Granny Cams and Smartphones:
Use of Audio and Video Footage in the Nursing Home Setting

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I. Introduction

Technological advances in our society have redefined the way that businesses, including nursing homes, are operated and managed. Video surveillance cameras, also known as “granny cams,” placed in nursing homes are becoming more prevalent with increased access to camera devices and the use of smartphones and social media allowing residents and residents’ family members to stay connected at any time of the day. These advances have prompted significant changes in the culture of the long-term care industry.

Over the past two decades, a number of states have enacted legislation addressing the installation of granny cams in nursing home facilities. Other states have debated the need for such legislation. As a result, questions have been raised regarding facility, personal and government usage of the footage captured by granny cams and smartphones, the impact of covert surveillance footage on litigation and whether such footage can be used as evidence in criminal or civil legal matters.

II. Background/History

A. Facility, Personal and Government Usage

1. Facility Usage

There is limited data regarding the rates at which nursing homes use resident-room cameras to detect or deter abuse. However, in 2016, researchers at Brown University conducted a limited survey to measure the use of granny cams in nursing homes around the country and to understand the nursing home industry’s view on the pros and cons of the use of video surveillance in nursing homes. More than half of the 228 survey respondents represented nursing homes and about twenty-five percent represented assisted living facilities. The remaining respondents represented a combination of both. The survey revealed that of the 228 respondents, twenty-five percent of the facilities allow family members to install cameras in resident rooms. Sixteen percent reported at least one camera in use at their facility. It is also worth noting that approximately half of the facilities that either allow cameras or have at least one camera in use do not require any notification of the camera’s presence.

The respondents were also asked to list potential concerns related to granny cam use in their facilities. The respondents commonly cited resident, roommate, staff and visitor privacy as a concern. Clara Ber-ridge, Camera Use in Resident Rooms: Survey Results, McKnight’s Senior Living, June 27, 2016, http://www. mcknightsseniorgiving.com/guest-columns/camera-use-in-resident-rooms-survey-results/article/505607/.

These responses are aligned with the nursing home industry’s general opposition to the use of granny cameras in facilities. Nursing home operators have argued that cameras degrade residents by recording private moments, such as bathing and medical examinations. In addition, nursing home operators fear that the use of granny cams will only worsen the continuing problem of finding qualified nursing home staff. Tracey Kohl, Watching Out for Grandma: Video Cameras in Nursing Homes May Help to Eliminate Abuse, 30 Fordham Urban Law Journal 2083, 2083 (2002).

Some facilities, however, have pushed for the use of video surveillance in residents’ rooms. For instance, in California, an owner of a residential facility for Alzheimer’s disease and dementia patients argued that elderly patients in nursing homes should have the option of installing video surveillance cam-
eras in their rooms to help prevent lapses in resident care. As a result of this lobbying, in 2015, California’s Department of Social Services issued guidelines allowing in-room cameras as long as the resident and their families agree to its use. Prior to the Department of Social Services’ guidelines, video surveillance cameras were only permitted to monitor residents in common areas, such as dining facilities and hallways. Mari Payton, State Approves Security Cameras in Patient Rooms at Assisted Living Homes, 7 San Diego, Aug. 11, 2015, http://www.nbcsandiego.com/news/local/State-Approves-Security-Cameras-in-Patient-Rooms-at-Nursing-Homes-321489631.html.

2. Personal Usage

There has been an increasing demand by nursing home residents’ family members to install granny cams in residents’ rooms. Granny cams are often used by family members who suspect abuse but have been ignored by authorities regarding their concerns.

For instance, in 2010, Susan Master suspected that her 95-year-old mother was being mistreated in a private residential care facility in Columbus, Ohio. She placed a clock radio, which included a video camera, in her mother’s room. The surveillance video revealed Ms. Master’s mother calling for help for several hours. When an aide finally arrived, the aide discovered that Ms. Master’s mother had soiled her bed. In response, the aide yelled at Ms. Master’s mother and threw a clean gown at Ms. Master’s mother, hitting her in the face. Ms. Master shared the footage with the facility’s director and the aide was immediately fired. Eric Lyttle, Spying on Nursing-Home Employees at Issue, The Columbus Dispatch, Jul. 1, 2013, http://www.dispatch.com/article/20130701/NEWS/307019681.

