RETIRING THE ONE-PARTY CONSENT STATUTE FOR LONG-TERM CARE RESIDENTS' ROOMS

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I. INTRODUCTION

A recent article in the *Arizona Daily Star* opened with a heartbreaking story: A woman learned that her father had not received a critical medication during a month's stay at an assisted living facility.[1] His health declined rapidly, and he died a few months later.[2] The article featured an interview with a Tucson attorney, who noted that litigation often prompts long-term care facilities to make improvements. According to the attorney, "[i]f facilities are being looked at and watched more closely, they generally will attempt to do better."[3] But litigation comes too late for some families hoping to protect their loved ones. Instead, families may turn to technology to watch their relative's facility more closely and ensure their loved ones are being cared for properly.

The use of an electronic monitoring device ("EMD"),[4] such as a camera, in a long-term care resident's room raises critical ethical and legal questions

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1. Stephanie Innes, *Complaints to Arizona's Adult Protective Services Rarely Substantiated*, ARIZ. DAILY STAR (Mar. 18, 2017), http://tucson.com/news/local/complaints-to-arizona-s-adult-protective-services-rarely-substantiated/article_9e9be43c-c961-5214-a2ce-45a0bbe92856.html.

2. *Id.*

3. *Id.*

4. For the purposes of this Comment, "electronic monitoring device" refers to cameras and other devices that capture video, audio, or both, and store or transmit captured media. A number of modern devices market to senior citizens, including fall detectors and pendants that alert emergency responders. *See* Amy Goyer, *How to Choose a Medical Alert System*, AARP, https://www.aarp.org/caregiving/home-care/info-2017/medic-alert-systems-options.html (last visited Oct. 26, 2018). Some devices have two-way communication capabilities, meaning that two individuals may engage in live communication remotely. *See* Jim T. Miller, *How to Keep Tabs on an Elderly Parent with Video Monitoring*, HUFFINGTON POST: BLOG, (Dec. 6, 2017), https://www.huffingtonpost.com/jim-t-miller/how-to-keep-tabs-on-an-el_b_8954044.html (describing the Nest Cam, the Piper NV, and Simplicam, which all offer two-way communication). Access to the internet, typically through a Wi-Fi connection, may be required for live or remote access to captured media, although some devices require only a connection to 4G/LTE mobile networks. *See* NOBU, https://www.nubocam.com (last visited Oct. 26, 2018) ("NuboCam is a mobile monitoring camera that connects to 4G/LTE and Wi-Fi, giving you the

regarding privacy and responsibility. Currently, most states, including Arizona, rely on wiretapping statutes to govern the use of EMDs in long-term care residents' rooms. In theory, long-term care residents in one-party consent states should be able to capture conversations to which they are a party without seeking the permission of any other party. But the nuanced environment of long-term care complicates the legal analysis, because a resident's room is a home, a health care facility, and a workplace. In states with one-party consent statutes,[5] reliance on wiretapping statutes is inefficient, and exposes facilities and residents to unnecessary risks through uncertainty about rights and responsibilities. Tailored statutes governing EMDs in long-term care facilities clarify the rights and responsibilities of facilities, residents, and residents' family members.

EMD legislation addresses a modern reaction to enduring concerns about inadequate treatment in long-term care facilities. These laws require facilities to permit a resident to use an EMD and outline responsibilities of facilities, residents, and family members. While efforts to legislate the use of EMDs in long-term care facilities span nearly two decades, success has been slow.[6] Only six states have passed legislation addressing EMDs in long-term care facilities.[7] But several factors indicate that EMD legislation may become more popular in state legislatures. First, advances in technology have made it easier than ever to capture and share disturbing videos of elder abuse or neglect in long-term care facilities. A rash of news stories featuring these videos have captured public interest, drawing attention to EMDs.[8] Second, families are interested in using technology to

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freedom to do what you love while protecting the things you love."). Some literature refers to EMDs in long-term care residents' rooms as "granny cams." *See, e.g.*, Tracey Kohl, Comment, *Watching Out for Grandma: Video Cameras in Nursing Homes May Help to Eliminate Abuse*, 30 FORDHAM URB. L.J. 2083, 2083 (2003).

5. *See* discussion *infra* Part II.C.

6. In 2001, nine states considered EMD legislation. Of the nine, only Texas succeeded in enacting the legislation. Bradley J.B. Toben & Matthew C. Cordon, *Legislative Stasis: The Failures of Legislation and Legislative Proposals Permitting the Use of Electronic Monitoring Devices in Nursing Homes*, 59 BAYLOR L. REV. 675, 698 (2007).

7. Texas, New Mexico, Oklahoma, Washington, Illinois, and Utah have EMD legislation. MINN. ELDER JUSTICE CTR., RESIDENTIAL CARE AND SERVICES ELECTRONIC MONITORING WORK GROUP FINAL REPORT 8 (Jan. 16, 2017), http://www.health.state.mn.us/divs/fpc/rcworkgroup/finalreport.pdf. In 2003, Maryland passed a bill requiring the Department of Health and Mental Hygiene to develop guidelines regarding the use of EMDs in "facilities that voluntarily elect to use electronic monitoring" at a resident's request. OFFICE OF HEALTH CARE QUALITY, DEP'T OF HEALTH & MENTAL HYGIENE, GUIDELINES FOR ELECTRONIC MONITORING 3 (2003), https://health.maryland.gov/ohcq/ltc/docs/Reports/149report.pdf.

8. *See, e.g.*, Sarah Cwiek, *Video: "Horrible" Nursing Home Abuse Caught on Hidden Camera*, MICH. RADIO (Mar. 5, 2018), http://michiganradio.org/post/video-horrible-nursing-home-abuse-caught-hidden-camera.

"validat[e] good care."[9] One study found that more than half of individuals with a relative in a nursing home would be likely to request a camera in their relative's room.[10] Finally, the discourse surrounding the most recent EMD legislation suggests that stiff resistance from the long-term care industry may have softened a bit.[11] But the long-term care industry remains wary of efforts to permit residents to install EMDs in their rooms.[12]

This Comment advocates for balanced, thoughtful legislation that permits long-term care residents to use an EMD without interference, but allows a facility to adopt custom EMD procedures. Although the proposed statutory language could benefit any one-party consent state, the approach is tailored for Arizona. The state's demographics, and a recent Arizona Supreme Court decision addressing claims of elder abuse, make Arizona an ideal framework for EMD legislation analysis.[13] Part II examines Arizona law addressing elder abuse, then describes ongoing struggles within the long-term care industry. Part II.C provides a brief overview of one-party consent laws, focusing on Arizona's wiretapping statute. Part III.A describes the privacy concerns surrounding EMDs in long-term care residents' rooms. Part III.B highlights failed EMD legislation efforts and explores the strength of the long-term care industry's influence in state legislatures. Part III.C introduces EMD legislation in four one-party consent states and compares key provisions. Part IV draws upon the provisions in Part III.C and proposes EMD legislation language for Arizona that balances a family's desire to protect a long-term care resident while providing flexibility for the facility.

II. BACKGROUND

Long-term care facilities, particularly nursing homes, generally do not enjoy a positive reputation in the United States. A long-term care facility is painted as a place to be feared and avoided at all costs.[14] Advances in

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9. Gaby Loria, *Consumer Perspectives on Nursing Home Surveillance*, SOFTWARE ADVICE (Nov. 19, 2014), https://www.softwareadvice.com/long-term-care/industryview/surveillance-report-2014/.

10. *Id.*

11. *See* Lois A. Bowers, *Utah Camera Bill Headed to Governor's Desk*, MCKNIGHT'S SENIOR LIVING (Mar. 3, 2016), http://www.mcknightsseniorliving.com/news/utah-camera-bill-headed-to-governors-desk/article/481094/.

12. *See id.* ("'We are still concerned, and personally for me and my company, I'm still concerned about making sure that the resident's rights are protected, making sure that there are safeguards in place,' [a state industry leader] said.").

13. *See* discussion *infra* Part II.A.

14. *See, e.g.*, Ariz. Adult Protective Servs., *Frequently Asked Questions About Adult Protective Services (APS) Involvement*, ARIZ. DEP'T ECON. SECURITY,

technology have exasperated the problem. The ease of sharing images and videos have exposed long-term care facilities to quick and widespread scrutiny.[15] News reports of abuse and neglect in facilities frequently include damning video captured by hidden cameras.[16]

These hidden cameras pose risks beyond negative publicity. The use of these devices in the rooms of long-term care residents represents a clash of interests and milieu of distrust. At the heart of this web of precarious relationships lies a wiretapping statute that curiously aims to protect privacy while condoning secrecy. To fully understand the potentially contentious environment of long-term care and the implications of that contention, an examination of efforts to protect elderly citizens from abuse and neglect is necessary.

A. Protections for Elderly Citizens in Arizona

Concerns about elder abuse and neglect are not unique to Arizona, but Arizona's population makes the state a place of interest for issues concerning long-term care.[17] More than one-fifth of Arizona's population is sixty years of age or older,[18] and the number of individuals sixty or older increased significantly between 2010 and 2015.[19] More than 14,000 of those residents live in a nursing home or another institution.[20]

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https://des.az.gov/services/aging-and-adult/adult-protective-services/arizona-adult-protective-services-eligibility-and (last visited Oct. 27, 2018) ("Will I be forced to live in a nursing home?").

15. *See, e.g.*, Jacey Fortin, *Behind the Photo of the Older Women in Waist-High Water in Texas*, N.Y. TIMES (Aug. 28, 2017), https://www.nytimes.com/2017/08/28/us/nursing-home-houston-texas.html?_r=0 (describing the reaction to a widely-shared image of assisted living center residents waiting for rescue in flood water in Texas following Hurricane Harvey).

16. *See, e.g.*, Avi Selk, *A Dying Vet Needed CPR. Hidden Video Shows His Nurse Laughing Instead*, WASH. POST (Nov. 18, 2017), https://www.washingtonpost.com/news/to-your-health/wp/2017/11/18/a-dying-vet-needed-cpr-hidden-video-shows-his-nurse-laughing-instead/?utm_term=.220b9f04a44f ("The clips appear to show [the patient] gasping for air, begging for help and collapsing that morning while nurses barely attempt to revive him and at one point laugh over his bed.").

