



TO: SDMC Panel Members

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

DATE:

SUBJECT: Interpretation of SDMC Panel Votes

In any case that comes before a SDMC, there are three determinations the panel may be required to decide. They are:

1. Whether or not the patient lacks the capacity to consent or refuse the proposed major medical treatment;
2. Whether or not the patient has an authorized relative or surrogate or judicially appointed surrogate to act on his or her behalf; and
3. Whether or not the proposed major medical treatment is in the best interest of the patient.

If the panel determines the patient has capacity, the proceeding and deliberations end and the panel does not continue to decide whether or not there is an authorized surrogate or whether the proposed treatment is in the best interest of the patient. The patient will make the decision. Similarly, if the panel determines that the patient is incapacitated but that there is an authorized surrogate to act on the patient's behalf, the panel deliberations end and the authorized relative or surrogate will make the decision whether or not to consent to the proposed medical treatment.

DISCUSSION:

1. Patient's Need for Surrogate Decision-making
 - a. **Panel Votes:** Article 80 provides that SDMC panels first must decide "whether the patient is in need of surrogate decision-making," and entails two determinations: First, does the patient lack the capacity to consent or refuse the proposed major medical treatment and second,

is there a parent, spouse, adult child, legal guardian, committee, conservator or other surrogate who is legally authorized, available and willing to make such a decision.

“Unless three or more panel members concur in the determination that the patient is in need of surrogate decision-making, the patient shall be deemed not to need surrogate decision-making” (NY Mental Hyg. L. §80.07(e))

As is the case regarding any decision of an SDMC panel, interested persons may appeal any determination made by the panel.

- b. **Standards Regarding Whether Patient Lacks Capacity:** Article 80 also provides that the panel is to consider the patient’s capacity or lack thereof only for the treatment decision described in the SDMC declaration.

In making the determination of whether the patient lacks the capacity to make the proposed major medical treatment decision, the panel shall consider whether the patient is unable to adequately understand and appreciate the nature and consequences of the proposed major medical treatment decision, including:

- 1) The burdens of the treatment to the patient in terms of pain and suffering outweighing the benefits, or whether the proposed treatment would merely prolong the patient’s suffering and not provide any net benefit;
- 2) The degree, expected duration and constancy of pain with and without treatment, and the possibility that the pain could be mitigated by less intrusive forms of medical treatment, including the administration of medications;
- 3) The likely prognosis, expectant level of functioning, degree of humiliation and dependency with or without the proposed major medical treatment; and
- 4) Evaluation of treatment options, including non-treatment and their benefits and risks compared to those of the proposed major medical treatment decision (Mental Hyg. L §80.03 (c), 14 NYCRR §710.4 (a) (2)).

The patient’s stated decision regarding the proposed major medical decision by itself should not be determinative of the individual’s capacity. The panel is obliged to explore the patient’s understanding and assessment of considerations by asking questions of the patient and persons concerned with the patient’s well-being.

The panel must decide after hearing from the patient and others concerned with the patient's well-being, whether there is clear and convincing evidence that the patient is in need of surrogate decision-making (NY Mental Hyg. L. §80.07(e)). 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 (NY Comp. Code R. & Regs. §710.4(d) (1)). In other words, the evidence must be clear enough such that each panel member must be convinced that the person is incapacitated prior to voting "no" to his or her capacity; and second, each panel member must be convinced that the person has no authorized surrogate prior to voting "no" to availability of an authorized surrogate.

2. Whether Major Medical Treatment is in Patient's Best Interest

- a. **Panel's votes:** Article 80 requires at least three panel members to consent to or refuse the proposed medical treatment (NY Mental Hyg. L. § 80.07(f)).
- b. **Standards Concerning Best Interests:** In order to consent to the proposed treatment, the panel must decide by a fair preponderance of the evidence that the proposed treatment is in the patient's best interest (NY mental Hyg. L. §80.07 (f)). A fair preponderance of the evidence traditionally means that the evidence, when weighed for its quality, rather than its quantity, tips the scale in favor of treatment. In making its decision, the panel must give full consideration to any evidence of a previously articulated preference by the patient (NY Mental Hyg. L. §80.07 (f) and shall consider the same regulatory standards detailed above in regard to the capacity issue. 14 NY Comp. Code R & Regs §710.4 (e) which references §710.4 (d) (2) standards.