Similarly, in 2012, Doris Racher placed a motion-activated camera in her mother’s room at a nursing home in Oklahoma City, Oklahoma. The video captured an aide stuffing latex gloves into Ms. Racher’s mother’s mouth while another aide taunted her and tapped her on the head. The aides then removed Ms. Racher’s mother from her wheelchair and tossed her onto a bed. One aide performed forceful chest compressions on Ms. Racher’s mother. Ms. Racher’s mother died soon after.

Following this incident, one of the aides involved pled guilty to abuse and neglect. The other aide is believed to have fled the country. The outcry from Ms. Racher’s mother’s case led Oklahoma to pass legislation on November 1, 2013, explicitly permitting residents in long-term care facilities to use video surveillance cameras in their rooms. Jan Hoffman, Watchful Eye in Nursing Homes, N.Y. Times, Nov. 18, 2013, https://well.blogs.nytimes.com/2013/11/18/watchful-eye-in-nursing-homes/.

3. Government Usage

As in the case of Ms. Racher’s mother, a growing number of states have used granny cams to investigate allegations of nursing home abuse, neglect and mistreatment. For instance, in 2013, the Attorney General of Ohio shut down a Zanesville nursing home after authorities installed video surveillance cameras in the residents’ rooms because of complaints of mistreatment. This was the first time Ohio state authorities used surveillance cameras to investigate nursing homes. When faced with the question as to whether the use of the surveillance cameras was legal, the Attorney General’s office stated that although the use of the surveillance cameras was a type of search, the office did not need a warrant because the Attorney General’s office acquired consent to install the cameras from every resident or guardian of a resident whose care was recorded. Lyttle, supra.

Hidden camera video surveillance has also been used by state governments to obtain criminal convictions in nursing home abuse investigations. In 2010, the New York Attorney General arrested twenty-two nursing home employees after surveillance footage revealed neglect and other forms of mistreatment of residents in two different facilities. The Attorney General installed hidden cameras in nursing homes across New...
York State. Similar to the case in Ohio, the Attorney General’s office obtained the consent of the residents’ family members prior to installing the hidden surveillance cameras.

In the targeted nursing homes, defendants falsified medical records to cover up their neglect. One employee even created fake records of a resident’s annual medical exam, which was never conducted. The surveillance footage also revealed that nurses failed to administer medication, check residents’ vital signs, change residents’ underwear for long periods of time and treat residents’ bedsores. One of the civil suits brought against one of the nursing homes was initiated by the New York Medicaid Fraud Control Unit, which investigates individuals and companies that carry out improper or fraudulent Medicaid billing schemes. The Nat’l Trial Lawyers’ Nursing Home Trial Lawyers Ass’n, Twenty-Two Arrested in Hidden Camera Nursing Home Probe, Apr. 1, 2010, http://www.nhtla.com/2010/04/twenty-two-arrested-in-hidden-camera-nursing-home-probe/.

The New Jersey Attorney General has similarly used video surveillance cameras to prosecute nursing home employees. Additionally, in December of 2016, the Attorney General announced a program, “Safe Care Cam,” to provide surveillance cameras to family members of the elderly who suspect abuse by home care workers and caregivers at nursing home facilities. In applying to receive a camera, family members must agree not to use the camera outside of the resident’s room in order to respect the privacy of other residents and facility employees. The State of N.J. Dep’t of Law and Pub. Safety, Office of the Att’y Gen., New Jersey Attorney General and Division of Consumer Affairs Announce Plans to Expand “Safe Care Cam” Program, Tighten Home Health Aides Rules to Enhance Protection of Elderly and Disabled (May 9, 2017).

Florida legislators have also grappled with instituting a program to promote the use of granny cams in nursing homes. In 2002, Senator Ginny Brown introduced a bill in the state Senate’s Health Aging and Long-Term Care Committee for a year-long program to test the impact of cameras on incidents related to neglect, mistreatment and abuse in nursing homes. The bill, which was approved by the Long-Term Care Committee, called for nursing homes from different parts of Florida to apply to have video surveillance cameras installed in their facilities’ common areas and in individual rooms if such a request was made by residents or residents’ guardians and consented to by roommates. For some nursing home employees, the possibility of the pilot program raised concerns with regard to the lack of trust between nursing home employees and nursing home owners. Ronni Sayewitz, Debate Over Nursing Home Cameras Focuses on Florida, S. Fla. Bus. Journal, Feb. 25, 2002, http://www.bizjournals.com/southflorida/stories/2002/02/25/story8.html.

