Client Alert: Senate Bill 349: New Rights for Substance Use Patients, Tough Measures Against Deceptive Marketing, Trolls, and Patient Brokering

Legal Update: Senate Bill 349: New Rights for Substance Use Patients, Tough Measures Against Deceptive Marketing, Trolls, and Patient Brokering

On April 13th, 2022, California enacted new legislation intended to strengthen protections for substance abuse patients and their families. The new statute, named "The California Ethical Treatment for Persons with Substance Use Disorder Act" (**Senate Bill 349**), has two distinct components: First, the legislation creates an **Ethical Bill of Rights** specifically for substance abuse patients. Treatment providers are required to make these rights available to current and prospective clients. Second, the new bill creates additional liability for treatment programs and patient brokers that use deceptive marketing practices to capture clients.

Implementing the Ethical Bill of Rights

There is a myriad of federal and state laws related to notifying patients of their rights, protections, as well as garnering their consent for medical care. Ideally, providers apprise patients upon admission to a facility or in advance of implementing a treatment decision. However, common substance-use conditions can raise significant questions regarding a patient's "decision capacity" or "decision competency." Due to clinical challenges and legal considerations, providers may opt for a strategy of 'notification redundancy' to verify that a course of care coincides with a patient's wishes and that the provider is compliant with any applicable regulatory law. We recommend that the Ethical Bill of Rights should also be incorporated with other types of documentation that require 'notification redundancy' when a patient's "decision competency" is in question during an intake.

The statutory language for the Ethical Bill of Rights should be duplicated verbatim:

Every treatment provider operating in the state shall adopt, and make available to all clients and prospective clients, a client bill of rights that ensures that persons receiving treatment for a substance use disorder have the right to all of the following:

(1) To be treated for the life-threatening, chronic disease of substance use disorder with honesty, respect, and dignity, including privacy in treatment and in care of personal needs.

(2) To be informed by the treatment provider of all the aspects of treatment recommended to the client, including the option of no treatment, risks of treatment, and expected result or results.

(3) To be treated by treatment providers with qualified staff.

(4) To receive evidence-based treatment.

(5) To be treated simultaneously for co-occurring behavioral health conditions, when medically appropriate and the treatment provider is authorized to treat co-occurring conditions.

(6) To receive an individualized, outcome-driven treatment plan.

(7) To remain in treatment for as long as the treatment provider is authorized to treat the client.

(8) To receive support, education, and treatment for their families and loved ones, if the treatment provider is

authorized to provide these services.

(9) To receive care in a treatment setting that is safe and ethical.

(10) To be free from mental and physical abuse, exploitation, coercion, and physical restraint.

(11) To be informed of these rights once enrolled to receive treatment, as evidenced by written acknowledgment or by documentation by staff in the clinical record that a written copy of these rights were given.

(12) To be informed by the treatment provider of the law regarding complaints, including, but not limited to, to be informed of the address and telephone number of the department.

(13) To receive ethical care that covers and ensures full compliance with the requirements set forth in Chapter 5 (commencing with Section 10500) of Division 4 of Title 9 of the California Code of Regulations and the alcohol and other drug program certification standards adopted in accordance with Section 11830.1, if applicable.

Those involved in the hospital industry may note that the rights enumerated for substance-use patients resemble a similar bill of rights for for patients in acute care hospitals. In contrast to the requirement that hospitals prominently display the rights in English and Spanish, there is no similar requirement for substance-use rights.

More Liability for Deceptive Marketing

The secondary purpose of SB 349 is to curb treatment programs that employ false advertising and other deceptive marketing practices. Addressing the problem of "trolling" in digital lead generation and call centers for addiction treatment marketers has been an ongoing agenda item for state lawmakers. In January, California implemented a statute (SB 541 – 2021) that required licensed facilities to prominently display their licensing information on their websites, marketing materials, and other communications. That statute was intended to dissuade the practice of using third party intermediary marketers from recruiting potential clients for substance abuse programs and then "brokering" them for a referral fee to a program. The latest law, however, takes a different approach. First, it requires treatment providers to maintain a "record of referrals to or from recovery residences." Presumably, this will make it easier for regulators to investigate entities that violate anti-kickback laws. In addition, SB 349 creates liability even for *unintended* violations related to misleading advertising or deceptive marketing. The final iteration of the bill was carefully reconstructed to prevent providers from claiming ignorance or inadvertency to shield themselves from accusations. The amended bill dictates:

(c) It is unlawful for a treatment provider to ~~knowingly and willfully~~ make a ~~materially~~ false or misleading statement, or provide false or misleading information, about the nature, identity, or location of substance use disorder treatment services in advertising materials, on a call line, on an internet website, or in any other marketing materials.

[…]

(e) It is unlawful for any person or entity to ~~knowingly~~ provide, or direct any other person or entity to provide, false or misleading information about the identity of, or contact information for, any treatment provider.

The amended bill makes it *critical* for providers to review advertising language before dissemination to prevent the potential transmission of any inaccuracies or misleading statements.

Website "Spoofers" and Disingenuous "Body Brokers"

In the world of drug rehab, there are countless entities and individuals who pretend to be associated with licensed providers, trolling on the identities of legitimate treatment programs to generate prospects. Some set-up dummy websites with a similar web address and web design belonging to a licensed facility. Others use the names and images of existing programs to give the misimpression that the person searching is dealing with an established program. When contacted, the marketing site then steers the addict to another licensed provider in return for a fee. There is also the problem of recruiters "trolling" in-person at AA meetings in search of potential patients. In

exchange for providing successful referrals, these "body brokers" collect substantial kickbacks from drug rehab centers. To establish their credibility, brokers advertise themselves as having affiliations or being associated with established, licensed facilities, when, in truth, no contractual relationship exists and the marketer is planning to "sell" the client to the highest bidder. One major advantage of the new bill is that it empowers licensed providers to take legal action against entities and individuals that divert their business by claiming a fictional association. The bill states:

(f) It is unlawful for any person or entity to include false or misleading information about the internet address of any treatment provider's website, or to surreptitiously direct or redirect the reader to another website.

(g) It is unlawful for any person or entity to suggest or imply that a relationship with a treatment provider exists, unless the treatment provider has provided express, written consent to indicate that relationship.

Past attempts to *criminally* prosecute body brokers have been rare and rather unsuccessful. In contrast, SB 349 creates a means for patients and licensed facilities to pursue *civil* claims when harmed by deceptive actors.

Penalties

California sets a maximum $20,000 civil penalty (per incident) for a person or entity that violates *any* part of SB 349. This includes the segments related to the Ethical Bill of Rights, maintaining referral records, deceptive marketing, as well as falsely claimed relationships and identity spoofing. Public prosecutors, licensed facilities, as well as private persons who suffer harm may initiate an action against a party that allegedly violates the new statute.

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