

**Department of
Veterans Affairs**

Memorandum

Date: **MAR 28 2018**

From: Principal Deputy Under Secretary for Health (10A)

Subj: Rescission of Memorandum entitled "Patient Recording of Clinical Encounters"

To: VISN Directors, 10N1-23

Thru: Deputy Under Secretary for Health for Operations and Management (10N)

1. This notice rescinds the memorandum and the appendix released through the office of the Deputy Under Secretary for Health Operations and Management (10N) entitled "Patient Recording of Clinical Encounters," issued on December 14, 2017. See attached copy.
2. The workgroup responsible for the memorandum received thoughtful comments and constructive feedback from VHA Central Office and field facilities.
3. This rescission does not change ethical and professional obligations to deliver patient-centered health care.
4. Inquiries concerning this rescission should be sent to the VHA Risk Management Program, Office of Quality, Safety and Value, at the following Outlook mail group address: **VHA 10E2E Risk Management Staff**.
5. For specific ethics concerns regarding patient recording of clinical encounters, please contact your facility's local ethics consultation service (list available here: <http://go.va.gov/rlij>) or the VA National Center for Ethics in Health Care at vhaethics@va.gov.



Christopher L. Vojta, MD, MBA, MSCE

Attachment

**Department of
Veterans Affairs**

Memorandum

DATE: DEC 14 2017

FROM: Acting Principal Deputy Under Secretary for Health (10A)

SUBJ: Patient Recording of Clinical Encounters

TO: VISN Directors, 10N1-23

THRU: Deputy Under Secretary for Health for Operations and Management (10N)

1. This Memorandum provides VHA staff with information for managing circumstances when Veterans, patients, family members, visitors, or other non-employees are overtly or covertly producing photographs, digital images, and/or video or audio recordings of VHA employees providing health care services on property under the charge and control of VA (and not under the charge and control of the General Services Administration). This Memorandum does not apply to a person's taking of photographs, digital images, and/or video or audio recordings for news purposes, advertising or commercial purposes.
2. VA promotes patient-driven, proactive, personalized care where patients are empowered to participate meaningfully in their care. VA embodies this value by promoting access to, and availability of, patient's health care information. Patients are encouraged to view, gather and collect their medical information in ways that meet their health care needs (e.g., My HealthVet). VA has also made efforts to allow Veterans to access care and services using electronic devices. In some circumstances, patients or their family will use these devices to record information from a clinical encounter for later review and consideration, either with or without the provider's explicit knowledge or permission.
3. When recording during clinical encounters, the competing values of patient-centeredness, privacy, and confidentiality can lead to ethical conflicts. For example, health care providers may have concerns about the use of recording, including patients' and their own privacy, and they may expect patients to notify them prior to such recording. Health care providers may also be apprehensive about any potential liability exposure for them or VA if patients make and subsequently alter a recording, or if they improperly release confidential information later.
4. The Appendix provides guidance for managing these issues in concert with VA core values and 38 C.F.R. § 1.218. Responsibly attending to both the regulations and the values can help employees manage these situations that are both legally supportable but also ethically justifiable and consistent with VA's mission and values. Questions related to this Memorandum should be directed to your local IntegratedEthics® Ethics Consultation Service ([full list available here](#)) or the VA National Center for Ethics in Health Care by emailing vhaethics@va.gov or at 202-632-8457.


Miguel H. LaPuz, MD, MBA

Appendix A

RECORDING (PHOTOGRAPHS, DIGITAL IMAGES, VIDEO, AND/OR AUDIO) OF CLINICAL VISITS BY PERSONS ON VA PROPERTY (EXCLUDING VA STAFF)

Note: This guidance does not refer to VA-provided compensation disability examinations. VHA Directive 1078(1) Privacy of Persons Regarding Photographs, Digital Images, and Video or Audio Recordings, provides guidance for recordings in clinical settings made by VHA employees.

Patient Perspective

Across all levels of health literacy, patients can struggle to understand and recall information from an encounter with a health care professional. Studies have demonstrated that patients benefit from audio recording encounters by allowing them to be fully present and focused on the encounter and allowing them to later review and share this information with loved ones. Recording the encounter improves patients' information recall and overall satisfaction with care. When patients reported covert recording (i.e., without the provider's knowledge or agreement) they often did so because they believed that their request to record would be denied, or were concerned that an affronted clinician would deny them access to future care.

