

TITLE 9 HUMAN RIGHTS
CHAPTER 2 AGE
PART 23 PATIENT CARE MONITORING IN LONG-TERM CARE FACILITIES

9.2.23.1 ISSUING AGENCY: Aging and Long-Term Services Department.
[9.2.23.1 NMAC - N, 7/15/04]

9.2.23.2 SCOPE: This rule applies to the general public.
[9.2.23.2 NMAC - N, 7/15/04]

9.2.23.3 STATUTORY AUTHORITY: This rule is adopted pursuant to the terms of Sections 28-4-6(B), 28-17-5 and 28-17-19 NMSA 1978, Law 2004, Ch. 23, Sec. 6(E) and Laws 2004, Ch. 53, Sec. 10.
[9.2.23.3 NMAC - N, 7/15/04]

9.2.23.4 DURATION: Permanent.
[9.2.23.4 NMAC - N, 7/15/04]

9.2.23.5 EFFECTIVE DATE: July 15, 2004, unless a later date is cited in the history note at the end of a section.
[9.2.23.5 NMAC - N, 7/15/04]

9.2.23.6 OBJECTIVE: This rule implements the provisions of the Patient Care Monitoring Act, Laws 2004, Ch. 53.
[9.2.23.6 NMAC - N, 7/15/04]

9.2.23.7 DEFINITIONS: The following terms are used in this rule:

- A. "department"** means the aging and long-term services department;
 - B. "facility"** means a long-term care facility licensed pursuant to the provisions of Section 24-1-5 NMSA 1978, other than an intermediate care facility for the mentally retarded, and may also include:
 - (1) a skilled nursing facility;
 - (2) an intermediate care nursing facility;
 - (3) a nursing facility;
 - (4) an adult residential shelter care home;
 - (5) a boarding home;
 - (6) any adult care home or adult residential care facility; and
 - (7) any swing bed in an acute care facility or extended care facility;
 - C. "monitoring device"** means a surveillance instrument that broadcasts or records activity, but does not include a still camera;
 - D. "patient"** means a person who is a resident of a facility;
 - E. "program"** means the New Mexico long-term care ombudsman program;
 - F. "roommate"** means a patient who shares a room in a facility with a patient who has chosen, or whose surrogate has chosen, to install and use a monitoring device; and
 - G. "surrogate"** means a legal guardian or a legally appointed substitute decision-maker who is authorized to act on behalf of a patient.
- [9.2.23.7 NMAC - N, 7/15/04]

9.2.23.8 AUTHORIZATION AND USE OF A MONITORING DEVICE:

- A.** A patient or surrogate may authorize installation and use of a monitoring device in a facility provided that:
 - (1) the facility is given notice of the installation on a form prescribed by the department;
 - (2) if the monitoring device records activity visually, such recording shall include a record of the date and time;
 - (3) the monitoring device and all installation and maintenance costs are paid for by the patient or surrogate;
 - (4) written consent is given by each roommate or each roommate's surrogate on a form prescribed by the department;

(5) the monitoring is conducted in accordance with any limitation placed on it as a condition of consent by a roommate or the roommate's surrogate; and

(6) if a roommate or the roommate's surrogate also wishes to install and use a monitoring device, the patient or surrogate consents to the installation and use on terms that are no more restrictive than any that have been placed on the patient's or surrogate's installation and use.

B. A patient or surrogate may establish and a facility shall accommodate limits on the use, including the time of operation, direction, focus or volume, of a monitoring device.

[9.2.23.8 NMAC - N, 7/15/04]

9.2.23.9 INSTALLATION AND USE OF A MONITORING DEVICE:

A. At the time of admission to a facility, a patient shall be offered the option to have a monitoring device, and a record of the patient's authorization or choice not to have a monitoring device shall be kept by the facility and shall be made accessible to the program.

B. After authorization, consent and notice, a patient or surrogate may install, operate and maintain a monitoring device in the patient's room at the patient's or surrogate's expense. The patient or surrogate is responsible for all costs associated with installing, operating and maintaining the monitoring device, except the cost of electricity.

C. A patient or surrogate is responsible for selecting the type of monitoring device that will be used in the patient's room. If the patient or surrogate chooses to install a monitoring device that uses Internet technology, the monitoring device must have at least 128-bit encryption and enable a secure socket layer ("SSL").

