

## Covert Recording by Patients of Encounters With Gastroenterology Providers: Path to Empowerment or Breach of Trust?



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*Last year, while sedated for colonoscopy, a patient covertly recorded conversations among endoscopy staff and providers. Comments about the patient were egregious, and resulted in loss of employment and a large financial settlement. The reality of today's world is that we all are subject to constant (real or potential) surveillance. Nothing is private and nothing recorded is temporary, yet physicians value private conversations with our patients. When a patient records a visit, either covertly or overtly, most physicians pause and have some emotional reaction (either positive or negative). Some welcome the ability to communicate accurately to a wider audience, while others believe the act of recording violates an interpersonal bond. In this month's Road Ahead column, Megan Adams, MD, JD, MSc discusses legal and ethical ramifications when a patient records our clinical interactions. She offers an excellent analysis and practical risk management strategies. Personally, I follow my wife's dictum to act like I am always on camera.*

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Patients and physicians were collectively horrified last year when news broke of a Virginia man who recorded conversations among his gastroenterologist, anesthesiologist, and other endoscopy unit staff while sedated for his colonoscopy, including a number of disparaging remarks about the patient. Among other objectionable comments, providers mocked the patient for being demanding in the preprocedure area and for the amount of sedation he required, made comments implying that he had syphilis or tuberculosis, and discussed avoiding the patient following the procedure via

an urgent "fake page."<sup>1</sup> The patient sued, resulting in a \$500,000 judgment against the anesthesiologist for defamation and malpractice, including punitive damages. Although this case clearly represents an extreme example of unprofessional behavior, it also raises thought-provoking questions regarding the evolving relationship between patients and their physicians as well as the legal and ethical implications of covert recording that deserve further discussion.

In this era of personal digital devices, there is increased opportunity for covert electronic recording of medical encounters by patients and families. Although this practice may be a consequence of underlying distrust between patient and physician, if discovered it may ultimately lead to further erosion of trust, negatively impacting ongoing medical care and further compromising the patient-physician relationship.

This article reviews the current state of knowledge regarding the frequency of and motivation for covert patient recording of medical encounters, and the legal and ethical principles informing this area. It concludes by proposing several strategies gastroenterologists can use to mitigate risk of liability while also preserving the patient-physician relationship and upholding professional autonomy.

### Weighing the Benefits and Harms of Patient Electronic Recording

Patient recording of medical encounters, whether covert or overt, presents both benefits and risk of harm. Theoretically, recording medical encounters could assist patients in remembering and/or better understanding recommendations provided by their physicians. It may



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## PRACTICE MANAGEMENT: THE ROAD AHEAD, *continued*

also secondarily improve patient compliance and overall engagement in medical care, and help patients accurately communicate recommendations to family members and other caregivers not immediately available during the clinical encounter. Patients may also view these recordings as a mechanism for empowerment, allowing them to shift the power dynamic between patient and provider.<sup>2,3</sup> However, there is also the potential for recorded comments to be taken out of context or misinterpreted, leading to confusion on the part of the patient or family. Overt recording of medical encounters also may alter physician decision-making, leading to more aggressive testing and expense for the patient and healthcare system. Even worse, covert recording of medical encounters (if discovered) may irreparably harm the physician-patient relationship by introducing distrust and causing the physician to take a more defensive posture in subsequent dealings with a given patient.

Recent research has shed new light on the potential frequency of patient covert recording of medical encounters, suggesting that it is alarmingly common. In a mixed-methods study of 130 patients in the United Kingdom recruited via radio and social media, 15% of respondents indicated having secretly recorded a clinical encounter and an additional 11% personally knew someone who had covertly recorded.<sup>4</sup> Those reporting having covertly recorded were significantly more likely to be male and less educated than those who had not. An additional 35% of respondents indicated that they would consider covertly recording a clinical encounter in the future. Although the generalizability of these results may be challenged based on the potential for sampling bias, the results suggest a shifting paradigm in the way in which patients view the physician-patient relationship and a fundamental breakdown in communication and erosion of trust.

The underlying motivations for patient recording of medical encounters are complex and multifaceted. These recordings seem to be a relatively new phenomenon, and one that elicits strong reactions, positive and negative, on the part of patients, physicians, and society.<sup>2</sup> Qualitative studies reveal that, whether covertly or overtly recording, most patients are driven by a common desire to replay, relisten, and/or share the recording with family, friends, and other caregivers.<sup>4</sup> Indeed, the patient involved in the previously mentioned litigation purportedly intended to record the postcolonoscopy discharge instructions from his gastroenterologist, only to later discover much more. Patients who record covertly report being motivated by a fear of being denied permission to record, or by prior experiences of poor quality care and the prospect of gathering verifiable evidence to support their experience. In contrast,

patients who ask permission to record seem to be motivated primarily by a desire to preserve or enhance the physician-patient relationship.<sup>4</sup> These insights are valuable in that they allow clinicians to view medical encounters from the perspective of patients, understand the power-dynamics at play, and ultimately use this information to enlighten future care.

### **Legal Guidance: “One-Party” Versus “All-Party” Consent**

Although the prospect of covert patient recording may be unsettling to physicians, is it illegal? Because of a paucity of legal precedent in this area, the legal landscape is rather murky. Through the provisions of the Electronic Communications Privacy Act, federal law prohibits the interception and disclosure of wire, oral, or electronic communications without specific consent of at least 1 party to the conversation.<sup>5</sup> This so-called “one-party” consent standard affords a baseline level of legal protection. A handful of states offer additional protection under state law by requiring all parties to the conversation to consent to the recording (so-called “all-party” consent). Virginia, where the audio recording of the previously mentioned colonoscopy took place, is a “one-party” consent state.<sup>6</sup> In contrast, such states as California and Florida have adopted an “all-party” consent rule.<sup>7,8</sup> However, uncertainty remains. For instance, if medical providers have a conversation in the same room as a sedated patient during a medical procedure on that patient, is the patient a “party” to the conversation? Furthermore, can such a conversation be considered private when held in front of a patient during a medical procedure? Is the patient in such a scenario “eavesdropping”? Given a lack of legal precedent in the form of case law and the unique features of each clinical scenario, this is likely to remain an area of significant legal ambiguity. Although the possibility of covert patient recording may be unnerving for providers, the reality is that in most cases it is likely legally permissible.

### **Ethical Principles: Navigating an Evolving Physician-Patient Relationship**

The relationship between physician and patient, a core aspect of medical ethics, has evolved markedly over time. This relationship was historically paternalistic: the patient was seen to be dependent on the physician’s professional authority in determining the appropriateness of care, and patient preferences were seen as secondary to physician judgment. In recent years, however, the physician-patient relationship has evolved toward

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