

CHAPTER 5: Informed Consent

There is perhaps no right more basic than the right to control what happens to one's own body. The right to give or withhold consent to medical treatment is well established in California. This right is grounded in the constitutional right to privacy and in the common law. (Cobb v. Grant, 8 Cal 3d. 229 (1972))

The Lanterman-Petris-Short (LPS) Act recognizes that patients may be involuntarily committed yet nevertheless remain capable of giving informed consent. (Riese v. St. Mary's Hospital and Medical Center, 209 Cal.App.3d 1303 (1987))

GENERAL PRINCIPLES OF INFORMED CONSENT

PRESUMPTION OF COMPETENCE/ CAPACITY

Both state and federal law grant competent adult patients the right to make their own healthcare decisions. California Probate Code, Section 4657 presumes capacity: "A patient is presumed to have capacity to make health care decisions..."

Further, the LPS Act explicitly provides, "No person may be presumed incompetent because he or she has been evaluated or treated for mental disorder or chronic alcoholism, regardless of whether that evaluation or treatment was voluntarily or involuntarily received." (Welfare and Institution Code (WIC) Section 5331)

ELEMENTS OF INFORMED CONSENT

Generally, all patients have the right to the following information:

- the nature and seriousness of his or her illness, disorder or condition;
- the nature of the proposed treatment;
- the risks complications, and expected benefits of the treatment; and,
- any alternatives to the proposed treatment and their risks and benefits.

In addition, California law requires that the physician provide specified additional information to the patient in some circumstances, including proposed treatment with antipsychotic medication, electroconvulsive therapy (ECT), or psychosurgery. The additional requirements for treatment with antipsychotic

medications are discussed below. (Contact COPR for additional information about requirements for ECT or psychosurgery)

FREE WILL

The patients' decision to consent to or refuse treatment must be an informed and voluntary decision. The LPS Act makes this clear; Section 5326.5 of the Welfare and Institutions Code provides as follows:

(a) For purposes of this chapter [the entire LPS Act], "written informed consent" means that a person knowingly and intelligently, without duress or coercion, clearly and explicitly manifests consent to the proposed therapy ...

(b) The physician may urge the proposed treatment as the best one, but may not use, in an effort to gain consent, any reward or threat, express or implied, nor any other form of inducement or coercion, including, but not limited to, placing the patient in a more restricted setting, transfer of the patient to another facility, or loss of the patient's hospital privileges... No one shall be denied any benefits for refusing treatment.

The principles of informed consent apply to all forms of treatment, including hospitalization, placement, services and medication. It applies to medical and psychiatric treatment.

LPS PROVISIONS AND LIMITATIONS RELATED TO CONSENT TO TREATMENT

The right to informed consent ensures that mental health patients are given good information and the opportunity to participate in the treatment process.

The purposes of informed consent include:

- educating patients about the risks, benefits and alternatives to medication or other treatments;
- involving patients in an important and significant part of their treatment;
- certifying that the patient was offered an explanation of the treatment or medication and has received a copy of specific drug information;
- providing a legal record of the patient's agreement or disagreement with the proposed treatment or the administration of medication.

Under LPS, the right to informed consent can be limited only under the following circumstances:

Providing Patients' Rights Advocacy, through Education and Investigative Services under Contract #18-70006-000 with the California Department of State Hospitals.

Emergency

There is a statutorily defined emergency where it is immediately necessary to impose treatment over the individuals' objection for the preservation of life or the prevention of serious bodily harm and it is not practical to first gain consent; or

Determination of Incapacity

It has been determined in a hearing (called a Riese or capacity hearing) that a person does not have capacity to consent to the administration of antipsychotic medications; or

LPS Conservatee

The person is on an LPS conservatorship with a specific judicial determination of incapacity to give or refuse consent.

It is important to note that even when an individual does not have the right to consent, they still almost always retain the right to be informed. In other words, a facility may not "hide" someone's medications in their food or mislead an individual regarding a procedure or medication, even if that person has lost the right to consent.

