

SUPPORTED DECISION- MAKING (SDM) IN ND

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P&A TEAM



Mary Anderson
Disabilities Advocate

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AGENDA

Topic one - Capacity

Topic two - What is SDM?

Topic three - Let's Talk about it

Topic four - Do I need it in writing?

Supported Decision-Making (SDM) in ND

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TOPIC ONE - CAPACITY

Who can make decisions?

Legal & Mental Capacity

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CAPACITY - MENTAL

Mental capacity is separate from legal capacity.

Mental capacity is a person's cognitive decision-making capability.

Cognitive decision-making means identifying and choosing something using your

- values,
- beliefs,
- and preferences.

CAPACITY - LEGAL

This means you have rights and you can do things with those rights - legally as your own decision-maker. You cannot be your own guardian.

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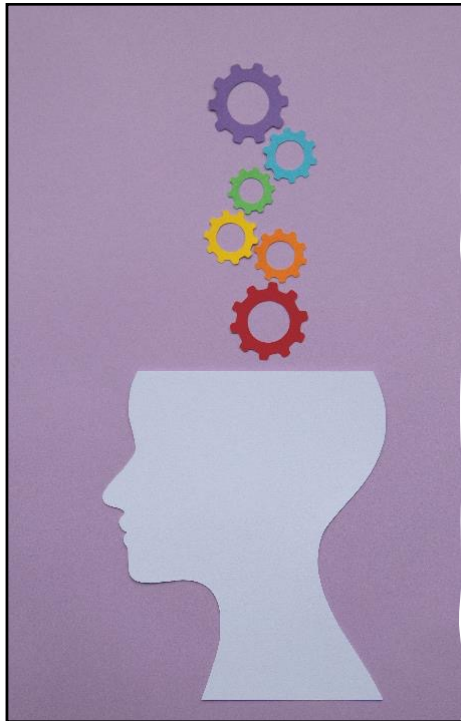
WHAT AFFECTS MENTAL CAPACITY?

- Disability
- Age
- Illness
- Environment
- Other external factors

Often a moment in time. Capacity should never be treated as a fixed point.

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ASSESSMENT OF MENTAL CAPACITY

Is there an impairment in the person's mind or brain functioning?

Is the impairment causing the person to be unable to make a particular decision?

- Does the person understand information related to the decision?
- Can they retain the information related to the decision?
- Can they use and weigh information while making the decision?
- Can they communicate their decision in any way?

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LACK OF MENTAL CAPACITY

In North Dakota, if a court finds a person lacks mental capacity, or is incapacitated, it can order a guardianship for that person. [N.D.C.C. section 28-35-01\(6\)](#).

The term "Incapacitated person", means any adult person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, or chemical dependency to the extent that the person lacks capacity to make or communicate responsible decisions concerning that person's matters of residence, education, medical treatment, legal affairs, vocation, finance, or other matters, or which incapacity endangers the person's health or safety. [N.D.C.C. section 30.1-26-01\(2\)](#).

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WHAT IS A GUARDIANSHIP?

Guardianship is a legal relationship in which a court orders the appointment of a guardian to make decisions for another individual who is known as a ward (subject of guardianship). [N.D.C.C. section 28-35-01](#). Instead of "ward" use "person subject to guardianship" whenever possible.

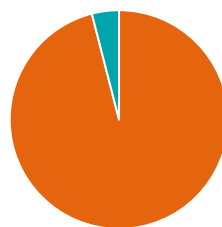
This means that someone else can legally make decisions for the person subject to guardianship and is often referred to as "substituted" decision-making.



FULL & LIMITED GUARDIANSHIP

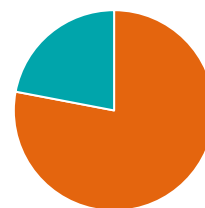
Guardianships may be full or limited in terms of what decision-making rights the incapacitated individual keeps. These are different in each case. They are explained in the court order and guardianship letters.

Full Guardianship



Guardian decisions Ward decisions

Limited Guardianship



Guardian decisions Ward decisions

BEST INTERESTS VS. EXPRESSED WISHES

Guardianship or substituted decision-making includes a best interest component. A guardian can decide for the ward what they believe is best.

Supported decision-making, on the other hand, is based on "expressed wishes". This means the Individual Decision-Maker decides what they want to do (within their legal rights).