17. Rhonda Bodfield & Enric Volante, *Arizona Fails to Protect Nursing Home Residents*, ARIZ. DAILY STAR (Apr. 6, 2008), http://tucson.com/news/local/arizona-fails-to-protect-nursing-home-residents/article_b5744d1f-1346-518e-9beb-ff04a7ee39b0.html ("'Arizona, of all places, with all the old people there, should be more concerned about quality,' said Charlene Harrington, a national expert on nursing homes . . . .").

18. Admin. for Cmty. Living, *Profile of State OAA Programs: Arizona*, AGING INTEGRATED DATABASE, https://agid.acl.gov/StateProfiles/Profile/Pre/?id=3&topic=1&years=2015 (last visited Oct. 27, 2018). In 2015, Arizonans aged sixty or older numbered approximately 1.5 million. *Id.*

19. In 2010, Arizonans aged sixty or older numbered approximately 1.23 million. Admin. for Cmty. Living, *Profile of State OAA Programs: Arizona*, AGING INTEGRATED DATABASE, https://agid.acl.gov/StateProfiles/Profile/Pre/?id=3&topic=1&years=2010,2015 (last visited Oct.

All states have established measures that attempt to protect elderly citizens or vulnerable adults.[21] The Arizona legislature enacted the Adult Protective Services Act (APSA) in 1988 to address elder abuse.[22] The APSA made abuse of a vulnerable adult a class 5 felony.[23] In 1989, the legislature added a statutory civil cause of action for a vulnerable adult endangered or injured by "neglect, abuse, or exploitation" by "any person or enterprise that has been employed to provide care."[24] The APSA interprets "enterprise" broadly, including even acute care facilities.[25]

Until recently, Arizona courts applied the *McGill* test to determine whether a negligent act constituted actionable abuse under the APSA.[26] In *McGill*, the Arizona Supreme Court grappled with whether to apply the APSA to a claim for damages for injuries caused by "negligent medical care provided to a vulnerable or incapacitated adult."[27] The claim arose from an alleged failure by the patient's mental and physical health care providers to properly coordinate patient care.[28] The defendants argued that the claims amounted only to malpractice, and thus should be analyzed under malpractice laws, not the APSA.[29] In finding the APSA covered the claim, the court established the *McGill* test, which set forth four factors:

> [U]nder APSA, the negligent act or acts (1) must arise from the relationship of caregiver and recipient, (2) must be closely connected to that relationship, (3) must be linked to the service the caregiver undertook because of the recipient's incapacity, and (4) must be related to the problem or problems that caused the incapacity.[30]

27, 2018). This rate of increase is greater than the increase across all fifty states and D.C. between 2010 and 2015. Admin. for Cmty. Living, *Profile of State OAA Programs: Arizona*, AGING INTEGRATED DATABASE, https://agid.acl.gov/StateProfiles/Profile/Compare/?id=3&compareid=109&variable=1&years=2010,2015 (last visited Oct. 27, 2018).

20. Admin. for Cmty. Living, *supra* note 18.

21. Elder Consumer Prot. Program, *Statutory Update—Adult Protection Statutes*, STETSON UNIV., http://www.stetson.edu/law/academics/elder/ecpp/statutory-update-adult-protection-statutes.php (last visited Oct. 27, 2018).

22. Mathews v. Life Care Ctrs. of Am., Inc., 177 P.3d 867, 870 (Ariz. Ct. App. 2008).

23. ARIZ. REV. STAT. ANN. § 46-455(A) (2018).

24. *Id.* § 46-455(B) (2018); Estate of McGill v. Albrecht, 57 P.3d 384, 386 (Ariz. 2002), *overruled by* Delgado v. Manor Care of Tucson AZ, LLC, 395 P.3d 698 (Ariz. 2017).

25. *See* Estate of Wyatt v. Vanguard Health Sys., 329 P.3d 1040, 1042 (Ariz. 2014). *But see* Estate of Braden *ex. rel.* Gabaldon v. State, 266 P.3d 349, 354 (Ariz. 2011) (holding that the legislature did not intend to include the State as an "enterprise").

26. *See Delgado*, 395 P.3d at 700–01.

27. *Estate of McGill*, 57 P.3d at 385.

28. *Id.* at 386.

29. *Id.*

30. *Id.* at 389.

In establishing these factors, the *McGill* court sought to address overlap between the APSA and the medical malpractice remedies, finding that APSA and malpractice actions are not mutually exclusive.[31]

In *Delgado v. Manor Care of Tucson AZ, LLC*, the Arizona Supreme Court abolished the *McGill* test, calling the test "problematic."[32] The Court described the APSA as "a broad remedial cause of action against caregivers" that should be construed broadly.[33] But, the Court said, the *McGill* test narrowed the scope of liability by requiring victims to first identify "which specific medical conditions render [them] vulnerable, and then relating subsequent treatment and injuries to those specific 'vulnerable' conditions."[34] These requirements, the Court reasoned, exceeded requirements of the APSA.[35] The Court set forth a new four-factor test, identifying the four requirements of the APSA: "(1) a vulnerable adult, (2) has suffered an injury, (3) caused by abuse, (4) from a caregiver."[36] The *Delgado* defendants argued that the new test would make APSA applicable to "virtually all medical malpractice cases arising from care provided to adults in inpatient healthcare institutions."[37] The court agreed, but noted that the responsibility to limit the scope of the APSA belongs to the legislature.[38]

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31. *Id.* at 390.

32. Delgado v. Manor Care of Tucson AZ, LLC, 395 P.3d 698, 701 (Ariz. 2017).

33. *Id.*

34. *Id.* at 701–02.

35. *Id.* at 702.

36. *Id.* ARIZ. REV. STAT. ANN. § 46-451(A)(1) (2018) defines abuse as "(a) Intentional infliction of physical harm. (b) Injury caused by negligent acts or omissions. (c) Unreasonable confinement. (d) Sexual abuse or sexual assault."

37. *Delgado*, 395 P.3d at 702.

38. *Id.* The effects of the *Delgado* decision may be difficult to discern because the APSA does not preclude a facility from invoking a voluntary arbitration agreement. Mathews v. Life Care Ctrs. of Am., Inc., 177 P.3d 867, 871–72 (Ariz. Ct. App. 2008) ("[A] victim of elder abuse pursuant to APSA would not be deprived of the remedies specified by the legislature simply because the case is resolved using arbitration."). Arbitration agreements have become increasingly prevalent in long-term care facility admission contracts. Some speculate that up to ninety percent of large nursing home chains' admission contracts include arbitration agreements. Haley Sweetland Edwards, *An 87-Year-Old Nun Said She Was Raped in Her Nursing Home. Here's Why She Couldn't Sue*, TIME (Nov. 16, 2017), http://time.com/5027063/87-year-old-nun-said-she-was-raped-in-her-nursing-home/. An Obama administration rule would have limited a long-term care facility's ability to keep disputes in arbitration. Ina Jaffe, *Under Trump Rule, Nursing Home Residents May Not Be Able to Sue After Abuse*, NPR (Aug. 21, 2017, 8:35 AM), https://www.npr.org/2017/08/21/544973339/trump-rule-could-make-it-harder-for-nursing-home-residents-to-sue-for-abuse. But the Trump administration has proposed a rule to remove the prohibition on pre-dispute binding arbitration agreements and allow binding arbitration to be a condition of admission to a long-term care facility. Press Release, Ctrs. for Medicare & Medicaid Servs., CMS Issues Proposed Revision Requirements for Long-Term Care Facilities' Arbitration Agreements (June 5, 2017), https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2017-Fact-Sheet-items/2017-06-05.html.

State statutes such as the APSA unfortunately have not eliminated abuse or neglect in long-term care facilities. Federal and state lawmakers have attempted to improve the quality of care through various measures. But the complicated long-term care industry is plagued by challenges ranging from staffing to basic patient communication.

B. Challenges to Quality Long-Term Care

Facilities, residents, and their families must navigate complicated interpersonal, contractual, and financial concerns in pursuing quality long-term care. Few would disagree that quality care for long-term care residents should be a priority for the industry and for society in general. But consensus on how to achieve and maintain a robust, quality long-term care system remains elusive. Residents have unique health and social needs, as evidenced by the nuanced long-term care options and hurdles to quality care described in this section. As described in this section, the long-term care industry encompasses diverse facilities, and federal efforts to improve care have made even more options available to families. But additional options do not eradicate the facility staffing and cultural challenges that interfere with resident care.

"Long-term care" is a general term referring to a variety of facilities, not all of which are relevant to this discussion. A long-term care facility assists "aged, ill or disabled persons who can no longer live independently."[39] Two types of facilities are relevant to this discussion: nursing homes and assisted living facilities.[40] The level of care provided to a resident is the greatest factor in distinguishing the two. Nursing home residents require "intensive medical and nursing care."[41] Residents in assisted living facilities may

39. DIV. OF AGING & ADULT SERVS., DEP'T OF ECON. SEC., ARIZONA LONG TERM CARE OMBUDSMAN MANUAL 61 (2011), https://des.az.gov/sites/default/files/AAA-1188ANAMNA.pdf.

40. The scope of each type of facility and respective licensing requirements vary by state. Thus, the term "long-term care facilities" will be used throughout this Comment and will refer to both types of facilities collectively. The National Center for Health Statistics uses the term "long-term care" to refer to any kind of care for adults unable to care for themselves, including adult day services centers and home-based care, as well as nursing homes and assisted living facilities. LAUREN HARRIS-KOJETIN ET AL., NAT'L CTR. FOR HEALTH STATISTICS, LONG-TERM CARE PROVIDERS AND SERVICES USERS IN THE UNITED STATES 2 (2016), https://www.cdc.gov/nchs/data/series/sr_03/sr03_038.pdf. This Comment does not reach legislation affecting adult day services centers, home health services, or hospice; thus, the term "long-term care facility" encompasses a narrower set of care services than contemplated by the National Center for Health Statistics report.

