liability insurance rates; difficulty in recruiting staff; privacy concerns; and general ineffectiveness of surveillance cameras to curb abuse in the homes.

a. Increased Litigation and Insurance Costs

Nursing homes frequently claim that surveillance of their residents would lead directly to an increase in litigation.¹²⁰ The nursing home representatives have claimed that litigation costs and inflated liability insurance premiums are the biggest problems that have faced the industry.¹²¹ Some opponents have gone so far as to suggest that the installation of the cameras is designed solely for the purpose of bringing lawsuits against nursing homes.¹²² Statements by insurance companies have appeared to support this concern. In a study conducted by the Florida Agency for Health Care Administration,¹²³ letters from two executives in the insurance industry stated that legislation designed to grant the right of residents or their representatives to install video monitoring devices would lead insurance companies to raise liability premiums or to deny coverage to nursing homes altogether.¹²⁴ According to one of the insurance representatives:

Making video cameras a resident's right that is exercised by family members or the resident's legal representative produces a fundamental clash between privacy rights and requirements for video monitoring. This contradiction of objectives is so fundamental that no one

¹²⁰See Vince Galloro, *Watching Out for Nursing Home Residents: Cameras Could Help Curb Abuse but Others Argue They Invade Patient Privacy*, MODERN HEALTHCARE, May 14, 2001, available at 2001 WLNR 8944326.

¹²¹Dunkelberger, *supra* note 119.

¹²²See Galloro, *supra* note 120; Kampert, *supra* note 115.

¹²³Florida was one of the first states to consider legislation that would permit residents to install electronic monitoring devices in their rooms. For further information regarding this legislation, see discussion *infra* Part III.B.

¹²⁴Letter from Clayton L. Deen, Vice President, Brown & Brown, Inc., to Video Camera Study, Agency for Health Care Administration, (Oct. 22, 2001), reprinted in AGENCY FOR HEALTH CARE ADMINISTRATION, CAMERAS IN NURSING HOMES app. B (2002), [hereinafter DEEN LETTER]; Letter from J. Sterling Shuttleworth, President and Chief Executive Officer, Underwriting Management Corp., to CaraLee Starnes, Video Camera Study, Agency for Health Care Administration 1 (Oct. 22, 2001), reprinted in AGENCY FOR HEALTH CARE ADMINISTRATION, CAMERAS IN NURSING HOMES app. B (2002), [hereinafter SHUTTLEWORTH LETTER].

can foresee the extent of legal entanglements and the years of challenges this will produce.

This will add uncertainty so great that no reasonable underwriter will consider accepting this exposure. The very existence of video cameras lends itself to misinterpretation, and confusion of otherwise defensible situations.¹²⁵

Others have introduced the idea of monitoring the homes as a means for preventing litigation. Proponents of legislation in some states have said that the evidence produced by monitoring devices could be used to exonerate a nursing home or nursing home employee, just as the same information could give rise to liability.¹²⁶ Moreover, some nursing home operators who have installed cameras on a voluntary basis have reported that their insurance rates dropped significantly after the installation of the cameras. In one instance, the liability insurance premiums for one Florida nursing home reportedly fell from \$57,000 per year to \$10,000 after the facility installed the cameras.¹²⁷

b. Difficulty in Recruiting Staff

Recruitment and retention of quality staff in nursing homes is another problem facing the industry, and nursing home representatives have claimed that the installation of monitoring devices could worsen the dilemma.¹²⁸ According to one nursing home operator, the average nursing assistant “is going to say to herself, for a dollar or two less, I can work at the Holiday Inn next door, clean rooms, and have a lot less headaches in my life than working in a nursing home.”¹²⁹ Proponents of monitoring claim that the installation has had an opposite effect—that nursing homes with cameras have had a lower staff turnover rate than those without cameras.¹³⁰ The Florida Agency for Health Care Administration confirmed these

¹²⁵Deen Letter, *supra* note 124.

¹²⁶See Patrice Sawyer, *Legislature 2002*, CLARION-LEADER, Jan. 30, 2002, at 1, available at LEXIS, News Library, CLLEDG File.

¹²⁷Kampert, *supra* note 115.

¹²⁸Galloro, *supra* note 120.

¹²⁹Dunkelberger, *supra* note 119.

¹³⁰See Kampert, *supra* note 115.

proponents' claims with respect to at least one facility, which reported in 2001 that the installation of cameras resulted in a minimal turnover rate.¹³¹

c. *Privacy Concerns*

Nursing home administrators who oppose electronic monitoring often raise concerns regarding privacy rights of residents, as well as the rights of roommates, employees of the facilities, and visitors.¹³² Federal law provides a basis for the privacy rights of residents, including a provision that guarantees "[t]he right to privacy with regard to accommodations, medical treatment, written and telephone communications, visits, and meetings of family and of resident groups."¹³³ State laws often provide similar rights.¹³⁴ Commentators have also noted concerns regarding the application of federal and state wiretapping statutes.¹³⁵ Under most proposals, however, the decision as to whether electronic surveillance devices should be installed is voluntary on the part of a resident and/or the resident's representative.¹³⁶ Because the electronic monitoring statutes and bills are based on the express consent of the residents or their representatives, as well as the implied consent of visitors, employees, and so forth, the statutes and bills circumvent many of the concerns related to privacy rights.¹³⁷

The nursing home industry has also raised privacy in a more general context, with some noting that a proposal for electronic monitoring "compromises that privacy, respect, and dignity of [the] residents."¹³⁸ Although the decision as to whether the cameras are installed should be made by each resident or a legal representative acting on behalf of the resident, critics note that the proposals still raise these general privacy

¹³¹ AGENCY FOR HEALTH CARE ADMINISTRATION, CAMERAS IN NURSING HOMES 18 (2002), [hereinafter CAMERAS IN NURSING HOMES].

¹³² See Adelman, *supra* note 13, at 825–33; Kohl, *supra* note 13, at 2092–103; see also CAMERAS IN NURSING HOMES, *supra* note 131, at 5–8; Kampert, *supra* note 115.

¹³³ 42 U.S.C. § 1395i-3(c)(iii) (2000).

¹³⁴ See, e.g., CAMERAS IN NURSING HOMES, *supra* note 131, at 5 (summarizing Florida law).

¹³⁵ See *id.* at 9–10; Adelman, *supra* note 13, at 822–25.

¹³⁶ See discussion *infra* Part III.

¹³⁷ See CAMERAS IN NURSING HOMES, *supra* note 131, at 10 (noting that implied consent to communications can be obtained through the posting of prominent signs informing visitors and others that the nursing home is under electronic surveillance).

¹³⁸ Sawyer, *supra* note 126.

concerns.¹³⁹ According to one critic, “it is distressing to think of these cameras recording such private moments as a resident undergoing medical procedures, being bathed or being assisted to the toilet. Families might pressure their already vulnerable relatives to approve of the cameras even if they [do not] want them.”¹⁴⁰ Supporters of the use of cameras, such as representatives of the AARP, have countered, “It should be a resident’s choice, because it’s their home.”¹⁴¹

d. General Ineffectiveness of Electronic Surveillance

A few critics have charged that electronic monitoring devices would be ineffective in curbing abuse, and that any benefits in their use do not outweigh the costs of installing and maintaining the systems.¹⁴² Similar to other concerns raised by the critics, however, proponents have noted that the experiences with nursing homes that have installed cameras have demonstrated that they indeed can be effective.¹⁴³

III. LEGISLATIVE ACTIVITY REGARDING ELECTRONIC SURVEILLANCE
IN NURSING HOMES

Corresponding to the national debate surrounding the installation of electronic monitoring devices in nursing home were proposals in a number of states that would allow residents voluntarily to install cameras in their rooms.¹⁴⁴ The biggest push in state legislatures came in 2001, when nine states considered bills that would allow electronic monitoring.¹⁴⁵ Texas became the first state to enact such legislation during the Seventy-Seventh Legislature in 2001. Following the Texas Legislature’s enactment were

¹³⁹See Kelly Greene, *Support Grows for Cameras in Care Facilities*, WALL ST. J., Mar. 7, 2002, at B1.

¹⁴⁰*Do We Need Big Brother Watching over Granny?*, PANTAGRAPH, Apr. 19, 2001, at A10, available at 2001 WLNR 4336580.

¹⁴¹Kampert, *supra* note 115 (quoting the Illinois state director of the AARP).

¹⁴²See *id.*

¹⁴³See Noel Brinkerhoff, *Using Cameras To Stop Nursing Home Abuse*, STATE NET CAPITAL JOURNAL, July 9, 2001, available at LEXIS, News Library, ALLNWS File; *Good Morning America: Profile: Report on Whether Granny Cams Would Be Helpful in Preventing Abuse in Nursing Homes* (ABC television broadcast Mar. 19, 2002), available at LEXIS, News Library, (ABCNEW File).

¹⁴⁴See Galloro, *supra* note 120.

¹⁴⁵See COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION 80 (2002).

recommendations from such entities as the Council of State Governments¹⁴⁶ and the Florida Agency for Health Care Administration¹⁴⁷ that such legislation should be passed. Only one state, however, has followed Texas' lead when New Mexico in 2004 enacted a statute that allows electronic monitoring,¹⁴⁸ although other states have enacted provisions that provide guidance to facilities who wish to allow electronic monitoring (Maryland¹⁴⁹) or establish pilot programs to study electronic monitoring in nursing homes (Louisiana¹⁵⁰).

A. Texas Becomes the First State to Allow Electronic Monitoring

1. Poor Conditions and Treatment in Texas Nursing Homes and Previous Legislative Efforts

Like several other states, Texas nursing homes have had a troubling record regarding conditions of the facilities and treatment of residents. In 1996, Texas Attorney General Dan Morales filed about twenty lawsuits against nursing homes, citing neglect and failure to provide medication.¹⁵¹ The Texas Legislature recognized this problem as it examined potential legislation in 1997 that was designed to improve these conditions:

Currently, there are approximately 90,000 residents in nursing homes in Texas; roughly 23 percent of the state's annual \$5.57 billion Medicaid budget is spent on nursing home facility care; and the number of aging Texans who will need nursing facility care is steadily increasing as baby-boomers reach retirement age. These facts, along with testimony and newspaper articles concerning alarming conditions in some nursing homes and the cumbersome regulatory processes that exist today, raise the need for nursing home reform.¹⁵²

¹⁴⁶ See discussion *infra* Part III.C.

¹⁴⁷ See discussion *infra* Part III.A.

¹⁴⁸ See discussion *infra* Part III.E.

¹⁴⁹ See discussion *infra* Part III.D.

¹⁵⁰ See discussion *infra* Part III.F.3.

¹⁵¹ See *Opinion: A Wolf at Our Door*, SAN ANTONIO BUS. J., Sept. 13, 1996, available at <http://www.bizjournals.com/sanantonio/stories/1996/09/16/editorial1.html>.

¹⁵² SEN. COMM. ON HEALTH & HUMAN SERVS. BILL ANALYSIS, Tex. 190, 75th Leg., R.S. (1997) [hereinafter SENATE BILL ANALYSIS, S.B. 190].