The bill for the Florida pilot program was eventually defeated in the Florida Senate and; thus, the question as to what impact video surveillance cameras would have on Florida nursing homes was never resolved.

B. Devices Used

The cost of granny cams can range anywhere from $30.00 to $400.00. The cameras installed by family members of nursing home residents typically come in two forms. They are either a closed circuit video camera or a web camera. Video cameras often include motion detectors that activate the camera when there is movement in the resident’s room as well as night vision. Video cameras record surveillance footage onto a tape which can then be watched later by family members. Web cameras, on the other hand, maintain a continuous stream to the internet, allowing family members to access surveillance footage in real time. Selket Nicole Cottle, “Big Brother” and Grandma: An Argument for Video Surveillance in Nursing Homes, 12 Elder L.J. 119, 123 (2004). Significantly, these cameras are both affordable and easy to use, making them highly accessible to residents and residents’ family members. In addition, these cameras can be placed in covert locations, including radios, alarm clocks or plants. Hoffman, supra.

It should also be noted that abuse in nursing homes has been captured by relatives of residents using smartphones. Id. Accordingly, nursing homes must take into account the implications of video footage captured
on smartphones, tablets and other electronic devices, as such devices have become increasingly accessible and affordable over the past decade and can therefore be used by anyone for the purpose of covert surveillance.

C. Change in Culture and Social Media’s Impact

Further, nursing homes have faced civil and criminal penalties as a result of nursing home employees posting embarrassing and dehumanizing photographs and videos of residents on social media platforms. ProPublica, a nonprofit investigative journalism organization, identified thirty-five cases from the years 2012 to 2015 where nursing home employees secretly shared photographs or videos of residents. Some of the residents were partially or completely naked in the photographs and videos. Approximately sixteen of the cases involved photographs and videos that were shared on Snapchat, a social media platform that allows users to upload photographs and videos, which then disappear twenty-four hours after they are posted. As discussed in more detail below, posting such photographs and videos without residents’ permission on social media may violate the Health Insurance Portability and Accountability Act (HIPAA), which imposes both civil and criminal penalties. Charles Ornstein, Nursing Home Workers have been Posting Abusive Photos of Elderly on Social Media, The Washington Post, Dec. 21, 2015, https://www.washingtonpost.com/national/health-science/abusive-photos-on-social-media-pose-rising-threat-to-nursinghome-patients/2015/12/19/d71b4204-9ec8-11e5-bce4708fe33e3288story.html?utmterm=.660cb307e094.

Consequently, nursing homes must also consider implementing staff training and written policies that prohibit employees from capturing and sharing nursing home video footage. These policies should specifically prohibit sharing footage in any capacity, including on social media platforms such as Snapchat, YouTube, Facebook, Instagram and Twitter. In addition to increasing exposure to civil and criminal liability, generally, nursing home surveillance videos that have “gone viral” on social media have only served to deteriorate the trust between nursing homes and nursing home residents and their family members.

III. Legal Considerations

A. Privacy

1. Resident and Roommate Privacy

The Nursing Home Reform Act provides that a nursing home “must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of quality of life of each resident.” The Act further provides that nursing homes must “provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident.” 42 U.S.C.A §§1396r(b)(1)(A), (b)(2)(A).

The Code of Federal Regulations also sets forth rights for residents of nursing homes that participate in Medicaid programs. The Code unequivocally guarantees nursing home residents’ right to privacy. 42 C.F.R. §483.10(h). Consequently, prior to installing video surveillance cameras in nursing homes, an important consideration that must be made by facilities, families of residents and government agencies is whether doing so would violate a resident’s right to privacy.

The United States Supreme Court has held that, with regard to electronic surveillance, the Fourth Amendment guarantees a privacy interest where a person has a reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 353 (1967). Applying the “reasonable expectation of privacy” analysis in the nursing home context is difficult because nursing homes include elements of both private and public places.