41. DIV. OF AGING & ADULT SERVS., DEP'T OF ECON. SEC, *supra* note 39, at 83.

require assistance with daily activities, such as dressing, eating, or bathing.[42] Those in assisted living may be unable to live fully independently, but do not require the level of care provided by a nursing home.[43]

Federal efforts to address abuse and neglect in long-term care facilities have been haphazard.[44] But even as America's senior population continues to grow,[45] so do options for families. The traditional nursing home "is much less the touchstone."[46] In an effort to "divert" seniors from nursing homes, the federal government allowed home- and community-based services to qualify for Medicaid benefits.[47] Occupancy in nursing homes has declined somewhat in recent years.[48] Still, "the [nursing home] industry remains dominant."[49] Nursing homes serve three times as many people as residential care communities such as assisted living facilities.[50]

Hiring and retaining staff proves to be a significant hurdle to quality long-term care. A report indicated a turnover rate of fifty percent for direct care staff in skilled nursing care centers in 2012.[51] Direct care employees make up the largest proportion of employees in nursing centers and include registered nurses, licensed practical nurses, and certified nursing assistants.[52] Direct care employees and personal care aides in long-term care facilities earn low hourly wages.[53] Long-term care facilities even struggle to

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42. *Id.* This does not imply that residents in assisted living facilities do not require specialized care. *See* Jordan Rau, *Dementia Patients Fuel Assisted Living's Growth. Safety May Be Lagging*, N.Y. TIMES (Dec. 13, 2018), https://www.nytimes.com/2018/12/13/business/assisted-living-violations-dementia-alzheimers.html ("Dementia care is the fastest-growing segment of assisted living.").

43. *Id.*

44. Toben & Cordon, *supra* note 6, at 682–83.

45. NAT'L CTR. FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2016, at 11 (2017), https://www.cdc.gov/nchs/data/hus/hus16.pdf.

46. Robert L. Kane & Rosalie A. Kane, *The Long View of Long-Term Care: Our Personal Take on Progress, Pitfalls, and Possibilities*, 63 J. AM. GERIATRICS SOC'Y 2400, 2404 (2015).

47. *Id.*

48. *See* NAT'L CTR. FOR HEALTH STATISTICS, *supra* note 45, at 313 (showing nation-wide residency in certified nursing facilities declining from 1,479,550 in 1995 to 1,360,970 in 2015).

49. *See* Kane & Kane, *supra* note 46, at 2404.

50. HARRIS-KOJETIN ET AL., *supra* note 40, at 15. The report uses the term "residential care communities" to distinguish from adult day services centers, home health and hospice, and nursing homes. The term includes assisted living facilities. *See id.* at 2.

51. AM. HEALTH CARE ASS'N, AMERICAN HEALTH CARE ASSOCIATION 2012 STAFFING REPORT 3 (2014), https://www.ahcancal.org/research_data/staffing/Documents/2012_Staffing_Report.pdf.

52. *Id.* at 1.

53. Nursing assistants make up more than one-third of employees in skilled nursing facilities and earn a median hourly wage of $12.34. *May 2016 National Industry-Specific Occupational Employment and Wage Estimates: Nursing Care Facilities (Skilled Nursing Facilities)*, BUREAU LAB. STAT., https://www.bls.gov/oes/2016/may/naics4_623100.htm (last visited Oct. 21, 2018). Nursing assistants who work in assisted living facilities or retirement

attract highly-skilled employees such as physicians and nurse practitioners.[54] As the industry continues to grapple with retention strategies, families must rely on low-paid employees in understaffed facilities to manage their loved one's care.[55]

Language and culture barriers also disrupt quality care in long-term care facilities.[56] A language barrier may be subtle and undetectable. For example, a resident may identify as proficient in English, or a health care professional may identify as proficient in the resident's first language. Both may overestimate their ability to communicate effectively.[57] Cultural barriers involving language or familial expectations may deepen distrust of long-term care facilities.[58]

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communities tend to earn less, with a median hourly wage of less than $12. These employees make up nearly twenty percent of employees at these facilities. *May 2016 National Industry-Specific Occupational Employment and Wage Estimates: Continuing Care Retirement Communities and Assisted Living Facilities for the Elderly*, BUREAU LAB. STAT., https://www.bls.gov/oes/2016/may/naics4_623300.htm (last visited Oct. 21, 2018). Personal care aides, who make up another sixteen percent of employees at these facilities, earn even less, with a median hourly wage of less than $11. *Id.*

54. *See* Kane & Kane, *supra* note 46, at 2405.

55. Kane and Kane present a pessimistic future for workers in the long-term care system:

> One of the ugly truths about LTC is that it depends on exploitation. Underpaid workers provide its core services. LTC could not be sustained without the dedication of unpaid family members who provide what is euphemistically called informal care. Neither group is likely ever to be paid enough to compensate them adequately . . . .

Id.; *see also* Jordan Rau, *'It's Almost Like a Ghost Town.' Most Nursing Homes Overstated Staffing for Years*, N.Y. TIMES (July 7, 2018), https://www.nytimes.com/2018/07/07/health/nursing-homes-staffing-medicare.html?smid=fb-nytimes&smtyp=cur ("When nursing homes are short of staff, nurses and aides scramble to deliver meals, ferry bedbound residents to the bathroom and answer calls for pain medication. Essential medical tasks such as repositioning a patient to avert bedsores can be overlooked when workers are overburdened, sometimes leading to avoidable hospitalizations."). Low staffing is of special concern to families whose loved ones have dementia, as these patients may require additional care that some assisted living facilities may be unable or unprepared to provide. *See* Rau, *supra* note 42 (describing an assisted living facility resident with dementia who slipped away from the facility, was not identified as missing for seven hours, and was later found dead in a pond).

56. *See* Daniel Trielli, *AP-NORC Poll: Hispanics Lack Confidence in Nursing Homes*, AP-NORC (Aug. 21, 2017), http://www.apnorc.org/news-media/Pages/AP-NORC-poll-Hispanics-lack-confidence-in-nursing-homes.aspx; *see also* Paul M. Schyve, *Language Differences as a Barrier to Quality and Safety in Health Care: The Joint Commission Perspective*, 22 J. GEN. INTERNAL MED. 360, 360 (2007) (describing how language differences affect quality of health care generally).

57. Schyve, *supra* note 56, at 360.

58. Trielli, *supra* note 56 ("Fewer than 2 in 10 Hispanics age 40 and older say they are very or extremely confident that nursing homes and assisted living facilities can accommodate their cultural needs . . . .").

For families considering options to care for an aging loved one, any path can prove overwhelming.[59] Families who cannot or choose not to care for a family member at home must navigate a vast network of long-term care options with little bargaining power. Approximately seventy percent of nursing homes and more than eighty percent of residential care communities in the United States are for-profit.[60] More than fifty percent of nursing homes and residential care communities are chain-affiliated.[61] And while nearly all nursing homes in the United States are Medicare- and Medicaid-certified, only about half of residential care communities are "authorized or certified to participate in Medicaid."[62] Limited options or limited bargaining power may require a family to choose a facility they do not fully trust or a facility too far to visit regularly.[63]

Distance and distrust of the facility prompt some families to turn to technology to keep tabs on a loved one in a long-term care facility. Use of technology, such as EMDs, invokes questions about privacy. Wiretapping laws limit how technology may be used in order to protect one's privacy.

C. One-Party Consent

Wiretapping laws protect an individual's privacy by restricting the surreptitious capturing or intercepting of a private communication.[64] The Federal Wiretap Act of 1968 imposes criminal and civil penalties for

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59. Although home-based care now qualifies for some federal or state assistance, families often face significant paperwork to qualify for that assistance, and often work to cobble together temporary assistance to help meet the demands of caring for a senior. For a personal narrative of these challenges, see Robrt L. Pela, *For Seniors and Their Caregivers Navigating Arizona's Health-Care System, There's No Place Like Home*, PHX. NEW TIMES (Mar. 5, 2017), http://www.phoenixnewtimes.com/news/for-seniors-and-their-caregivers-navigating-arizonas-health-care-system-theres-no-place-like-home-9134897 ("I maintain two full-time jobs and spend 55 caregiving hours each week to patch the holes in the leaky system of keeping my mom in the house where she has lived for the past 50 years.").

60. HARRIS-KOJETIN ET AL., *supra* note 40, at 12. Many for-profit nursing homes outsource services, providing owners legal protection from suits for damages. *See* Jordan Rau, *Care Suffers as More Nursing Homes Feed Money into Corporate Webs*, N.Y. TIMES (Jan. 2, 2018), https://www.nytimes.com/2018/01/02/business/nursing-homes-care-corporate.html.

61. HARRIS-KOJETIN ET AL., *supra* note 40, at 13; *see also supra* note 50 and accompanying text.

62. HARRIS-KOJETIN ET AL., *supra* note 40, at 14.

63. The debate over arbitration agreements in long-term care facility contracts also demonstrates a family's lack of bargaining power. *See* Edwards, *supra* note 38 (citing the American Association of Retired Persons concern that residents "can't easily shop between facilities").

64. Susan Freiwald, *Online Surveillance: Remembering the Lessons of the Wiretap Act*, 56 ALA. L. REV. 9, 21 (2004).

violators.[65] Most states have corresponding statutes that provide at least as much privacy protection as federal law.[66] Generally, wiretapping laws protect privacy by curbing an invasion by law enforcement.[67] Depending upon the statute, parties to the conversation in question may also be subject to recording restrictions.

A handful of states forbid an individual from recording a private conversation unless all parties to the conversation consent to the record, employing a so-called two-party consent statute.[68] But most state wiretapping statutes allow one-party consent, meaning that a private conversation may be recorded if at least one party of that conversation consents. Arizona is a so-called one-party consent state. Arizona's wiretap statute reads in part:

"Except as provided in this section and section 13-3012, a person is guilty of a class 5 felony who either . . .

