Sample Panel Questions for Capacity, Surrogacy and Best Interest

Non-Emergency Major Medical Treatment
Capacity: Clear and Convincing Standard

Capacity is something that is presumed; an individual lacks the ability to consent or refuse major medical treatment if he or she cannot understand the proposed medical treatment, understand the risks, benefits and alternatives of the treatment, or make an informed decision about the proposed treatment in a knowing and voluntary manner.

Clear and Convincing standard refers to evidence that is highly reliable and upon which reasonable persons may rely with confidence in the probability of its correctness.

Capacity has already been evaluated by a professional, please refer to the Capacity Certification (SDMC Form 210) for additional information as you formulate your questions.

Capacity Considerations

- Has the procedure or treatment been explained?
- Can this individual understand the proposed medical treatment?
- Can this individual understand the risks, benefits and alternatives of the treatment/procedure?
- Can this individual understand the burden of treatment?
- Can this individual make an informed decision about the proposed treatment in a knowing and voluntary manner?
- Can this individual appreciate that there may be pain with and possibly without the treatment?
- Does this individual understand the prognosis?
- Has this individual evaluated the treatment options? Can he/she articulate the reasoning behind his/her decision?

Sample Questions for the Individual

Please ensure questions are initially addressed directly to the individual, regardless of his/her apparent ability to participate or interact.

Good morning John Smith, how are you today? Do you know why we are here today? Have you been to the doctor recently?

- What did the doctor say about your medical condition? Has the medical procedure been explained to you?
- What is the treatment and what is it likely to do for you?
- Have the risks and benefits been explained to you? What are the risks? The benefits?
- Please tell me in your own words what the doctor wants to do.
- Have you been sick before? Did you see the doctor then?
- Have you been to a hospital before? Do you remember what happened there?
- Have you ever had an operation?
- What sickness or injury did you have then?
Sample Questions for the Individual (cont’d)

- How did the doctors help you? Did the doctors do anything that hurt you?
- Do you remember if you were asleep during the procedure?
- Did you feel better or worse after the procedure?
- Have you decided whether to have the procedure or not? How did you decide to accept or reject that treatment? Why do you think the doctor wants you to have the treatment?
- What makes your choice better than the doctor’s recommendation? Do you believe you need some kind of treatment?
- Has the doctor explained that sometimes, but not very often, the treatment can make some people feel some pain afterward?
- Are you in any pain now? Do you understand you will be asleep during the procedure and that you will wake up afterwards? Why do you want to have the procedure done (or not done)?
- What has the doctor told you could happen if you have the procedure or decide not to have the procedure? What is the treatment likely to do for you?
- Is there an alternative procedure that the doctor decided not to do?

Sample Questions for the Declarant, Providers, and Staff

For individuals who lack expressive skills, information about their capacity may be evaluated through questions addressed to the declarant, providers, and correspondents.

- Please describe this individual’s overall functional level with regard to baseline communication, social, and adaptive skills. How does this individual make his/her needs known? How does he/she respond to new situations? What types of support does this individual need with daily living skills such as dressing, hygiene, and routine tasks?
- Please describe a typical day for this individual. What decisions does this person make on a regular basis? Does he/she choose their own clothing?
- Does this individual manage his/her own money?
- What kind of supervision does this individual require?
- When the procedure was explained to the individual, what was his/her reaction?
- Does this individual understand what the doctors are going to do and how the treatment might help?
- Does this individual understand or comprehend the degree of pain and suffering that he/she will experience with or without treatment?
- Does this individual understand how the treatment will help him/her? Does this individual understand the nature and consequences of the treatment options, including non-treatment?
Surrogacy: Clear and Convincing Standard

A surrogate is someone who is available and willing to make the medical treatment decision. This can include a parent, spouse, health care agent, legal guardian, adult child, adult sibling or family member, court-appointed guardian, or health care proxy.

Clear and Convincing standard refers to evidence that is highly reliable and upon which reasonable persons may rely with confidence in the probability of its correctness.

A correspondent is a person that has a genuine interest in promoting this individual’s best interests, but isn’t legally authorized to provide consent.

Information about the individual’s possible surrogates is found in the Declaration for Major Medical Treatment, SDMC form 200. Please review this information as you formulate your questions.

Surrogacy Considerations

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

Sample Questions Addressed to Providers and Staff

- Does this individual have a parent who is available, authorized and willing to make the medical decision? Has this individual ever been married or have any children?
- Is there a legal guardian with authority to make medical decisions?
- Has this individual ever executed a health care proxy?
- If this is the first time the individual has been before SDMC, who previously provided consent for medical procedures?
- Does this individual have regular visitors? If so, who are they and when did they last visit?
- What efforts have been made to contact such people?
- What were the results of those efforts?
- Does this individual have any ongoing and supportive contact with anyone on a regular basis?
- Were the Notice of Hearing and Declaration sent to all known authorized persons and correspondents? Was there any response?
Best Interest: Fair Preponderance of the Evidence Standard

Panel members make a best interest decision for the individual by considering all the factors and unique needs associated with the individual. The individual’s opinion regarding the proposed major medical treatment is to be given full consideration by the panel and balanced against the best interest needs of the individual, as well as his/her ability to understand and appreciate the consequences of his/her preferences.

Fair Preponderance of the Evidence standard refers to the evidence that when weighed for its quality rather than quantity, tips the scale to provide or withhold consent for the proposed procedure/treatment; the evidence just has to tip the scale in one direction.

Best Interest Considerations

Is the proposed medical treatment/procedure in the best interest of this individual?

The panel will assess the risks, benefits, and alternatives to the proposed treatment of:

- The relief of suffering
- Preservation or restoration of functioning
- Improved quality of life and the potential quality of life with and without the treatment
- Whether this individual has any opinion or personal beliefs about the proposed treatment
- The burdens of treatment; with the benefits outweighing the risks
- The appreciation of pain with and without treatment; the possibility that the pain could be mitigated
- The prognosis with and without the procedure
- Evaluation or treatment options and alternatives

Sample Questions to ask the Nurse or Medical Providers

Please describe the individual’s medical condition and the treatment being requested and why it is necessary.

- What are the risks to the individual?
- What are the burdens of treatment in terms of pain and suffering?
- What are the benefits of the treatment?
- Will the proposed treatment merely prolong the individual’s suffering and not provide any benefit?
- What is the expected degree, duration and constancy of pain with and without treatment?
- What is the likely prognosis with and without treatment?
Sample Questions to Ask the Nurse or Medical Providers (cont’d)

- 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?
- Is there a less invasive alternative? If so, why is the doctor requesting this procedure instead?
- What are the other treatment options, including non-treatment? What are the benefits and risks of those options compared to the proposed treatment?
- How is the individual's overall health?
- Any cardiac or pulmonary issues or concerns?
- Does this individual take any medications that will be affected by or that will potentially affect the treatment?
- Does this individual have any medical issues that could impact the procedure and/or outcome?
- How will the individual handle any pre-operative or pretreatment preparations?
- Will someone familiar to the individual be able to accompany him/her to the procedure and stay at the hospital, if required? What type of after-care plan will be required? Will the facility be able to provide the required aftercare?
- Will this individual be able to tolerate or comply with after care requirements?
- Has the individual expressed any concerns and/or preferences with regard to the treatment?
- Are there any individualized risks to the individual if local or general anesthesia are used?