For instance, although a court would likely find that a resident has a reasonable expectation of privacy in his/her room, a court could determine that a resident does not have a reasonable expectation of pri-
privacy in common areas within a nursing home, such as a dining area or hallway. Kohl, supra at 2093. Based on a resident’s reasonable expectation of privacy in his/her room, however, the general practice is that a facility must obtain consent from a nursing home resident before conducting surveillance. Elizabeth Adelman, Video Surveillance in Nursing Homes, 12 ALB. L.J. Sci. & Tech. 821, 829 (2002).

This same privacy analysis would apply to a nursing home resident’s roommate because, even though a roommate impliedly consents to a lower expectation of privacy by agreeing to live with a roommate, a roommate cannot impliedly consent to electronic monitoring. Thus, prior to conducting video surveillance of a room, a facility or resident is required to obtain consent from the resident’s roommate. Kohl, supra at 2097.

Long-term care facilities are also covered entities under HIPAA. HIPAA requires that patients’ protected health information remains confidential. The definition of protected health information under HIPAA includes images or other types of recordings of patients. HIPAA; P.L. No. 104-191, 110 Stat. 1938 (1996). Accordingly, permitting a resident to be recorded without their consent could violate HIPAA and therefore result in sanctions instituted by the Office of Civil Rights if resident recordings are not adequately safeguarded pursuant to HIPAA.

2. Employee Privacy

With regard to employees, it appears that federal law provides little privacy protection in the context of video surveillance in nursing homes. Employees sometimes turn to the Electronic Communications Privacy Act, also known as the Wiretap Act, if they feel as though their privacy has been violated. Under the Act, it is illegal to intentionally or purposefully intercept, disclose or use the contents of any wire, oral or electronic communication through the use of a device. 18 U.S.C. §2511(1). The Act however, only governs communications and therefore does not provide recourse if an individual is monitored through silent video surveillance. In addition, the Act includes an exception for employers who use surveillance to supervise and evaluate employees. This exception would likely include monitoring nursing home staff for mistreatment of residents. As a result, employees often turn to state law for privacy protection. Kohl, supra at 2097-98.

Employees commonly assert an invasion of privacy cause of action; however, this tort is not recognized by all states. In addition, recovery under the invasion of privacy tort is typically limited to very private areas, such as bathrooms. Consequently, covert video surveillance in staff break rooms, locker rooms, hallways or residents’ rooms likely would not be found to provide recovery for an employee under a state’s invasion of privacy cause of action. Id.

3. Nursing Home Privacy

It is well established law that a corporation does not have a recognized right to privacy because violation of the right to privacy relates to injury to human feelings and dignity. See, e.g., U.S. v. Morton Salt Co., 338 U.S. 632, 652 (1950). In addition, the Second Circuit has determined that the government’s interest in the regulation of nursing homes with regard to patient care standards outweighs a nursing home’s “virtually non-existent” right of privacy. Blue v. Koren, 72 F.3d 1075, 1080 (2d Cir. 1995). Accordingly, a claim that a nursing home’s right to privacy was violated by the installation of video surveillance would likely fail. Katherine Anne Meier, Removing the Menacing Specter of Elder Abuse in Nursing Homes through Video Surveillance, 50 Gonz. L. Rev. 29, 35 (2014).

B. State Law

The following is a breakdown of state specific video surveillance law that is relevant to the nursing home context. Please note that this breakdown only includes states with relevant legislation and/or regulations.
1. Alabama

In Alabama, the law prohibits an individual from engaging in surveillance while trespassing in a private place. A private place is where one may reasonably expect to be safe from casual or hostile intrusion or surveillance. Ala. Code §§13A-11-30, 13A-11-32 (2013). In addition, Alabama’s eavesdropping statute criminalizes the use of any device to record communications without the consent of at least one party engaged in the communication. Id. §13A-11-31. These laws could preclude people from hiding a camera in a nursing home resident's room to secretly record the care the resident was receiving.

2. Arizona

In Arizona, it is unlawful for any person to knowingly photograph, videotape, film, digitally record or by any other means secretly view another person without that person’s consent in a bathroom, bedroom or other location where the person has a reasonable expectation of privacy and the person is urinating, defecating, dressing, undressing, nude or involved in sexual contact. Ariz. Rev. Stat. §13-3019 (1996).

3. Arkansas

In Arkansas, image recording for the purpose of secretly videotaping a person in a residence, school or business is expressly prohibited if that person is in a private area out of public view, has a reasonable expectation of privacy and has not consented to the observation. Ark. Code Ann. §5-16-101 (2010).