2. Intentionally intercepts a conversation or discussion at which he is not present . . . without the consent of *a* party to such conversation or discussion."[69]

While imposing criminal penalties, the statute also indicates that only one party must consent to the recording of a private conversation. A lack of notice requirement means that any other party to that conversation may be recorded without knowledge.[70] Vicarious consent may also suffice under certain conditions,[71] meaning that a legal guardian may consent on behalf of an individual. And although Arizona's constitution has a right to privacy provision,[72] that right is not implicated when one party to a conversation consents to the recording.[73]

The nature of a state's wiretapping statute lays an important foundation for analyzing how an EMD may be used to capture or discourage acts of negligence or abuse. Despite APSA, elder abuse—and abuse in long-term

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65. Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 843–844 (1998).

66. Vermont does not have this law. *Id.* at 851.

67. *See* Freiwald, *supra* note 64, at 13–14.

68. *See* Bast, *supra* note 65, at 857, 869. "Two-party consent" is somewhat misleading, as the term fails to account for conversations involving more than two parties. *Id.*

69. ARIZ. REV. STAT. ANN. § 13-3005 (2018) (emphasis added).

70. Recording may commence so long as a single party consents, even if the consenting party is the recorder. The statute does not address an objection by another party; presumably, one party may record the conversation even if any other party objects.

71. State v. Morrison, 56 P.3d 63, 65 (Ariz. Ct. App. 2002).

72. ARIZ. CONST. art. 2, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.").

73. A person's right to privacy is not implicated by interception of wire or oral communication if one party has given consent. *See* State v. Stanley, 597 P.2d 998, 1005 (Ariz. Ct. App. 1979).

care facilities—continues to be a significant problem in Arizona. Information about elder abuse can be difficult to track; for example, multiple agencies in Arizona field complaints and tackle investigations.[74] Disparaging headlines perpetuate fear and distrust of long-term care facilities, and call into question the state's ability to prevent abuse in these facilities.[75] State statutes like APSA have not effectively curbed abuse in long-term care facilities.[76] Fears of abuse and neglect have prompted some families to turn to EMDs. A handful of states have adopted legislation to outline the rights of long-term care residents to use this technology and to protect facilities from extensive liability.

III. EMD LEGISLATION

A lack of comprehensive federal guidance on this issue has prompted efforts at the state level.[77] Legislative efforts must address varying legal concerns, including privacy and consent laws. The biggest hurdle for passing EMD legislation generally has been balancing the interests of

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74. *See* Innes, *supra* note 1 (identifying Adult Protective Services, Arizona Department of Health Services, and county agencies as outlets for complaints); *Long Term Care Ombudsman*, ARIZ. DEP'T ECON. SECURITY, https://des.az.gov/services/aging-and-adult/aging-and-disability-services/long-term-care-ombudsman-ltco (describing program within Arizona Department of Economic Security as program to "identify, investigate and resolve complaints made by or on behalf of residents of long term care facilities").

75. *See* Bodfield & Volante, *supra* note 17; Carli Brosseau, *Assisted-Living Complaints Shielded from Public View*, ARIZ. DAILY STAR (Oct. 4, 2014), http://tucson.com/news/local/govt-and-politics/assisted-living-complaints-shielded-from-public-view/article_db7d690e-6ed6-59bd-a76f-0e1e16611af0.html; Innes, *supra* note 1; Stephanie Innes, *Facilities for Elderly Duck Responsibility, Advocates Say*, ARIZ. DAILY STAR (June 4, 2016), http://tucson.com/news/local/watchdog/facilities-for-elderly-duck-responsibility-advocates-say/article_8b8ff8e9-e353-5874-bff2-035c247a09ce.html. In a recent distrubing incident, a caregiver was accused of raping a patient at a long-term care facility providing care for individuals with disabilities. The patient, who required "a maximum level of care" gave birth in December 2018. Bree Burkitt, *Former Hacienda Nurse Accused of Raping, Impregnating Patient Enters 'Not Guilty' Plea*, ARIZ. REPUBLIC (Feb. 5, 2019), https://www.azcentral.com/story/news/local/arizona-health/2019/02/05/hacienda-rape-suspect-nathan-sutherland-enters-not-guilty-plea/2770683002/. Calls for reform have focused on facilities caring for adults with disabilities, but at a meeting hosted by the Arizona Developmental Disabilities Planning Council, concerns included oversight of facilities caring for "vulnerable adults," which would include elderly patients. Stephanie Innes, *Community Outrage at Hacienda Rape Could Result in New Laws, More Oversight*, ARIZ. REPUBLIC (Jan. 23, 2019), https://www.azcentral.com/story/news/local/arizona-health/2019/01/23/community-outrage-hacienda-healthcare-rape-could-result-new-arizona-laws/2660686002/.

76. *See generally* NAT'L CTR. ON ELDER ABUSE, ABUSE OF RESIDENTS OF LONG TERM CARE FACILITIES (2012), https://ncea.acl.gov/resources/docs/Abuse-LongTermCare-Facilities-2012.pdf.

77. *See* Toben & Cordon, *supra* note 6, at 698–99.

elderly residents concerned about safety and the influential long-term care industry concerned about litigation and insurance costs.

A. Privacy

Privacy is a key point in the debate over EMD legislation, particularly because long-term care is a unique environment. A facility is simultaneously a workplace, a home, and a medical setting. Thus, the legal context of privacy rights for different aspects of the long-term care facility must be considered.

A long-term care facility's right of privacy is "virtually non-existent" where regulation of patient care is concerned.[78] Thus, the industry's concerns over privacy center on the privacy rights of residents, which relates the industry's biggest concern: liability.[79] The industry's opposition to EMD legislation focuses on increased costs, specifically staff turnover and liability insurance.[80] The industry argues that EMDs will lead to increased litigation, potentially stemming from misinterpreted communications captured by EMDs, including caregivers' interactions with residents with impaired cognition.[81] This increased litigation, the industry claims, will spook liability insurance carriers and cause insurance to be prohibitively expensive.[82]

Employees enjoy few rights regarding privacy in the workplace, particularly where video surveillance is concerned.[83] Opponents of EMD

78. Kohl, *supra* note 4, at 2101 (quoting Blue v. Koren, 72 F.3d 1075, 1081 (2d Cir. 1995)).

79. *See* AGENCY FOR HEALTH CARE ADMIN., CAMERAS IN NURSING HOMES app. B (2002), https://web.archive.org/web/20030315174427/http://www.fdhc.state.fl.us:80/cinh/docs/Video_Camera_Study_Letters.pdf (arguing that a "fundamental clash between privacy rights and requirements for video monitoring" is a "contradiction of objectives" that will drive up insurance costs because "no reasonable underwriter" will take on the risk).

80. AGENCY FOR HEALTH CARE ADMIN., CAMERAS IN NURSING HOMES 11–12 (2002), https://web.archive.org/web/20030417044859/http://www.fdhc.state.fl.us:80/cinh/docs/cinhreport1_2002.pdf [hereinafter CAMERAS IN NURSING HOMES]; Jan Hoffman, *Watchful Eye in Nursing Homes*, N.Y. TIMES: WELL (Nov. 18, 2013), https://well.blogs.nytimes.com/2013/11/18/watchful-eye-in-nursing-homes/.

81. Hoffman, *supra* note 80. *But see* Brad Schrade, *Families Turn to Cameras in Nursing Homes*, SEATTLE TIMES (Sept. 21, 2011), https://www.seattletimes.com/seattle-news/health/families-turn-to-cameras-in-nursing-homes/ ("'As it turns out, [New Mexico's EMD law] hasn't been a big issue from the providers' standpoint,' said Linda Sechovec, executive director with . . . an industry trade group that represents nursing homes.").

82. *See* CAMERAS IN NURSING HOMES, *supra* note 80, at 11.

83. Katherine Anne Meier, *Removing the Menacing Specter of Elder Abuse in Nursing Homes Through Video Surveillance*, 50 GONZ. L. REV. 29, 39–40 (2014); Robert Sprague, *Orwell Was an Optimist: The Evolution of Privacy in the United States and Its De-Evolution for American Employees*, 42 J. MARSHALL L. REV. 83, 84 (2008) ("The employer has the potential

legislation warn that staff retention issues will worsen because low-wage health care workers "feel subjected to scrutiny and attack" by EMDs in use without notice.[84] But proponents argue that EMDs will actually protect employees against unsubstantiated allegations. For example, residents with dementia may accuse a caregiver of acts that did not occur.[85]

The federal and state governments have paid special attention to the rights of long-term care residents in an effort to improve the quality of care in facilities. The Nursing Home Reform Act of 1987 outlines general rights of residents[86] and requires any facility subject to Medicare regulations to give residents notice of these rights.[87] The Act gives residents the rights of free choice, privacy, confidentiality, accommodation of needs, ability to file grievances, freedom from restraints, and participation in activities.[88] The Arizona Administrative Code also lists explicit rights of residents in assisted living facilities[89] and nursing homes.[90] Similar to the federal version, these rights include privacy.[91] These privacy rights include "visual privacy and for visits or other activities, auditory privacy to the extent desired."[92] Residents also have rights to private space, but a facility may not infringe on the rights of other residents when establishing that private space.[93]

In the debate over privacy, the focus centers on residents. Proponents of EMD legislation point out that a resident's room is essentially his or her home. They argue that just as a parent may install an EMD to observe a nanny's interaction with a child, a resident or their guardian should have the same ability to use an EMD to observe the resident's care.[94] But opponents caution that when well-meaning relatives install an EMD in a resident's room, the relatives infringe "on [the resident]'s privacy arguably for [the

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to be a Big Brother, always watching, listening, and recording."); Kohl, *supra* note 4, at 2099 ("Under [the theory of implied consent], when an employer notifies the employees of the electronic surveillance or when there is an established monitoring policy, an employee is considered to have implied consent to the surveillance through her continued employment.").

84. Hoffman, *supra* note 80.

85. *See* Vince Gallero, *Watching Out for Nursing Home Residents*, MODERN HEALTHCARE, May 2001, at 24, 25.