[9.2.23.9 NMAC - N, 7/15/04]

9.2.23.10 ACCOMMODATION BY FACILITY: A facility shall cooperate to accommodate the installation of a monitoring device, provided the installation does not place undue burden on the facility.

A. Reasonable accommodation includes, but is not limited to, the following:

(1) providing a reasonably secure place to mount a monitoring device;

(2) providing access to power sources, if feasible;

(3) rearranging a room, if feasible;

(4) accommodating the limits a patient or roommate, or a surrogate of either, may place on the use of a monitoring device, if feasible;

(5) referring a patient or surrogate to potential roommates or surrogates of roommates who have indicated on a current patient authorization form that they would consent to monitoring if a current roommate or surrogate of a roommate withholds consent; and

(6) allowing patients, roommates and potential roommates to change rooms, when feasible, in those cases where consent is an issue.

B. Undue burden includes, but is not limited to, making structural changes to a room by anyone other than a licensed contractor, or a non-licensed person approved by the facility.

C. If a patient or surrogate chooses to install a monitoring device that uses Internet technology for visual monitoring, a facility shall allow the patient or surrogate to install any necessary Internet access line(s), if feasible. This may require access to the facility's telecommunications or equipment room, and the facility shall provide such access. In addition:

(1) a patient or surrogate is responsible for contracting with an Internet provider and for any expense for activation, installation and on-going service; and

(2) the facility is not required to allow Internet access through facility or corporate networks that also maintain confidential patient, medical, financial or personnel records.

D. A facility has the burden of proving that a requested accommodation is not feasible or constitutes an undue burden.

E. A facility may impose a refundable damage deposit of up to \$150 to cover the cost of repairing any damages to the facility caused by the installation or removal of a monitoring device. Within thirty days after the removal of a monitoring device, the facility shall deliver to the patient or surrogate a written statement itemizing any deductions from the deposit together with the balance of the deposit. The facility has the burden of proving that any deductions from the deposit are reasonable.

[9.2.23.10 NMAC - N, 7/15/04]

9.2.23.11 CONSENT OF PATIENT:

A. Consent to the authorization for the installation and use of a monitoring device may be given only

by a patient or surrogate.

(1) If a patient has capacity to consent, only the patient may do so, notwithstanding the terms of any durable power of attorney, advance health-care directive, or similar instrument.

(2) If a patient does not have capacity to consent, only the patient's surrogate may give consent. If there is a dispute among surrogates within the same priority class under the Uniform Health-Care Decisions Act, none of them can give consent.

(3) A patient is presumed to have capacity to consent unless the patient has been determined to be incapacitated by a court of competent jurisdiction or by two qualified health-care professionals, one of whom shall be the primary physician, in accordance with the terms of the Uniform Health-Care Decisions Act.

B. Consent to the authorization for the installation and use of a monitoring device shall include a release of liability for the facility for a violation of the patient's right to privacy insofar as the use of the monitoring device is concerned.

C. A patient or surrogate may reverse a choice to have or not have a monitoring device installed and used at any time, after notice to the facility on a form prescribed by the department.

[9.2.23.11 NMAC - N, 7/15/04]

9.2.23.12 CONSENT OF ROOMMATES:

A. Consent of a roommate to the installation and use of a monitoring device by a patient or surrogate may be given only by the roommate or the roommate's surrogate.

(1) If a roommate has capacity to consent, only the roommate may do so, notwithstanding the terms of any durable power of attorney, advance health-care directive, or similar instrument.

(2) If a roommate does not have capacity to consent, only the roommate's surrogate may give consent. If there is a dispute among surrogates within the same priority class under the Uniform Health-Care Decisions Act, none of them can give consent.

(3) A roommate is presumed to have capacity to consent unless the roommate has been determined to be incapacitated by a court of competent jurisdiction or by two qualified health-care professionals, one of whom shall be the primary physician, in accordance with the terms of the Uniform Health-Care Decisions Act.

B. Consent to the authorization for the installation and use of a monitoring device shall include a release of liability for the facility for a violation of the roommate's right to privacy insofar as the use of the monitoring device is concerned.

C. A roommate or the roommate's surrogate may condition or limit consent on the use, including the time of operation, direction, focus or volume, of a monitoring device.

D. A roommate or the roommate's surrogate may reverse a choice to give, not give, or limit consent at any time, after notice to the facility on a form prescribed by the department.

