

Audio/Video Recording in Healthcare Practices

Question

Is it legal for my patients to record our conversations (either audio or video) during their appointments in my office?

Answer

With so many people using smartphones now — 77 percent of Americans have smartphones¹ — patients are able to use them to record their encounters with their healthcare providers. These recordings might be shared with family members and caregivers and used to help recall important details and medical advice. However, in some cases, patients and families are recording encounters without providers' knowledge or permission (whether legal or not), and some video has appeared on public websites and social media.

At least 1 in 10 patients in the United States records discussions at medical appointments.² Some states allow audio recording if at least one party to the conversation consents. Therefore, patients may record a clinical visit without obtaining the healthcare provider's consent in those states. In other states, all parties must consent to the recording. State laws also might differ regarding telephone versus in-person recording requirements.³

In any state, healthcare providers can develop policies on patients using recording devices in their healthcare practices. Policies may distinguish between recordings made in public areas, such as waiting rooms, and recordings made in private areas, such as examination rooms. Providers may also want to consider prohibiting their patients from making recordings in public areas of the office to avoid any allegations of a privacy breach from other patients and staff members.

Give your patients a written copy of your policy, and be sure to get them to sign it to acknowledge their understanding. If your practice doesn't have a written policy on audio/video recording by patients, you may want to consider this approach if your patients ask to record:

- Ask your patient why he/she wants to record the conversation so you can understand his/her intentions. You may learn that some of your patients need extra attention.
- Consider whether other options exist including recording only parts of the clinical encounter. Discuss these options with your patient.
- Accept or decline the request. If you decline, explain why and offer to continue with the appointment. If your patient insists, use your discretion on continuing the appointment.
- Be sure to document in your patient's health record if a recording was made in your office. Documentation should include the duration of the recording, topics discussed, and other pertinent details. Also, ask your patient for a copy of the recording. When possible, retain a copy of the recording with your patient's health record.⁴

If your patient initiates the recording and does not give it to the healthcare provider, then the recording is not subject to the Health Insurance Portability and Accountability Act (HIPAA) laws. HIPAA laws apply when the recording is "created or received" by a "covered entity," including healthcare practitioners.⁵

It can be very beneficial for your patients to have a recording of their clinical visits, and the presence of a recording also can protect healthcare providers. Keeping the lines of communication open about audio/video recording may decrease any threats to other patients' privacy as well as the privacy of staff members. Here are some risk management tips regarding recording:

- Familiarize yourself with your state laws and regulations on audio and video recording.
- Touch base with your professional liability carrier about recording policies and responsibilities under HIPAA in your state.
- Consult a HIPAA compliance officer or an attorney if your concerns include HIPAA violations or a damaged reputation as a result of allowing patient recordings of clinical encounters.
- Avoid responding to dissemination of information on social media or in public forums.⁶

Most importantly, healthcare practices should have an audio/video recording policy in place that covers any issues related to consent, limitations on recording locations in the office, duration, and content to avoid potential liability exposure.

¹ Techjury. (2021, September 9). *67+ revealing smartphone statistics for 2021*. Retrieved from <https://techjury.net/blog/smartphone-usage-statistics/#gref>

² Dallas, M. E. (2017, July 10). *More patients are recording their doctor visits*. CBS News Healthday. Retrieved from www.cbsnews.com/news/patients-are-tape-recording-their-doctor-visits/

³ Justia. (2018). *Recording phone calls and conversations*. Retrieved from www.justia.com/50-state-surveys/recording-phone-calls-and-conversations/

⁴ Canadian Medical Protective Association. (2017). *Smartphone recordings by patients: Be prepared, it's happening*. Retrieved from www.cmpa-acpm.ca/en/advice-publications/browse-articles/2017/smartphone-recordings-by-patients-be-prepared-it-s-happening

⁵ Elwyn, G., Barr, P. J., & Castaldo, M. (2017). *Can patients make recordings of medical encounters? What does the law say?* *JAMA*, 318(6). Retrieved from <https://jamanetwork.com/journals/jama/article-abstract/2643728>

⁶ Sigman, L. J. (2019, April 30). *State, federal laws govern whether doctor visits can be recorded*. AAP News. Retrieved from <https://www.aappublications.org/news/2019/04/30/law043019>

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