Legislators placed much of the blame for these poor conditions on the regulatory process in Texas. According to an analysis in the Texas House of Representatives:

[a] combination of weaknesses in Texas law limit[s] the effectiveness of current regulation of nursing facilities, placing our most vulnerable population of elderly and disabled at risk of abuse, neglect, exploitation, and inadequate care. Texas law provides inadequate measures to assure that only persons with solid credentials may own, operate and control licensed nursing facilities. Further, Texas law is vague and ambiguous in its delegation of key regulatory authority, including license revocation, application of remedies and rulemaking.¹⁵³

Based on these conclusions, the legislature in 1997 enacted legislation¹⁵⁴ that was designed to provide this much-needed reform:

[The legislation] protects nursing home residents and makes homes accountable to the public by ensuring that nursing homes are regulated in four basic ways: (1) provide the highest possible quality of care; (2) strictly monitor all factors relating to the health, safety, welfare, and dignity of each resident; (3) impose prompt and effective penalties for noncompliance with licensing standards; and (4) provide the public with information concerning the operation of institutions in this state.¹⁵⁵

The reform legislation failed, due largely to severe funding problems of nursing homes in the state. As of 2001, Texas ranked forty-fifth in the nation in Medicaid reimbursements, leading in part to severe staffing problems.¹⁵⁶ Texas ranked forty-sixth in the nation in the number of nursing aides per nursing home and forty-seventh in the number of

¹⁵³HOUSE COMM. ON HUMAN SERVS., BILL ANALYSIS, S.B. 190, 75th Leg., R.S. (1997), available at <http://www.capitol.state.tx.us>.

¹⁵⁴Act of June 2, 1997, 75th Leg., R.S., ch. 1159, 1997 Tex. Gen. Laws 4363 (current version in scattered sections of Tex. Health & Safety Code); see also Althea Borck, *Woman Fights Nursing Home Abuse*, HOUSTON CHRON., July 29, 2004, available at LEXIS, News Library, HCHRN File.

¹⁵⁵SENATE BILL ANALYSIS, S.B. 190, *supra* note 152.

¹⁵⁶Steve Habel, *Tight Nursing Home Budgets Hit on Two Fronts*, AUSTIN BUS. J., Apr. 27, 2001, available at http://www.bizjournals.com/austin/stories/2001/04/30/focus4.html?jst=s_rs_hl.

registered nurses per home.¹⁵⁷ According to the Texas Health Care Association, about a quarter of Texas nursing homes in 2001 had filed Chapter 11 bankruptcy.¹⁵⁸ Insurance premiums of nursing homes reportedly jumped from an average of \$250 per bed in 1999 to \$2500 to \$3000 per bed in 2001.¹⁵⁹

The Seventy-Seventh Legislature saw the introduction of more than sixty bills designed to address the concerns of the nursing home industry. Some of the proposals included rolling back the reform regulations from 1997.¹⁶⁰ Other proposals included, for example, a bill that would have limited the use of Texas Department of Human Services (now the Texas Department of Aging and Disability Services¹⁶¹) reports that cite nursing home deficiencies in civil trials.¹⁶² Legislators also sought to limit recovery of punitive damages in civil cases involving nursing homes.¹⁶³ Nursing home advocates likewise lobbied to move toward self-regulation of the industry in the state.¹⁶⁴

The cause of the problems in funding has been subject of extensive debate. The nursing home industry—predictably—blames large jury awards for the problems with the insurance costs.¹⁶⁵ The industry also blames the extensive government regulation of the facilities, with some claiming that survey reports completed by the Department of Aging and Disability Services have become fodder for trial lawyers because the reports

¹⁵⁷ *Id.*

¹⁵⁸ *See id.*

¹⁵⁹ *See* Armando Villafranca, *Nursing Homes Seek Legislative Cure*, HOUSTON CHRON. Apr. 8, 2001, at 1, available at LEXIS, News Library, HCHRN File.

¹⁶⁰ *See* Nate Blakeslee, *Blaming the Victim: Are Patients Responsible for the Nursing Home Crisis?*, TEX. OBSERVER, Apr. 13, 2001, available at <http://www.texasobserver.org/showArticle.asp?ArticleID=372>. Two of the bills would have restricted the authority of the Texas Department of Human Services to inspect and cite deficiencies in homes. *See* Tex. S.B. 1082, 77th Leg., R.S. (2001), available at <http://www.capitol.state.tx.us>; Tex. S.B. 1083, 77th Leg., R.S. (2001), available at <http://www.capitol.state.tx.us>; *see also id.*

¹⁶¹ The Texas Legislation in 2003 reorganized the functions of the Texas Department of Human Services into a myriad of new departments. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 198, 2003 Tex. Gen. Laws 611. Licensing and enforcement duties related to nursing homes that previous fell under the purview of the Department of Human Services now falls under the Department of Aging and Disability Services. TEX. HUM. RES. CODE ANN. § 161.071 (Vernon Supp. 2004–2005).

¹⁶² *See* Tex. H.B. 3476, 77th Leg., R.S. (2001), available at <http://www.capitol.state.tx.us>.

¹⁶³ *See* Blakeslee, *supra* note 160.

¹⁶⁴ *See id.*

¹⁶⁵ *See id.*

are used as evidence in trials.¹⁶⁶ Advocates for nursing home residents and other watchdog groups have countered that the nursing home industry should only blame itself for the crisis, pointing out that nursing home companies borrowed large sums of money in the 1980s and early 1990s to support expansion, only to see Congress, as part of the Balanced Budget Act of 1997,¹⁶⁷ alter its method of Medicare and Medicaid payments.¹⁶⁸ According to these advocates, the lost revenues from the federal government led directly to the financial crisis of nursing homes in the late 1990s and early 2000s.¹⁶⁹

2. Texas Legislature Passes Legislation Allowing Cameras

The focus of the Seventy-Seventh Legislature in 2001 on proposals to provide financial and other relief to the nursing home industry set a peculiar stage for the enactment of legislation that would allow residents to monitor their rooms through electronic devices. In 2001, Senator Frank Malda introduced Senate Bill 177, which was referred to the Senate Committee on Health and Human Services. The committee on March 28, 2001 substituted a new version of the bill,¹⁷⁰ which included Senator Mike Moncrief as the bill's co-author. Senator Moncrief spoke in support of the bill during a public hearing on March 29, 2001:¹⁷¹

In recent years, we've all seen several investigative reports in the news media focusing attention on efforts to

¹⁶⁶ See Villafranca, *supra* note 159.

¹⁶⁷ Pub. L. No. 105-33, 111 Stat. 251 (1997).

¹⁶⁸ See Villafranca, *supra* note 159. The Balanced Budget Act altered the payment system from one that paid nursing homes for the individual services that were provided to patients to one where nursing homes received a flat fee per resident. *Id.* For additional information about Medicare after the Balanced Budget Act of 1997, see Janet Silversmith, *The Impact of the 1997 Balanced Budget Act on Medicare*, MINN. MED., Dec. 2000, available at <http://www.mnmed.org/publications/MnMed2000/December/Silversmith.html>.

¹⁶⁹ See Villafranca, *supra* note 159.

¹⁷⁰ The original bill would have added section 242.505 to the Texas Health and Safety Code. Tex. S.B. 177, 77th Leg., R.S. (2001), available at <http://www.capitol.state.tx.us> (introduced version). The committee substitute added a new subchapter to chapter 242 of the Health and Safety Code. Tex. S.B. 177, 77th Leg., R.S. (2001), available at <http://www.capitol.state.tx.us> (introduced version, committee substitute). The committee substitute included a number of changes from the original bill, including a provision stating that a facility could not be held civilly liable in connection with the covert placement or use of an electronic monitoring device in a resident's room. *Id.*

¹⁷¹ Senator Moncrief's statements were made on behalf of Senator Malda.

prevent the abuse and neglect of residents in nursing homes by using video camera equipment to monitor that resident. Currently there is no reference in the state law that prohibits or allows such recordings. It does neither, nor is there any guidance for families who are concerned for their loved ones and may wish to use these recordings. . . .

With [this bill] . . . we believe that we have the opportunity to really outline for those individuals who believe that this drastic step is necessary exactly what their rights as well as their responsibilities are if they make this hard choice.¹⁷²

Five members of the public spoke at the meeting with only one speaker identified as being against the bill,¹⁷³ although others who spoke on the bill expressed reservations. According to Tim Graves of the Texas Health Care Association:

I don't think, in the final analysis, the cameras protect people. I think well-trained people protect people. And my concern is [that] the bill is . . . a distraction from the real issue we need to be looking at [*sic*], which is really improving the staffing levels, wages and benefits, to eliminate the 150% turnover rate that we have in our nursing homes.¹⁷⁴

Graves also indicated concern that the cameras would provide families with a false sense of security. Senator Moncrief, on the other hand,

¹⁷²HEARING ON TEX. S.B. 177 IN THE SENATE HEALTH AND HUMAN SERVICES COMMITTEE, 77th Leg., R.S. (Mar. 29, 2001) (statement of Senator Mike Moncrief) (quotation transcribed by authors; electronic file containing hearing is available through the Texas Senate's web site at <http://www.senate.state.tx.us/75r/Senate/AVarch.htm>).

¹⁷³The witnesses for the bill included David Bragg of the Legislative Counsel of the American Association of Retired Persons; Beth Ferris of the Texas Advocates for Nursing Home Residents; Tim Graves of the Texas Health Care Association; David Latimer of the Texas Association of Homes and Services for the Aging; and John J. Loshier of the Christian Care Center. Although others raised some concerns (speaking "on" the bill), only Loshier spoke openly against it. The witness list for this bill is available at <http://www.capitol.state.tx.us/tlo/77R/witbill/SB00177S.HTM>.

¹⁷⁴HEARING ON TEX. S.B. 177 IN THE SENATE HEALTH AND HUMAN SERVICES COMMITTEE, 77th Leg., R.S. (Mar. 29, 2001) (statement of Tim Graves, Texas Health Care Association) (quotation transcribed by authors; electronic file containing hearing is available through the Texas Senate's Web site at <http://www.senate.state.tx.us/75r/Senate/AVarch.htm>).

rebuffed these types of criticisms, noting that families need the option of monitoring residents through electronic devices:

While . . . there are many other important problems in nursing home facilities which need to be addressed, . . . with advancing technology this kind of monitoring will indeed continue to be used. [The] Legislature . . . can remain silent on this issue and let families and courts experiment in determining how these devices will be used, or abused, or we can put into law an outline of the rights and responsibilities for each party taking part in the monitoring process.¹⁷⁵

After being reported favorably by the Health and Human Services Committee, Senate approved the bill on April 10, 2001 by a vote of 28-1, with one abstention.¹⁷⁶ The Senate did not engage in any substantive debate on the bill.

The engrossed bill was sent to the House Committee on Human Services, where it was considered in public hearing on April 23, 2001. Only one member of the public, Beth Ferris of the Texas Advocates for Nursing Home Residents, participated in the hearing.¹⁷⁷ Ferris expressed some concern that a resident or representative who requested monitoring would effectively communicate to a nursing home administrator that the resident or representative did not trust the administrator or the nursing home staff.¹⁷⁸ Members of the committee, including Representative Harryette Ehrhardt disagreed, noting that the cameras would provide a deterrent to abuse and neglect. According to Rep. Ehrhardt:

I would think that this bill would allow a lot more people to have an opportunity to take advantage [of

¹⁷⁵ HEARING ON TEX. S.B. 177 IN THE SENATE HEALTH AND HUMAN SERVICES COMMITTEE, 77th Leg., R.S. (Mar. 29, 2001) (statement of Senator Mike Moncrief) (quotation transcribed by authors; electronic file containing hearing is available through the Texas Senate's web site at <http://www.senate.state.tx.us/75r/Senate/AVarch.htm>).

¹⁷⁶ S.J. OF TEX., 77th Leg., R.S. 1126 (2001).

¹⁷⁷ Three members of the public registered to speak at the hearing but did not testify, including representatives of Advocacy, Inc., Texas Watch, and Advocates for Nursing Home Reform.