4. California

California's Department of Social Services has issued guidelines that allow video surveillance in both common and private areas of long-term care facilities. Audio recording, however, is prohibited. In addition, the guidelines require residents’ written informed consent. Cal. Dep't of Soc. Services, Reference Material for Office Functions, Guidelines for Use of Video Surveillance (2015).

5. Delaware

In Delaware, a person may not install hidden camera surveillance in a private place without the consent of the “person or persons entitled to privacy there.” Del. Code Ann. tit. 11 §1335 (2014).

6. District of Columbia

In D.C., it is unlawful for a person to electronically record an individual who is using the bathroom, totally/partially undressed or changing clothes or engaging in sexual activity without the express and informed consent of the individual being recorded. Express and informed consent is only required when the individual engaging in such activities has a reasonable expectation of privacy. D.C. Code §22-3531 (2012).

7. Georgia

In Georgia, covert recording is prohibited, except in very specific circumstances, such as recording conducted by law enforcement and by private investigators to prove abuse or neglect. Ga. Code Ann. §§16-11-60-16-11-64 (2010).

8. Hawaii

In Hawaii, the unauthorized installation of any recording or amplifying device is expressly prohibited. The act of installation itself is subject to prosecution even if no recording took place. Haw. Rev. Stat. §711-1111 (2011).
9. Illinois

10. Kansas

11. Louisiana
In Louisiana, the state's video voyeurism law bars the use of any type of hidden camera to observe or record a person where that person has not consented if the recording “is for a lewd or lascivious purpose.” La. Rev. Stat. Ann. §14:283.

12. Maine

13. Maryland
Maryland’s Department of Health and Mental Hygiene has guidelines for nursing centers if they choose to allow individuals to install cameras. Cameras may be placed into a resident’s room, but only if the facility permits them. Md. Dep’t of Health and Mental Hygiene, Guidelines for Electronic Monitoring, (2003).

14. New Mexico
In New Mexico, a resident or a resident’s legal representative is expressly permitted to place surveillance cameras in a resident’s room provided that the facility is given notice of the installation and use of the monitoring device. Patient Care Monitoring Act, N. M. Stat. Ann. 26 §24-26-3 (2004).

15. New York
In New York, you may videotape a subject without her consent, unless she/he has a reasonable expectation of privacy. Recording of another person's image for voyeuristic, profitable, defamatory or exploitative purposes is expressly prohibited and constitutes a Class E felony, punishable by four to seven years in prison. Stephanie's Law, N.Y. Penal Law §250.50 (2003).

16. Oklahoma
In Oklahoma, residents of nursing homes may install video surveillance cameras in their private rooms. A resident or representative of a resident who wishes to conduct electronic monitoring is required to notify the facility using a consent form prescribed by the Oklahoma Department of Health. Okla. Stat. tit. 63, §§1-1953.2, 1953.5, 1953.6 (2014).

17. Texas
In Texas, nursing home residents are expressly permitted to place surveillance cameras in their rooms. Residents who conduct electronic monitoring or the resident's guardian or legal representative must post and maintain a conspicuous notice at the entrance stating that the room is being monitored by an electronic monitoring device. Nursing homes must provide reasonable physical accommodations for electronic monitoring. Tex. Health & Safety Code §242.847 (2001).
18. Utah

Utah law requires assisted living communities to grant resident requests to install video surveillance cameras in their rooms. A resident that wishes to conduct electronic monitoring must notify the facility in writing. Assisted Living Facility Surveillance Act, Utah Code Ann. §26-21-301 (2016).

19. Virginia

Virginia’s Department of Health has promulgated guidelines regarding electronic monitoring of residents’ rooms. Under the guidelines, facilities must have procedures in place to obtain residents’ documented consent prior to installing any monitoring equipment, including the consent of any resident sharing a room with the resident to be monitored. Virginia Department of Health Office of Licensure and Certification, Electronic Monitoring in Resident’s Rooms (2004).

20. Washington

In Washington, residents and their family members are permitted to place cameras in residents’ rooms pursuant to a request. Wash. Admin. Code §388-97-0400 (2008).

