



Smile! You're on Candid Camera

■ JOHN SHUFELDT, MD, JD, MBA, FACEP

A 34-year-old patient presents with an acute exacerbation of chronic low back pain. A cursory review of his medical records done before seeing him reveals that he has had multiple visits to your urgent care for a variety of complaints including:

- Flank pain and blood in his urine
- Dental caries
- Gout
- Headache
- Low back pain
- Knee strain

He typically shows up about 5 minutes before closing and is always pleasant to a fault. He is not demanding but always leaves with a prescription for narcotics – typically Percocet. The last time he was in the center was for his fifth visit for back pain. He was denied narcotics and given Robaxin. When that happened, the previous provider noted that the patient became belligerent.

You sense that he may have an issue with substance abuse so you query your state's prescription monitoring website and discover that he has almost daily visits to a variety of providers and almost always receives a narcotic prescription. When you enter the room, the patient is fiddling with something that looks like a pen. He immediately places it in his shirt pocket and seems to obsess about always turning his torso towards you. You soon realize that he is not only recording but also videotaping the encounter. What are your options?

I have personally had patients say, "Hold on for a sec" and whip out their iPhone and record a procedure or an exam. It is a bit unnerving. Does my hair look ok? Do I have food in my teeth? Do my clothes match (After Garanimals went out of style, I always wonder!)?

One-Party States

Federal law allows recording of phone calls and other electronic communications with the consent of at least one party to the call. In other words, only the party doing the recording has to know about it. In my home state of Arizona as well as 37 states

and the District of Columbia, the law permits individuals to record exchanges to which they are a party without informing the other parties that they are doing so. These states are referred to as "one-party consent" states, and as long as you are a party to the exchange, it is legal for you to record it. Like Federal law, only the person doing the recording has to know.

An exception exists in Arizona and most other states where the person has a right to expect privacy – a bathroom, locker room, exam room or bedroom. Thus, you can't secretly audiotape or videotape an interaction where a reasonable person would expect privacy. In every state, a medical provider is ethically barred from surreptitiously recording an interaction without the patient's consent. That action would violate the patient's right to privacy, and would be considered unprofessional conduct by licensing boards.

Two-Party States

Twelve states are two-party states (at least two and however many more parties participate) and the consent of all parties involved in a conversation is mandatory under most circumstances. Those jurisdictions are California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania and Washington. Generally, you may record, film or broadcast any interaction where all the participants to it consent. Thus, it is legal to record, tape or film a face-to-face interview when your recording device is in plain view. In these situations, the consent of the parties is presumed.

Patients Recording Interactions

In a medical malpractice case, the admission of a video recording or the interaction would constitute "real evidence" and as such, its validity and authenticity would supersede testimony recounting the event. Thus, there are pros and cons of allowing patients or surrogates to record a visit.

If providers at the center elect not to allow recordings of the encounter, it is best to have a written policy banning the use of recording devices and to post a conspicuous sign at the reception desk, in triage and in each exam room. Also, alert staff to be aware of patients, family or friends who may record.



John Shufeldt is CEO of Urgent Care Integrated Network and sits on the Editorial Board of *JUCM*. He may be contacted at jshufeldt@shufeldtconsulting.com.

Call for Articles

JUCM, the Official Publication of the Urgent Care Association of America, is looking for a few good authors.

Physicians, physician assistants, and nurse practitioners, whether practicing in an urgent care, primary care, hospital, or office environment, are invited to submit a review article or original research for publication in a forthcoming issue.

Submissions on clinical or practice management topics, ranging in length from 2,500 to 3,500 words are welcome. The key requirement is that the article address a topic relevant to the real-world practice of medicine in the urgent care setting.

Please e-mail your idea to
JUCM Editor-in-Chief
Lee Resnick, MD at
editor@jucm.com.

He will be happy to discuss it with you.



HEALTH LAW

Model Policy Language

When Visitors and/or Patients Try to Record Health Care Activities

Patients/visitors are generally not permitted to photograph or record by any means center activity without the express permission of those being recorded, including employees, providers, volunteers, and other patients or visitors.

If a visitor attempts to photograph staff without staff's express permission, staff may reiterate to the visitor that permission for photography is not given. If the visitor persists, staff may request that the offending visitor leave the premises or call security, provided that will not adversely impact treatment provided. In such situations, staff should enter an event report to document the situation for Risk Management.

Cases and Investigations

If a malpractice case ensues and the plaintiff produces a recording thus violating the office policy, the violation may give the court appropriate grounds to exclude the evidence at trial. At a minimum, the violation of the policy would justify dismissing the patient from your practice and should negatively affect his or her credibility with the jury.

In fraud investigations, government investigators use secret videotaped recordings of office visits to prove that a provider did not do what is claimed by testimony or an office note. An example of a circumstance in which this would occur is when a provider routinely documents, codes and bills for a test or exam not actually performed. Such a video always trumps the provider's testimony or documentation for what occurred.

In *Desnick v. ABC*, an ophthalmologist who agreed to be interviewed for "Primetime Live" sued ABC under the federal wiretapping statute for videotaping consultations between the doctor and video-camera-equipped individuals posing as patients. The 7th Circuit rejected this argument because the federal statute requires only one-party consent, and the undercover "patients" had consented to the taping.

Conclusions

The take-home points are these:

- In one-party states you do not have to consent to be recorded.
- If you don't want to be recorded, post signs in the treatment areas and have a policy that prohibits patients from recording interactions. If you become aware that the interaction is being recorded you are within your rights to ask the individual stop. If he or she refuses, you are also within your rights to end the interaction and even dismiss the individual from the practice.
- Never videotape or record an interaction with a patient unless the patient or his or her guardian consents. Patients have an expectation of privacy in the exam room. ■