EMERGENCIES

An emergency situation allows for administration of medication only to the degree, and for the duration, needed to address the emergency situation. An emergency must be addressed in the least restrictive manner. This means administering smaller rather than larger dosage amounts and only shorter acting medications. (Title 9 California Code of Regulations (CCR) Section 853)

Determinations of an emergency should be contemporaneous with the administration of medication. If at any point the behavior justifying the emergency ends or it becomes practicable to gain informed consent, the justification for the emergency administration of medication no longer exists.

ANTIPSYCHOTIC MEDICATIONS

"Antipsychotic medication" is defined as any drug customarily prescribed for the treatment of symptoms of psychoses and other severe mental and emotional disorders. (Welf. & Inst. Code Section 5008(I), Title 9 CCR Section 856)

Voluntary patients have an explicit right to accept or refuse antipsychotic medication after being fully informed of the risks and benefits except in a statutorily- defined emergency. (Title 9 CCR. Section 850-856)

Involuntary patients may be treated with antipsychotic medication only after being fully informed and being advised that they have the right to refuse such medication. (WIC Section 5152(c), 5332 (a))

If an involuntary patient orally refuses or gives other indication of refusal of treatment with medication in a non-emergency situation, medication should only be administered after the treatment staff that determines the treatment alternatives to involuntary medication are unlikely to meet the needs of the patient and there has been a legal finding of incapacity. (WIC Section 5332(b), Riese v. St. Mary's Hosp. & Med. Ctr. (1987) 209 Cal.App. 3d 1303, 271 Cal.Rptr. 199))

Note that this hearing only covers situations where antipsychotic medications are proposed to be administered to an involuntarily held patient. They do not give the facility the authority to administer other medications or perform medical tests without the person's consent unless there has been a court authorization for medical treatment pursuant to Probate Code sections 3200 et. seq. for that purpose (see below section regarding Physical Health Care).

THE RIGHT TO KNOW

Informed consent means that the patient, after being provided adequate information about their condition and proposed treatment, knowingly and intelligently, without duress or coercion, clearly and explicitly gives their consent to the proposed treatment (Cobbs v. Grant (1972) 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505)

Before a patient decides to consent or not consent to treatment, the physician must explain the following:

- The patient's right to refuse treatment with antipsychotic medications;
- The patient's right to be medicated over their objection only if there is a legally defined emergency or a legal determination of incapacity;
- A description of the nature and seriousness of the mental condition, disorder, or behavior;
- An explanation of the reasons for the treatment;

- The name and type, frequency, amount, and method of dispensing the treatment, and the probable length of time that the treatment will be taken;
- A description of the likelihood of improvement and the probable degree and duration (temporary and permanent) of improvement or remission expected with (and without) the medication;
- An explanation of the nature, degree, duration, and probability of the side effects and interactions (with other treatment), the risks and how and to what extent they may be controlled, if at all;
- An explanation of the reasonable alternative treatments available (including other medications and non-medication oriented treatment) and why the doctor is recommending this particular treatment. (WIC Section 5152(c), 5213(b), 5332; Title 9 CCR Section 851)

GIVING CONSENT

After providing the patient the above information, the doctor should ask the patient whether they agree or disagree to take the medication. The facility must keep a written record of the patient's decision, i.e., a consent form signed by the patient (or if the patient refuses to sign, the appropriate documentation). The patient may withdraw consent at any time by stating their intention to any member of the treatment staff (Title 9 CCR Section 852, 854).

WITHHOLDING CONSENT

After giving informed consent, the patient still has a right to refuse the medication and/or revoke the consent previously given.

VOLUNTARY PATIENTS

If the patient is on voluntary status, they must be allowed to refuse the medication unless there is an emergency. The refusal to consent is not in itself grounds for initiating an involuntary commitment. (Title 9 CCR Section 851, 853, 855)

INVOLUNTARY PATIENTS

If the patient is on a 72 hour hold or 14 day hold, they must be allowed to refuse absent an emergency or hearing decision (WIC Section 5332(b)).