¹⁷⁸ HEARING ON TEX. S.B. 177 IN THE HOUSE COMMITTEE ON HUMAN SERVICES, 77th Leg., R.S. (Apr. 23, 2001) [hereinafter *House Hearing*] (statement of Beth Ferris, Texas Advocates for Nursing Home Residents) (electronic file containing hearing available through the Texas House of Representatives' web site at <http://www.house.state.tx.us/committees/audio77/310.htm>).

electronic monitoring], and the goal, it seems to me, . . . would be not so much to catch someone doing something wrong, as it would be to deter such action.¹⁷⁹

Ferris also recommended that the legislation should require nursing homes to post notices on their doors, warning visitors and others that electronic surveillance devices may be present.¹⁸⁰ Her recommendation was well-received by the committee:

If the posting says . . . to anyone who enters this facility . . . that there may be either hidden cameras or overt cameras, then I think it suggests that you'd better be careful because you're not even going to know—you're on notice that there may be cameras hidden or overt in every room. And I think that would serve to deter anyone from participating in any type of abuse and neglect.¹⁸¹

The House committee on April 30, 2001 approved a committee substitute to Senate Bill 177 that included the requirement that facilities post notice on their doors.¹⁸² The committee approved the substituted version on April 30. The bill was passed to a third reading on May 15¹⁸³ and approved by the House on May 16 by a vote of 139-0, with three abstentions.¹⁸⁴ As was the case in the Senate, no member of the House of Representatives posed any questions or engaged in debate on the bill. Governor Rick Perry signed the bill on June 15, 2001, which became effective on September 1, 2001.¹⁸⁵

¹⁷⁹ *Id.* (statement of Sen. Harryette Ehrhardt) (quotation transcribed by authors).

¹⁸⁰ *Id.* (statement of Beth Ferris, Texas Advocates for Nursing Home Residents).

¹⁸¹ *Id.* (statement of Sen. Elliott Naishtat, chair of the Texas House Comm. on Human Servs).

¹⁸² TEX. S.B. 177, 77th Leg., R.S. (2001) (committee substitute of engrossed version).

¹⁸³ H.J. OF TEX., 77th Leg., R.S. 3274 (2001).

¹⁸⁴ H.J. OF TEX., 77th Leg., R.S. 3337 (2001).

¹⁸⁵ S.J. OF TEX., 77th Leg., R.S. 4520 (2001); HEALTH & SAFETY CODE ANN. § 242.841 (Vernon Supp. 2004–2005).

3. Provisions of the Texas Legislation and Subsequent Regulations

The 2001 legislation added subchapter R to chapter 242 of the Texas Health and Safety Code.¹⁸⁶ The statute defines “electronic monitoring device” as (1) a video surveillance camera installed in a resident’s room;¹⁸⁷ or (2) an audio device installed in a resident’s room that is designed “to acquire communications or other sounds occurring in the room.”¹⁸⁸ The statute permits “authorized electronic monitoring,” which the code defines as “the placement of an electronic monitoring device in the room of a resident of an institution and making tapes or recordings with the device after making a request to the institution to allow electronic monitoring.”¹⁸⁹ Only a resident may allow electronic monitoring if the resident has not been judicially declared to lack the capacity to do so.¹⁹⁰ If the resident lacks capacity to request electronic monitoring,¹⁹¹ then only the guardian or legal representative of the resident may request monitoring.¹⁹²

The statute requires the Texas Department of Aging and Disability Services (DADS) (formerly the Texas Department of Human Services¹⁹³) to prescribe a form that must be signed by the resident or the resident’s representative upon admission to a facility.¹⁹⁴ The regulations prescribing

¹⁸⁶TEX. HEALTH & SAFETY CODE ANN. § 242.841–.852 (Vernon Supp. 2004–2005). For additional information regarding this statute, see 44 MICHAEL P. PENICK, TEXAS PRACTICE: MEDICAL MALPRACTICE § 18.27 (2003).

¹⁸⁷TEX. HEALTH & SAFETY CODE ANN. § 242.841(2)(A)(i).

¹⁸⁸*Id.* § 242.841(2)(A)(ii).

¹⁸⁹*Id.* § 242.841(1).

¹⁹⁰*Id.* § 242.845(a).

¹⁹¹Only the legal guardian of a resident can request electronic monitoring if the resident has been judicially declared to lack capacity. *Id.* § 242.845(b). If the resident lacks capacity but has not been judicially declared to lack such capacity, then only the resident’s legal representative may request monitoring. *Id.* § 242.845(c). Under the rule promulgated by the Texas Department of Aging and Disability Services, the resident’s physician is authorized to determine whether a resident lacks capacity. 40 TEX. ADMIN. CODE § 19.422(d)(3)(A) (2005).

¹⁹²TEX. HEALTH & SAFETY CODE ANN. § 242.845(c).

¹⁹³The regulations were promulgated prior to the formation of the Texas Department of Aging and Disability Services. Thus, the regulation refers to the Texas Department of Human Services. *See, e.g.*, 40 TEX. ADMIN. CODE § 19.422(c).

¹⁹⁴TEX. HEALTH & SAFETY CODE ANN. § 242.844.

these forms were adopted to be effective on July 1, 2002.¹⁹⁵ When a resident first enters a facility, the regulations require the facility to provide a form entitled *Information Regarding Authorized Electronic Monitoring for Nursing Facilities*¹⁹⁶ that must be signed by each resident or the resident's representative.¹⁹⁷ The regulation required current residents or their representative to have signed these forms no later than October 1, 2004.¹⁹⁸ If a resident, the resident's guardian, or the resident's legal representative would like to conduct electronic monitoring, then the proper party must complete, sign, and date a form entitled *Request for Authorized Electronic Monitoring*¹⁹⁹ and submit the form to the facility's manager or other proper designee.²⁰⁰

The statute also mandates that a resident who wishes to install an electronic monitoring device in a multi-person room obtain consent from the resident's roommate or roommates.²⁰¹ The resident's roommate may condition his or her consent on whether a video camera is pointed away from the roommate or whether use of an audio device is limited or prohibited.²⁰² Moreover, if a new roommate moves into a room where electronic monitoring is being conducted, the electronic monitoring must cease until the new roommate has consented to the monitoring.²⁰³ Each roommate of a resident wishing to conduct electronic monitoring must complete a form entitled *Consent by Roommate for Authorized Electronic Monitoring*²⁰⁴ and submit it to the facility's manager or other appropriate designee.²⁰⁵

¹⁹⁵ 40 TEX. ADMIN. CODE § 19.422. The agency subsequently promulgated regulations regarding authorized electronic monitoring that apply to assisted living facilities. 40 TEX. ADMIN. CODE § 92.129.

¹⁹⁶ The form entitled *Information Regarding Authorized Electronic Monitoring for Nursing Facilities* is available online at <http://www.dads.state.tx.us/forms/0065/0065.pdf>.

¹⁹⁷ 40 TEX. ADMIN. CODE § 92.129(c).

¹⁹⁸ *Id.*

¹⁹⁹ The form entitled *Request for Authorized Electronic Monitoring* is available online at <http://www.dads.state.tx.us/forms/0066/0066.pdf>.

²⁰⁰ 40 TEX. ADMIN. CODE § 92.129(d).

²⁰¹ TEX. HEALTH & SAFETY CODE ANN. § 242.846(b)(3); 40 TEX. ADMIN. CODE § 19.422(e).

²⁰² TEX. HEALTH & SAFETY CODE ANN. § 242.846(e); 40 TEX. ADMIN. CODE § 19.422(e)(2).

²⁰³ TEX. HEALTH & SAFETY CODE ANN. § 242.846(f); 40 TEX. ADMIN. CODE § 19.422(e)(4).

²⁰⁴ The form entitled *Consent by Roommate for Authorized Electronic Monitoring* is available online at <http://www.dads.state.tx.us/forms/0067/0067.pdf>.

²⁰⁵ 40 TEX. ADMIN. CODE § 92.129(f).

The statute and regulations require each facility to post a notice regarding electronic surveillance at the entrance of the institution.²⁰⁶ The DADS regulation requires each facility to entitle the notice “Electronic Monitoring” and state, in large and easy-to-read type, as follows: “The rooms of some residents may be monitored electronically by or on behalf of the residents. Monitoring may not be open and obvious in all cases.”²⁰⁷ The statute does not prohibit the covert use of an electronic device, but a facility may not be held civilly liable in connection with the covert placement or use of such a device.²⁰⁸ Under the statute, use of a device is considered covert if: (1) “the placement and use of the device is not open and obvious; and (2) the institution and [DADS] are not informed about the device by the resident, a person who placed the device in the room, or a person who is using the device.”²⁰⁹ A facility may not discharge a resident for the covert use or placement of a device, but, once discovered by the facility, the resident must meet all the requirements for Authorized Electronic Monitoring before monitoring is allowed to continue.²¹⁰

A tape or recording created through the use of an authorized electronic monitoring device may be admitted into evidence in a civil or criminal court action or administrative proceeding, subject to applicable rules of evidence or procedure.²¹¹ Despite the provisions regarding the covert use and placement of a device, tapes or recordings made through the covert use of a device may also be admitted into evidence.²¹² The tape or recording may not be entered into evidence unless it shows the time and date that the events on the tape or recording occurred and the contents of the tape have not been edited or artificially enhanced.²¹³ Where the contents of a tape or recording have been transferred from the original format to another technological format, the tape or recording may be entered into evidence only if the transfer was completed “by a qualified professional and the contents of the tape or recording were not altered.”²¹⁴

²⁰⁶TEX. HEALTH & SAFETY CODE ANN. § 242.850; 40 TEX. ADMIN. CODE § 19.422(g).

²⁰⁷40 TEX. ADMIN. CODE § 19.422(g).

²⁰⁸TEX. HEALTH & SAFETY CODE ANN. § 242.843(b).

²⁰⁹*Id.* § 242.843(a)(1), (2).

²¹⁰40 TEX. ADMIN. CODE § 19.422(i).

²¹¹TEX. HEALTH & SAFETY CODE ANN. § 242.849(a).

²¹²*Id.*

²¹³*Id.* § 242.849(b)(1), (2).

²¹⁴*Id.* § 242.849(b)(3).

The statute and regulation require a person who is conducting electronic monitoring on behalf of a resident to report abuse or neglect under section 242.122 of the Texas Health and Safety Code.²¹⁵ Such a person who fails to report abuse and neglect is subject to criminal liability under section 242.131 of the Health and Safety Code.²¹⁶ Additionally, “[a] person who intentionally hampers, obstructs, tampers with, or destroys an electronic monitoring device” commits a Class B misdemeanor.²¹⁷

B. Florida Legislation Fails

The state of Florida for a number of years likewise struggled with the quality of care offered by its nursing home facilities. In 1980, a Dade County grand jury in 1980 found that of thirty-eight nursing homes in the county, sixty percent gave care deemed to be unacceptable or consistently very poor.²¹⁸ More than twenty years later, the state—which according to statistics published in 2001 was home to 71,000 nursing home residents²¹⁹—continued to struggle with the quality of its nursing home care.

The quality of nursing home care continues to be a concern because residents are generally showing increasing levels of acuity and disability and require increasingly more complex treatments. These concerns about problems in the quality of long-term care persist despite some improvements in recent years, and are reflected in, and spurred by, recent government reports, congressional hearings, newspaper stories, and criminal and civil court cases. Debate also continues over the effectiveness and appropriate scope of state and national policies to regulate long-term care, reduce poor performance of providers, and improve the health and well being of those receiving care.²²⁰

The Florida Senate in 2001 considered a bill that was designed to amend several statutory sections related to regulatory provisions and standards for long-term care facilities.²²¹ Sixteen days after the original introduction of

²¹⁵ *Id.* § 242.848(a); 40 TEX. ADMIN. CODE § 19.422(k).

