

HEALTH CARE LAW ALERT

GRANNY CAMS AND SMART PHONES: CAN PATIENTS SECRETLY RECORD HEALTH CARE PROVIDERS?

With the prevalence of smart phones and other easily accessible digital technologies, providers are increasingly faced with the challenge of policing appropriate use of these technologies by patients and their families. When a provider finds out that a patient has recorded their interaction without the provider's consent, the provider often feels that this is a violation of the trust that must exist in the patient-provider relationship. In the long term care context, "Granny Cams" – hidden cameras placed in a resident's room to secretly record interactions with nursing home staff - have been used by resident families, as well as the New York Attorney-General's Office, to expose potential neglect or abuse. This naturally leads providers to ask, can my patient record me without my permission?

In New York, it is not illegal for a patient to record a provider without his or her permission. This is because New York is a "one party consent" jurisdiction, meaning that the consent of either party to the recording is sufficient. This one party consent rule is what allowed the New York Attorney-General's Office to set up hidden cameras in various nursing homes in the past, exposing resident abuse and neglect and leading to criminal charges and arrests for employees of those facilities. In those cases, the families of the residents consented to the placement of the hidden cameras to monitor the resident. However, if a hidden camera recorded people other than the resident when the resident was not present, this would be a violation of the law.

Although there is no legal prohibition against secret recording in New York, there is no explicit right for patients or nursing home residents to record others without consent. While other states have passed laws expressly permitting residents of long term care facilities to maintain Granny Cams in their rooms, New York does not have such a law on the books. In addition, patient rights guaranteed by federal and New York regulations do not expressly grant patients or nursing home residents the right to secretly record health care staff.

In the health care setting, providers set the rules about how care is delivered and thus, have options for limiting patient or resident use of recording devices. Providers should weigh the pros and cons of allowing patients to use digital technologies in the health care setting. While such technology can be useful in helping patients and families record explicit follow-up care instructions, for example, there is also the danger that the privacy rights of other patients may be infringed when the use of digital technologies is not carefully constrained. Also, providers should consider whether allowing patients to use recording devices might infringe employee rights guaranteed in an employee handbook or by a collective bargaining agreement.

Your organization's rules for patient or resident use of recording devices should be made explicit in a policy explaining when patients may be allowed to use recording devices (e.g. with the provider's consent) and when they may not (e.g. never during any procedure or surgery). The policy should be posted in a conspicuous manner so it can be clearly communicated to patients. In the nursing home context, your facility's policy on the use of recording devices should be included in the admission policy and in the admission agreement.

Please contact one of our Firm's health law attorneys identified below if you would like more information on this issue.

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