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TO: SDMC Panel Members

FROM: Greg Jones, Sr. Attorney
Counsel's Office

DATE:

SUBJECT: Determination of Patient Capacity

One of the essential decisions of the SDMC panel is required to make before it has the authority to approve the proposed medical care is whether or not the patient lacks legal capacity to consent or refuse the proposed major medical treatment. If the panel determines that the patient has the capacity to make major medical decisions, no further action by the panel is required or authorized (MHL §80.07(e) and (f)). If this is the case, and the patient has consented to the proposed treatment, such consent shall be legally valid. If the panel, based on clear and convincing evidence, finds that the patient lacks the capacity to consent or refuse treatment and no authorized surrogate can be located, the panel must then make the decision to consent or refuse the proposed medical treatment or procedure.

All adults, including those residing in mental hygiene facilities, are presumed to have capacity (MHL §33.01).

In order for a patient to be the subject of an SDMC panel "Declaration for Surrogate Decision Making", both the declarant and a psychologist or psychiatrist must express an opinion and/or serious doubts regarding whether or not the patient has the capacity to make major medical treatment decisions, and must certify such in SDMC forms 200 and 210.

In cases involving the withdrawal or withholding of life sustaining treatment, the declarant must offer his or her opinion regarding the ability of the patient to give informed consent in the "Declaration for Health Care Decisions Act" (SDMC Form 300). In addition, the attending physician as well as another consulting physician or psychologist, one of whom must meet the qualifications set forth in section 1750-b (4)(a)(i-iii) of the Surrogate's Court Procedure Act, must confirm to a reasonable degree

of certainty that the patient lacks capacity to make health care decisions (SDMC Form 310).

A patient's lack of ability to consent to or refuse major medical treatment "means the patient cannot adequately understand and appreciate the nature and consequences of a proposed major medical treatment, including the benefits and risks of and alternatives to such treatment, and cannot thereby reach an informed decision to consent to or refuse such treatment in a knowing and voluntary manner that promotes the patient's well-being" (MHL §80.03(c)).

In order to reach an informed decision, the patient or other decision maker must be provided with all relevant information by the patient's treatment professionals and/or others, and demonstrate an appreciation of the benefits and risks associated with the proposed medical treatment or procedure. In addition, the decision to consent or refuse major medical treatment by the patient or other decision maker must be made freely and voluntarily without coercion or undue influence. The fact that a particular patient's decision may seem unwise is not, in and of itself, determinative of the lack of capacity.

For additional information or questions, panel members are encouraged to contact SDMC staff at 518-549-0328.

SAMPLE QUESTIONS

The following sample questions are intended to provide guidance to SDMC panelists. Not all questions will be applicable to every SDMC proceeding. For this reason, they should not be considered mandatory in nature; rather, they serve as guidelines to be followed in the panelists' discretion. Similarly, panelists may find it necessary to ask other questions that are not included on this list. They should use their judgment in determining which questions are relevant and helpful in making their determination as to each issue. Additionally, panelists should word the questions, particularly those directed to the patient, in a manner appropriate to each individual case.

Reminder: The panel must determine by clear and convincing evidence that the patient does not have capacity and that there is not an available, authorized, and willing surrogate, in order to determine that the patient is in need of surrogate decision-making. Clear and convincing evidence is evidence that is highly reliable and upon which reasonable persons may rely with confidence in the probability of its correctness.

The panel must determine by a fair preponderance of the evidence that the proposed major medical treatment is in the best interests of the patient in order to consent to the proposed treatment. A fair preponderance is usually considered as evidence that when weighed based on its quality rather than its quantity, "tips the scale."

CAPACITY

To the patient

- What is your name?
- How old are you?
- Do you remember my name?
- Where do you live?
- How did you get here today?
- What did you have for breakfast [lunch, dinner]?
- What do you do during the day?
- Do you know why you're here today?
- Has the medical procedure been explained to you?
- Have you been to the doctor?
- Do you feel pain?
- Have the risks and benefits been explained to you?
- What are the risks?
- What are the benefits?
- Can you explain what the doctor is going to do to you?
- Please tell me in your own words what the doctor wants to do.
- Have you decided whether to have the procedure or not? Why?
- Have you been sick before?
- Did you have to see the doctor then?
- Did you feel pain?
- Have you been to a hospital before?
- Do you remember what happened there?
- Have you ever had an operation?
- Do you remember what happened?
- What sickness or injury did you have then?
- How did the doctors help you? What did they do?

