

Protect yourself from secret recording

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A nurse accidentally discovers a recording of himself giving patient care posted on the Facebook page of a patient's family member. Another nurse receives a notice that a State Board of Nursing complaint has been filed against her for disparaging comments she made about a patient without knowing that the patient was recording her on his cellphone.

As smart phones and social media have become ubiquitous, the number of recordings posted online have grown exponentially. Most nurses now know the dangers of posting patient-related content online, but what happens when the reverse occurs and a patient or patient family member posts videos, photos, or content about the nurse? What rights does the nurse have? And what happens when a voice-control device captures a nurse's inappropriate comment? Is the nurse at risk?

These are not hypothetical questions. A 2018 survey of 52 nurses found that several had experienced unapproved postings related to their professional actions, leaving them feeling "violated" and "disrespected."

Understanding the issues surrounding

secret recording can help you avoid possible damage to your career and emotional health.

Ubiquitous recording

Recordings are occurring in a wide variety of settings. Patients and families may be recording care in hospitals, in long-term-care and assisted-living facilities, and in the home. In some cases, these recordings may be sanctioned by the state. For example, many states have laws that require skilled nursing facilities to allow residents to install monitoring equipment ("granny cams") to document care. Requirements associated with the law may include obtaining consent from the patient's roommate, posting a sign that recording is in progress, and making the resident responsible for camera equipment costs.

In the home, voice-control or "smart speaker" devices such as the Amazon Echo or Google Home may not just be reminding patients to take their medication; they may also be recording what people in the room are saying. Additionally, home security camera systems such as Ring or Google Nest may be recording people as they arrive, leave, and move about the home.

Unfortunately, nurses may not know they are being recorded. A survey of the general public in the UK found that 15% had secretly recorded a clinic office visit. The most common reason was simply to improve understanding of medical information and to share with family members.

In the US, these types of recordings may violate wiretapping laws. The federal wiretapping laws (18 U.S. Code § 2511) only require one party to agree to a recording, but many states have "all-party" requirements, which means all parties must consent to the recording. Typically, the more restrictive state law would take precedent over the federal law.

When private goes public

When evidence of healthcare professionals behaving inappropriately goes public, it can result in significant professional harm, including possible legal action, for those involved. In 2015, for example, a patient used his phone to record post-discharge instructions for a colonoscopy. He neglected to turn off the recording and was later shocked to hear disparaging comments made by the surgeon during the procedure, while the patient was under anesthesia. The patient subsequently won a \$500,000 lawsuit.

Failing to speak up when inappropriate behavior occurs does not protect you from legal action. For example, the anesthesiologist in a video created by a surgeon who was dancing during surgery has been named in a lawsuit.

In the courts

The admissibility of recordings in court cases varies by jurisdiction, and legal parameters surrounding these issues are still being developed. It is also important to be aware that federal and state legal thresholds may differ, affecting court decisions.

Recordings may also impact the types

Reducing recording risks

Both organizations and individual nurses can take steps to help avoid legal action stemming from recordings made by patients and families.

Organizations

- Establish policies regarding use of cell phone, tablet, and other recording devices by patients and families.
- Educate staff and volunteers about photo and video rules and policies.
- Post notifications for patients and families to see that restrict use of cell phones and other devices capable of recording.
- Provide patients and families with written information about organizational policies related to recording.
- Nurses
- Survey the room before delivering care. Note if there are any cell phones, tablets, or voice-activated devices present.
- Request that devices be removed or turned off. Let patients know that devices can be distracting to care delivery and refer to relevant organizational policies as needed.
- Do not pose for photos with patients or patient family members; these photos could end up on social media. If a family member is making a recording of patient care, ask them to stop, explaining that he or she is violating the patient's right for privacy under the Health Insurance Portability and Accountability Act.
- Report inappropriate social media posts about you. If you see such a post, take a screen shot or record the posting (for evidence in any potential court case) and report the posting to the social media outlet.
- If you become involved in a lawsuit related to a recording showing you engaged in inappropriate behavior, be honest with your insurer and attorney about the entire scope of the recording. For example, just because only part of a video was posted online doesn't mean that additional footage won't appear during a court case.
- Keep in mind that good communication helps reassure patients and families that quality care is being delivered, removing the motivation to record in order to ensure the patient is receiving excellent care.

and amount of damages awarded as a result of legal action because of the perception that what is said, or tone of voice used, in the audio or video clip reveals a lack of "feeling" by the defendant. This perception can also be an issue when it comes to settlements. For example, if minor patient harm occurred but the nurse is recorded making negative comments about the patient, there might be a push for a higher payment.

Self-protection

Nurses can take steps to protect themselves from negative consequences of being recorded. (See *Reducing recording*

risks.) Keep in mind that Provision 5 of the American Nurses Association Code of Ethics for Nurses with Interpretive Statements notes that "...the same duties we owe to others we owe to ourselves." You should expect patients and families to respect your privacy in the same way you respect theirs. Setting boundaries related to recording is a reasonable step to take. This, combined with not making inappropriate comments or taking inappropriate action that could be detected by recording devices, will help you avoid litigation while providing quality care. ■

Resources

ABC13 Eyewitness News. Patient records doctor's insults during surgery, wins \$500,000 lawsuit. 2015. <https://abc13.com/health/listen-patient-records-doc-tors-mocking-him-during-surgery/802568>.

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