

TECHNOLOGY ■

smartphone recordings by patients: be prepared, it's happening

In the 10 years since the launch of the first Apple iPhone in 2007, mobile devices have become integral to many people's daily life.¹ It is not surprising then that some patients want to bring their smartphones into their physicians' offices to record some or all of their clinical healthcare encounter.

These recordings (audio or video) may benefit patients, giving them improved clarity about their health and a greater sense of engagement, possibly leading to better adherence to their care plan. However, any recording in a physician's office also has the potential to raise issues, such as the privacy of other patients and staff, the impact on the doctor-patient relationship, and the incorporation into the medical record.

To leverage the possible benefits of recordings and counter any possible problems, physicians need to be prepared. They should become aware of their privacy obligations and consider whether to adopt a policy on recordings in their premises. Any policy should address potential problems that are specific to a recording's location—that is, the policy must address recordings made in public areas, such as waiting rooms, and recordings made in private areas, such as an examination room.

Patients are likely unaware of the issues with recording in a physician's office and recordings will likely happen.



PRIVACY ISSUES IN PUBLIC AREAS

Patients recording in public areas of a doctor's office, such as waiting rooms and other common spaces, could possibly capture other people who are not involved in the patient's healthcare encounter. The recordings could include identifiable information about another patient or staff member and lead to an allegation of a privacy breach against the physician.

The allegations would be based on physicians' ethical and legal obligations to maintain their patients' personal health information in accordance with privacy legislation. Physicians are also required to protect the personal information of their employees. The general rule is that identifiable, personal information about an individual cannot be collected, used, or disclosed unless the individual has provided consent, or unless the collection, use, or disclosure is otherwise required or permitted by law.

The CMPA has seen cases in which video taken by a patient in a doctor's office without the physician's knowledge has appeared on public websites and on social media.

IMPACT ON THE DOCTOR-PATIENT RELATIONSHIP

A patient may have valid reasons for wanting to record a clinical encounter in a private area such as an examination room. They may want to have an accurate record of the physician's advice, or to share the information with a family member. However, the recording of a clinical encounter by a patient without the physician's knowledge can be perceived as reflecting a lack of confidence in the relationship on the part of the patient.

As well, misunderstandings related to recordings can lead to regulatory authority (College) complaints.

IMPACT ON THE MEDICAL RECORD

Any recording made at the time of the clinical encounter (i.e. contemporaneously) could be considered part of the medical record.

The law in each province and territory requires that physicians and healthcare institutions maintain a treatment record for each patient.² A recording made in the context of providing patient care is likely to be considered part of the clinical record. While not necessarily a substitute for a physician's notes, a recording of the clinical encounter can be invaluable to a physician since it is likely the most accurate and reliable record of the encounter.

WHAT CAN PHYSICIANS DO ABOUT RECORDINGS IN THEIR OFFICES?

Physicians should prepare for patient recordings and consider adopting a policy on the use of smartphones and other recording devices in their offices.

Any policy should distinguish between what is allowed in public spaces and in private areas. At a minimum, physicians should consider whether it is necessary to prohibit patients from taking

photos and making video and audio recordings in the waiting room or other public areas to protect the privacy of patients and staff members.

Physicians may also want to be proactive by encouraging patients to speak with them before making a recording of the clinical encounter in a private area. A smartphone recording of a patient's visit has the potential to be used in a legal proceeding (in the event of a legal action or College complaint). It is therefore ideal for the physician and patient to reach an agreement about whether a recording may be made, how it will be made, and to ensure the privacy of others will not be affected. There may be times when it's not possible to have this kind of discussion in advance, such as when someone begins recording during an emergency. In these situations physicians should find an appropriate time later to talk about the issues.

Physicians should document in patients' medical records that a recording took place and other details (e.g. duration of the recording, topics covered, etc.). The recording itself should be maintained in the medical record or the record should indicate where the recording can be found (e.g. in a file on the office computer server). Physicians should ask the patient for a copy of the recording. If there are concerns about obtaining a reliable copy from the patient, physicians may consider offering to record the encounter and to provide a copy to the patient, or to make their own recording at the same time as the patient. Physicians who make their own recording of patient encounters are encouraged to first obtain patients' informed consent.

