

VIEWPOINT

Can Patients Make Recordings of Medical Encounters?

What Does the Law Say?

Glyn Elwyn, MD, PhD
Dartmouth Institute for Health Policy and Clinical Practice, Lebanon, New Hampshire.

Paul James Barr, PhD
Dartmouth Institute for Health Policy and Clinical Practice, Lebanon, New Hampshire.

Mary Castaldo, JD, MPH
Dartmouth Institute for Health Policy and Clinical Practice, Lebanon, New Hampshire.

For many clinicians, it is possible that some of their patients are recording their office visit, with or without permission. In a cross-sectional survey administered to the general public in the United Kingdom, 19 of 128 respondents (15%) indicated that they had secretly recorded a clinic visit, and 14 of 128 respondents (11%) were aware of someone covertly recording a clinic visit.¹ Because every smartphone can record conversations, this may become even more commonplace. The motivation is often reasonable: patients want a recording to listen to again, improve their recall and understanding of medical information, and share the information with family members.² A review identified 33 studies (including 18 randomized trials) of patient use of audio-recorded clinic-visit information. Audio recordings were highly valued; across the studies, 72% of patients listened to their recordings, 68% shared them with a caregiver, and individuals receiving recordings reported greater understanding and recall of medical information.³

In the few health care organizations in the United States that offer patients recordings of office visits, clinicians and patients report benefits. In addition, liability insurers maintain that the presence of a recording can

For many clinicians, it is possible that some of their patients are recording their office visit, with or without permission.

protect clinicians. For example, at the Barrow Neurological Institute, in Phoenix, Arizona, where patients are routinely offered video recordings of their visits, clinicians who participate in these recordings receive a 10% reduction in the cost of their medical defense and \$1 million extra liability coverage (P.J.B., unpublished data, 2017).

However, many clinicians and clinics have concerns about the ownership of recordings and the potential for these to be used as a basis for legal claims or complaints.⁴ Administrators and patients are unclear about the law and are concerned that recording clinical encounters might be illegal, especially if done covertly.

The law is inconsistent: recording is allowed in certain situations and is illegal in others. The goal of this Viewpoint is to help clinicians, administrators, and patients understand the law in relation to the recording of clinical encounters and guide reactions to this new phenomenon.

Is it Legal for Patients to Record Encounters?

In the United States, the situation is complex. Substantial effort is made to maximize privacy in clinical encounters. Wiretapping or eavesdropping statutes provide the primary legal framework guiding recording practices and protect against nonconsensual recording of conversations when individuals have a reasonable expectation that their conversation is private. These laws vary at the state level, and these distinctions have significance for patients who wish to record their clinical encounters.

US State-Level Wiretapping Laws

Wiretapping laws differ as to whether 1 or all parties must consent to the recording. In so-called all-party jurisdictions, covert recording (recording without the expressed permission of all parties) is illegal because all who are being recorded must consent. In contrast, in single-party jurisdictions, the consent of any 1 party to the conversation is sufficient, including the person making the recording; therefore, if patients wish to record a clinical encounter, they can do so without obtaining the clinician's consent. Statutes in 39 of the 50 states and the District of Columbia conform to the single-party consent rule (Figure). The 11 all-party jurisdictions are California, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Pennsylvania, and Washington.

The consequences of violating wiretapping laws can be severe. Typically, it is a felony to make an unauthorized recording and affected parties also may seek damages from the person who made the recording, including compensation for harm, attorney's fees, and other costs. Disseminating the recording may be an additional violation, and recordings made in violation of the law may not be introduced as evidence in court.

Are Office Recordings Subject to HIPAA Compliance?

Whether the Health Insurance Portability and Accountability Act (HIPAA) standards apply to the audio or video recording of a clinic visit is based on ownership of the recording. The recording is subject to HIPAA standards if it is "created or received" by a "covered entity," including health plans, health care practitioners, and health care clearinghouses. However, a patient-initiated recording that is retained by the patient (and not given to the clinician or health plan) is not subject to HIPAA.

Corresponding Author: Glyn Elwyn, MD, PhD, Dartmouth Institute for Health Policy and Clinical Practice, One Medical Center Drive, Williamson Translation Research Building, Lebanon, NH 03756 (glynelwyn@gmail.com).

How Can Clinicians React if a Patient Wishes to Record the Clinical Encounter?

If a clinician in a single-party jurisdiction is asked by a patient to allow a recording, the clinician may ask the patient not to proceed, but the patient has the right to record the clinical encounter. The clinician can choose to continue, accepting that the conversation is being recorded, or terminate the visit. Clinicians in single-party jurisdictions should be aware that patients may be recording covertly. In all-party jurisdictions, a clinician can refuse to grant patients permission to make recordings. In these jurisdictions, illegal recording may be reported to the authorities.

Sharing Recordings

Patients are free to share the content of recordings in single-party consent states, but require agreement of those who were recorded in all-party consent states. Most patients use this right to share the recording with a family member or caregiver but not on social media. This freedom may not apply to recordings modified or used to the detriment or harassment of the clinician captured in the recording. Using the recording to harm or damage the reputation of the clinician recorded could lead to legal action by the person affected.

