

Sample Panel Question

This document has been created as a resource for Surrogate Decision-Making Committee Volunteer Panel Members preparing for an SDMC Major Medical Treatment Proceeding. Additional resources are available at justicecenter.ny.gov/volunteer.

Below are sample questions for Panel Members on each of the three considerations raised at an SDMC proceeding. Panel Members should create questions for proceeding participants based on the specific information provided in the SDMC Declaration, and Volunteers may use the sample questions below to assist in that preparation.

Capacity: Clear and Convincing Evidence

It's important to remember that capacity is always presumed, until there is reasonable evidence to reflect a person lacks capacity to provide their own informed consent for medical treatment. A person lacks the ability to consent or refuse major medical treatment if they cannot understand the proposed treatment, the risks, benefits, and alternatives of the treatment to make an informed decision in a knowing and voluntary manner.

The determination of capacity is weighed on **Clear and Convincing Evidence**. This refers to evidence that is highly reliable and upon which reasonable persons may rely with confidence in the probability of its correctness.

Capacity is always evaluated by a Licensed Psychologist or Psychiatrist before the SDMC hearing. Please refer to **SDMC Form 210: Capacity Certification** for the evaluation for each case. Panel members should rely on both the documents submitted with the Declaration for Major Medical Care and the testimony of those present at the hearing to inform their decision.

Capacity Considerations

Does the person have the capacity to understand the risks, benefits, and alternatives to the proposed medical procedure or treatment?

The panel must evaluate the person's capacity by considering if the person can:

- Understand the proposed medical treatment
- Understand the risks and benefits associated with the proposed treatment and alternative treatment options
- Make an informed decision in a knowing and voluntary manner
- Appreciate the possibility of pain with and without the treatment
- Demonstrate consistent and logical reasoning for their decision

Sample Questions for the Patient

Please ensure questions are initially addressed to the person, regardless of their ability to verbally respond or interact. If the person is responding to your questions, continue directing questions to them. Use the person's name when asking questions to help them feel comfortable. Ask short, simple, open-ended questions one at a time, leaving ample opportunity for the person to respond.

- Good morning Mr. Smith, how are you today?
- Have you seen the doctor recently? If yes, what did the doctor say?
- What is the procedure the doctor thinks you should have?
- Why does the doctor think you should have this procedure?
- Are you in any pain now? If so, where?
- What are the risks of having this procedure?
- What has the doctor told you could happen if you do not have the procedure?
- Do you want to have this procedure? Please explain why /why not.

Sample Questions for the Declarant and Providers

Once questions have been addressed to the person, capacity may be evaluated through questions addressed to the declarant, providers, and any correspondents.

- Is this person answering questions today as they typically do?
- What decisions do they make on a regular basis? (e.g. select clothing, meals, handle money?)
- What decisions do staff make on this person's behalf?
- What types of support does the person need with daily living skills such as dressing, or hygiene.
- When the procedure was explained to the person, what was their reaction? [Note: if not explained to patient previously, the provider should be asked to do so at the hearing]
- Do you think the person understands the risks, benefits, and alternatives? Can you explain why or why not?
- Do you think that the person understands the nature and consequences of the treatment options, including non-treatment? Can you explain further?
- Do you think that the person is answering voluntarily and with sound reasoning? Can you explain further?

Surrogates: Clear and Convincing Evidence

A surrogate is someone who is legally authorized, available and willing to make the medical treatment decision on behalf of the person when the person lacks capacity to provide their own informed consent. This may include a parent, spouse, adult child, health care agent, legal guardian, and for people served by OPWDD, any actively-involved family member. Please see Memo 2 of the [Volunteer Handbook](#) for more information about potential surrogates.

The determination of surrogacy is also weighed on **Clear and Convincing Evidence**. This again refers to evidence that is highly reliable and upon which reasonable persons may rely with confidence in the probability of its correctness.

Information about possible surrogates can be found on **SDMC Form 200: Declaration for Major Medical Treatment**. Panel members should rely on both the documents submitted with the Declaration for Major Medical Care and the testimony of those present at the hearing to inform their decision.

Surrogate Considerations

Does the patient have a legally authorized, available, and willing surrogate to make this decision?

The panel must determine if there is a potential surrogate by considering:

- If there is a parent, adult child, spouse, or guardian/health care proxy available and willing to act as the surrogate decision-maker
- For an OPWDD setting, if there is an actively-involved family member who is available and willing to act as the surrogate decision-maker

Sample Questions on Surrogates

- Has the person has ever been married?
- Does the person have any children?
- Is there a legal guardian with authority to make medical decisions?
- Has this person ever executed a valid health care proxy?
- Who previously provided consent for the person's medical procedures? or for psychiatric drugs? COVID immunization?
- (OPWDD services) Who has provided consent for things like Life Plans, Service Planning Documents, Behavior Plans?
- If a potential surrogate exists, have they indicated that they do not wish to make the decision?
- What efforts have been made to contact any potential surrogates?

Best Interest: Fair Preponderance of the Evidence

The panel determines if the proposed medical treatment or procedure is in the best interest of the person by considering the person's entire medical condition, unique needs, and any preferences or beliefs they have regarding the proposed treatment.

The determination of best interest is weighed on a **Fair Preponderance of the Evidence**. This refers to evidence that when weighed for its quality rather than quantity, tips the scale to give consent or withhold consent for the proposed procedure or treatment.

Information about the proposed treatment or procedure and the risks and benefits associated can be found on **SDMC Form 220-A: Certification on Need for Major Medical Treatment** of the case. Panel members should rely on the documents submitted with the Declaration for Major Medical Care and the testimony of those present at the hearing to inform their decision.

Best Interest Considerations

Is the proposed medical treatment or procedure in the best interest of the Patient?

The panel will assess if the proposed treatment is in the person's best interest by considering:

- To what extent the person's quality of life will improve
- If the treatment can restore the person to a previous level of functioning
- Whether the person has any preferences or personal beliefs about the proposed treatment
- The burdens of treatment and any alternatives

Sample Questions

- What is the person's medical condition and what treatment is being recommended?
- What are the risks and benefits of the treatment?
- What are the burdens of treatment in terms of pain, discomfort, or change in routine? What burdens can be expected without treatment?
- What is the likely prognosis with and without treatment?
- Is there a less invasive alternative? If so, why is the doctor requesting this procedure instead?
- How is the person's overall health? Do they have any medical issues that could impact the procedure use of anesthesia, or the recovery?
- Will this person be able to tolerate or comply with preparation and after-care requirements?
- What type of after-care plan will be required? Will the facility be able to provide the required aftercare?
- Has the person expressed any concerns and/or preferences with regard to the treatment?