²¹⁶ TEX. HEALTH & SAFETY CODE ANN. § 242.848(a).

²¹⁷ *Id.* § 242.852(a).

²¹⁸ FLA. HEALTH, AGING, & LONG-TERM CARE COMM., SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, S. 1202, 103d Leg., Reg. Sess., at 2 (2001).

²¹⁹ See CAMERAS IN NURSING HOMES, *supra* note 131, at 1.

²²⁰ *Id.* at 2.

²²¹ S. 1202, 103d Leg., Reg. Sess. (Fla. 2001) (introduced version dated Mar. 1, 2001).

Senate Bill 1202, the Senate's Committee on Health, Aging, and Long-Term Care inserted an amendment adding a provision allowing nursing home residents to install cameras in their rooms.²²² The proposal made installation voluntary on the part of a nursing home resident or the resident's legal representative but mandated that each nursing home facility allow the resident or resident's representative to install these monitoring devices.²²³ The bill stated specifically that monitoring must: (1) be noncompulsory; (2) be funded by the resident or legal representative of the resident; and (3) "[p]rotect the privacy rights of other residents and visitors to the nursing home facility to the extent reasonably possible."²²⁴ Each nursing home would have been required to provide "a reasonably secure place to mount the electronic monitoring device," as well as "access to power sources."²²⁵ A tape created by the use of the electronic monitoring device would have been admissible in a civil or criminal action, subject to the Florida Rules of Evidence.²²⁶

The final committee substitute of Senate Bill 1202 removed the provision that would have allowed electronic monitoring and instead substituted a provision that required the Florida Agency for Health Care Administration (AHCA) and the Office of the Florida Attorney General to study jointly the potential for use of electronic monitoring devices in nursing homes.²²⁷ The AHCA and the Office of Attorney General released

²²² S. 1202, 103d Leg., Reg. Sess. § 3 (Fla. 2001) (committee substitute dated Mar. 17, 2001); see also Dunkelberger, *supra* note 119; "Granny Cams" in *Nursing Homes Proposed*, HOUSTON CHRON., Apr. 8, 2001, available at LEXIS, News Library, HCHRN File.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ S. 1202, 103d Leg., Reg. Sess. § 3 (Fla. 2001) (first engrossed version dated Apr. 27, 2001). The bill directed the AHCA and the Florida Attorney General to focus on several topics related to electronic monitoring:

The study shall include, but not be limited to, a review of the current use of electronic monitoring devices by nursing home facilities and their residents and other health care facilities, and analysis of other state laws and proposed legislation related to the mandated use of electronic monitoring in nursing home facilities, an analysis of the potential ramifications of requiring facilities to install such devices when requested by or on behalf of a resident, the impact of the devices on the privacy and dignity of both the resident on whose behalf the device is installed and other residents who may be affected by the device, the potential impact on improving the care of the residents, the potential impact on the care environment and on staff recruitment and retention, appropriate use of any tapes if mandated by law, including methods and time frames for

their report to the Florida Legislature in January 2002.²²⁸ The task force reviewed uses of video cameras;²²⁹ initiatives in other states;²³⁰ quality of care issues;²³¹ legal issues, such as privacy rights related to surveillance;²³² attorney-client issues;²³³ civil liability for invasion of privacy;²³⁴ wiretapping concerns;²³⁵ evidentiary issues;²³⁶ the economic impact of legislation that would allow installation of electronic monitoring devices;²³⁷ and the public's perspective.²³⁸ Representatives of the task force also visited one Florida nursing home that had installed cameras voluntarily and found that the facility had a successful experience with the monitoring devices.²³⁹ The AHCA and Office of Attorney General endorsed the bill that would require nursing homes to permit residents to install the cameras.²⁴⁰

[T]he likely deterrent effect on resident abuse and neglect, together with the benefits to management, residents and their families and friends, suggest that the voluntary use of cameras in nursing homes and resident rooms . . . would work well in Florida. Legislation should allow Floridians to make this choice.²⁴¹

reporting any questionable incidents to the facility and appropriate regulatory agencies, appropriate security needed to protect the integrity of tapes for both the protection of the resident and direct care staff, and the potential ramifications on the care environment of allowing the use of recorded tapes in legal proceedings, including any exceptions that should apply if prohibited.

²²⁸ See Diane C. Lade, *Task Force Recommends Installing "Granny Cams,"* S. FLA. SUN-SENTINEL, Jan. 25, 2002, available at LEXIS, News Library, SUNSEN File.

²²⁹ CAMERAS IN NURSING HOMES, *supra* note 131, at 2–3.

²³⁰ *Id.* at 3–4.

²³¹ *Id.* at 4.

²³² *Id.* at 5–8.

²³³ *Id.* at 8.

²³⁴ *Id.* at 8–9.

²³⁵ *Id.* at 9–10.

²³⁶ *Id.* at 10.

²³⁷ *Id.* at 10–12.

²³⁸ *Id.* at 12–17.

²³⁹ *Id.* at 17–18.

²⁴⁰ *Id.* at 1–2, 18–19.

²⁴¹ *Id.* at 19; see also Lade, *supra* note 228, available at LEXIS, News Library, SUNSEN File.

In February 2002, the Committee on Health, Aging, and Long-Term Care submitted a substituted version for Senate Bill 1714²⁴² that would have required the AHCA to conduct a one-year pilot project in two nursing homes “to demonstrate the use of electronic monitoring equipment in nursing homes.”²⁴³ Under the proposed bill:

[t]he pilot project would be conducted in two private nursing homes in different parts of the state. A resident, or the resident’s legal representative, could be permitted to request electronic monitoring of the resident’s room. The participating nursing homes would be required to make reasonable physical accommodation for the electronic monitoring. The nursing homes would also be required to conduct electronic monitoring in common areas of the facility.²⁴⁴

The proposed bill passed in the Florida Senate on March 20, 2002.²⁴⁵ The House Committee on Rules, Ethics and Elections, however, did not take action on the bill prior to the conclusion of the Florida Legislature’s regular session, which ended March 22, 2002.²⁴⁶ The Florida Legislature has not since considered a proposal to allow for electronic surveillance in nursing home facilities.

C. Council of State Governments Recommends Electronic Monitoring Statute

Following the enactment of Senate Bill 177 in Texas (and prior to the Florida House of Representatives failing to act on similar legislation), the Council of State Governments in 2002 recommended passage of an electronic monitoring statute in its annual publication, *Suggested State*

²⁴²The original version of Florida Senate Bill 1714 in 2001 expressed intent on the part of the Florida Legislature “to revise laws relating to services for the elderly.” S. 1714, 104th Leg., Reg. Sess. (Fla. 2002) (introduced version dated Jan. 25, 2002).

²⁴³S. 1714, 104th Leg., Reg. Sess. § 1 (Fla. 2002) (committee substitute dated Feb. 21, 2002).

²⁴⁴FLA. HEALTH, AGING, & LONG-TERM CARE COMM., SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, S. 1714, 104th Leg., Reg. Sess., at 1 (2002).

²⁴⁵S. 1714, 104th Leg., Reg. Sess. (2002) (engrossed version dated Mar. 20, 2002).

²⁴⁶See Greg Groeller, “Granny Cams” Lose Focus in Legislature, ORLANDO SENTINEL, Mar. 26, 2002, available at LEXIS, News Library, ORSENT File.

*Legislation.*²⁴⁷ The Council used the enrolled version of Texas Senate Bill 177 as the model for its suggested legislation.²⁴⁸

D. Maryland Agency Issues Guidelines for Electronic Monitoring

Maryland was one of the first states to introduce electronic monitoring legislation in 2001.²⁴⁹ The first bill was sponsored by Sue Hecht, who witnessed her mother, Vera, being abused in a nursing home.²⁵⁰ The bill was introduced on February 1, 2001, and submitted the House Committee on Environmental Matters.²⁵¹ The proposal died after the General Assembly's regular session ended in July 2001. A second bill, entitled "Vera's Law" by Delegate Hecht was introduced in 2002, but the proposal also died in committee.²⁵²

A third proposal in 2003, also referred to as "Vera's Law," required the Maryland Department of Health and Mental Hygiene to "develop guidelines for a nursing home that elects to use electronic monitoring with the consent of a resident or the legal representative of a resident" of a nursing home.²⁵³ The bill was enacted by the Maryland General Assembly and became effective on July 1, 2003. The Department of Health and Mental Hygiene issued its report, entitled *Guidelines for Electronic Monitoring*, on December 1, 2003.²⁵⁴ The document is "intended to provide guidance to facilities that voluntarily elect to use electronic monitoring at the request of a resident or the legal representative of a resident and with the consent of a resident's roommate."²⁵⁵ Although most of the provisions in the guidelines

²⁴⁷COUNCIL OF STATE GOVERNMENTS, *supra* note 145, at 80–81.

²⁴⁸*Id.* at 81–86.

²⁴⁹For a discussion of the first Maryland proposal, see Adelman, *supra* note 13, at 835–38.

²⁵⁰See Norman N. Covert, *Don't Throw Me in the Briar Patch*, THE TENTACLE, Mar. 26, 2002, http://www.thetentacle.com/Articles_Mar/March26_article2.html.

²⁵¹H.D. 433, 2001 Leg., 415th Sess. (Md. 2001), *available at* WL MD-BILLS-OLD Database.

²⁵²H.D. 880, 2002 Leg., 416th Sess. (Md. 2002), *available at* WL MD-BILLS-OLD Database. House Bill 880 was first sent to the House Committee on the Judiciary, but it was later assigned to the House Committee on Environmental Matters. Neither committee took any formal action on the bill.

²⁵³Act of May 22, 2003, ch. 409, § 1, *available at* WL 2003 Maryland Laws Ch. 409 (H.B. 149).

²⁵⁴MD. DEPT. OF HEALTH & MENTAL HYGIENE, GUIDELINES FOR ELECTRONIC MONITORING (2003), <http://www.dhmd.state.md.us/ohcq/reports/149report.pdf>.

²⁵⁵*Id.* at 3.

are not compulsory in nature, some elements, such as those related to privacy and consent, are mandatory.²⁵⁶

E. New Mexico Passes Statute in 2004

In 2004, New Mexico became the third state to enact legislation allowing nursing home residents to install electronic monitoring devices in their rooms.²⁵⁷ The statute, known as the Patient Care Monitoring Act, was one of a number of health care bills enacted by the New Mexico Legislature in 2004.²⁵⁸ Governor Bill Richardson's office took credit for the enactment of the provision:

[The Patient Care Monitoring Act] addresses the zero-tolerance stance that Governor Richardson is taking against nursing home abuse. Most abuse and neglect cases in long-term facilities go undetected because the victims are too ill to report them or do anything about them. This act is one more way to protect nursing home residents from becoming victims of abuse, theft, and other harm.²⁵⁹

The legislation was introduced as Senate Bill 401 on January 29, 2004. The bill met with some resistance, including opposition by the New Mexico Health Care Association, an advocacy group for nursing homes in the state.²⁶⁰ Nevertheless, the Senate and House passed the bill on February 11 and 18, respectively, and Governor Richardson signed the bill into law on March 3, 2004. The New Mexico Aging and Long-Term Services Department (NMALTS) promulgated regulations related to patient care monitoring, which became effective on July 15, 2004.²⁶¹

The Patient Care Monitoring Act, as well as the corresponding regulations, define a monitoring device as a "surveillance instrument that broadcasts or records activity," but the term does not include a still

²⁵⁶ *Id.*

²⁵⁷ N.M. STAT. ANN. §§ 24-26-1 to -12 (West Supp. 2005).

