Implications of Patients Recording Urgent Care Provider Encounters

Urgent message: The ubiquity of smartphones increases the risk that patients will openly or covertly record interactions with their physicians. Urgent care operators should understand the legal and privacy implications and protect themselves with appropriate policies and training.

ALAN A. AYERS, MBA, MAcc

Introduction

Smartphones with cameras and audio and video recorders that can be easily concealed in a pocket, purse, or backpack are now used by roughly 71% of Americans, including 86% of Generation Y (adults aged 25–34 years), according to the Nielsen Company.[1] As patients have become more social in sharing their health-care experiences and as health care has become more subject to litigation, the risk has grown that patients will use their smartphones to record a physician–patient interaction.

Recording an urgent care encounter, however, can undermine the trust relationship between a patient and provider while breaking various federal and state laws protecting conversations and potentially violating the privacy of other patients. Urgent care operators should thus be aware of the risk that patients will record some or all of their visits. To protect the urgent care center, managers should implement written policies, signage, and staff training to address this risk in a practical manner. An experienced health-care attorney or privacy consultant can assist in balancing compliance with the law and the practicalities of staff enforcement and patient compliance.

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Alan A. Ayers, MBA, MAcc, is Practice Management Editor for *JUCM*, is on the board of directors of the Urgent Care Association of America, and is Vice President of Concentra Urgent Care.

Patient Intentions: Not All Egregious

There are three common reasons why a patient might feel a need to record an interaction with a physician:

Table 1. Interview Dates for This Article

Expert	Interview Date
K. Royal	March 25, 2015
Heather Rosen	March 16, 2015
Alan Carpenter	March 17, 2015
Robert Barrese	March 18, 2015

Recording to Share Medical Experiences with Family and Friends

Patients may just want to share information about their injuries, illnesses, or medical experiences with family and friends. This may include photos and recorded excerpts of the visit, including their conversation with the physician. One risk of this is that the recording will end up on the Internet via social media for anyone to see, according to Robert Barrese, managing director of Urgent Care Assurance Company, based in Schaumburg, Illinois. (In the interests of full disclosure, **Table 1** lists dates for all interviews conducted for this article.)

"The patient is free to manipulate the intellectual property for his/her own agenda," adds Heather Rosen, MD, medical director of UPMC Urgent Care in Pittsburgh, Pennsylvania. "Many patients may not understand the message conveyed in the recording when trying to decipher it at home. They may enlist family members or friends to help interpret the recording, which can potentially further skew the intended message."

"I wouldn't be comfortable having my encounters recorded even with my knowledge, let alone in some stealthy secret-agent manner," says Alan Carpenter, DO, owner of Upper Valley Urgent Care Center in El Paso, Texas. "The federal HIPAA laws [Health Insurance Portability and Accountability Act] are explicitly written to tell those who provide health care that an individual's medical issues are private and to be respected. No patient would be comfortable with a physician secretly recording or videotaping an exam, and similarly the physician would not want this either."

Recording as a Memory Aid

Patients may have memory problems, have an emotional response to an office visit, or be incapacitated for some reason and thus a family member records the visit. Often, patients cannot remember the details of what the physician explains and may want a recording to capture the information for review. This scenario is more conducive to gaining the physician's consent, because it is in the patient's best interest to have the information, as opposed to a setting where the patient may feel placed in an adversarial position. Additionally, patients may want a recording regarding treatment of their treatment in order to seek judgment against another party.

"Over my nearly thirty years of practicing medicine, I don't recall any attempts at recording encounters being motivated by good intentions like Grandma listening to the doctor again later," Carpenter adds. "Medicine is litigious, and recordings were usually motivated by some other reasons aimed at using the encounter against the physician in some manner."

Recording as Documentation When Trust Is Lacking

A patient might not have a trusting relationship with the physician and may intend to use the recording to initiate a medical board compliant, malpractice claim, or other litigation against either the provider or a third party.

"Any physician–patient relationship should be founded upon mutual trust and respect, which wouldn't ever require that a medical exam or visit be recorded," Carpenter says. "The idea on the part of a patient that he or she should record her encounter with a physician should be a red flag that he or she has lost trust with the physician and that it is time to arrange for care by someone else."

Trust may be absent when someone other than the patient is arranging and paying for the medical care and that other party may be at fault, such as after auto accidents, in workers' compensation cases, or even in employer-mandated physical examinations, according to K. Royal, RN, JD, a health-care privacy consultant based in Phoenix, Arizona. In these situations, the patient may feel that they are forced into seeing a physician with whom they have no relationship and that the interests and loyalty of the physician may not lie with the patient.

