
Audio-Video Recording of Patient Visits

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Everyone has a pocket-sized, easy-to-use audio/video recording device – a cell phone. Just as people record more and more of life's events, many now record conversations with their physicians and other healthcare providers. These recordings can be performed either with permission or surreptitiously. For physicians, there's a good chance at least one of your last 10 patients recorded their visit, with or without your permission, according to research from the Dartmouth Institute for Health Policy and Clinical Practice. In a survey of 128 patients in Britain, researchers found that 15 percent acknowledged secretly recording their encounter. It is safe to say that if you have not yet had this issue present itself in your practice, you will at some point in the near future.

In a well-publicized case from Virginia in 2015, a jury awarded a patient \$500,000 because an anesthesiologist and others mocked him during a colonoscopy while sedated. The man had left his cell phone on and in his pocket during the outpatient procedure. Upon waking, the patient listened to the recording and heard members of the medical team making derogatory and unfounded remarks joking that they suspected he had syphilis, Ebola, and tuberculosis. The anesthesiologist and gastroenterologist were recorded disparaging the man and other patients for what they described as bad attitudes.

In 2016, a Texas patient hid a tiny recording device the size of a USB drive in her hair during surgery for the stated reason that she just had a bad feeling about her surgeon and wanted a record of the events in the OR for her family in the event something went wrong. During the abdominal surgery, members of the medical team are heard joking in an offensive manner about the patient's belly button. The anesthesiologist called her a "retard" and the surgeon stated he felt sorry for her husband and referred to the patient as "Precious" which she alleged was a racial slur.

These cases may be extreme examples, but they are important reminders of the need to act in a professional manner at all times regardless of your location and regardless of whether or not you think a patient or family member can hear you. In this day and age, it is safe to assume that you are always being recorded and act accordingly. A good rule of thumb is that if it is not something you would say to the patient directly or to a jury in court, it is not something you should be saying in private or when you think you are in a private setting.

All of this leads to the question: Should patients be able to record their encounters with their healthcare providers? The question raises legal, ethical, and practical considerations. Audio/video recording of healthcare encounters requires balancing potential privacy and liability risks with the potential benefits of improved patient recollection of instructions and treatment adherence. This often pits the patient's interests against those of the provider.

The laws that provide the primary legal framework regarding recording practices are wiretapping and eavesdropping statutes as well as privacy regulations. State laws differ on whether all parties must consent to the recording. In "all-party" jurisdictions, covert recordings by either the patient or the healthcare provider are illegal since everyone being recorded must consent to be recorded. If a recording is obtained illegally, it should not be admissible in court in a malpractice lawsuit. There are currently 11 all-party jurisdictions: California, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Pennsylvania and Washington.

The majority of jurisdictions in the United States are "one-party" jurisdictions. At this time, 39 of the 50 states and the District of Columbia use the one-party consent rule including Tennessee, Arkansas, Kentucky, Mississippi, Alabama, Georgia and Virginia. One-party jurisdictions require that only one party to a conversation must consent to being recorded to be legal. This means that a patient (or family member, if present) can secretly record the healthcare provider, and, because it is legal, the recording would most likely be admissible in court.

HIPAA and privacy regulations do not prevent a patient from recording their own healthcare encounters. These laws and regulations are designed to protect the patient's health information from accidental or intentional disclosure by healthcare providers and related entities. These regulations do not, however, prohibit patients from disclosing their own protected health information. If the patient creates (records) and possesses a sole copy of a recording, the patient can do nearly anything he or she wants with the information so long as it does not violate another party's privacy rights. If the patient makes a surreptitious recording and posts it online to YouTube, for example, and it can be established that it was disclosed by the patient, the healthcare provider probably has no exposure for HIPAA or privacy law violations. But, that does not mean that there are no consequences to the provider whose reputation may have been maligned. Recently, clinical encounters have been shared on social media much to the embarrassment of the provider.

On the other hand, if a physician records a conversation with a patient or videos a surgery, HIPAA and privacy laws require that the recording must be protected in the same manner as any other PHI. If the physician in that scenario fails to obtain the patient's permission, although not illegal in a one-party state, he or she may have committed an ethical violation that could result in an investigation by a state medical board.

What are the pros and cons of permitting the patient to record healthcare encounters from the practitioner's perspective? The primary benefit often cited is patient comprehension. Patients do not always understand or recall all the information provided during visits. This is especially true if they are receiving distressing news, suffering from an infirmity or are

elderly. Most studies show that as much as 80% of the medical information provided to patients is forgotten immediately and half of the information that is remembered is incorrect. Recordings could potentially improve accuracy, adherence, and personal engagement by allowing the patient or family members and caregivers the opportunity to review the conversation at a later time. Providers who know they are being recorded tend to slow down and choose their words more carefully. This could prove not only beneficial to the patient for better understanding, but to the provider in the event that a claim or lawsuit is asserted.

There are numerous drawbacks to allowing patients to record encounters with their providers. The process could undermine the trust between the provider and the patient. It might inhibit the free flow of information as the patient might be less likely to discuss sensitive information or admit to certain problems (i.e. drug or alcohol use or sexual activity), if the session is being recorded. Further, the recording devices could be disruptive and intimidating causing the provider to practice “defensive medicine.” Fear of litigation, loss of privacy and the threat of publication on social media are valid concerns for the provider. Unlike the EHR, electronic recordings can be altered or manipulated creating an inaccurate impression of the provider or the discussion. The provider does not typically retain a copy of the recording which places him or her at a disadvantage.

Balancing these competing interests, patient advocates, medical ethicists, and authors of professional journal articles have recently recommended that patients be permitted to record encounters with their healthcare providers. Most recognize the move toward transparency in medicine and the ubiquity of smartphones as reasons. Some healthcare providers, primarily in the western United States, are not only permitting recordings, but are furnishing a tablet or recording device for the patient to use. These “pioneers” are preliminarily reporting that patient understanding of medical information has improved while the number of claims has lessened. Many opine that in the future, all healthcare encounters will be recorded.

While this may ultimately prove true for the future, most professional liability insurers and defense attorneys do not currently recommend that patients be encouraged to record their visit. It is a complicated issue with risks and benefits, privacy concerns, technical concerns dealing with how to preserve and re-produce recordings, legal concerns, etc. There is no one size fits all solution.

As stated earlier, it is not illegal to secretly record the visit in a one-party state. Since patients may make surreptitious recordings, a medical practice may want to place a notice sign stating, “Audio or video recordings of any type are prohibited on the premises,” in prominent locations such as the waiting area, exam room and on the practice’s website. In addition, it is recommended that language prohibiting recordings be included in the conditions of treatment paperwork signed by the patient at the outset. The legal sufficiency of these notices will be unknown until tested in court, but they could serve as a deterrent and may provide defense counsel with the basis for an argument to exclude surreptitious recordings which, absent such notices, would not. If a patient requests permission to record

the visit encourage him or her instead to take notes, have a family member present, or review a pamphlet or other literature you provide. All of this needs to be documented in the medical record.

For providers who choose to be “pioneers” and permit recordings, it is recommended that parameters be set by the provider so that the entire encounter is not recorded. Only the discharge or follow-up instructions should be recorded, not the exam. The portion of the encounter that is allowed to be recorded should be consistent with the provider’s notes and, the provider should retain a copy of the to policies and procedures established by the practice).

Due to the complexity of this subject and the potential ramifications, medical practices should seek advice of corporate counsel when establishing a policy on the recording of patient encounters. The decision has legal consequences and may generate strong feelings that will likely vary from provider to provider and certainly from practice to practice. It should be thoroughly vetted before adopted.

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