²⁵⁸ See Press Release, Office of the Governor, State of New Mexico, Governor Bill Richardson Signs Health Care Legislation (Mar. 3, 2004), http://pssc.aphanet.org/pdfs/030304_2.pdf.

²⁵⁹ *Id.*

²⁶⁰ See Deborah Davis, *Bill Pushes Nursing Home "Granny Cams,"* SANTE FE NEW MEXICAN, Feb. 6, 2004, at A7, available at LEXIS, News Library, NEWMEX File.

²⁶¹ N.M. CODE R. §§ 9.2.23.1-20, (Weil 2005).

camera.²⁶² In order to install a device, a resident or the resident's surrogate must consent to the installation and use of a device²⁶³ and give notice to the facility on a form prescribed by the NMALTS.²⁶⁴ The resident must also obtain the consent of the resident's roommate or the roommate's surrogate.²⁶⁵ A monitoring device that records activity visually must include a record of the time and date.²⁶⁶ The patient or the patient's surrogate²⁶⁷ must pay all costs for the installation and maintenance of the device,²⁶⁸ with the exception of the cost of electricity.²⁶⁹ Under the regulations, the patient or patient's surrogate is responsible for selecting the type of device that will be used,²⁷⁰ except that a device that uses the Internet must be encrypted and secure.²⁷¹ The regulations also include provisions requiring a facility to allow a resident to install Internet access lines.²⁷²

A facility must offer each resident the option to install a device, and the facility must maintain a record of the resident's choice.²⁷³ The facility must reasonably accommodate the installation of the device, so long as the installation does not place an undue burden on the facility.²⁷⁴ The

²⁶²N.M. STAT. ANN. § 24-26-2(C); N.M. CODE R. § 9.2.23.7(C). The Patient Care Monitoring Act does not affect the use of still cameras in a nursing home facility. See New Mexico Aging and Long-Term Services Department, *Information Sheet (Patient Care Monitoring Act)*, <http://www.nmaging.state.nm.us/gcam%20Information%20Sheet.pdf> (last visited Aug. 3, 2005).

²⁶³N.M. STAT. ANN. § 24-26-3(A)(4); N.M. CODE R. § 9.2.23.11.

²⁶⁴N.M. STAT. ANN. § 24-26-3(A)(1); N.M. CODE R. § 9.2.23.8(A)(1).

²⁶⁵N.M. STAT. ANN. § 24-26-6(C); N.M. CODE R. § 9.2.23.12.

²⁶⁶N.M. STAT. ANN. § 24-26-3(A)(2); N.M. CODE R. § 9.2.23.8(A)(2).

²⁶⁷A surrogate is defined in the statute and regulation as "a legal guardian or a legally appointed substitute decision-maker who is authorized to act on behalf of the patient." N.M. STAT. ANN. § 24-26-2(F); N.M. CODE R. § 9.2.23.7(G).

²⁶⁸N.M. STAT. ANN. § 24-26-3(A)(3); N.M. CODE R. § 9.2.23.8(A)(2).

²⁶⁹N.M. CODE R. § 9.2.23.9(B).

²⁷⁰According to information distributed by the New Mexico Aging and Long-Term Services Department, the New Mexico Long-Term Care Ombudsman Program maintains a limited number of cameras that can be loaned to residents. See New Mexico Aging and Long-Term Services Department, *supra* note 262.

²⁷¹*Id.* § 9.2.23.9(C). Under the regulation, [i]f the patient or surrogate chooses to install a monitoring device that uses Internet technology, the monitoring device must have at least 128-bit encryption and enable a secure socket layer." *Id.*

²⁷²N.M. CODE R., § 9.2.23.10(C).

²⁷³N.M. STAT. ANN. § 24-26-4(A); N.M. CODE R. § 9.2.23.9(A).

²⁷⁴N.M. STAT. ANN. § 24-26-4(C); N.M. CODE R. § 9.2.23.10.

regulations provide examples of reasonable accommodation, including the following:

- (1) providing a reasonably secure place to mount a monitoring device;
- (2) providing access to power sources, if feasible;
- (3) rearranging a room, if feasible;
- (4) accommodating the limits a patient or roommate, or surrogate of either, may place on the use of a monitoring device, if feasible;
- (5) referring a patient or surrogate to potential roommates or surrogates of roommates who have indicated on a current patient authorization form that they would consent to monitoring if a current roommate or surrogate of a roommate withholds consent; and
- (6) allowing patients, roommates and potential roommates to change rooms, when feasible, in those cases where consent is an issue.²⁷⁵

In contrast, the regulations indicate that an undue burden may include, for instance, “making structural changes to a room by anyone other than a licensed contractor, or a non-licensed person approved by the facility.”²⁷⁶ The facility bears the burden of proving that an accommodation requested by a resident is not feasible or constitutes an undue burden.²⁷⁷ Each facility, at its own expense, must post a sign in a conspicuous place at the entrance of every room that is conducting electronic monitoring that states, in both English and Spanish, the room is being monitored electronically.²⁷⁸

The statute and regulations prohibit a facility from discharging or otherwise discriminating or retaliating against a patient for authorizing the installation and use of an electronic monitoring device.²⁷⁹ A patient who complies with the provisions of the Patient Care Monitoring Act is immune from civil or criminal liability in connection with the use of the presence of

²⁷⁵N.M. CODE R. § 9.2.23.10(A).

²⁷⁶*Id.* § 9.2.23.10(B).

²⁷⁷*Id.* § 9.2.23.10(D).

²⁷⁸N.M. STAT. ANN. § 24-26-9; N.M. CODE R. § 9.2.23.18.

²⁷⁹N.M. STAT. ANN. § 24-26-11; N.M. CODE R. § 9.2.23.19.

a monitoring device.²⁸⁰ On the other hand, if a resident uses a monitoring device without the knowledge of the facility or without the prescribed form, then material obtained through the device may not be used in a civil action against the facility.²⁸¹ A person, other than a patient or the patient's surrogate, who intentionally hampers with, tampers with, obstructs, or destroys a monitoring device commits a fourth-degree felony.²⁸²

F. Introduction of Bills in Other States

In addition to the states discussed above, several other states have considered legislation that would have permitted nursing home residents to install electronic monitoring devices in their rooms. In most of these states, the proposed bills died after being referred to legislative committees.

1. Alabama

A bill allowing electronic monitoring was introduced in the Alabama House of Representatives in 2003.²⁸³ The bill was sent to the House Committee on Health on May 1, 2003, but died in committee.

2. Arkansas

An electronic monitoring bill introduced in the Arkansas General Assembly in 2001 was sent to the House Committee on Public Health, Welfare, and Labor.²⁸⁴ The General Assembly session ended, however, before any action was taken on the bill. A similar bill introduced in 2003 likewise died in committee.²⁸⁵ Following the beating death of nursing home resident Willie Mae Ryan,²⁸⁶ the Arkansas Legislature in 2005 again considered an electronic monitoring bill entitled "The Willie Mae Ryan

²⁸⁰N.M. STAT. ANN. § 24-26-7(B); N.M. CODE R. § 9.2.23.15.

²⁸¹N.M. STAT. ANN. § 24-26-7(A); N.M. CODE R. § 9.2.23.16.

²⁸²N.M. STAT. ANN. § 24-26-12; N.M. CODE R. § 9.2.23.20.

²⁸³H.R. 679, 2003 Reg. Sess. (Ala. 2003), *available at* WL AL-BILLS-OLD Database.

²⁸⁴H.R. 2420, 83d Gen. Assem., Reg. Sess. (Ark. 2001), *available at* WL AR-BILLS-OLD Database.

²⁸⁵H.R. 2452, 84th Gen. Assem., Reg. Sess. (Ark. 2003), *available at* WL AR-BILLS-OLD Database.

²⁸⁶*See Nurses Aide Says She Held Woman Down During Beating*, *supra* note 1; *see also* discussion *supra* Part I.

Nursing Home Resident Protection Act.”²⁸⁷ Although House of Representatives passed the bill by a vote of 82-2 (with sixteen abstentions), the Senate failed to garner enough votes to pass the bill.²⁸⁸

3. Louisiana

The Louisiana Legislature has considered several proposals that would allow residents to install electronic monitoring devices. The first bill was introduced in March 2001 and sent to the House Committee on Health and Welfare.²⁸⁹ The legislature’s session ended prior to any committee action on the bill. Two years later, the Louisiana Legislature considered two additional proposals. The first came in the form of a bill that would permit electronic monitoring in the rooms of nursing home residents, similar to the 2001 proposal.²⁹⁰ The bill died after being sent to the House Committee on Health and Welfare. In 2003, a second proposal in 2003 came in the form of a concurrent resolution that called for the implementation of a pilot program that would “study the practicality of installing electronic monitoring devices in nursing home facilities.”²⁹¹ The resolution was adopted by both the Louisiana House and Senate on June 19, 2003.²⁹²

²⁸⁷ H.R. 1392, 85th Gen. Assem., Reg. Sess. (Ark. 2005), *available at* WL AR-BILLS-OLD Database.

²⁸⁸ Passage of the bill in the Senate required eighteen votes. Although the final result showed fifteen yeas and six nays, thirteen members of the senate did not participate, and the bill failed to pass. *See Bill To Put Video Cameras in Nursing Homes Fails*, AP ALERT—POLITICAL, Apr. 12, 2005, *available at* WL 4/12/05 APALERTPOLITICS 00:15:53.

²⁸⁹ H.R. 457, 2001 Reg. Sess. (La. 2001), *available at* WL LA-BILLS-OLD Database.

²⁹⁰ H.R. 99, 2003 Reg. Sess. (La. 2003), *available at* WL LA-BILLS-OLD Database.

²⁹¹ H.R. Con. Res. 206, 2003 Reg. Sess. (La. 2003), *available at* WL LA-BILLS-OLD Database.

²⁹² The text of the concurrent resolution reads as follows:

WHEREAS, House Bill No. 99 of the 2003 Regular Session, relative to the installation of electronic monitoring devices in nursing home facilities, was brought before the House Committee on Health and Welfare in a meeting during the 2003 Regular Session; and

WHEREAS, the committee discussed and determined that it was appropriate and necessary to study whether the installation of such electronic monitoring devices would be efficacious, would provide a greater sense of security for residents and their families, and would not place an undue burden on the nursing home facility; and

WHEREAS, an electronic monitoring device shall include any one or more of the following:

4. Massachusetts

The Massachusetts General Court in 2001 considered legislation that would give each nursing home resident “the right, upon his request or his representative’s request, to have a video camera installed in his room and to have it kept in constant operation.”²⁹³ Although the bill was set aside for study by the Joint Committee on Human Services and Elderly Affairs, the bill died before any action was taken.²⁹⁴ State Representative Gale Candaras, who sponsored the 2001 legislation, filed a new bill on November 30, 2004 relating to installation of granny cams, but the House never took action on the proposal.²⁹⁵

5. Michigan

Several bills related to electronic monitoring have been introduced in both the House of Representative and the Senate in Michigan. Legislators introduced three electronic monitoring bills in 2002, but each bill died in

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- (1) A video surveillance camera,
 - (2) An audio device,
 - (3) A video telephone,
 - (4) An internet video surveillance device; and

WHEREAS, the pilot program shall be conducted in one nursing home facility that is licensed by the Department of Health and Hospitals, to be determined by the department in conjunction with the Louisiana Nursing Home Association; and

WHEREAS, no resident of a nursing facility shall be a participant of a pilot study unless the individual makes the decision to participate while of sound mind.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana directs the Department of Health and Hospitals and the Louisiana Nursing Home Association to work in conjunction to study the practicality of installing electronic monitoring devices in nursing home facilities by developing and implementing a pilot program in one facility to be determined by the department and the association and to report the findings to the House Committee on Health and Welfare and the Senate Committee on Health and Welfare prior to the convening of the 2004 Regular Session.

