

VIEWPOINT

Ethical Implications of Patients and Families Secretly Recording Conversations With Physicians

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With recent advances in technology, smartphones can become recording devices with the touch of a button. This technological capability gives patients and their families the ability to easily and surreptitiously record conversations with physicians. The frequency of such recordings or whether they even occur is unknown. The ubiquity of smartphones, however, suggests the potential for secret recordings to occur. As of January 2014, 58% of Americans owned a smartphone, including 83% of young adults.¹ Although recording conversations with physicians may provide some benefit for patients and their families, secret recordings can undermine patient-physician relationships and ultimately affect the provision of health care.

Federal law prohibits recording a private conversation unless at least one party to the conversation consents to the recording.² That party may include either the person operating the recording device or others. Several states, such as California and Florida, provide additional protections by requiring that all parties to a conversation consent to the recording. In states without the additional protections, a patient or family member could

make their own health care decisions, such recordings could prove helpful to families, particularly when facing serious end-of-life decisions. Families often struggle with grief and complex emotions that impair their ability to absorb all the information provided at the time of the actual meeting with the physician.⁷ Recordings of the visit can give families the opportunity to review what the physician said at a time when they are better able to understand and process complex or stressful information.

Not all possible uses of these recorded conversations are beneficial to patients and physicians. Patients or family members who disagree with the advice of their physicians or who are upset with their physicians for whatever reason can easily take comments from these recordings out of context and, with a few keystrokes, disseminate them via social media. Patients can conceivably record conversations with the specific intent of establishing the grounds for a lawsuit or gathering material with which to manipulate a physician.⁸

When a conversation is recorded without a physician's consent, the nature of the relationship between patient and physician can change. Physicians who suspect secret recordings or learn of them after the fact may believe that their perceived right to consent to recordings has been violated. They may feel vulnerable because of the one-sided protections conferred by law to patient-physician communications. This can threaten the integrity of an existing patient-physician relationship and predispose a physician to assume a posture of distrust toward future patients.

Patients, on the other hand, may feel reassured by laws such as HIPAA and related privacy laws proscribing unauthorized scrutiny by spouses, employers, courts, or others. Legal protections and codes of professional ethics protect patients and encourage open and honest communication with physicians for the purposes of ensuring safe and appropriate health care.⁹

Physicians have no such legal protections in their interactions with patients. Patients are not limited in conveying the content of their conversations with physicians to others. However, until recently, it was technologically impossible for most patients to surreptitiously record conversations with their physicians. Thus, a physician's exact words during a conversation could not be recalled, scrutinized, and dissected for whatever purpose at a later time. This is no longer the case.

Moreover, the potentially surreptitious nature of recordings engenders a culture of mistrust and suspicion. Physicians who suspect they are being recorded

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surreptitiously record a conversation with a physician without fear of legal repercussions, provided no other laws were violated.

Although patients and their physicians may explicitly agree to record a family meeting, anecdotal experience and isolated reports suggest that some patients have done so covertly. Physician reactions to this have been mixed. Some physicians focus on the benefits of recording conversations for the patients and their families.³ Others focus on feeling vulnerable to the manipulations of those who may harbor negative intentions.^{4,5} So do the benefits of recordings outweigh the potential harms?

Recording conversations could be beneficial for patients. Patients do not always understand or recall all the information provided during visits to physicians.⁶ Recordings could potentially improve accuracy, adherence, and personal engagement by providing opportunities to review conversations at other times, from the comfort of home, and in conjunction with other family members or caregivers.

In intensive care units, where many patients are unconscious, have delirium, or otherwise are unable to

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without their consent would likely and understandably question a patient's or family's motives. Without intending, physicians may then question their own decision making, rethink their assessments and recommendations, and ask themselves how someone else—perhaps a lawyer or judge—would evaluate their decisions. Physicians may then feel more inclined to order additional tests and imaging than they otherwise would, practicing defensive medicine and potentially increasing health care costs. Even though physicians could terminate their relationships with patients they suspect of surreptitious recordings, this could give rise to additional disruptions in individual patient-physician relationships and perhaps undermine public trust in physicians and the medical establishment.

How, then, can physicians protect themselves from the potentially negative effects of surreptitious recordings? For better or worse, the technological advances cannot be undone. Several strategies exist for the medical profession. Changing federal or state laws related to the recording of private conversations is not one of them, at least not in the short term. This would take years, if not decades, and would require inordinate capital and political effort. Furthermore, the public will undoubtedly question what it is physicians are seeking to hide by attempting to change the law to prohibit recordings without their consent. What response could possibly outweigh the need for transparency in physician decision making in the patient-centered culture of health care?

As is often the case when anticipating ethical challenges in patient-physician relationships, the solution lies with physicians. The first and most essential strategy entails being aware of and embracing the possibility that every conversation with a patient or his or her family may be recorded. Physicians can use this knowl-

edge as an incentive to ensure that their words convey sensitive information efficiently, effectively, and compassionately. Professionalism requires not only honesty but also a commitment to developing effective communication skills. If the possibility of recording causes physicians to refine their skills and, in their intimate moments with families, to pause and reassess their choice of words, then physicians should consider this possibility as an opportunity to grow as health care professionals and strengthen patient-physician relationships.

If a physician suspects that a conversation is being recorded, that physician could handle the situation in several different ways that could benefit all parties. Doing so would first require that the physician be aware of the possibility of secret recordings. The physician can ask the patient if he or she is recording the conversation. Then, regardless of the answer, the physician can express assent, note constructive uses of such recordings, and educate the patient about the privacy rights of other patients so as to avoid any violations. Taking such an approach would demonstrate the physician's openness and desire to strengthen the relationship with the patient. The physician could also ignore any suspicions and provide care as he or she normally would without letting the possibility of recording affect either attitude toward the patient or medical decision making.

Unless federal or state laws change, physicians should be aware of the possibility that their conversations with patients may be recorded. If physicians embrace this possibility, establish good relationships with their patients, provide compassionate and competent care, and communicate effectively and professionally, the motives of patients and families in recording visits will be irrelevant.

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