86. 42 U.S.C. § 1396r(c)(1)(A) (2018).

87. *Id.* § 1396r(c)(1)(B).

88. *Id.* § 1396r(c)(1)(A).

89. ARIZ. ADMIN. CODE § 9-10-810 (2018).

90. *Id.* § 9-10-410.

91. *Id.* §§ 9-10-410(B)(1), 9-10-810(C)(3).

92. DIV. OF AGING & ADULT SERVS., DEP'T OF ECON. SEC., *supra* note 39, at 107.

93. *Id.*

94. *See* Hoffman, *supra* note 80.

relative's] own benefit."[95] Industry leaders who oppose EMD legislation frequently point to resident privacy as a significant concern.[96] Industry resistance has helped thwart efforts to enact EMD laws in several states.

B. Challenges to Implementation

Failed efforts in several states to pass EMD legislation expose the strength of the long-term care industry's resistance. Florida was not the first state to attempt to pass EMD legislation, and it was not the last state to fail in its efforts. But the failure in Florida is unique.[97] A task force comprised of the Florida Agency for Health Care Administration and the Office of the Florida Attorney General researched the use of EMDs in nursing homes and produced a report that strongly supported legislation to permit residents to use EMDs.[98] Despite this report, the final version of the Florida bill proposed only a pilot program in two facilities, not the robust legislation recommended by the task force.[99] Even in its weakened form, the bill died in committee.[100] Florida's failed 2002 attempt to pass legislation despite the task force's explicit support highlights the presumed sway of the nursing home industry in EMD legislation attempts:

> The study of cameras in nursing homes by the Florida task force in 2001 provides—at least perhaps—the strongest support for the approval of monitoring legislation . . . . Yet the [inaction] by the Florida Legislation . . . is the most typical of the response by the majority of state legislatures . . . . [O]ne may also reasonably assume that lobbying efforts by the nursing home and insurance

95. *Id.* (quoting law professor Nina A. Kohn); *see also* Jenni Bergal, *Nursing Home Cameras Create Controversy*, STATELINE (Sept. 25, 2014) ("[Advocates] point out that residents may not just be videotaped eating and sleeping, but also being bathed, having their diapers changed and having consensual sexual relations."); Joey Holleman, *Video Cameras in Nursing Home Rooms: Reassuring or Intrusive?*, THE STATE (Mar. 25, 2015) ("There are things that happened in my parents' room that no son should see happening to his mother."). *See generally* Robert N. Mayer, *Technology, Families, and Privacy: Can We Know Too Much About Our Loved Ones?*, 26 J. CONSUMER POL'Y 419 (2003) (exploring how the use of technology to track a family member can affect familial relationships).

96. *See, e.g.*, Holleman, *supra* note 95.

97. Toben & Cordon, *supra* note 6, at 724.

98. CAMERAS IN NURSING HOMES, *supra* note 80, at 19 ("[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—similar to what is allowed under the new Texas law—would work well in Florida. Legislation should allow Floridians to make this choice."); *see* Toben & Cordon, *supra* note 6, at 710.

99. Toben & Cordon, *supra* note 6, at 712.

100. *Id.*

> industries has [sic] had a detrimental impact on the passage of such legislation. [101]

Even more emotional approaches have failed to convince legislatures to adopt EMD legislation. The sponsor of Maryland's bill named the proposal "Vera's Law" after her mother, who "suffered painful indignities in her nursing home room."[102] The bill, which would have required long-term care facilities to accommodate EMDs, failed in 2001 and 2002.[103] In 2003, a diluted version passed, this time requiring only that guidelines be developed for facilities who chose to allow a resident to use an EMD in his or her room.[104] Similarly, Arkansas's bill was named for Willie Mae Ryan, an eighty-one-year-old woman who died after nursing home employees beat her with brass knuckles.[105] The Arkansas legislature failed to enact EMD legislation named for Ryan in 2001, 2003, and 2005.[106] The 2005 effort failed even after local industry leaders moderated their resistance.[107]

Despite these challenges, six states have enacted laws requiring certain facilities to accommodate a resident's request—or a guardian's request on behalf of a resident—to use an EMD in the resident's room. Of the six states with EMD laws, four have one-party consent laws.[108] One-party consent states may seem to be curious environments for EMD legislation. In theory, a long-term care resident could provide the necessary consent to capture interaction to which he or she is a party without obtaining consent from other parties. But as evidenced by EMD legislation passed in four one-party consent states, the characteristics of long-term care complicate the one-party consent framework.

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101. *Id.* at 724. Florida is a two-party consent state. FLA. STAT. § 943.03(3)(d) (2018). Thus, the provisions in the failed bill do not demand analysis here. But the joint report remains a hallmark of EMD legislation research, and the quiet death of the legislation in spite of the joint report lurks as a warning for states considering EMD legislation. *See also* Holleman, *supra* note 95 ("The nursing home industry is flexing its considerable muscle to stop the [South Carolina EMD] bill or severely limit its scope.").

102. Sue Hecht, *Vera's Law Would Provide Comfort to Families*, GAZETTE (Mar. 22, 2002), http://www.gazette.net/gazette_archive/2002/200212/frederickcty/letters/97007-1.html.

103. Toben & Cordon, *supra* note 6, at 713; Hecht, *supra* note 102.

104. OFFICE OF HEALTH CARE QUALITY, DEP'T OF HEALTH & MENTAL HYGIENE, *supra* note 7, at 3.

105. Meier, *supra* note 83, at 31.

106. Toben & Cordon, *supra* note 6, at 717–18.

107. *Providers Concede After Compromise on Arkansas "Granny Cam" Law*, MCKNIGHT'S LONG-TERM CARE NEWS (Mar. 7, 2005), https://www.mcknights.com/news/providers-concede-after-compromise-on-arkansas-granny-cam-law/article/101642/.

108. Washington and Illinois also have enacted EMD laws. 210 ILL. COMP. STAT. 32/1 to 32/99 (2018); WASH. ADMIN. CODE §§ 388-97-0380 to -0400 (2018). Laws from these states will not be discussed here because Washington and Illinois are two-party consent states. 720 ILL. COMP. STAT. 5/14-2 (2018); WASH. REV. CODE § 9.73.030(1)(a) (2018).

C. Four One-Party Consent States Adopt EMD Legislation

Texas, New Mexico, Oklahoma, and Utah have one-party consent statutes[109] and have enacted EMD legislation. The four statutes generally aim to prevent abuse of long-term care residents. But the statutes also vary in scope and specificity, revealing the extent to which each legislature attempted to address concerns from the long-term care industry.

In 2001, Texas became the first state to pass legislation explicitly protecting a nursing home resident's right to install an EMD in his or her room.[110] The law emerged following failed reform efforts, which hit the industry hard financially without achieving meaningful improvement in the care of nursing home residents.[111] The Texas law inspired Florida's efforts to pass similar legislation.[112] New Mexico followed in 2004.[113] Governor Bill Richardson signed the bill, calling it "one more way to protect nursing home residents from becoming victims of abuse, theft and other harm."[114]

Disturbing footage of abuse prompted Oklahoma to pass EMD legislation in 2013.[115] In 2012, a hidden camera caught two caregivers physically abusing ninety-six-year-old Eryetha Mayberry.[116] The outrage motivated the Oklahoma legislature to pass an EMD bill unanimously just thirteen months after video captured the assault of Mayberry.[117] The bill's sponsor said the new law would "give families peace of mind being able to monitor their loved ones."[118]

Utah passed EMD legislation in 2016.[119] The bill's sponsor said the measure's "primary value, to be honest, is deterrence."[120] The Utah Assisted

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109. N.M. STAT. ANN. § 30-12-1(C) (2018); OKLA. STAT. tit. 13, § 176.4(4) (2018); TEX. PENAL CODE ANN. § 16.02(c)(4) (West 2018); UTAH CODE ANN. § 77-23a-4(7)(b) (LexisNexis 2018).

110. Toben & Cordon, *supra* note 6, at 679.

111. *Id.* at 699.

112. CAMERAS IN NURSING HOMES, *supra* note 80, at 19.

113. N.M. STAT. ANN. §§ 24-26-1 to -12 (2018).

114. Erin Madigan, *Long-Term Health Care Costs Loom Large for Governors*, PEW CHARITABLE TRUSTS: STATELINE (July 16, 2004), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2004/07/16/longterm-health-care-costs-loom-large-for-governors.

115. OKLA. STAT. tit. 63, §§ 1-1953.1 to -.7 (2018).

116. Racher v. Westlake Nursing Home Ltd. P'ship, No. CIV-13-364-M, 2013 U.S. Dist. LEXIS 108696, at *2 (W.D. Okla. Aug. 2, 2013). A federal jury rendered a $1.21 million judgment against the nursing home's operator. Randy Ellis, *Court Upholds $1.21 Million Judgment Against Former Operator of Oklahoma City Nursing Home*, OKLAHOMAN (Oct. 5, 2017), http://newsok.com/court-upholds-1.21-million-judgment-against-former-operator-of-oklahoma-city-nursing-home/article/5566755.

117. Press Release, Okla. State Senate, Governor Signs Nursing Home Electronic Monitoring Bill (May 6, 2013), http://www.oksenate.gov/news/press_releases/press_releases_2013/pr20130506a.htm.

118. *Id.*

119. UTAH CODE ANN. §§ 26-21-301 to -304 (LexisNexis 2018).

Living Association and Utah Health Care Association each initially opposed the bill but announced a neutral stance after meeting with the bill's sponsor.[121]

Similarities exist across the legislation in these four states. Each state forbids the respective facilities from denying a potential resident admission to the facility or from discharging a resident from the facility because the resident wishes to install and use an EMD.[122] Each state permits a resident's legal guardian to authorize the installation and use of an EMD in the resident's room if the resident is incapable of giving that authorization.[123] In each state, residents cannot install an EMD without first consulting a roommate.[124] In each state, the expense of the device falls to the resident.[125] Finally, the statutes protect facilities from civil liability regarding privacy of the resident and a consenting roommate.[126]

Proponents of these statutes contend that the law protects both residents and facilities.[127] But the nuances in each statute and subsequent regulations underscore a perception as to whether residents or facilities had greater protection under the previous law.[128] Four categories of provisions provide important insight into the interests at stake in EMD legislation. These categories do not capture all aspects of the respective EMD laws, but instead focus on provisions in which one can best ascertain a legislative valuation of the potentially competing interests of residents, facilities, and families.