21. Wisconsin

The Wisconsin Department of Health Services’ regulations provide a list of where cameras can and cannot be placed in long-term care facilities. Cameras may be installed in common areas such as parking lots, hallways and offices that are not accessible to residents. However, electronic video monitoring is not allowed in resident bedrooms, dining rooms, visiting areas, hallways that lead to resident rooms, therapy rooms or any other space where a resident may be seen meeting with visitors or receiving personal care. Wis. Dep’t of Health, Electronic Video Monitoring and Filming in BAL Regulated Facilities (2016).

IV. Impact on Litigation

A. Admissibility and Discoverability

It appears that only three states have promulgated legislation relating to whether nursing home surveillance evidence is admissible and/or discoverable in the course of litigation.

In Oklahoma and Texas, a tape or recording created through the use of authorized electronic monitoring in a nursing home may be admitted into evidence in a civil or criminal court action or administrative proceeding. Okla. Stat. tit. 63, §1-1953.4 (2013); Tex. Health & Safety Code §555.159 (2013).

In New Mexico, in any civil action against a facility, material obtained through the use of a monitoring device may not be used if the monitoring device was installed or used without the knowledge of the facility or without the prescribed form. Patient Care Monitoring Act, N. M. Stat. Ann. 26 §24-26-7 (2004).

In addition, documents or records pertaining to abuse, neglect or exploitation of a resident, client or patient of a health facility or other documents, records or files in the custody of the human services department or the office of the state long-term care ombudsman at the aging and long-term services department that are relevant to the alleged violations are discoverable and admissible as evidence in any hearing before the New Mexico Department of Health. N.M. Stat. Ann. §24-1-5(j) (1996). Accordingly, video surveillance depicting abuse, neglect or exploitation of a resident would likely be admissible in a hearing before the New Mexico Department of Health related to a complaint about a nursing home.

As noted above, many states lack jurisprudence regarding whether nursing home surveillance evidence is admissible and/or discoverable in the course of litigation. Much of the case law related to video sur-
surveillance analyzes the admissibility and discoverability of post-claim video surveillance taken of a plaintiff that claims to be injured. Conversely, in the nursing home context, video surveillance evidence is often used to prove the negligent conduct of a nursing home's employees. However, state law jurisprudence regarding the admissibility and discoverability of surveillance of a plaintiff is instructive in determining whether a court would find that nursing home surveillance is admissible and/or discoverable.

With regard to discoverability, the majority rule is that a party is entitled not only to know before trial whether he or she has been the subject of surveillance, but to have pretrial access to the surveillance materials as well. Wanda Wakefield, Annotation, Discovery of Surveillance Photographs, 19 A.L.R. 4th 1236 (1983).

State law varies regarding the rules for the general admissibility of surveillance evidence. For instance, in California, surveillance evidence obtained after the close of discovery may be admissible, especially when it is probative, non-cumulative, and necessary to effectuate substantial justice. Preferred surveillance films are not admissible if they are cumulative, or will have no material effect on the record. Mazzolini v. City of Torrance, ADJ8595558, 2014 WL 2199997, at *5 (Apr. 25, 2014).

If a party uses surveillance footage at trial, it is required to satisfy the evidentiary requirements for admitting video recordings into evidence. Under California law, video recordings require authentication by witness testimony that the recording is an accurate representation of what it purports to show. However, the witness does not need to be the videographer. Nathaniel Lacktman & Jonathon Cohn, Who’s Watching? Strategic Legal and Operational Issues for Long Term Care Facilities Considering Video Surveillance Monitoring, 4 ABA Health Law Litigation 4, 8 (2007).

Conversely in Ohio, under the silent witness theory, video surveillance evidence may be admitted on a sufficient showing of the reliability of the process or system that produced the evidence. Midland Steel Prods. Co. v. U.A.W. Local 486, 61 Ohio St. 3d 121, 130, 573 N.E.2d 98, 105 (1991).

In order to safeguard against manipulation of video evidence, some courts require the party submitting the video evidence to establish that there has been no distortion of the video surveillance footage. Accordingly, a party must consider whether it should edit or enhance its video footage, as such editing might make it difficult to introduce the footage into evidence. Lacktman & Cohn, supra.

As noted above, nursing home video surveillance evidence has become instrumental in obtaining guilty pleas in cases of abuse, neglect and mistreatment in criminal proceedings. It is also important to note that such evidence has the potential to increase jury verdict and settlement values in civil proceedings.