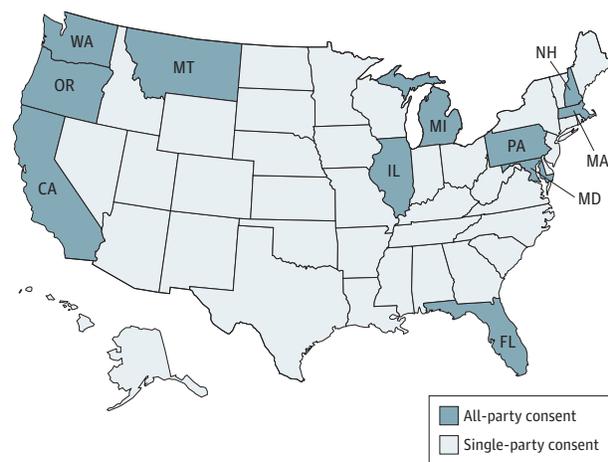
The Future of Recording in Clinic

Research suggests that patients benefit from recording their office visits, and further work is in progress.⁵ However, patients who choose to record may be concerned about upsetting their clinicians by requesting permission or may have concerns about retribution if a hidden recording is later discovered. Simultaneously, clinicians may be concerned about the possibility of hidden recorders. Both contexts hinder a relationship of trust and open communication. Clinicians, patient advocacy groups, and policy makers should work together to develop guidelines and regulatory guidance on patient recording. As health care continues to make significant strides toward transparency,⁶ the next step is to embrace the value of recording clinical encounters.

Summary

Digital recording of interactions is occurring widely, often covertly. Clinicians and health care systems are uncertain about the law

Figure. US States Requiring All-Party or Single-Party Consent for Audio Recording of Conversations



Connecticut requires all-party consent for recording telephone calls, but not for face-to-face conversations (Conn Gen Stat §§53a-187[a][2], 189). Similarly, Nevada requires all-party consent for wire recordings (unless an emergency precludes obtaining consent from both parties; Nev Rev Stat §§200.620 and 48.077). Vermont does not have a wiretapping statute; however, there is a possibility that nonconsensual recording could be deemed an invasion of privacy in this state. Michigan appears to require all-party consent (Mich Comp Laws §750.539c); however, an appellate court interpretation suggests that only a single party's consent may be required when the person making the recording is a party to the conversation (*Sullivan v Gray*, 11 Mich App 476, 481, 324 NW2d 58 [1982]). Because there is some uncertainty with Michigan, we have erred toward a strict statutory interpretation. Oregon law allows for a single party alone to consent to recording of a telephone conversation (Or Rev Stat Ann §165.540[1][a]), but requires consent of all participants for in-person conversations (Or Rev Stat Ann §165.540[1][c]). The constitutionality of this all-party consent rule was upheld in *Oregon v Knobel*, 777 P2d 985 (Or Ct App 1989). In addition to criminal penalties, civil liability may occur under wiretapping laws or a claim for invasion of privacy. If sued, the patient could be required to pay for any attorney's fees incurred by the physician and costs as well as damages (eg, NH RSA §570A:11).

relating to the recording of clinical encounters. Developing clear policies that facilitate the positive use of digital recordings would be a step forward.

ARTICLE INFORMATION

Additional Contributions: We thank Benjamin Moulton, JD, MPH (Informed Medical Decision Making Foundation); Nick Clements, MD (Medical Protection Society, United Kingdom); Elliott S. Fisher, MD, MPH, Stuart Grande, PhD, and Arianna Blaine, MPH (all with Dartmouth Institute) for reviewing the manuscript; and Kristy Bronner (Dartmouth Institute) for the creating the original figure. None of these persons received compensation.

Published Online: July 10, 2017.
doi:10.1001/jama.2017.7511

Conflict of Interest Disclosures: The authors have completed and submitted the ICMJE Form for Disclosure of Potential Conflicts of Interest. Dr Elwyn reported serving as a consultant to

Emmi Solutions LLC, the National Quality Forum, and the Washington State Health Department; and receiving royalties for editing from Radcliffe Press. No other disclosures were reported.

REFERENCES

1. Elwyn G, Barr PJ, Grande SW. Patients recording clinical encounters: a path to empowerment? assessment by mixed methods. *BMJ Open*. 2015;5(8):e008566.
2. Rodriguez M, Morrow J, Seifi A. Ethical implications of patients and families secretly recording conversations with physicians. *JAMA*. 2015;313(16):1615-1616.
3. Tsulukidze M, Durand M-A, Barr PJ, Mead T, Elwyn G. Providing recording of clinical consultation

to patients—a highly valued but underutilized intervention: a scoping review. *Patient Educ Couns*. 2014;95(3):297-304.

4. Elwyn G. "Patientgate"—digital recordings change everything. *BMJ*. 2014;348(March):g2078.
5. Barr PJ, Dannenberg M, Ganoë C, et al. Sharing annotated audio recordings of clinic visits with patient—development of the Open Recording Automated Logging System (ORALS): a study protocol. *JMIR Res Protoc*. 2017;6(6):e121.
6. Walker J, Darer JD, Elmore JG, Delbanco T. The road toward fully transparent medical records. *N Engl J Med*. 2014;370(1):6-8.