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

Four Person Panel

1) DOES PATIENT HAVE CAPACITY?		
YES	NO	RESULT
4	0	Patient's Consent or Refusal Controls SDMC case ends
3	1	Patient's Consent or Refusal Controls SDMC case ends
2	2	Patient's Consent or Refusal Controls SDMC case ends
1	3	Go to next question
0	4	Go to next question

2) DOES PATIENT HAVE AUTHORIZED, AVAILABLE & WILLING SURROGATE?		
YES	NO	RESULT
4	0	SDMC Panel Determines there is a Surrogate SDMC case ends
3	1	SDMC Panel Determines there is a Surrogate SDMC case ends
2	2	SDMC Panel Determines there is a Surrogate SDMC case ends
1	3	Go to next question
0	4	Go to next question

3) IS MAJOR MEDICAL TREATMENT IN PATIENT'S BEST INTERESTS?		
YES	NO	RESULT
0	4	SDMC Panel Refuses to Give Consent
1	3	SDMC Panel Refuses to Give Consent
2	2	No Decision*
3	1	SDMC Panel Gives Informed Consent
4	0	SDMC Panel Gives Informed Consent

*In this circumstance, the panel may decide to seek more information and reconvene at a later date, including by conference call.

Three Person Panel

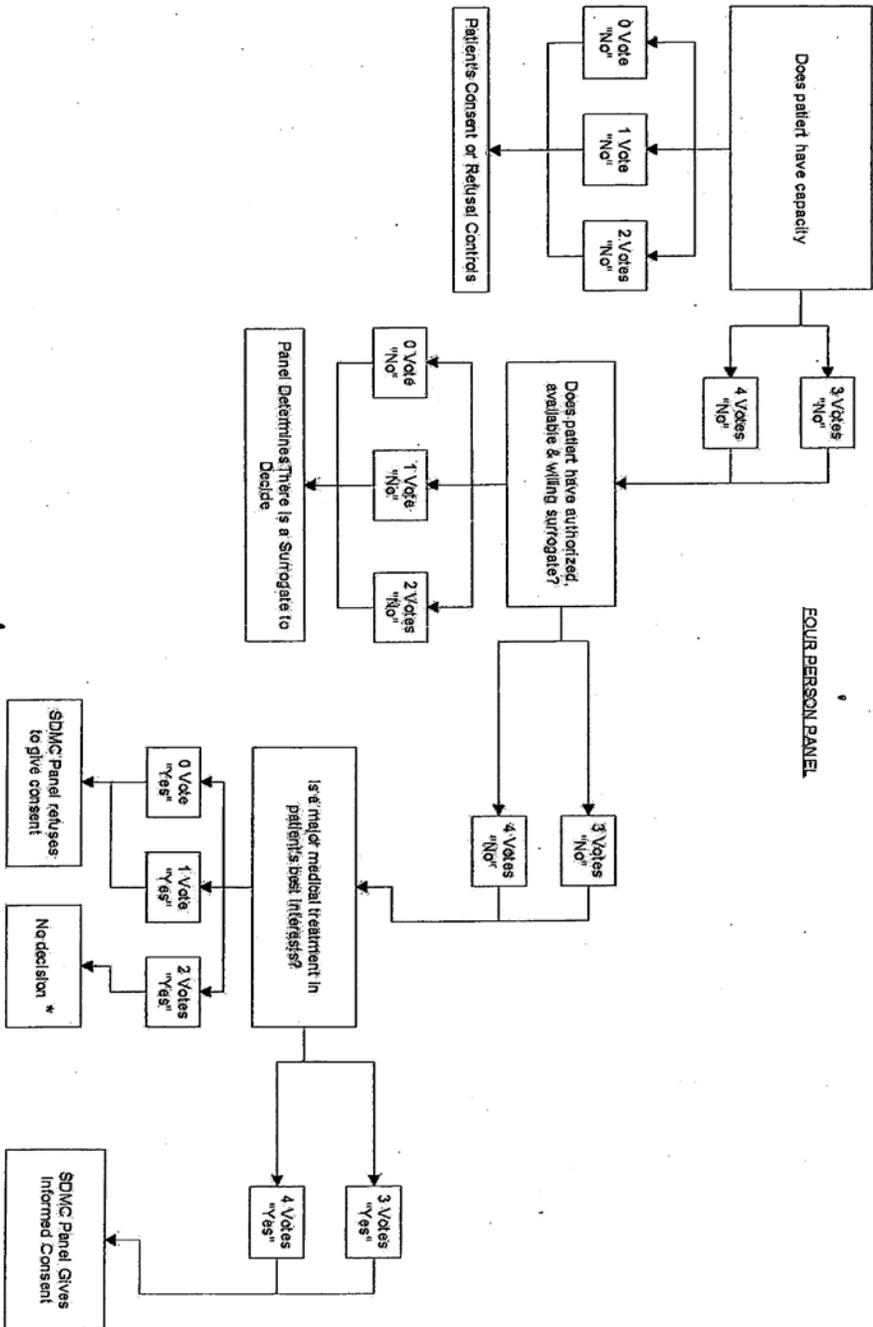
1) DOES PATIENT HAVE CAPACITY?		
YES	NO	RESULT
3	0	Patient's Consent or Refusal Controls SDMC case ends
2	1	Patient's Consent or Refusal Controls SDMC case ends
1	2	Patient's Consent or Refusal Controls SDMC case ends
0	3	Go to next question