E. If a monitoring device is being used in the room of a patient and a new roommate, who has not yet consented to the use of the monitoring device, moves into the room, monitoring shall cease until the new roommate, or the new roommate's surrogate, has consented in accordance with this section.

[9.2.23.12 NMAC - N, 7/15/04]

9.2.23.13 FORMS:

A. The department shall prescribe forms for implementing the Patient Care Monitoring Act and this rule. No facility shall use any forms other than those prescribed by the department.

B. A facility shall maintain the original copies of all completed forms relating to a patient for at least three years from the date of the patient's discharge from the facility. The forms shall be accessible to the program at all times.

[9.2.23.13 NMAC - N, 7/15/04]

9.2.23.14 AUTHORIZATION FORM: The form for the authorization of installation and use of a monitoring device shall provide for:

A. consent of the patient or surrogate authorizing the installation and use of the monitoring device;

B. notice to the facility of the patient's installation of a monitoring device and specifics as to its type, function and use;

C. consent of any roommate, or that roommate's surrogate;

D. notice of release from liability for privacy violation through the use of the monitoring device; and

E. waiver of the patient's right to privacy in conjunction with the use of the monitoring device.

[9.2.23.14 NMAC - N, 7/15/04]

9.2.23.15 UNAUTHORIZED USE: In any civil action against the facility, material obtained through the use of a monitoring device may not be used if the monitoring device was installed or used without the knowledge of the facility or without the prescribed form.
[9.2.23.15 NMAC - N, 7/15/04]

9.2.23.16 IMMUNITY: Compliance with the provisions of the Patient Care Monitoring Act shall be a complete defense against any civil or criminal action brought against the patient, surrogate or facility for the use or presence of a monitoring device.
[9.2.23.16 NMAC - N, 7/15/04]

9.2.23.17 NOTICE TO CURRENT PATIENTS: Within six months of the effective date of the Patient Care Monitoring Act, all facilities shall provide to each patient or surrogate a form prescribed by the department explaining the provisions of the Patient Care Monitoring Act and giving each patient or surrogate a choice to have a monitoring device installed in the patient's room. Copies of the completed form shall be kept by the facility and shall be made accessible to the program.
[9.2.23.17 NMAC - N, 7/15/04]

9.2.23.18 NOTICE OF MONITORING DEVICE: The facility shall post a notice in a conspicuous place at the entrance to a room with a monitoring device that a monitoring device is in use in that room of the facility. The notice shall be posted at the facility's expense and shall state in English and Spanish: "WARNING: THIS ROOM IS MONITORED ELECTRONICALLY."
[9.2.23.18 NMAC - N, 7/15/04]

9.2.23.19 PROHIBITED ACTS: No person or patient shall be denied admission to or discharged from a facility or be otherwise discriminated against or retaliated against because of a choice to authorize installation and use of a monitoring device. Any person who violates this section shall be subject to the provisions of Section 28-17-19 NMSA 1978 and Rule 9.2.21 NMAC.

A. The civil penalty for denying a person admission to a facility or for discharging a patient from a facility in violation of this section shall be \$10,000 per occurrence.

B. The minimum civil penalty for failing to accommodate the installation of a monitoring device, in violation of Section 9.2.23.10 of this rule, shall be \$1,000.

C. The minimum civil penalty for any person other than a patient or surrogate interfering with the use of a monitoring device or destroying a recording made by a monitoring device shall be \$1,000.

D. The minimum civil penalty for failing to refund a damage deposit in accordance with the terms of Section 9.2.23.10 of this rule shall be \$500.

E. The civil penalties for other forms of discrimination or retaliation that violate this section shall be determined in a manner consistent with Rule 9.2.21 NMAC.

F. Except for violations of Subsections B, C and D of this section, it is irrelevant whether the installation or use of a monitoring device was authorized in accordance with the terms of the Patient Care Monitoring Act and this rule.

[9.2.23.19 NMAC - N, 7/15/04]

9.2.23.20 CRIMINAL ACTS: Any person other than a patient or surrogate found guilty of intentionally hampering, obstructing, tampering with or destroying a monitoring device or a recording made by a monitoring device installed in a facility pursuant to the Patient Care Monitoring Act is guilty of a fourth degree felony and shall be sentenced pursuant to Section 31-18-15 NMSA 1978.
[9.2.23.20 NMAC - N, 7/15/04]

History of 9.2.23 NMAC: [RESERVED]