²⁹³H.R. 1202, 182d Gen. Ct., 2001 Reg. Sess. (Mass. 2001), available at WL MA-BILLS-OLD Database.

²⁹⁴For a brief discussion of the bill, see Michael Lesalandra, “Granny Cam” Bill Is Making Headway, BOSTON HERALD, Mar. 17, 2002, at 14, available at 2002 WLNR 295054.

²⁹⁵H.R. 1492, 184th Gen. Court, 2005 Reg. Sess. (Mass. 2005), available at WL MA-BILLS-OLD Database.

committee.²⁹⁶ In 2003 and 2005, additional bills were introduced in both the House and the Senate, but none of these proposals has passed even one chamber.²⁹⁷

6. Mississippi

In each session between 2002 and 2005, Mississippi state senator Deborah Dawkins sponsored legislation that would permit electronic monitoring. Each of the bills that she introduced on the subject, however, died in committee.²⁹⁸ Additionally, Dawkins introduced a proposed amendment to another bill that provided procedures related to background checks and health care workers.²⁹⁹ The Mississippi Senate rejected her proposal.³⁰⁰ Other bills relating to electronic monitoring that have been introduced in the Mississippi House of Representatives have also failed.³⁰¹

7. New Jersey

The Assembly and the Senate of the New Jersey Legislature considered bills in 2001 and 2002 that would have permitted electronic monitoring.

²⁹⁶H.R. 5786, 91st Leg., 2002 Reg. Sess. (Mich. 2002), *available at* WL MI-BILLS-OLD Database; S. 1120, 91st Leg., 2002 Reg. Sess. (Mich. 2002), *available at* WL MI-BILLS-OLD Database; H.R. 5603, 91st Leg., 2002 Reg. Sess. (Mich. 2002), *available at* WL MI-BILLS-OLD Database.

²⁹⁷H.R. 4044, 93d Leg., 2005 1st Reg. Sess. (Mich. 2005), *available at* WL MI-BILLS-OLD Database; H.R. 4159, 93d Leg., 2005 1st Reg. Sess. (Mich. 2005), *available at* WL MI-BILLS-OLD Database; S. 184, 93d Leg., 2005 1st Reg. Sess. (Mich. 2005), *available at* WL MI-BILLS-OLD Database; H.R. 4138, 92d Leg., 2003 1st Reg. Sess. (Mich. 2003), *available at* WL MI-BILLS-OLD Database; S. 82, 92d Leg., 2003 1st Reg. Sess. (Mich. 2003), *available at* WL MI-BILLS-OLD Database.

²⁹⁸S. 2363, 2005 Leg., Reg. Sess. (Miss. 2005), *available at* WL MI-BILLS-OLD Database; S. 2919, 2004 Leg., Reg. Sess. (Miss. 2004), *available at* WL MI-BILLS-OLD Database; S. 2415, 2003 Leg., Reg. Sess. (Miss. 2003), *available at* WL MS-BILLS-OLD Database; S. 2794, 2002 Leg., Reg. Sess. (Miss. 2002), *available at* WL MS-BILLS-OLD Database.

²⁹⁹*See* Patrice Sawyer, *Nursing Home Cameras Rejected*, CLARION-LEDGER, Mar. 6, 2003, at 1, *available at* LEXIS, News Library, CLLEDG File. Dawkins sought to amend House Bill 1077, which was later enacted by the Mississippi Legislature. For the text of the bill, see H.R. 1077, 2003 Leg., Reg. Sess. (Miss. 2003), *available at* WL MS-BILLS-OLD Database.

³⁰⁰*See id.*

³⁰¹H.R. 281, 2005 Leg., Reg. Sess. (Miss. 2005), *available at* WL MS-BILLS-OLD Database; H.R. 329, 2004 Leg., Reg. Sess. (Miss. 2004), *available at* WL MS-BILLS-OLD Database; H.R. 4, 2003 Leg., Reg. Sess. (Miss. 2003), *available at* WL MS-BILLS-OLD Database; H.R. 821, 2002 Leg., Reg. Sess. (Miss. 2002), *available at* WL MS-BILLS-OLD Database.

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Two Senate bills, introduced in 2001 and 2002 respectively, died in the Senate Committee on Health.³⁰² Another proposal was introduced to the New Jersey Assembly in 2002, but it died in the Assembly Committee on Senior Issues.³⁰³

8. North Carolina

An electronic monitoring bill was introduced to the North Carolina House of Representatives in 2001, but the bill died after being sent to the House Committee on Health.³⁰⁴

9. Ohio

An electronic monitoring bill introduced by Ohio state representative Annie L. Key in 2001 was considered by the House Committee on Retirement and Aging, but the bill eventually died at the committee stage.³⁰⁵ Although Key reportedly planned to reintroduce similar legislation in a later session,³⁰⁶ the Ohio Legislature has not considered proposals since 2001.

10. Pennsylvania

State representative Thomas C. Creighton introduced electronic monitoring bills to the Pennsylvania House of Representatives in 2001 and 2003. The 2001 legislation died in the House Committee on the Judiciary,³⁰⁷ and the 2003 bill died in the House Committee on Aging and Older Adult Services.³⁰⁸ Two other bills introduced during 2001 likewise

³⁰²S. 60, 210th Leg. (N.J. 2002), *available at* WL NJ-BILLS-OLD Database; S. 2231, 209th Leg. (N.J. 2001), *available at* WL NJ-BILLS-OLD Database.

³⁰³Assemb. 2123, 210th Leg. (N.J. 2002), *available at* WL NJ-BILLS-OLD Database.

³⁰⁴H.R. 996, Gen. Assem., 2001 Sess. (N.C. 2001), *available at* WL NC-BILLS-OLD Database.

³⁰⁵H.R. 216, 124th Gen. Assem. 2001-02 Reg. Sess. (Ohio 2001), *available at* WL OH-BILLS-OLD Database.

³⁰⁶*See* Encarnacion Pyle, *Families Pushing for Video Cameras in Nursing Homes*, COLUMBUS DISPATCH, Apr. 7, 2002, *available at* 1B, LEXIS, News Library, COLDIS File (quoting Key as follows: "Monitoring will help residents receive the quality care they deserve, aid facilities in identifying employees who are acting inappropriately and assist caregivers in identifying and correcting levels of care.").

³⁰⁷H.R. 1315, 185th Gen. Assem., Reg. Sess. (Pa. 2001), *available at* WL PA-BILLS-OLD Database.

³⁰⁸H.R. 5, 187th Gen. Assem., Reg. Sess. (Pa. 2003), *available at* WL PA-BILLS-OLD Database.

failed.³⁰⁹ Several members of the House of Representative authored a bill in 2005, which was referred to the House Committee on Aging and Older Adult Services.³¹⁰ The committee took no action on the bill after receiving it in March 2005.

11. South Carolina

In 2003, a proposed joint resolution introduced in the South Carolina House of Representatives would have convened a task force “to study the effectiveness of surveillance cameras in nursing homes and to report its findings and recommendations to the General Assembly.”³¹¹ The bill died in the House Committee on Medical, Military, Public and Municipal Affairs.

12. Tennessee

The Tennessee General Assembly considered three bills during the 103d General Assembly in 2004 that would have allowed residents to install electronic monitoring devices in their rooms.³¹² Only one of these bills survived the committee state, but it was withdrawn from consideration by the House of Representatives.

13. Virginia

A bill introduced in the 2003 Session of the Virginia General Assembly would have required the state’s Board of Health “to authorize the use of electronic monitoring devices in the room of a resident of a nursing home or certified nursing facility for the purpose of detecting abuse or neglect of elderly or disabled persons. . . .”³¹³ The bill was passed by indefinitely by the Senate Committee on Education and Health.

³⁰⁹H.R. 1440, 185th Gen. Assem., Reg. Sess. (Pa. 2001), *available at* WL PA-BILLS-OLD Database; H.R. 1297, 185th Gen. Assem., Reg. Sess. (Pa. 2001), *available at* WL PA-BILLS-OLD Database.

³¹⁰H.R. 970, 189th Gen. Assem., Reg. Sess. (Pa. 2005), *available at* WL PA-BILLS-OLD Database.

³¹¹H.R. 3250, 115th Gen. Assem. (S.C. 2003), *available at* WL SC-BILLS-OLD Database.

³¹²H.R. 3294, 103d Gen. Assem. (Tenn. 2003), *available at* WL TN-BILLS-OLD Database; S. 3283, 103d Gen. Assem. (Tenn. 2003), *available at* WL TN-BILLS-OLD Database; H.R. 3064, 103d Gen. Assem. (Tenn. 2003), *available at* WL TN-BILLS-OLD Database.

³¹³S. 922, Gen. Assem., Reg. Sess. (Va. 2003), <http://leg1.state.va.us/cgi-bin/legp504.exe?031+ful+SB922>.

14. West Virginia

West Virginia Delegate Harold Michael introduced bills in 2001, 2003, 2004, and 2005 that would have required nursing homes to permit the use of electronic monitoring devices by a resident or the resident's legal representative. In 2001 and 2003, the proposed bills died in the House Committee on the Judiciary.³¹⁴ The 2004 and 2005 proposals died after being sent to the House Committee on Health and Human Resources.³¹⁵

IV. CONCERNS REGARDING ELECTRONIC MONITORING STATUTES AND PROPOSALS AND THE LACK OF LEGISLATIVE ACTION

A. *Lack of Reliable Information About the Effectiveness of Electronic Monitoring*

Since 2001, the few studies that have been conducted about electronic monitoring in nursing homes suggest that proposals allowing such monitoring would be beneficial to improving the quality of care in those facilities. As of August 2005, eighteen states have had the opportunity to consider various proposals, and four have enacted legislation related to this monitoring. Nevertheless, these efforts, along with a considerable amount of commentary through legal scholarship and the general media, have failed to produce a significant level of reliable information that would support assertions that monitoring would benefit nursing home residents. On the other hand, opponents of these proposals, including representatives of nursing homes and the insurance industry, have produced little concrete evidence about the dangers of permissive electronic monitoring legislation other than abstract assertions about what could possibly happen if legislatures approved such legislation.

The study of cameras in nursing homes by the Florida task force in 2001³¹⁶ provides—at least perhaps—the strongest support for the approval of monitoring legislation. The report effectively dispelled many of the opposing declarations made by the nursing home and insurance industries, concluding that the resident's interest in quality of care should outweigh the

³¹⁴H.D. 2103, 78th Leg. (W. Va. 2003), *available at* WL WV-BILLS-OLD Database; H.D. 3039, 78th Leg. (W. Va. 2001), *available at* WL WV-BILLS-OLD Database.

³¹⁵H.D. 2272, 77th Leg., Reg. Sess., (W. Va. 2005), *available at* WL WV-BILLS-OLD Database; H.D. 2103, 79th Leg., Reg. Sess. (W. Va. 2004), *available at* WL WV-BILLS-OLD Database.