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120. Daphne Chen, *Bill Would Allow Cameras in Rooms at Assisted Living Facilities*, DESERET NEWS (Jan. 18, 2016), https://www.deseretnews.com/article/865645677/Bill-would-allow-cameras-in-rooms-at-assisted-living-facilities.html (quoting Representative Timothy Hawkes).

121. Bowers, *supra* note 11.

122. N.M. STAT. ANN. § 24-26-11 (2018); OKLA. STAT. tit. 63, § 1-1953.2(B) (2018); TEX. HEALTH & SAFETY CODE ANN. § 242.851(a)(2) (West 2018); UTAH CODE ANN. § 26-21-304(1).

123. N.M. STAT. ANN. § 24-26-5; OKLA. STAT. § 1-1953.2(A); TEX. HEALTH & SAFETY § 242.845; UTAH CODE ANN. § 26-21-303(1).

124. N.M. STAT. ANN. § 24-26-6(C); OKLA. STAT. § 1-1953.5(D); TEX. HEALTH & SAFETY § 242.846; UTAH CODE ANN. § 26-21-303(1)(b).

125. N.M. STAT. ANN. § 24-26-3(A)(3); OKLA. STAT. § 1-1953.5(A); TEX. HEALTH & SAFETY § 242.847(f); UTAH CODE ANN. § 26-21-303(1)(c).

126. N.M. STAT. ANN. § 24-26-7(B); TEX. HEALTH & SAFETY § 242.842; UTAH CODE ANN. § 26-21-303(2). Oklahoma's statute does not contain an explicit immunity provision.

127. *See* Holleman, *supra* note 95 ("'Somebody should be comforted to know that their loved one is not being abused or neglected,' [Senator Paul Thurmond] said, 'and those nursing homes should be comforted to know that they have a way of overcoming wrongful accusations of mistreatment.'").

128. *See* Selket Nicole Cottle, Note, *"Big Brother" and Grandma: An Argument for Video Surveillance in Nursing Homes*, 12 ELDER L.J. 119, 121 (2004) ("The real issue for both families of nursing home residents and for the nursing home industry is: Whose side is the law on?").

1. Scope

The New Mexico and Texas statutes have the broadest reach. New Mexico's statute applies to "facility" patients.[129] "Facility" is defined broadly as a "long-term care facility" and includes an expansive list of included types of institutions.[130] Similarly, Texas's statute applies to an EMD "in the room of a resident of an institution."[131] The Texas Health & Safety Code's definition of "institution" applies to establishments that serve four or more people and provides "minor treatment" under direction of a licensed physician.[132] Oklahoma and Utah's statutes apply less broadly. Oklahoma's statute applies strictly to nursing homes, and Utah's statute applies strictly to assisted living facilities.[133] Both states distinguish between the two types of facilities, and there is no indication either state has expanded the application to all long-term care facilities.[134]

By specifying which devices may be used, each statute implicitly determines whether a resident's guardian or family member can access captured data remotely. Generally, EMD statutes permit residents to install a device that performs video surveillance or records audio.[135] But Utah does not permit residents to use devices that connect to the internet, or devices

129. N.M. STAT. ANN. § 24-26-2(D).

130. "[M]ay also include: a skilled nursing facility; an intermediate care nursing facility; a nursing facility; an adult residential shelter care home; a boarding home; any adult care home or adult residential care facility; and any swing bed in an acute care facility or extended care facility." *Id.* § 24-26-2(B)(1)–(7).

131. TEX. HEALTH & SAFETY § 242.841(1).

132. *See id.* § 242.002(10).

133. Utah has nearly 10,000 beds in assisted living facilities, and more than 9,500 beds in nursing centers, meaning that the law applies to approximately half of Utah's residents in care facilities. *List of All Facilities*, HEALTH FACILITY LICENSING, CERTIFICATION AND RESIDENT ASSESSMENT, UTAH DEP'T HEALTH, http://health.utah.gov/hflcra/facinfo/facility_list_11_Sep_2018.htm (last updated Sept. 11, 2018). The Utah Department of Health provides a detailed description of how what type of care each type of facility performs. *See Levels of Care*, HEALTH FACILITY LICENSING, CERTIFICATION AND RESIDENT ASSESSMENT, UTAH DEP'T HEALTH, http://health.utah.gov/hflcra/facinfo/LevelsOfCare.pdf (last visited Oct. 28, 2018).

134. On the Oklahoma Department of Health website, the Authorized Electronic Monitoring Consent forms appear under "Nursing Homes" forms, but not "Assisted Living Center" forms. *See Long Term Care Forms*, OKLA. ST. DEP'T HEALTH, https://www.ok.gov/health/Protective_Health/Long_Term_Care_Service/Long_Term_Care_Forms/index.html (last visited Oct. 28, 2018). Depending on how states classify long-term care facilities, applying regulations to just one class of facility may create confusion about responsibilities if a facility provides different types of services at one location. *See* Marty Butler, *Video Monitoring in LTC Facilities: How Is Assisted Living Affected?*, MCKNIGHT'S SENIOR LIVING (Oct. 13, 2016), http://www.mcknightsseniorliving.com/marketplace-columns/video-monitoring-in-ltc-facilities-how-is-assisted-living-affected/article/547312/.

135. N.M. STAT. ANN. § 24-26-2(C) (2018); OKLA. STAT. tit. 63, § 1-1953.1(2) (2018); TEX. HEALTH & SAFETY § 242.842(c); UTAH CODE ANN. § 26-21-303(2) (LexisNexis 2018).

set up to transmit data electronically.[136] This would prohibit a guardian or family member from observing live video or remotely accessing recorded video from a resident's room.[137] New Mexico requires a facility to allow a resident to "install any necessary Internet access line(s)" but a resident is responsible for any internet activation or service expenses.[138]

2. Responsibilities of the Facility

Texas, New Mexico, and Oklahoma require a facility to make accommodations for a resident wishing to use an EMD. A facility in New Mexico must "cooperate to accommodate the installation" of an EMD unless the installation places an "undue burden" on the facility.[139] In New Mexico and Texas, a facility or institution must provide a resident with access to electricity at no charge, and must provide a "reasonably secure place to mount" the EMD.[140] An Oklahoma nursing home must "within a reasonable amount of time" accommodate a resident's request to move to a different room if the resident's roommate does not consent to the use of the EMD.[141] A Texas institution may move a resident to accommodate the use of an EMD, but the statute does not require it.[142] Utah places no such responsibility on an assisted living facility.

3. Notice

Upon admitting a resident, institutions in Texas must inform that resident of the right to use an EMD.[143] Texas Health and Human Services Form 0065 includes information about a resident's rights as well as abuse and neglect requirements.[144] Oklahoma takes a different approach and requires facilities

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136. UTAH CODE ANN. § 26-21-302(3)(b)(ii).

137. Even if a state allows residents to use EMDs that connect to the internet, a resident's ability to transmit live data may be hindered by a lack of internet access or slow internet speeds.

138. N.M. CODE R. § 9.2.23.10(C) (LexisNexis 2018).

139. N.M. STAT. ANN. § 24-26-4(C).

140. N.M. CODE R. § 9.2.23.10(A)(1); TEX. HEALTH & SAFETY § 242.847(e)(1).

141. OKLA. STAT. tit. 63, § 1-1953.5(D) (2018).

142. TEX. HEALTH & SAFETY § 242.847(i). A roommate who does not consent to the use of an EMD could effectively prohibit a resident from using an EMD if the institution does not or cannot move the resident. Opponents of Texas SB 177 pointed out that this could lead to "significant friction among residents." HOUSE RESEARCH ORG., REGULATING ELECTRONIC MONITORING IN NURSING HOMES, S.B. 177, at 5 (Tex. 2001).

143. TEX. HEALTH & SAFETY § 242.844(3).

144. TEX. HEALTH & HUMAN SERVS., INFORMATION REGARDING AUTHORIZED ELECTRONIC MONITORING FOR NURSING FACILITIES (2004), https://hhs.texas.gov/sites/default/files//documents/laws-regulations/forms/0065/0065.pdf.

to give written notice to residents informing residents that electronic monitoring under the Act is "not compulsory."[145]

Each state presents a different provision for notice to employees, visitors, and other residents. Texas and Oklahoma require facilities to post signs near the front entrance, warning visitors that they may be subject to electronic surveillance.[146] In Texas, this provision followed a suggestion by a representative for the Texas Advocates for Nursing Home Residents who spoke at the House Committee on Human Services public hearing.[147] The chair of the Committee agreed that such a notice would "serve to deter anyone from participating in any type of abuse and neglect."[148] Utah and New Mexico do not address notice at the entrance of a facility.[149]

Requirements for notice outside a resident's room posit a significant policy consideration, potentially pitting a resident's interest against the interests of their caretakers, visitors, and fellow residents. Two states, Texas and New Mexico, require a conspicuous sign outside a room where a resident has installed an authorized EMD.[150] These provisions address concerns about visitor and employee privacy and ideally creates a deterrent, similar to the reasoning behind the posted notice at a facility's entrance. But in Oklahoma, some senior groups insisted that a posted notice on a resident's room be voluntary so to ensure the room maintains a "home-like environment."[151] Utah's statute permits a facility to decide whether to require residents using EMDs to post a notice outside their door.[152] This provision aligns with Utah's industry-friendly approach that allows facilities to draft tailored consent agreements.[153]

A resident's responsibility to give notice to the facility adds another intricate layer to debate over policy, particularly in one-party consent states.