"Often, the extent of injuries or lack of addressing injuries is difficult to prove, resulting in a he-said-she-said situation," Royal says. "But when people are placed in situations wherein they lack the assurance that they can be free with their words, they start being very deliberate with their words. This deliberateness may or may not result in a change to patient care. There are delicate conversations we all have but would not want those words recorded, analyzed, and used against us. Hence, there are federal and state laws against eavesdropping."

Implications of Federal and State Laws

"There are no laws that directly address patients recording physician visits," says Royal. "There are, however,

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laws that govern electronic recording of conversations in every state, as well as on the federal level, which are intended to address wiretapping and eavesdropping but are worded to include recording of almost any conversation, by phone or in person."

Royal explains that federal law and the laws of most states permit recording conversations as long as one party to the conversation consents. She also notes that 12 states require the consent of all parties to the conversation: California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington.

Thus, there are two scenarios for consent to a recording: (1) only one party needs to consent or (2) all parties need to consent. Any recording gained illegally (without the required consent) is not permitted to be disclosed. It is generally not legal to record conversations in which you are not a party, other than permitted actions by law enforcement. Most laws provide for both criminal penalties and civil lawsuits for illegal recordings, as well as penalties for disclosing the contents of an illegal recording.

In the 12 states that require all-party consent, it is illegal to record a conversation unless all parties to the conversation have consented to the recording. Every law has exceptions and limits. For example, California Penal Code 632 PC criminalizes eavesdropping if it is intentional, not all parties have consented, the conversation is confidential, and electronics are used to amplify or record the conversation. All 4 elements must be in place.[2] Thus, for example, if a conversation happens in a location that is not confidential, it is not illegal to record it.

For example, an employer sends a representative with the patient when there is an injury on the job, and the representative asks to be in the room as well as to record the visit. In an all-party-consent state, both the patient and the physician can object to this. In a one-party-consent state, both the patient and the physician can object because the employer's representative is not a party to the conversation. There may be a conversation in which they are a party, but not likely during the patient's examination and treatment.

Risks to Urgent Care Providers

Barrese says that his malpractice insurance company has not yet encountered a situation in which a patient records a conversation,

Table 2. Considerations for Protecting the Urgent Care Center Against Unauthorized Patient Recordings

- Centers should have a no-audio-recording and no-video-recording policy that is based on the privacy risk that recording presents for other patients.
- Centers should consider posting signs prohibiting recording in each examination room and make acknowledging the policy part of the intake paperwork, ensuring that patients understand that no recording is permitted in the center.
- Centers should train staff members, physicians, and other health-care providers on the policy and engage in a variety of role-playing activities to demonstrate how to handle real-life discoveries of patients making recordings.

for the purpose of litigation, in an urgent care setting during a voluntary office visit. He admits, however that with smaller, more easily concealed technology, this is certainly a risk.

"That risk must be considered in the 'totality of circumstances' including the privacy of other patients," Royal adds. There are numerous provisions addressing confidentiality in health care, such as physician regulations, state laws, and federal laws. "Any recording that interferes with another person's privacy can absolutely be prohibited," she says. Thus when considering the California requirement that the parties expect a conversation to be confidential, it can be assumed that individuals expect privacy in a medical environment.

Patient privacy expectations flow throughout the urgent care center, from the waiting room to intake, examination rooms, hallways, and checkout; patients and patient information are everywhere. Someone with a smartphone can take pictures or video of themselves, other patients, and medical records of other patients surreptitiously, creating a huge potential for a privacy breach (**Table 2**).

Is a "No Cell Phones" Policy the Answer?

Some urgent care centers, including Carpenter's, have adopted a "no cell phones" policy. Carpenter has patients sign an agreement[3] at registration that their phones will be completely shut off for the duration of their visit. Not only does prohibiting cell phone use protect patient privacy and the confidentiality of physician–patient interactions but Carpenter says that it also improves the flow and efficiency of the medical office.

The reality for most urgent care operators, however, is that it is really difficult to control patient use of cell phones. Patients pass their waiting time by surfing the Internet, texting, or streaming videos or music, and they also call other people to discuss their experience at the urgent care center and their medical issue. According to Royal, these are legitimate uses that can absolutely be prohibited by a center's policies, but enforcement would likely create an unfriendly environment, resulting in negative patient perceptions.