2) DOES PATIENT HAVE AUTHORIZED, AVAILABLE & WILLING SURROGATE?		
YES	NO	RESULT
3	0	SDMC Panel Determines there is a Surrogate SDMC case ends
2	1	SDMC Panel Determines there is a Surrogate SDMC case ends
1	2	SDMC Panel Determines there is a Surrogate SDMC case ends
0	3	Go to next question

3) IS MAJOR MEDICAL TREATMENT IN PATIENT'S BEST INTERESTS?		
0	3	SDMC Panel Refuses to Give Consent
1	2	No Decision*
2	1	No Decision*
3	0	SDMC Panel Gives Informed Consent

*In this circumstance, the panel may decide to seek more information and reconvene at a later date, including by conference call.

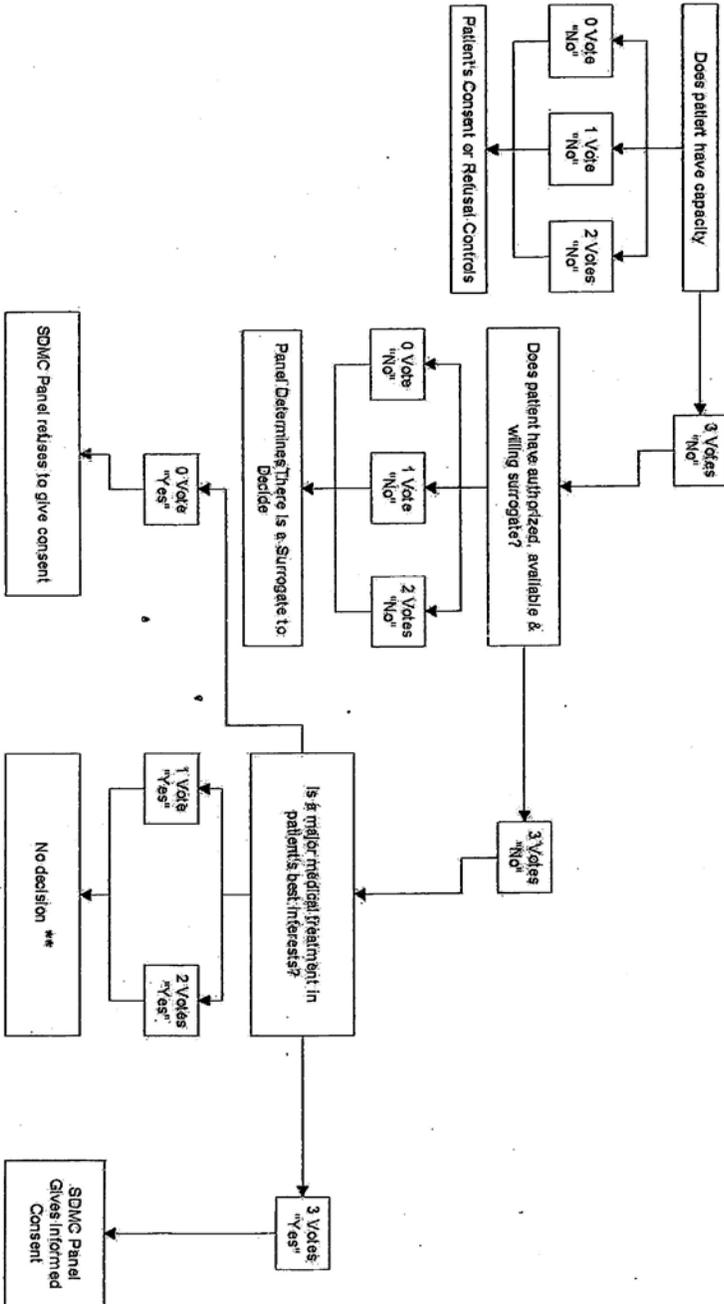
SDMC Memo 3
Attachment C



* In this circumstance, the panel may decide to seek more information and reconvene at a later date, including by conference call.

SDMC Memo 3
Attachment D

THREE PERSON PANEL*



* Unanimous Decisions Required to Proceed to Next Determinations
 ** In this circumstance, the panel may decide to seek more information and reconvene at a later date, including by conference call.