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145. OKLA. STAT. § 1-1953.2(A). This language appears to be a remnant of the bill's original scope, which required nursing homes to install EMDs throughout the facility, including residents' rooms. Originally, the bill provided an opt-out procedure, rather than a permissive approach. *See* S.B. 587, 2013 Leg., 54th Sess. (Okla. 2013).

146. OKLA. STAT. § 1-1953.2(C); 40 TEX. ADMIN. CODE § 92.129(g) (2018). In Texas, the sign must state surveillance may occur in the rooms of some residents and that "[m]onitoring may not be open and obvious in all cases." *Id.*

147. Toben & Cordon, *supra* note 6, at 704.

148. *Id.* at 705.

149. The Utah bill's sponsor indicated that some notice would occur. He characterized the bill as a "deterrence" effort, and posited that if a criminal who victimized elderly people saw "a sign that says you can be monitored and recorded, I think you're probably going to walk on by." Chen, *supra* note 120.

150. N.M. CODE R. § 9.2.23.18 (LexisNexis 2018); 40 TEX. ADMIN. CODE § 92.129(f)(1). In New Mexico, the facility bears the expense of such a sign, and it must be in English and Spanish. N.M. CODE R. § 9.2.23.18.

151. Bergal, *supra* note 95.

152. UTAH CODE ANN. § 26-21-304(3) (LexisNexis 2018).

153. Bowers, *supra* note 11.

Provisions in this vein potentially alter an individual's ability to legally capture communication without the other party's consent. Utah explicitly prohibits a resident from using an EMD "in secret" without a court order.[154] Language in the Oklahoma statute indicates that legislators presumed some residents had already installed EMDs in their rooms. The statute set a deadline, giving those residents two months to comply with the notice requirement.[155]

Oklahoma and New Mexico present incentives to residents to abide by requirements to notify their facilities before installing and using an EMD.[156] Oklahoma suggests that material captured only through "authorized" EMD use may be used as evidence in a civil, criminal, or administrative proceeding.[157] New Mexico's statute more explicitly protects a facility in a civil action if the facility did not have proper notice of the resident's EMD use.[158]

Texas distinguishes between "authorized electronic monitoring" and "covert" use of an EMD.[159] Authorized use involves a "request to the institution to allow" the use of an EMD.[160] EMD use is covert if the EMD is not "open and obvious" and the individual has not informed the institution or the Department of Human Services about the EMD.[161] A facility may require an EMD to be used "in plain view."[162] A facility may not discharge a resident for using an EMD in a covert manner, but can require a resident to meet the requirements for authorized use before continuing to use the EMD.[163] But Texas does not incentivize authorized use as robustly as Oklahoma or New Mexico.[164] EMD material captured through covert use

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154. UTAH CODE ANN. § 26-21-303(3)(a). The senior living industry requested that lawmakers remove a provision requiring residents to tell a facility "exactly where they plan to put a device" and "to communicate specifics about the equipment." Bowers, *supra* note 11. Lawmakers complied. *Id.*

155. OKLA. STAT. tit. 63, § 1-1953.7 (2018).

156. N.M. STAT. ANN. § 24-26-3(A)(1) (2018) ("A patient . . . may authorize installation and use of a monitoring device in a facility provided that: (1) the facility is given notice of the installation . . . ."); OKLA. STAT. tit. 63, § 1-1953.6(A) ("[R]esident . . . shall be required to notify the nursing facility.").

157. OKLA. STAT. § 1-1953.4 (2018).

158. N.M. STAT. ANN. § 24-26-7(A).

159. *Compare* TEX. HEALTH & SAFETY CODE ANN. § 242.843(a) (West 2018), *with id.* § 242.847.

160. *Id.* § 242.841(1).

161. *Id.* § 242.843.

162. 40 TEX. ADMIN. CODE § 92.129(h)(2) (2018).

163. *Id.* § 92.129(i). These requirements include posting notice outside the resident's room and obtaining consent from a roommate. *Id.* §§ 92.129(f)(1), (e)(3).

164. A person who uses a covert EMD waives "any privacy right the person may have had in connection with images or sounds that may be acquired by the device." TEX. HEALTH & SAFETY CODE ANN. § 242.844(2) (West 2018).

may still be admitted as evidence in criminal, civil, or administrative proceedings.[165] This provision maintains the spirit of the one-party consent law, favoring the resident's prerogative to decide how to use an EMD in his or her room.

4. Penalties

Texas imposes the stiffest penalties on institutions that fail to comply with the statute. Provisions permit sanctions or administrative penalties if an institution refuses to admit or discharges a resident based on the resident's desire to use an EMD.[166] Texas, New Mexico, and Oklahoma impose criminal penalties if a person tampers with an EMD or obstructs the use of an EMD.[167]

Each of the states have other statutes which require certain individuals to report elder abuse. Texas, however, is the only state to include reporting requirements in its EMD statute.[168] The law puts responsibility on a family member or guardian using an EMD to oversee a resident's care, requiring the individual to report incidents of abuse captured by the EMD.[169] Incidents of neglect must also be reported, but only if material captured by the EMD clearly indicates neglect.[170] These provisions require family members or guardians to actively participate in the electronic monitoring process and respond accordingly under possibility of penalty. While the long-term care industry may be concerned about statutory penalties related to elder abuse, penalties of a different nature create a significant financial concern for the industry.

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165. *Id.* § 242.849(a).

166. *Id.* § 242.851.

167. N.M. STAT. ANN. § 24-26-12 (2018) ("A person other than a patient or surrogate found guilty of internationally hampering, obstructing, tampering with or destroying a monitoring device or recording made by a monitoring device . . . is guilty of a fourth degree felony . . . ."); OKLA. STAT. tit. 63, § 1-1953.3(A) (2018) ("No person or entity shall intentionally hamper, obstruct, tamper with, or destroy a recording or an electronic monitoring device installed in a nursing facility."); TEX. HEALTH & SAFETY CODE ANN. § 242.852(a) (West 2018) ("A person who intentionally hampers, obstructs, tampers with, or destroys an electronic monitoring device installed in a resident's room . . . or a tape or recording made by the device commits an offense.").

168. HEALTH & SAFETY § 242.848.

169. *Id.*

170. *Id.*

D. Industry Concerns

The long-term care industry has raised several concerns about EMD legislation, including privacy of residents[171] and employee turnover.[172] A third key objection focuses on costs of litigation stemming from information captured by an EMD.[173] This objection is "not a new strategy for insurers or the nursing home industry."[174] High-dollar judgments, like the $1.21 million in Oklahoma's Mayberry suit, would certainly make any operator nervous.[175] But the industry appears to have retreated marginally from this argument. Little evidence has surfaced of higher litigation costs associated with EMD legislation.[176] EMD legislation may even help reduce litigation costs, as information captured by EMDs can help settle disputes before they escalate.[177] The long-term care industry has continued to oppose EMD legislation, but Utah's recent legislation suggests that the industry may be somewhat more amenable to a balanced EMD bill.[178]

The four EMD statutes in one-party consent states create a unique opportunity to devise a statute for Arizona that effectively balances the needs and interests of long-term care facilities and their residents. The recent enactment in Utah with a neutral stance from important industry groups suggests the timing may be ideal for Arizona to pass a refined statute that could serve as a model for other one-party consent states.

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171. Holleman, *supra* note 95.

172. Hoffman, *supra* note 80.

173. CAMERAS IN NURSING HOMES, *supra* note 80, at 11; HOUSE RESEARCH ORG., *supra* note 142, at 3; Toben & Cordon, *supra* note 6, at 726.

174. Toben & Cordon, *supra* note 6, at 726.

175. *See* Ellis, *supra* note 116. The facility's former owner fraudulently transferred money out of nursing home's accounts to avoid paying previous judgments; the jury awarded a $1.6 million personal judgment. Kyle Schwab, *Federal Jury Returns $1.6M Judgment Against Oklahoma City Nursing Home's Former Owner*, OKLAHOMAN (Jan. 29, 2016), http://newsok.com/article/5475666.

176. *See* Toben & Cordon, *supra* note 6, at 726 ("In the four years following the enactment of the Texas legislation . . . 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.").

177. *See* CAMERAS IN NURSING HOMES, *supra* note 80, at 17–18. Certainly a single dispute over whether a resident received eggs as part of their breakfast is unlikely to escalate to litigation, but the principle easily stretches to more serious disputes over care and interactions with other residents and visitors. *See also* Okla. State Senate, *supra* note 117 ("The bill should also help decrease the number of reported cases of suspected abuse and neglect by providing video and audio evidence to support or refute such claims.").

178. *See* Bowers, *supra* note 11.

IV. CRAFTING AN EMD STATUTE FOR ARIZONA

Under a one-party consent statute, a long-term care facility resident could act as the consenting party and install an EMD in his or her room to capture interactions with caretakers and visitors. But a one-party consent statute does not account for a facility's ability to restrict EMDs in a contract, and does not consider the possibility of retaliation if the facility learns about a resident's EMD use. These factors may drive residents or their families to install hidden cameras, which would cultivate an atmosphere of distrust and potentially expose the facility to unfair media coverage with footage from EMDs.

Before discussing the finer points of a proposed EMD statute for Arizona, a caveat must be addressed. There is no evidence that rates of elder abuse drop significantly in states with EMD legislation; thus, there is no reason to believe that any such legislation in Arizona will accomplish widespread improvement of care in long-term care facilities.[179] This goal is little more than a political talking point. Rather, this type of legislation clarifies the rights and responsibilities of parties involved in the use of EMDs in long-term care residents' rooms. More importantly, the legislation gives families and residents a valuable tool to discourage, detect, or prove elder abuse. The legislation balances the bargaining power for families and residents while offering practical protections for facilities. Thus, EMD legislation should operate as part of a broader package of efforts to combat elder abuse in Arizona long-term care facilities.

The following portions of drafted language signal the key components of an Arizona EMD statute. The suggestions assume consent of a resident or resident's legal guardian, as well as consent of a resident's roommate as applicable.