CAPACITY HEARINGS: RIESE

If the treating physician believes that a patient who is refusing medications does not have the capacity to make such a decision, the physician may petition the

Superior Court to request a hearing to determine whether the patient has the capacity to consent to or refuse the medication. Within two days (not including weekends) from the time the doctor requests the capacity hearing, the patient will be contacted by an attorney from the Public Defenders' Office or, in some counties, the Title 9 Patients' Rights Advocate to prepare for the hearing. The patient shall then be scheduled for a hearing to occur before a hearing officer or judge from the Superior Court who will decide the issue of capacity to give or withhold consent to medical treatment. (WIC Section 5333).

Unless there is an emergency as defined by Section 5008(m) of the California Welfare & Institutions Code, the patient cannot be medicated without giving consent until the hearing takes place. Then, if the court decides that the patient is not capable of giving informed consent, the doctor will be given authority to medicate the patient despite the patient's objections.

PHYSICAL HEALTH CARE

LEGAL BASIS OF RIGHT

Probate Code Section 3200, et seq. provides a procedure for petitioning a court to determine whether a patient lacks the capacity to make a health care decision and, if determined to lack capacity, to designate a person to make a health care decision on behalf of the patient. (Probate Code Section 3201)

For purposes of this law, a "health care decision" means a decision regarding the patient's healthcare, including selection and discharge of healthcare providers (emphasis added) and institutions; approval or disapproval of diagnostic tests (emphasis added), surgical procedures, and programs of medication; directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of healthcare, including cardiopulmonary resuscitation (Probate Code Section 3200(b)).

COURT AUTHORIZED MEDICAL TREATMENT

Pursuant to this law, a Court can determine that a patient is not competent to consent to certain medical procedures or treatments and therefore make an order authorizing the recommended healthcare for the patients and to order a substitute decision maker to make healthcare decisions on behalf of the patient (Probate Code Section 3208(a)).

Note that this procedure is required for non-routine physical healthcare decisions involving an individual on an LPS conservatorship whose conservator has been given the right to make decisions regarding medical or psychiatric care.

If a court finds that a patient has capacity but that they refuse to give consent to the recommended health care, the court shall neither authorize the recommended health care nor appoint a substitute decision maker (Probate Code Section 3208.5).

OTHER CONSIDERATIONS

SPIRITUAL HEALING

Probate Code section 3212 specifies "nothing in this part shall be construed to supersede or impair the right to any individual to choose treatment by spiritual means in lieu of medical treatment, nor shall any individual choosing treatment by spiritual means, in accordance with the tenets and practices of that individual's established religious tradition, be required to submit to medical testing of any kind pursuant to a determination of capacity."

Likewise, Welfare and Institutions Code (WIC) Sections 5006 and 7104 clarify the circumstances under which prayer or faith healing must be permitted for persons detained for mental health treatment.

ADVANCE DIRECTIVES

An Advance Health Care Directive is a legally binding document under state and federal law, which dictates the health care treatment that may be given to an individual who lacks capacity to make health care decisions (Probate Code Section 4600 et seq.; 42 Code of Federal Regulations Section 431.20, 489.100, 489.102, and 489.104).

An Advance Health Care Directive may contain a Power of Attorney for Health Care designating an agent to make healthcare decisions and/or Individual Health Care Instructions. An agent has priority over any other person in making health care decisions for the patients (Probate Code Section 4670, 4671, 4685).

A patient having capacity may revoke the designation of an agent by a signed writing or by personally informing the health care provider, and may revoke any and all other parts of an Advance Health Care Directive in any manner that communicates an intent to revoke (Probate Code Section 4695).

An agent is not authorized to make a health care decision if the patient objects to the decision. Before implementing a health care decision made for a patient, the health care provider must promptly inform the patient about the decision and the identity of the person making the decision (Probate Code Section 4689, 4730).

In addition, no individual mental or physical health care instruction may be carried out against the wishes of the patient. If the patient objects to his or her agent's health care decision or to the implementation of an individual mental or physical health care instruction, the matter concerning that particular procedure shall be governed by the law that would apply if there were no Power of Attorney for Health Care or Individual Health Care Instruction regarding that procedure (Probate Code Section 4689).