Provider Perspective

There are reasonable situations when patients would want to, and would benefit from, recording a conversation with their health care provider. However, the provider may not regard every patient attempt to record information during an encounter as productive or beneficial to a therapeutic health care relationship. Providers may have particular concerns about the use of covert recording because they may experience it as a violation of their privacy when speaking in confidence with patients. Providers may have concerns about the use, editing, reworking, and/or republishing of recordings that may take information out of context and misrepresent the provider's words or intentions, and as such, may damage the provider's professional reputation. Ultimately, providers may believe that covert recordings undermine the trust necessary for high quality patient care.

Federal Law

VA regulation codified at 38 C.F.R. § 1.218(a)(10) does not bar persons on VA property from taking photographs, digital images, and/or video or audio recordings intended strictly for private, non-commercial use. Such conduct cannot however create a disturbance, as described in 38 C.F.R. § 1.218(a)(5). A disturbance includes any conduct that impedes or disrupts the performance of an employee's official duties. This includes disturbances such as creating loud or unusual noise; unreasonably obstructing the usual use of entrances, foyers, lobbies, corridors, offices, elevators, stairways, or parking lots; or preventing one from obtaining medical or other services provided on the property in a timely manner. So while there can be no automatic ban on the taking of photography or recordings intended for strictly personal, non-commercial purposes, such activity cannot be allowed to create a disturbance. This provides a needed check on otherwise permissible conduct. Although the act of recording a clinical encounter in and of itself is not likely to create a disturbance, such a determination is fact-specific and should be made on a case-by-case basis.

Additionally, VA staff cannot confiscate the recording devices of patients or others even if it is discovered that their recording is occurring covertly. If VA staff believes that any recording by a patient or other person is creating a disturbance as defined in regulation, such as disrupting the

performance of an employee's official duties, they should explain this respectfully to the patient or individual and ask them to cease. If the individual continues to refuse, then staff are advised to contact District Counsel or the VA Police.

Health Care Ethics Perspective

Although health care providers may be significantly troubled at what feels like a loss of privacy or professional autonomy with the prospect of caring for Veterans who may be legally recording their conversations, their professional obligations to both provide high quality care and honor the VA ICARE values should take precedence. Therefore, the responsibility and leadership for productively and professionally addressing the recording of clinical encounters must come from VA and its health care professionals.

Although providers may feel constrained by VA's position that patients may record encounters, they should behave and work as if all encounters are recorded by patients, and use this perspective as an opportunity to promote high quality care. By always conducting themselves with the highest standards of professionalism, providers promote strong ethical health care practice, whether they are being recorded or not. VA providers can also choose to embrace a patient's desire to record as their attempt to better engage in their health care and improve the transparency associated with their health care decisions. Providers can respond productively in the following ways to a patient who asks to record an encounter:

1. Health care providers should encourage patients who wish to record to do so openly in order to promote the desired transparency that facilitates high quality care and a trusting clinical relationship.
2. If health care providers become aware of a recording (or a desire to do so), they should begin with an open and non-judgmental discussion that attempts to elicit a patient's motivations for recording. The provider should emphasize their unwavering commitment to care for the patient regardless of the patient's choices for how they wish to gather and collect health care information.
3. Providers can also educate patients on the value of recording conversations and how it could be used productively in the treatment relationship. This demonstrates a provider's willingness to put the patient first, maintain the integrity and trustworthiness of the relationship, and demonstrate openness to the patient's preferences and interests.
4. If the patient's desire to record appears to be a clear indication of a lack of trust in the provider and that distrust cannot be remediated, then advocating for the patient could include offering him or her the option to see another provider with whom they may build a more productive and trusting relationship.

Ethics Recommendations

Prohibiting patients from recording encounters with their providers (either covertly or not) or unilaterally ending clinical encounters unless the patient stops recording is not ethically justifiable. Such practice does not respect patients' choices about how they wish to gather or collect their health care information and can interfere with the health care provider's primary professional obligation to provide health care. We advise VA employees to approach their concerns over a patient's or other person's taking of photographs or recordings as an opportunity to improve the quality of patient care. By always conducting themselves with the highest standards of professionalism, providers promote strong ethical health care practice, whether they are being recorded or not.