V. Tips and Advice for Nursing Home Facilities

A. The Pros and Cons of Installing Granny Cams in Nursing Home Facilities

1. Advantages

Installing video surveillance cameras in a nursing home facility can provide a number of benefits to facility owners. For instance, video surveillance may serve to improve the quality of care to nursing home residents.

In addition, if a nursing home aide is falsely accused of abuse, neglect or mistreatment, video surveillance footage may be used to vindicate the caregiver. Video surveillance may also deter residents from making false allegations. Further, video surveillance may decrease insurance costs because of its effect of deterring false complaints.

In the context of staff recruitment and retention, video surveillance may serve to eliminate potential abusers and encourage non-abusive staff to apply for nursing home aide positions. Barbara Phair, Video
2. Disadvantages

Conversely, installing video surveillance cameras in nursing home facilities may be disadvantageous to nursing home owners, the most obvious disadvantage being the use of video surveillance as evidence that may produce civil or criminal liability and/or increase lawsuit and settlement values. As with any piece of evidence, a fact-finder may misinterpret the events depicted in video surveillance footage and may determine that, what is actually acceptable care, is neglect, mistreatment or abuse.

Further, as noted above, the use of video surveillance cameras may cause issues with recruiting and retaining qualified nursing home employees and exacerbate the problem of staffing issues, as employees may not want to work in an environment where they are under surveillance.

In addition, the use of video surveillance may violate the privacy of residents, roommates, employees and visitors. Phair, supra.

Thus, there are many considerations nursing home management must make prior to installing video surveillance in a facility.

B. Practical Tips and Guidance

1. Nursing Home Facilities

- Go on the offensive.
- Adequately train staff to provide quality care by knowing your specific jurisdiction’s laws and regulations regarding standards of care.
- Train staff to provide care to residents as if they were under surveillance.
- Increase and encourage communication between facility staff and residents and their families regarding concerns related to resident care.
- Collaborate with residents and residents’ family members to outline plans to address concerns related to resident care and memorialize efforts to correct treatment related issues.
- Encourage residents and residents’ family members to inform staff of potential issues with treatment before initiating covert surveillance.
- Consider implementing a “no smartphone policy” for residents’ guests, by requiring visitors to surrender their smartphones upon entering the facility, due to privacy concerns.
- Put in place policies and procedures for residents that request electronic monitoring in their rooms.
- Obtain written consent from residents or residents’ legal representatives if facility conducts electronic monitoring.
- Obtain written consent from staff members acknowledging the presence of electronic monitoring in the facility if facility conducts electronic monitoring.
- Consider implementing written policies prohibiting staff from capturing and sharing video footage of nursing home residents, in particular on social media platforms.
- Verify that adequate staffing levels are being maintained.
- “Do what you document and document what you do.” Repeatedly advise staff of the importance of accurate documentation.
• In the context of government investigations, get counsel involved immediately. Be cooperative, but know your rights.
• Develop risk management strategies to deal with unfavorable surveillance footage.

2. Attorneys
• Understand your client facility’s policies and procedures related to surveillance and gather all protocol related to same.
• Know your jurisdiction’s discovery and admissibility rules related to surveillance footage.
• Identify privileged material where applicable.
• Consider a motion in limine to keep facility surveillance footage out of evidence.
• If a government investigation of the facility that you represent is pending, make a Freedom of Information Act (FOIA) request to the appropriate government authorities to obtain any surveillance footage that the government may have in its possession.
• Identify and interview the individuals captured in surveillance footage.
• Scrutinize the authenticity of any surveillance footage offered to ensure that the recorded evidence is a true and accurate reflection of what the proponent party claims it to be.
• Identify a witness that is able to authenticate favorable surveillance footage.
• If the client facility that you represent conducts its own surveillance, advise that client facility to properly keep and maintain such surveillance.
• Provide the client facility with in service trainings regarding surveillance to prevent litigation.

VI. Conclusion
Granny cams and smartphones have changed the landscape of nursing home operation and management. In addition, our social media-driven society has changed the dynamic between nursing homes and nursing home residents and their families. As a result, nursing homes must consider technology’s impact on the long-term care industry and the regulatory issues that have arisen due to these technological advances. With these changes, nursing homes and their counsel can be proactive by staying informed of changes in the law that relate to nursing home surveillance footage and by implementing strategies to adhere to the law in order to reduce exposure to civil and criminal liability.