In the event that a patient has inappropriately posted online a recording from the physician's office, various options are available to attempt to have it removed, depending on the website and the content of the recording. Most social media sites provide reporting tools to request removal. Members are encouraged to contact the CMPA to discuss the options available to them in specific circumstances.

When patients ask to record their visit...

1. Ask them why they want to record the encounter to determine what they hope to achieve.
2. Consider whether better alternatives exist, including recording part, but not all, of the encounter, and discuss these options with patients.
3. Accept or decline the request. If declining, explain the reasons for the decision and offer to continue with the encounter regardless. If the patient insists on recording, physicians will have to use their discretion on whether or not to continue the appointment.
4. If a recording is made, note this fact in the medical record and, when possible, ensure a copy of the recording is maintained along with the clinical documentation.

THE BOTTOM LINE

Patients may benefit from recording their healthcare encounters. Open communication about the need for the recording will help ensure that recordings will not threaten the privacy of other patients and staff or affect the trust between physician and patient. If a physician believes a recording is appropriate, consideration must be given to ensuring a copy of that recording is kept as part of the medical record.

As technology advances and recordings become more common in healthcare, robust communication skills are becoming essential for physicians. The *CMPA Good Practices Guide's* section on communication provides physicians with information on how to improve communication with patients.³ ■

1. Canadian Radio-television and Telecommunications Commission [Internet]. Ottawa (ON): CRTC; 2015. Communications Monitoring Report 2015, Telecommunications sector overview [cited 2016 Dec 15]. Available from: <http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2015/cmr5.htm>
2. Canadian Medical Protective Association [Internet]. Ottawa (ON): CMPA; September 2016. Medical-legal handbook for physicians. Version 8.2 [cited 2017 Jan. 20]. Available from: https://www.cmpa-acpm.ca/documents/10179/24891/com_16_MLH_for_physicians-e.pdf
3. Canadian Medical Protective Association [Internet]. Ottawa (ON): CMPA. CMPA Good Practices Guide [cited 2017 Jan 20]. Available from: <https://www.cmpa-acpm.ca/serve/docs/ela/goodpracticesguide/pages/communication/communication-e.html>
4. Canadian Medical Protective Association [Internet]. Ottawa (ON): CMPA; March 2011. Using clinical photography and video for educational purposes [cited 2016 Dec 15]. Available from: https://www.cmpa-acpm.ca/en/duties-and-responsibilities/-/asset_publisher/bFaUiyQG069N/content/using-clinical-photography-and-video-for-educational-purposes
5. Canadian Medical Protective Association [Internet]. Ottawa (ON): CMPA. Photo and video consent form [cited 2017 Jan 20]. Available from: https://www.cmpa-acpm.ca/documents/10179/25003/com_photo_and_video_consent_form-e.pdf
6. Canadian Medical Protective Association [Internet]. Ottawa (ON): CMPA; October 2013. Protecting patient health information in electronic records [cited 2016 Jan 31]. Available from: <https://www.cmpa-acpm.ca/en/-/protecting-patient-health-information-in-electronic-records>

Additional reading at cmpa-acpm.ca

- “Online physician reviews: What’s to be done?”
- “Using electronic communications, protecting privacy”



PHYSICIAN USE OF SMARTPHONE RECORDINGS

Although patients can record their clinical encounters without a physician’s consent, the same does not hold true for physicians. Clinicians who wish to record a clinical encounter must first obtain consent from the patient.

The CMPA has provided detailed information on the duties and responsibilities associated with clinical photographs and videos, and the need for de-identification of images and obtaining patient consent.⁴ The CMPA also offers a consent form template for these activities.⁵

To prevent privacy breaches, any personal health information stored on a mobile device should be encrypted. This safeguard is a requirement in an increasing number of jurisdictions.⁶