- Did the doctors do anything that hurt you for a while?
- How long did the pain last?
- How long did you stay at the hospital [doctor's office]?
- Do you remember if you were asleep during the procedure?
- Did you feel better or worse after the procedure?
- Do you understand that you will be asleep during the procedure and that you will wake up afterwards?
- Why do you want to have this procedure done?
- Did the doctor or your staff tell you what they want the operation to do for you?
- Did they explain that it will hurt a lot at first but that later you will be better if the operation goes as planned?
- Did they tell you that sometimes in a few cases the operation doesn't do what they plan it to do?
- Did they tell you that sometimes, but not very often, the operation can make some people feel worse, if the operation doesn't go as planned?
- What do you think is wrong with your health now?
- Do you believe you need some kind of treatment?
- What is the treatment likely to do for you?
- What makes you think it will do that?
- What do you think will happen if you are not treated?
- Why do you think the doctor wants you to have this treatment?
- What does the doctor say will happen to you if you have the procedure? And, if you do not have the procedure? Is there an alternative or different procedure that the doctor decided not to do?
- How did you decide to accept or reject this treatment?
- What makes [person's choice] better than [doctor's choice]?

To the Declarant or Other Staff

- Does the patient understand what the doctors are going to do?
- Does the patient understand how the treatment will help her or him?
- Does the patient understand the degree of pain and suffering that s/he will experience with or without treatment?
- Does the patient understand whether there are other treatment options, including non-treatment?
- Does the patient understand the nature and consequences of those treatment options?

AVAILABLE, AUTHORIZED AND WILLING SURROGATE

General Questions:

- Does the patient have a parent or a spouse who is available, authorized, and willing to make the medical decision?
- Does the patient have an adult child, legal guardian, committee or conservator who is available, authorized, and willing to make the medical decision?
- Have efforts been made to contact such people?
- If not, why not?
- If so, what were the results of such efforts?
- When was the last time said person had contact with the facility or the patient?
- Has any such person been involved in other medical decisions for the patient?
- Who gave consent for other medical decisions for the patient?
- Were the Notice of Hearing and Declaration sent to all known authorized persons and correspondents?
- Was there any response from such persons?

Minors:

- Is the patient a minor?
- Does the minor have a living parent?
- Have the parent's parental rights been terminated?
- Has the parent signed the waiver, Commission Form 260, permitting the SDMC proceeding?

Guardians Surrogate's Court Procedure Act Article 17 or 17-A:

- Is there a court order limiting the guardian from making medical decisions on behalf of the patient?
- Has the guardian objected to the SDMC proceeding?

Conservator:

- Is the conservator authorized by court order or a court approved plan of personal well being to provide medical decision-making on behalf of the patient?
- Has the conservator objected to the SDMC proceeding?

Committee:

- Is there a committee of the person?
- Has the committee of the person objected to the SDMC proceeding?

Guardian for Personal Needs: Mental Hygiene Law Article 81

- Has the court granted to the guardian for personal needs the specific authority to make major medical decisions?
- Has the guardian for personal needs objected to the SDMC proceedings?

BEST INTERESTS

- What are the burdens of treatment to the patient in terms of pain and suffering?
- What are the benefits of the treatment?
- Will the proposed treatment merely prolong the patient's suffering and not provide any net benefit?
- What will be the degree, expected duration and constancy of pain with and without treatment?
- What is the likely prognosis with or without the proposed treatment?
- What is the expectant level of functioning with or without the proposed treatment?
- What is the expectant degree of humiliation with or without the proposed treatment?
- What other treatment options are there, including non-treatment?
- What are the benefits and risks of those options compared to the proposed treatment?
- What type-of-after-care will-be-required?
- Will the facility be able to provide required after-care?
- Does the patient have any concerns and/or preferences with regard to the treatment?
- Are there any individualized risks to this patient if local anesthesia is used?
- Are there any individual risks to this patient if general anesthesia is used?