³¹⁶*See* discussion *supra* Part III.B.

myriad of objections raised by those industries.³¹⁷ Yet the response to the recommended legislation by the Florida Legislature—that is, inaction—is most typical of the response by the majority of state legislatures. One may only surmise the specific reasons for the lack of positive legislative response, but one may also reasonably assume that lobbying efforts by the nursing home and insurance industries has had a detrimental impact on the passage of such legislation. It is perhaps difficult to ignore such statements that electronic monitoring legislation would “eliminate any possibility of a rational and reasonably priced insurance product for nursing homes” in a state that adopt this legislation.³¹⁸

Oddly enough, no representative of the insurance industry testified before the Texas Legislature in 2001 when Texas adopted its legislation.³¹⁹ One might expect that a study of Texas nursing homes in the four years that passed after passage of this legislation would provide answers to concerns of the industries that oppose the monitoring proposals. Little or no evidence, however, has surfaced from Texas nursing homes regarding the impact of cameras in insurance or any of the other issues raised in the study by the Florida task force or other forums for this debate. This is true despite the fact that nursing home residents were required to have signed an information form concerning their rights to conduct electronic monitoring by July 1, 2003.³²⁰ Moreover, according to the observation of one official with the Texas Department of Aging and Disability Services, only a “fairly small” number of nursing home residents have taken advantage of the Texas legislation that allows these residents to monitor their rooms electronically.³²¹ Assuming this observation is accurate, it would likely prove useful for legislators in other states that are considering electronic monitoring legislation. However, primarily because the Texas legislation does not mandate collection of any data related to the use of electronic monitoring, the department does not maintain statistics on the use of the technology.³²² Thus, not only have advocates and opponents of electronic

³¹⁷ See CAMERAS IN NURSING HOMES, *supra* note 131, at 18–19.

³¹⁸ Deen Letter, *supra* note 124, at 2. The author of the letter represented Brown & Brown, Inc., the eighth largest insurance brokerage firm in the U.S. *Id.* at 1.

³¹⁹ See discussion *supra* Part III.A.2.

³²⁰ 40 TEX. ADMIN. CODE § 19.422 (2005). Regulations governing assisted living facilities required residents to have signed this form no later than October 1, 2004. 40 TEX. ADMIN. CODE § 92.129 (2005).

³²¹ Telephone Interview with Bevo Morris, Program Specialist, Policy Development and Support, Texas Department of Aging and Disability Services (June 27, 2005).

³²² *Id.*

monitoring failed to produce significant evidence about the effect of electronic monitoring in nursing homes, the first state that allowed this monitoring has not produced statistics about how many residents have actually taken advantage of this option.

Anecdotal evidence tends to support the use of cameras and other similar technology in the nursing home environment. Long-term care providers have already begun to discover the many uses of information technology in the homes of the elderly.

A technology laggard until recently, the long-term care sector is now embracing all manner of information technology that help older adults lead better, more independent lives. Technologies are emerging rapidly that sense motion, enhance communication, monitor health status remotely, and make activities of daily living easier and physical environments safer. By partnering with technology firms, long-term care providers are finding a boon in 21st century innovations.³²³

Nursing home residents in the near future may very well have much greater familiarity and knowledge of modern technology. Reports have demonstrated a significant increase in the number of Americans ages sixty-five and older using the Internet, including a 47% increase between 2000 and 2004 according to a study conducted by the Pew Internet and American Life Project.³²⁴ The report also revealed that the percentages of Americans who are between the ages of fifty and sixty-eight use the Internet in much higher numbers than those ages sixty-nine and older, including 62% of those between the ages of fifty and fifty-eight and 46% of those between the ages of fifty-nine and sixty-eight.³²⁵ Older Americans who have online access also “are often as enthusiastic as younger users in the major activities that define online life,” according to the report.³²⁶

Of course, an increase in the use of the Internet and related technologies does not necessarily mean that a significantly greater number of future nursing home residents will demand the installation of video cameras. Nevertheless, such a dramatic increase probably means that a greater number of seniors will be more accustomed to the use of this type of

³²³Marline Piturro, *Assistive Technology in LTC*, CARING FOR THE AGES, Dec. 2004, http://www.amda.com/publications/caring/december2004/assistive_tech.cfm.

³²⁴Susannah Fox, *Older Americans and the Internet*, PEW INTERNET AND AMERICAN LIFE PROJECT, 1, Mar. 25, 2004, http://www.pewinternet.org/pdfs/PIP_Seniors_Online_2004.pdf.

³²⁵*Id.* at 13.

³²⁶*Id.* at 3.

technology in their everyday lives and that these seniors will be less likely to view an electronic monitoring as a foreign intrusion.

B. Mixed Messages Regarding Potential Litigation and the Effect on Insurance Costs

Opponents of electronic monitoring legislation, particularly representatives of the facilities themselves along with representatives of the insurance industry, often suggest that this legislation would necessarily escalate the perceived crisis in nursing home litigation and liability insurance.³²⁷ In the four years following the enactment of the Texas legislation, however, little evidence has surfaced suggesting that the monitoring statute has had any effect on either the number of lawsuits filed or on insurance costs. Despite the fact that Texas nursing homes, along with those in Florida, have reportedly been the subject of a disproportionate number of general and professional liability claims since 1995,³²⁸ none of the reports that have investigated trends in Texas suggest that the electronic monitoring statute had any impact on the number of claims in the state.³²⁹

Instilling fear of the rise in nursing home litigation and subsequent costs is certainly not a new strategy for insurers or the nursing home industry. In fact, insurers have identified as causal factors in the increase in litigation most legislative efforts that have been designed to improve nursing home residents' quality of life. For instance, insurers claim that pieces of legislation designed to guarantee a minimum standard of care, including the creation of bills of rights for residents³³⁰ along with private rights to action,

³²⁷ See discussion *supra* Part II.E.2.a. For a summary of the perceived litigation crisis involving nursing homes, see Bernadette Wright, Nursing Home Liability Insurance: An Overview, 12–13 (Am. Ass'n of Retired Persons Pub. Pol'y Inst., Issue Paper No. 2003-08, July 2003), http://assets.aarp.org/rgcenter/health/2003_08_nh_ins.pdf.

³²⁸ See David Thomason, *Nursing Home Liability Rates: Factors Contributing to Rate Increases in Texas*, In Brief, Feb. 2001, 1, 6, (Feb. 2001) http://www.senate.state.tx.us/SRC/pdf/IN_BRIEF_Nursing.pdf.

³²⁹ See Aon Risk Consultants, Inc., Long Term Care: General Liability and Professional Liability, 2004 Actuarial Analysis 24–26 (June 2004), http://www.ahca.org/brief/aon_ltcanalysis_2004.pdf; see also David Stevenson & David M. Studdert, *The Rise in Nursing Home Litigation: Findings from a National Survey of Attorneys*, HEALTH AFFAIRS, Mar./Apr. 2003, at 219, 224–26, <http://content.healthaffairs.org/cgi/reprint/22/2/219>.

³³⁰ According to one study, nursing home litigants in Florida have relied on Florida statutes providing residents' rights more so than litigants in other states. Stevenson & Studdert, *supra* note 329, at 221. The Florida rights statute is located at FLA. STAT. ANN. § 400.022 (West 2002). Florida law also provides a private cause of action for a resident when a nursing home has violated

increase support for plaintiffs' claims against nursing homes.³³¹ Likewise, insurers have blamed increased awareness among residents of their rights and remedies,³³² including the increase in the availability of public information about deficiencies in the quality of care,³³³ as a contributor to the rise in litigation.³³⁴ Government action thus, according to many advocates for insurers and nursing home facilities, creates a vicious circle: that is, the government establishes minimum standards to address quality of care problems; adherence by nursing homes to the government's standards provide fodder for plaintiffs' lawyers who engage in litigation with nursing homes that violate these standards; the increase in litigation causes increased insurance costs and higher premiums; and the increase in costs to nursing homes results in substandard quality due to understaffing and similar problems.³³⁵

Arguments of this sort in the context of electronic monitoring legislation appear to be misplaced. Most states have limited their consideration to legislation that is permissive in nature, rather than legislation that would mandate installation of cameras in these facilities.³³⁶ Unless evidence surfaces suggesting that residents are actually using recordings as a means for pursuing litigation, fear of litigation alone should not be a factor when legislators determine whether to enact this type of legislation.

a right listed in section 400.022. See FLA. STAT. ANN. § 400.023 (West 2002). By comparison, Texas law also provides a statement of residents' rights, but it does not provide a specific private cause of action for violation of these rights. See TEX. HEALTH & SAFETY CODE ANN. § 242.501 (Vernon Supp. 2005).

³³¹ See Kathleen M. Wilson, *Nursing Home Liability Crisis*, CARING FOR THE AGES, July 2003, <http://www.amda.com/caring/july2003/liability.cfm>; see also David F. Bragg, *Dealing with Nursing Home Neglect: The Need for Private Litigation*, 39 S. TEX. L. REV. 1, 15–22 (1997).

³³² See Wilson, *supra* note 331.

³³³ See Richard S. Biondi, *Nursing Home Liability Insurance Crisis*, ACTUARIAL DIGEST, 2001, <http://www.milliman.com/pubs/nhlic.html>.

³³⁴ See Wilson, *supra* note 331.

³³⁵ The effect of litigation on nursing home insurance has been subject to dispute. For further discussion, see Thomason, *supra* note 328, at 2–3, 5; Stevenson & Studdert, *supra* note 329, at 225–26 (noting that “sizable portions of nursing home resources are being channeled toward litigation”); WRIGHT, *supra* note 327, at 12–23 (summarizing reports of the possible causes for costs and availability of nursing home liability insurance). For a study the relationship between litigation and the quality of care provided by nursing homes, see Jennifer L. Troyer & Herbert G. Thompson Jr., *The Impact of Litigation on Nursing Home Quality*, 29 J. HEALTH POL. POL'Y & L. 11 (2004).

³³⁶ For further discussion of permissive versus mandatory electronic monitoring legislation, see Cottle, *supra* note 13, at 133–46.

C. Nursing Facility Quality Assurance Team Report

During its regular session in 2003, the Texas Legislature again grappled with problems associated with nursing home quality, along with nursing home liability.³³⁷ In order to provide further investigation into problems in the nursing home industry, the Legislature created the Nursing Facility Quality Assurance Team (NFQAT).³³⁸ The statute charged the team with investigating a number of issues related to nursing homes, including minimum standards for Texas nursing homes that will be included in contracts between facilities and state agencies³³⁹ and improvements to consumers' level of access relating to nursing homes.³⁴⁰ The legislation additionally required the team to study the risk factors contributing to lawsuits against nursing facilities, as these factors are identified by the Texas Department of Insurance.³⁴¹

The NFQAT made more than a dozen recommendations when it issued its report on October 1, 2004.³⁴² The report, consistent with the legislative

³³⁷The 78th Legislature in Texas is best known for the enactment of a major tort reform proposal. The legislation, still commonly referred to by its bill number—House Bill 4—amended a number of provisions in different statutory codes. Among the provisions of this legislation was a section that limits the admissibility of certain evidence relating to nursing homes. See Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 16.01–.02, 2003 Tex. Gen. Laws 847, 891–92 (codified at TEX HUM. RES. CODE ANN. § 32.060; TEX. HEALTH & SAFETY CODE ANN. § 242.017). For further discussion of House Bill 4, see generally Michael D. Morrison, *Texas Tort Law—2003: It Was a Very ____ Year*, 56 BAYLOR L. REV. 423 (2004).

³³⁸TEX. HUM. RES. CODE ANN. § 32.060 (Vernon Supp. 2004–2005). The team consisted of nine individuals appointed by the governor, including two physicians, a registered nurse, three nursing facility advocates, and three representatives in the nursing facility industry. *Id.* § 32.060(b).

³³⁹*Id.* § 32.060(g)(1). Under the statute, the minimum standards should both ensure that nursing homes are providing medical assistance that meets or exceeds minimum standards of care and to encourage nursing facilities to provide the highest quality of care to residents. *Id.* § 32.060(g)(1)(A),(B).

