



**TB and the Law Project**

**Frequently Asked Questions on the Comparison between Civil and Criminal Detention**

	<b>Civil Process</b>	<b>Criminal Process</b>
<b><i>Who can detain the persistently nonadherent patient?</i></b>	A health officer may detain in a hospital or other appropriate place for examination and treatment a person who is subject of an order of detention issued under H&S Code §121365. §121366.	A detention is preceded by an arrest. Arrests generally are made by peace officers. Penal Code §834. If there is a memorandum of understanding with the county sheriff, security officers at health facilities owned and operated by cities or counties may exercise the power of arrest. Penal Code §830.7.
<b><i>Does there need to be a warrant for the patient's arrest?</i></b>	Not applicable, since the patient is not arrested. However, in order to detain the patient, there must be a valid detention order issued under H&S Code §121365.	In general, yes, a warrant is necessary for an arrest. However, a warrantless arrest is permissible if the criminal activity (i.e., a patient's refusal to abide by a health order) is committed in the presence of a peace officer. Penal Code §836. In addition, warrantless arrests are permissible when there is both probable cause and exigent circumstances. See <i>People v. Ramey</i> , 16 Cal. 2d 263 (1976).
<b><i>What type of lawyer brings the case?</i></b>	Generally, an attorney from the county counsel's office will bring a civil case to court. A private attorney or public defender will represent the patient upon request.	Generally, an attorney from the district attorney's office will bring a criminal case to court. A private attorney or public defender will represent the patient upon request.

	<b>Civil Process</b>	<b>Criminal Process</b>
<b><i>Where can detention occur?</i></b>	Detention can occur in a health or other treatment facility, but probably may not occur in a correctional facility. H&S Code §§121365 & 121358. See <i>Souvannarath v. Hadden</i> , 95 Cal.App.4 <sup>th</sup> 1115 (2002)	Detention can occur in any appropriate facility, penal institution, or dwelling approved for the specific case by the local health officer. H&S Code §120280.
<b><i>What standard of proof is needed to involuntarily detain a patient?</i></b>	A civil court uses the standard of “clear and convincing evidence.” This means the evidence introduced regarding the behavior of the persistently nonadherent patient must show a <i>high probability</i> that the person is unable or unwilling to abide by health orders.	A criminal court uses the standard of “beyond a reasonable doubt.” This means that the evidence introduced regarding the behavior of the persistently nonadherent patient must show with <i>moral certainty</i> that the person is unable or unwilling to abide by health orders.
<b><i>What court hears the case?</i></b>	Superior Court in the county in which the civil violation occurred.	Superior Court in the county in which the crime occurred.
<b><i>Is probation possible?</i></b>	No. There is no mechanism for probation in civil cases.	Yes. Upon suitable assurance that the health order will be complied with, a court may order probation rather than detention for up to two years. Should the health order subsequently be violated, the probation shall be terminated and detention ordered. H&S Code §120280.
<b><i>How often does a court review the detention order?</i></b>	A court will review the detention order at least every 90 days. §121366	There is no mechanism for periodic court review of criminal detention orders.
<b><i>What pre-detention procedural due process rights do patients have?</i></b>	All patients have a right to the following: <ul style="list-style-type: none"> <li>▪ Health orders in writing.</li> <li>▪ Language translation of health orders as necessary.</li> <li>▪ Individualized assessments of non-compliance.</li> <li>▪ Least restrictive alternatives used, or considered and rejected, prior to order for detention.</li> </ul>	All patients have a right to the following: <ul style="list-style-type: none"> <li>▪ Health orders in writing.</li> <li>▪ Language translation of health orders as necessary.</li> <li>▪ Individualized assessments of non-compliance.</li> <li>▪ Least restrictive alternatives used, or considered and rejected, prior to order for detention.</li> </ul>

	<b>Civil Process</b>	<b>Criminal Process</b>
<b><i>What procedural due process rights to patients have once they have been detained?</i></b>	<p>Patients detained via the civil process have a right to the following:</p> <ul style="list-style-type: none"> <li>▪ Legal counsel.</li> <li>▪ A court hearing within 72 hours upon a request for release, or within 60 days if no request for release.</li> <li>▪ Written notice that the patient has a right to request release with a phone number to call to request release, a right to legal counsel, and a right to have up to 2 individuals notified about the detention.</li> </ul>	<p>Patients detained via the criminal process have a right to the following:</p> <ul style="list-style-type: none"> <li>▪ Legal counsel.</li> <li>▪ A hearing before a magistrate must be held within 2 days, excluding Sundays and holidays.</li> <li>▪ No later than 3 hours after arrest, an arrested person has the right to make at least 3 completed phone calls to an attorney, a bail bondsman, a relative, or other person.</li> </ul>
<b><i>Can a detainee be involuntary treated?</i></b>	Probably, but not without a prior court order. §121369(b).	Yes, prisons are able to enforce compulsory treatment orders.
<b><i>Does a detainee have the right to release prior to his/her court hearing?</i></b>	No. But if the patient requests release, the court hearing must take place within 72 hours.	A person who is arrested for a misdemeanor who requires medical care does not have a right to release pending a court hearing. Penal Code §853.6(i)(2).
<b><i>For how long can a patient be detained?</i></b>	<p>A person with infectious TB can be detained until s/he ceases to be infectious or until after the health officer ascertains that circumstances have changed and the patient can be adequately separated from others to prevent transmission of the disease. H&amp;S Code §121368(b).</p> <p>A person with active TB can be detained only until s/he has completed an appropriate prescribed course of medication. H&amp;S Code §121368(c).</p>	A person who is convicted of violating a health order may be confined until the terms of the health order have been fully complied with or terminated by the health officer. In no instance may a person be confined for more than 1 year. H&S Code §120280.

	<b>Civil Process</b>	<b>Criminal Process</b>
<b><i>Will CDHS reimburse local programs for the cost of detention?</i></b>	Yes, if detention occurs outside a correctional facility.	Yes, if detention occurs outside a correctional facility.