Even if a center does not go as far as having patients sign a policy statement banning cell phone use, it can still post signs saying that no recordings are allowed, including audio and visual—or even more narrowly, no recordings of any other people. A sign should be posted at the front desk alerting individuals to this policy. This is a clear policy statement that can be enforced and is narrowly tailored to suit the needs of the medical office.

The written policy to support the sign posting should address the point that the company has taken a position of denying all requests for recording. Physicians and employees should not be permitted to waive this refusal. As Carpenter states, "Certainly, if the patient discussed the issue ahead of time and was fully disclosing the reason for needing a recording, *and* if the physician was comfortable with the request, then it might be done on a case-by-case basis, but most attorneys would probably advise against this."

Royal adds: "If there is a bona fide need—perhaps a deaf patient has an interpreter and the patient wishes to have a recording to verify with family—then there should be a process to escalate a request to the proper person in management. In such a case, the office could determine if they only grant recording requests if the office also receives a copy—and then how to operationalize that requirement. If the policy is to permit recordings under certain circumstances, have those circumstances detailed in the policy with the proper instructions. Ensure that all staff members are trained on this."

Patient Caught Red-Handed

"Under the law in the state I'm practicing, any recording of an individual by another without his or her knowledge is a crime," Rosen says. "If I discovered a patient recording, I would immediately stop the interview and advise the patient I would not proceed until the recording had ceased. I would inform the patient that I would be willing to continue once the recording device was put away. Furthermore, I would ask that the patient delete what he or she recorded."

Asking patients if they are recording at the start of a visit is not a way to build trust. However, staff members,

when assessing vital signs and showing the patient to the examination room, could include a reminder that portable device and phone recordings (video or audio) are not permitted. This matter-of-fact reminder might deter some surreptitious recording, but those who are recording for malicious purposes will likely ignore any instructions.

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Regardless of the reason a patient is recording a visit, unless staff members know that the patient has a malicious intent, the patient should be treated with respect and courtesy. Inform the patient of the center's policies and politely ask that the patient cease recording. Train providers and staff members on the center's policies for recording, and provide instruction on how to address the issue with patients, emphasizing that a prohibition on recording is to protect patients' privacy. In most cases, patients will comply with such a request.

Royal points out that although a medical practice can prohibit recording on behalf of the business, only individuals can consent to having their conversations recorded. When a patient has requested permission to record an interaction, the provider and the center's managers should discuss the details and implications of the request with the parties to be recorded. If permission is granted, then all staff members should be informed and have the opportunity to consent for themselves. A provider should not speak for staff members or any other individual who should have the opportunity to determine their own wishes.

Royal emphasizes that a center's stance on an individual request would depend on the scenario. If the patient is recording because they have an injury they wish to share via social media, then staff members and providers could permit that recording without permitting recording of the direct treatment and discussions. On the other hand, if the patient is required to see this physician because someone else is responsible for the bill or a second opinion is required, then the circumstances require application of a different logic. The latter scenarios are more contentious and likely to elicit a defensive position by both providers and staff members.

If a physician feels that the quality of care they provide for a patient is compromised because they are recorded, that is cause for concern. If treatment quality suffers because the physician feels like they are under suspicion and cannot establish a proper relationship with the patient, then that is a separate conversation to have with the patient.

All of that aside, how a physician reacts relates directly to whether they suspect that the patient is trying catch them doing something less than what is best for the patient. If the physician is likely to make statements that should not be recorded, perhaps those things should not be said. If there are tests that would not be ordered unless the physician felt under pressure by being recorded, then perhaps the tests should remain unordered. Being recorded or not should have no impact on a physician's treatment of the patient to the best of their ability.

Conclusion

The recording of patient–physician interactions is both a simple and a complex topic. The United States is particularly litigious: Patients sue physicians, and individuals sue one another over injuries. Our environment is also technologically sophisticated. Pair contentious situations with technical capability, and we will see more recording.

Physicians and patients should feel like they are in a trusting relationship. It is difficult to establish such a relationship when one party feels like the other intends to cast aspersions on one's character or skills and catch them doing wrong. When the patient doubts where the physician's loyalty lies, then there is no trust.

Physicians can perhaps allay these fears with frank conversations with patients, identifying reasons behind recording and basing their response on the underlying cause rather than focusing on the recording. However, looking at this issue through the lens of urgent care, there is not generally an opportunity or need to build a lasting relationship of trust. Yes, there should be basic trust, but extended trust is neither expected nor required if there is no long-term treatment relationship. ■

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