³⁴⁰*Id.* § 32.060(g)(2). Regarding improvements to the consumer access to information, the statute charged the team with investigating improvements to “the types and amount of information to which consumers have access” and to the data systems that contain information relating to inspections of nursing homes and the quality of care provided at nursing homes. *Id.* § 32.060(g)(2)(A),(B).

³⁴¹*Id.* § 32.060(h). The statute charged the team to “consider for inclusion in the minimum standards” under which nursing homes must operate, the practices recommended by the Texas Department of Insurance for reduction in nursing home litigation and other standards designed to improve the quality of care at nursing homes. *Id.* § 32.060(h)(2)(A), (B).

³⁴²NURSING FACILITY QUALITY ASSURANCE TEAM, 79TH LEG., RECOMMENDATIONS TO PROMOTE HIGH-QUALITY CARE FOR RESIDENTS OF TEXAS NURSING FACILITIES 1–2 (2004).

mandate,³⁴³ focused on additional standards for Medicaid contract renewal,³⁴⁴ consumer access to information,³⁴⁵ along with additional legislative and administrative recommendations³⁴⁶ and issues to study in the future.³⁴⁷ Not surprisingly,³⁴⁸ though also not insignificantly, the report does not refer at all to electronic monitoring among its final recommendations or discussion.³⁴⁹ Electronic monitoring, however, is not irrelevant in this context. The report stresses the need for improved consumer access to information such as Texas' Long Term Care Quality Reporting System³⁵⁰ and the Center for Medicare and Medicaid Services' Nursing Home Compare system³⁵¹ on the Internet. Consumer access to information about deficiencies is a form of self-help, allowing residents and their families to make better informed decisions about facilities.³⁵² Self-help is precisely the benefit of permissive electronic monitoring—it provides a level of protection against abuse and neglect and allows family members and others to communicate with residents, which should improve the resident's quality of life.³⁵³ If few residents and families are taking advantage of this option, then perhaps an increase in consumer awareness of this option could benefit them.

D. Language of the New Mexico Legislation

A final area of concern relates to the language in the New Mexico electronic monitoring statute, along with the corresponding regulations, both passed in 2004. These concerns are as follows:

³⁴³ See *id.* at 3.

³⁴⁴ *Id.* at 4–10.

³⁴⁵ *Id.* at 11–12.

³⁴⁶ *Id.* at 12–13.

³⁴⁷ *Id.* at 13.

³⁴⁸ The legislation that created the NFQAT focused mostly on cost savings in health and human services. See HOUSE COMM. ON APPROPRIATIONS, BILL ANALYSIS, Tex. H.B. 2292, 78th Leg., R.S. (2003).

³⁴⁹ See *id.*

³⁵⁰ NURSING FACILITY QUALITY ASSURANCE TEAM, *supra* note 342, at 11. The Long Term Care Quality Reporting System is available online at <http://facilityquality.dhs.state.tx.us>.

³⁵¹ *Id.* The CMS's Nursing Home Compare system is available online at <http://www.medicare.gov/NHCompare/home.asp>.

³⁵² See Jennifer L. Hilliard, *The Nursing Home Quality Initiative*, 26 J. LEGAL MED. 41, 44 (2005).

³⁵³ See Kohl, *supra* note 13, at 2091.

1. Patient or Surrogate

In several instances, the statute specifies that the statute applies to either a patient or the patient's surrogate.³⁵⁴ For instance, the statute and regulations allow either a patient or a surrogate to authorize the installation and use of a monitoring device, subject to some conditions.³⁵⁵ However, within the same section, the statute specifies that all costs for the monitoring device must be paid for by the patient³⁵⁶ and that the patient may establish limitations on the device's use,³⁵⁷ but neither of these sections refers to the patient's surrogate. The regulations, on the other hand, specify that either the patient or the surrogate may pay the costs of the device³⁵⁸ or place limitations on the device's use.³⁵⁹ The omission of surrogate in this instance appears to be a simple mistake in the legislation, but the language in the statute should nevertheless be consistent with the language in the regulations.

2. Accommodation Without Undue Burden on the Facility

The New Mexico statute requires a facility to accommodate the installation of a monitoring device unless the installation will place an undue burden on the facility.³⁶⁰ Though the statute does not define reasonable accommodation or undue burden, the regulations provide examples.³⁶¹ The example of undue burden in the regulations, however, only refers to structural changes made by someone other than a licensed contractor or an unlicensed contractor who is approved by the facility.³⁶² The regulation perhaps assumes that installation of a monitoring device would not require significant structural changes within a facility, but the

³⁵⁴The statute defines "patient" as the resident of the facility. N.M. STAT. ANN. § 24-26-2(D) (West Supp. 2005); *see also* N.M. CODE R. § 9.2.23.7(D) (Weil 2005). The statute defines "surrogate" as the "legal guardian or a legally appointed substitute decision-maker who is authorized to act on behalf of a patient." N.M. STAT. ANN. § 24-26-2(F) (West Supp. 2005); *see also* N.M. CODE R. § 9.2.23.7(G) (Weil 2005).

³⁵⁵N.M. STAT. ANN. § 24-26-3(A) (West Supp. 2005); N.M. CODE R. § 9.2.23.8(A) (Weil 2005).

³⁵⁶N.M. STAT. ANN. § 24-26-3(A)(3) (West. Supp. 2005).

³⁵⁷*Id.* § 24-26-3(B).

³⁵⁸N.M. CODE R., § 9.2.23.8(A)(3) (Weil 2005).

³⁵⁹*Id.* § 9.2.23.8(B).

³⁶⁰N.M. STAT. ANN. § 24-26-4 (West Supp. 2005).

³⁶¹For a discussion of these terms, *see supra* notes 274–76 and accompanied text.

³⁶²N.M. CODE R. § 9.2.23.10(B).

regulation nevertheless is unclear about what it contemplates regarding structural changes in the facility. For instance, the regulation requires the facility to permit the patient to install Internet access lines if the monitoring device relies on Internet technology,³⁶³ but the regulation's application remains unclear in the event that the installation requires what the facility considers to be a structural change within the facility. According to the terms of the regulation, this structural change would have to be performed by a licensed contractor, and one could only surmise that those who install access lines for Internet service providers are not likely to be licensed contractors. Hiring a licensed contractor could increase the costs associated with the installation of the device to the extent that it would effectively prohibit the resident from installing the monitoring device or force the resident to choose an alternative to the resident's choice.

3. Criminal Prosecution for Tampering with a Device

A final concern relates to provisions in the New Mexico statute and regulations—which are nearly identical to a provision in the Texas statute³⁶⁴—establishing criminal liability for anyone who intentionally hampers, obstructs, tampers with, or destroys a monitoring device in a facility.³⁶⁵ The New Mexico statute classifies this as a fourth degree felony³⁶⁶ (the Texas statute classifies the same offense as a Class B misdemeanor³⁶⁷). While the legislature obviously included the provision, at least in part, for its deterrent effect, enforcement of such a provision may prove most difficult. A monitoring device may be rendered inoperative due to any number of circumstances, such as power failure, tape failure, improper installation, or the like. Criminal proscription of abuse of an elder has not effectively prevented such abuse, and an employee inclined to abuse a patient may not be deterred by the prospect of criminal prosecution for disengaging the monitoring device prior to carrying out a wrongful act against a resident.

³⁶³*Id.* § 9.2.23.10(C).

³⁶⁴TEX. HEALTH & SAFETY CODE ANN. § 242.852 (Vernon Supp. 2004–2005).

³⁶⁵N.M. STAT. ANN. § 24-26-12 (West Supp. 2005); N.M. CODE R. § 9.2.23.20 (Weil 2005).

³⁶⁶N.M. STAT. ANN. § 24-26-12; N.M. CODE R. § 9.2.23.20 (Weil 2005).

³⁶⁷TEX. HEALTH & SAFETY CODE ANN. § 242.852(a).

V. RECOMMENDATIONS

Despite the ongoing series of disputes regarding electronic monitoring between the different camps on this issue, much of the debate has focused on bare assertions about how these devices *could* help nursing home residents by deterring abuse or how the devices *could* harm the services offered by nursing home facilities. However, before any state can make a reasoned decision regarding the enactment of legislation—whether such legislation is permissive or mandatory in nature—these states need more information in order to clarify the issues.

A. More Information is Needed About Electronic Monitoring in Texas and New Mexico Nursing Homes

The Texas and New Mexico state legislatures each enacted electronic monitoring statutes in efforts to allow residents and their families to take actions to curb abuse and neglect. In furtherance of this effort, both legislatures should require state agencies—the Department of Aging and Disability Services in Texas and the Health Facility Licensing and Certification Bureau in New Mexico—to study and provide some statistics regarding the usage of monitoring devices in nursing homes in those states. At the least, these agencies should determine how many nursing home residents have installed devices since the statutes in those states became effective. If the percentage of residents is relatively small, then the agencies should identify reasons for these low numbers, such as lack of interest, cost concerns, or any other factors.

B. The Federal Government Should at Least Take Steps Adopted in Maryland and Louisiana

Even if the federal government is not inclined to require nursing homes to permit electronic monitoring, either as a requirement for facilities with Medicare beneficiaries or otherwise, the federal government is in the best position to provide valuable information to states that consider permissive legislation in this area. The federal government would be well advised to look to proposals in Louisiana (pilot program³⁶⁸) and Maryland (guidelines³⁶⁹) to provide some guidance to these states. With respect to a pilot program, the federal government would be in a better position to

³⁶⁸ See discussion *supra* Part III.D.

³⁶⁹ See discussion *supra* Part III.F.3.

establish a broader program³⁷⁰ that could include multiple nursing homes in several states, particularly in Florida, California, and even Texas.³⁷¹ A federal feasibility study such as this would likely provide greater evidentiary support in favor of or even in opposition to permissive electronic monitoring. At the least, it would provide residents who may consider using a device with more concrete information about whether the device is likely to be effective. In addition, guidelines similar to those adopted in Maryland could provide better direction to nursing homes on a national basis about how to implement policies related to use of electronic monitoring.

C. Federal and State Government Agencies Should Clear Up Questions Regarding the Viability of Electronic Monitoring

Given that the debate regarding electronic monitoring has given rise to at least as many questions as it has provided answers, the federal government along with state governments should make efforts to provide more definitive answers to several basic questions regarding electronic monitoring. The information that government agencies should seek should relate to basic issues related to whether monitoring is more beneficial to residents than it is detrimental to facilities. Some sample questions could appear as follows:

Does electronic monitoring in nursing homes benefit residents in terms of deterring abuse and neglect in nursing homes?

Does permissive electronic monitoring in nursing homes increase the likelihood of litigation against a nursing home facility?

Does permissive electronic monitoring likely cause an increase in liability insurance costs?

³⁷⁰In its resolution, the Louisiana Legislature limited the pilot program to one nursing facility. H.R. Con. Res. 206, 2003 Reg. Sess. (La. 2003), *available at* WL LA-BILLS-OLD Database.

³⁷¹Florida, California, and Texas contain the largest number of elderly citizens in the United States. *See* Thomason, *supra* note 328, at 1.

VI. CONCLUSION

Indifference on the part of nursing home residents and their families has perhaps resulted in the lack of widespread use of electronic monitoring devices in nursing homes. Insufficient demand would, of course, render as moot issues associated with legislation permitting use of the devices. This may well have been the experiences in Texas and New Mexico. Conversely, if the hesitancy on the part of legislatures relates to fears of litigation and insurance costs—generated, of course, from the insurance industry and the facilities themselves—then legislatures need facts that would substantiate or refute these fears. Without sufficient information, legislators are left with various unknown factors in making their decisions—an unfortunate reality given the prospect the electronic monitoring could offer.