A. Scope

To prevent confusion among long-term care facilities that offer different levels of care, EMD legislation should apply to both assisted living and nursing home facilities as defined in the Arizona Revised Statutes. The definition of "assisted living facility" captures adult foster care homes and assisted living homes serving fewer than ten residents.[180] To avoid undue burden on smaller facilities, these facilities should be excluded. Only

179. *See* Bergal, *supra* note 95 ("[T]he [nursing home] industry doesn't believe that using cameras is a guarantee that residents will be protected and well cared for. '(The cameras) should not be the be all and end all, in terms of ensuring quality of care . . . .'").

180. ARIZ. REV. STAT. ANN. §§ 36-401(A)(8), (A)(5), (A)(9) (2018).

"assisted living centers," which serve eleven or more residents, should be included.[181] "Nursing care institutions" include traditional nursing homes.[182]

> *For the purposes of this article:*
>
> *"Facility" means an assisted living center as defined in 36-401(A)(7) or a nursing care institution as defined in 36-401(A)(32).*

Utah's statute unnecessarily restricts the type of devices a resident may use. A facility may be concerned about the cost or burden of allowing residents to access the facility's internet network connections. This may be resolved by permitting a facility to charge a nominal fee for internet access if not already included in the cost of residency. Staying silent on the internet access portion will allow a facility and a resident to contract on that issue depending on the facility's internet infrastructure and capabilities.

Many EMDs now offer two-way connectivity, meaning a device can do more than passively record. This additional feature may allow more convenient communication between a resident and remote family members in addition to capturing footage of interactions in a resident's room. If facility operating procedures permit, this feature may allow a caregiver to communicate with a resident's relative, with resident consent. A restriction on devices which require internet connection or allow remote access of captured media would otherwise prevent the use of this valuable feature.

> *In this article, unless the context otherwise requires:*
>
> *"Electronic monitoring device" means video surveillance cameras and audio devices that are designed to capture communications, sounds or other interactions occurring in the room of a resident. This does not include a device prohibited under section 13-3005*[183] *or section 13-3019.*[184]

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181. *Id.* § 36-401(A)(7).

182. *Id.* § 36-401(A)(32) (describing facilities that provide "inpatient beds or resident beds and nursing services to persons who need continuous nursing services but who do not require hospital care or direct daily care from a physician").

183. This statute prohibits a person from intentionally intercepting a wire or electronic communication to which the individual is not a party without consent from any party.

184. This statute addresses recording devices used to capture a person engaging in intimate activities, such as changing clothes or having sex, without that person's consent.

B. Responsibilities of Facilities

This subsection most clearly distinguishes an EMD statute from a one-party consent law. Under a one-party consent statute, a resident may install a camera in his or her room. But a one-party consent statute does not necessarily protect that resident from a facility's decision to move that resident to a less desirable room if the resident installs or requests to install an EMD. A one-party consent statute does not protect a resident against an employee's decision to move an object in front of the camera to block its view or move the EMD to a location that would render it ineffective. Finally, a one-party consent statute does not explicitly prevent a facility from forbidding the use of EMDs as a term of its contract with a resident. While laws generally do not permit a facility to discriminate in admission decisions based on certain factors such as race, without EMD legislation, a facility may discriminate against a potential resident if that resident wishes to use an EMD.

> *A facility may not deny admission to a person to that facility if the person or the person's legal guardian requests to use an electronic monitoring device in the person's room and such request is a determining factor in the facility's decision to deny admission to the person.*
>
> *A facility may not remove a resident from the facility if the resident's use or request to use an electronic monitoring device in the room of the resident is a determining factor in the facility's decision to remove the resident.*
>
> *A facility must reasonably accommodate a resident's request to install, use, and maintain an EMD in the room of the resident, including:*
>
> > *Providing a secure place to install the electronic monitoring device and*
> >
> > *Providing access to power source for the electronic monitoring device.*
>
> *A person may not intentionally tamper with, obstruct or otherwise damage an electronic monitoring device in the room of a resident.*

> *If a resident living in a shared room refuses to consent to the use of an electronic monitoring device, a facility must make reasonable efforts to place the resident requesting to use an electronic monitoring device in different room to accommodate the request of the resident.*

C. Notice

Notice to another resident in a shared room is not negotiable in an EMD statute. Significant concerns about capturing intimate health information about a resident's roommate require notice to and the consent of any roommate. Additionally, an EMD statute should address four key areas of notice: notice to visitors outside the facility, notice to anyone entering a resident's room, notice of a resident's right to use an EMD, and notice to the facility that a resident is using an EMD.

In accordance with other EMD statutes, notice outside a facility should be provided to potential visitors. That notice should detail the possibility of EMDs in common areas and residents' rooms. Like New Mexico, any EMD statute in Arizona should require these notices to be posted in English and in Spanish to accommodate the needs of residents' family members or visitors.

Given the unique challenges of caring for long-term care residents, a facility must be given freedom to determine whether to require notice posted outside the room of a resident using an EMD. Utah's statute takes this approach. Because a resident's room is his or her home, a posted notice may detract from a home-like atmosphere. But a facility operating a memory care unit may wish to require residents to post a conspicuous notice, which would offer a reminder to that resident and any visiting resident that an EMD is in use in that room. A facility can best determine what notice procedures would best suit its residents and should be permitted to adopt procedures accordingly.

Facilities must provide information to residents about their rights; adding information about an additional right would be a de minimis burden. A form modeled after Texas Health and Human Services Form 0065 would adequately inform a resident of their right to use an EMD and provide notice of mandatory reporting of abuse. This notice would also create an opportunity for the resident to then provide notice to the facility of their request to use an EMD.

New Mexico's approach to notice incentivizes a resident to give notice to the facility. Both Texas and New Mexico distinguish between covert and overt EMD. A facility understandably would prefer to know which residents have installed EMDs, so as to adequately notify employees and to have an opportunity to request any footage in case of an incident or dispute. By

limiting how information captured by a covert EMD may be used as evidence in a civil suit, similar provisions would incentivize residents to abide by the law and notify the facility. Such provisions would in turn addresses the industry's concerns about increased litigation costs.

> *A facility shall post at its main entrances a sign that clearly states in English and in Spanish that electronic monitoring devices may be in use in rooms of residents.*
>
> *A facility may require a resident using an electronic monitoring device to post a conspicuous notice outside the room of the resident that clearly states in English and in Spanish that an electronic monitoring device is in use in the resident's room.*
>
> *When a resident is admitted to a facility, the facility shall provide written notice to the resident of the resident's right to install and use an electronic monitoring device in the room of the resident.*
>
> *A resident shall provide written notice to the facility if the resident wishes to install and use an electronic monitoring device.*
>
> *In any civil or administrative action against the facility, material captured by an electronic monitoring device may not be used as evidence if the electronic monitoring device was installed or used without proper written notice to the facility or without the actual knowledge of the facility.*

D. Penalty

Texas and New Mexico impose penalties for facilities. Naturally, the threat of a fine or a felony charge would incentivize a facility and its employees to protect residents' rights to use an EMD; such threats would also provoke opposition to EMD legislation. To balance the burden, a provision unique to the Texas statute may ease some concerns in the industry. The statute attaches constructive notice to a relative's or guardian's ability to monitor information captured by an EMD. Thus, a relative or guardian who fails to report abuse or neglect captured by the EMD may be liable under elder abuse reporting statutes. This liability may prompt a relative or guardian to consider whether they are willing to actively monitor the EMD before installing an EMD.

Texas and New Mexico penalize intentional tampering or damaging a resident's EMD as a criminal act. While a fine and monetary damages for the property damage may seem more appropriate, one must remember that an EMD may capture potential evidence in a criminal or civil action that could implicate or exonerate a caregiver. Thus, attaching a criminal penalty to these actions further protects both facilities and residents, because the penalty discourages all parties from interfering with the EMD.

> *A person who conducts electronic monitoring on behalf of a resident is considered to have viewed or listened to material captured by an electronic monitoring device on or before the thirtieth day the material is captured and is subject to requirements under 46-454.*[185]
>
> *A person who tampers with, obstructs or otherwise damages an electronic monitoring device in the room of a resident commits a criminal offense.*

E. EMD Legislation and APSA

Information captured by an EMD could satisfy the second, third, and fourth requirements identified by the *Delgado* court for satisfying a claim under the APSA. EMD footage could permit a factfinder to identify the injury and determine that the injury was caused by abuse from a caregiver. *Delgado* significantly expanded the applicability of the APSA, and in turn, the potential liability of caregivers. Thus, EMD legislation may not enjoy the muted industry resistance witnessed in Utah. EMDs have potential to produce evidence that a resident was not injured in the manner claimed, or that a caregiver was not responsible for the injury, and EMD legislation limits how captured information may be used in litigation. But an effort to enact EMD legislation in Arizona would likely face less resistance if the legislature first limited the scope of the APSA, as the Arizona Supreme Court left that task to elected officials.

V. CONCLUSION

Thanks to developments in technology, EMDs offer a simple and effective tool for families to monitor loved ones residing in long-term care facilities. EMDs in the rooms of long-term care residents will not eliminate

185. Arizona establishes a duty to report abuse, neglect and exploitation of vulnerable adults.

abuse or neglect. But EMDs provide an option for families or residents concerned about quality of care. In the years since Texas enacted the first EMD statute, the weightiest of the industry's concerns have waned. Utah's legislative effort demonstrates that a balanced approach will weather industry push-back.

Long-term care facilities and residents deserve clarity in the rights and responsibilities involved in the use of EMDs. One-party consent statutes simply cannot effectively govern the modern complexities of electronically capturing interactions in the long-term care environment. Arizona's population and documented difficulty in effectively addressing complaints of abuse or neglect makes the state an ideal environment to introduce EMD legislation. Naturally, the long-term care industry would push back on any legislative efforts, particularly in light of the *Delgado* test for APSA applicability. But a balanced bill that considers the needs of the industry protects facilities as well as residents. Legislation that limits civil liability for information captured by an unauthorized EMD and allows facilities to tailor policies should ease industry concerns while clearly establishing a resident's right to use an EMD in his or her room.