

**CHAPTER 5
DETERMINATION OF CAPACITY
OF MENTAL HEALTH PATIENTS
TO GIVE OR WITHHOLD
INFORMED CONSENT TO
ADMINISTRATION
OF ANTIPSYCHOTIC MEDICATION
(RIESE HEARING)**

Rule 8.5.1

Scope and Purpose

The following procedures are intended to implement the requirements of *Riese v. St. Mary's Hospital* (1988) 209 Cal.App.3d 1303, and Welfare and Institutions Code section 5332 et seq. They apply to patients, both adults and minors, who are being treated in public or private hospitals, and are being detained pursuant to Welfare and Institutions Code sections 5150 (72-hour hold), 5250 (14-day hold), 5270 (30-day hold) or 5350 et seq. (temporary conservatorship).

Generally, the hearing is conducted at the facility where the patient is being treated, and any appeal of the hearing officer's decision is heard by the Mental Health Court.

(Adopted 7/1/2006; Rev. 1/1/2011; Rev. 1/1/2016)

Rule 8.5.2

Petition

When the treating physician has determined that treatment of the patient's condition requires the administration of antipsychotic medication (as defined by subdivision (I) of Welfare and Institutions Code section 5008) and the patient has refused to consent to the medication, the treating physician may petition the court for a legal determination as to whether the patient is capable of giving or withholding informed consent.

(Adopted 7/1/2006; Rev. 1/1/2016)

Rule 8.5.3

Required Documents

To obtain a determination of the patient's capacity to give or withhold informed consent to treatment by antipsychotic medication, the treating physician must complete, sign and date the "Petition of Treating Physician Regarding Capacity to Consent to or Refuse Antipsychotic Medication" (SDSC Form #MHC-056). If the physician will not be present for the hearing, the petition must have attached to it a "Treating Physician's Declaration Regarding Capacity of Patient to Consent to or Refuse Antipsychotic Medication" form (SDSC Form #MHC-055). These forms must be delivered or faxed to the Office of Counselor in Mental Health in order to calendar a hearing.

(Adopted 7/1/2006; Rev. 1/1/2011; Rev. 1/1/2015; Rev. 1/1/2016)

Rule 8.5.4

Calendaring Hearings

It is assumed that time is of the essence in each *Riese* hearing. The physician or treating facility must deliver or fax the required documents in order to calendar a hearing. The Office of the Counselor in Mental Health will calendar all hearings upon receipt and filing of the requisite forms. Whenever possible, the hearing will be set within two court days. The physician or treating facility must notify the Office of the Counselor in Mental Health of the need for an interpreter when one is needed at the hearing.

(Adopted 7/1/2006)

Rule 8.5.5

Attorney Duties

The patient's attorney must meet with the patient as far in advance of the hearing as possible to determine the patient's position with respect to the proposed antipsychotic medication. If the patient consents to the administration of antipsychotic medication prior to the hearing, it is the responsibility of the patient's attorney to notify the Office of the Counselor in Mental Health promptly so the hearing may be canceled and unnecessary travel and expense may be avoided.

(Adopted 7/1/2006; Rev. 1/1/2011)

Rule 8.5.6

Appointment of Hearing Officers

The San Diego Superior Court Executive Officer will appoint attorneys as Hearing Officers to conduct the evidentiary hearings.

(Adopted 7/1/2006)

Rule 8.5.7**Treating Physician/Facility Representative**

Physicians and treating facilities may, but need not, be formally represented by counsel. The physician must present the petition, or a facility representative must present the petition and declaration, as well as any verbal or documented evidence, at the time of the hearing. The facility representative must be a psychiatrist, psychologist, registered nurse, or a social worker with at least a master's degree. Although it is not required that the treating physician testify, it should be recognized that the absence of the treating physician may leave insufficient evidence of incapacity in the event the petition and declaration are deficient.

(Adopted 7/1/2006; Rev. 1/1/2011; Rev. 1/1/2018)

Rule 8.5.8**Surroundings of Hearing**

Hearings must be held in surroundings which allow for quietness and a reasonable degree of confidentiality and safety. Whenever possible, the hearings will be held at the facility where the patient is located. In any event the hearing will be held as close to the facility as is practicable under the circumstances. Hearings may be electronically recorded.

(Adopted 7/1/2006)

Rule 8.5.9**Burden of Proof**

The burden is on the physician or treating facility to establish by clear and convincing evidence that the patient does not have the capacity to give or withhold informed consent to the administration of antipsychotic medication.

(Adopted 7/1/2006; Rev. 1/1/2011)

Rule 8.5.10**Determination of Capacity**

In determining the patient's capacity to give or withhold informed consent, the judge or hearing officer will consider (1) whether the patient is aware of their mental condition, (2) whether the patient has been informed of and is able to understand the benefits and the risks of, as well as the alternatives to, the proposed medication and (3) whether the patient is able to understand and to knowingly and intelligently evaluate the information required to be given patients whose informed consent is sought and otherwise participate in the treatment decision by means of rational thought processes.

(Adopted 7/1/2006; Rev. 1/1/2011)

Rule 8.5.11**Patient Presence**

The patient has the right to be present at the hearing and at any appeal hearing, and to present evidence and to cross-examine witnesses at the hearing and appeal hearing through his or her attorney. However, the patient may choose not to attend the hearing or the appeal hearing.

(Adopted 7/1/2006; Rev. 1/1/2016)

Rule 8.5.12**Access to Records**

The hearing officer and the Mental Health Court judge may have access to and may consider the relevant medical records of the patient as well as the petition and declaration of the physician in reaching the legal determination of the patient's capacity to give or withhold informed consent.

(Adopted 7/1/2006; Rev. 1/1/2011)

Rule 8.5.13**Continuance of Hearings**

Upon a showing of good cause and at the discretion of the judge or hearing officer, a hearing may be continued for a reasonable amount of time.

(Adopted 7/1/2006)

Rule 8.5.14**Determination**

At the conclusion of the hearing, the hearing officer or judge will make a legal determination whether the patient has the capacity to give or withhold informed consent to the administration of antipsychotic medication.

(Adopted 7/1/2006; Rev. 1/1/2011)

Rule 8.5.15**Confidentiality**

The proceedings under these rules and all records of these proceedings are confidential as provided in Welfare and Institutions Code section 5328.

(Adopted 7/1/2006)