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DIGNITY OF RISK

"Dignity of risk" refers to the legal right of every person to make choices and take risks in order to learn, grow and have better quality of life.

That person will never know if they can do it, if they don't. We all have tried and failed, yet we try again. It's human nature to want to protect someone.

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DUTY OF CARE

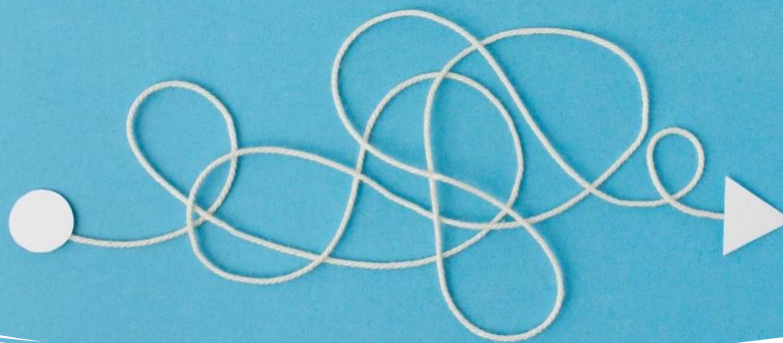


Duty of care is the legal responsibility set up to ensure people are not harmed by the services an organization and its staff provides. The main misconception is that duty of care means protecting the person from themselves and their own choices, but this is not necessarily true.

We need to make sure we are not 'overprotecting' the person unnecessarily. Each person has the right to make decisions for themselves within their capacity to do so.

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CAPACITY & SDM

Capacity, when it comes to decision-making, is not "all or nothing."

A person may be capable of:

- Making some decisions, but not others.
- Making some decisions at some times, but not others.
- Making decisions only if they get help understanding the decision to be made (informed consent).

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TOPIC TWO - WHAT IS SDM?

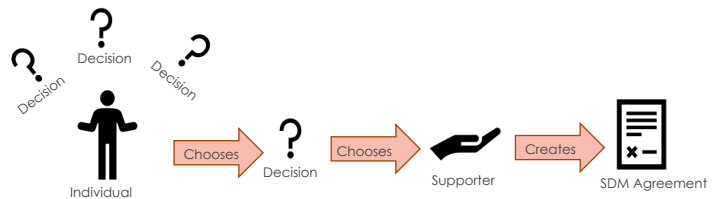
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SDM IN SHORT

Three parts:

1) Named Individual (Decision-Maker), 2) Supporter to assist Decision-Maker, and 3) Agreement



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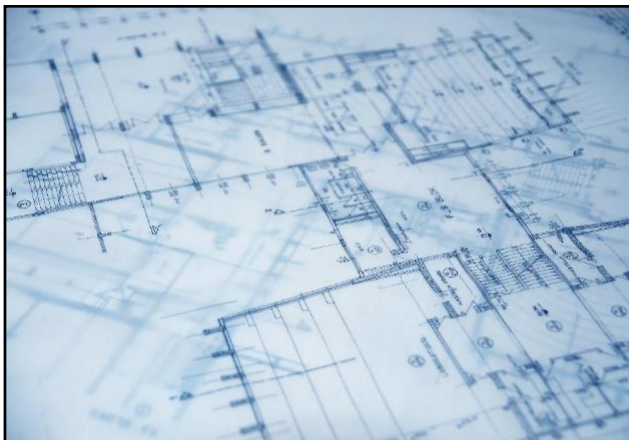
SDM IN LAW

"Supported decision-making" means assistance from a person of a Named Individual's choosing:

- To identify, collect, and organize documents and information that apply and may be helpful to a decision the Individual is considering;
- To help the Individual understand documents;
- To identify choices available for a responsible decision and the advantages/disadvantages of available choices;
- To communicate any decision by the Individual to others at the request of the Individual; or
- To explain the decision-making process allowed under this subsection to the court in any proceeding to create or modify a guardianship or conservatorship for the Individual. [N.D.C.C. section 301-36-01\(3\)](#).



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INDIVIDUAL DECISION-MAKER

The Individual chooses what types of decisions they would like assistance with and how that assistance will look. The Individual is the architect of a SDM Agreement.

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INDIVIDUAL DECISION-MAKER

The Individual:

- can have more than one agreement with different Supporters for the same decision or different decisions [N.D.C.C. section 30.1-36-04\(3\)](#).
- does not have to take the advice of their Supporter(s), and
- can seek the advice of someone who is not a Supporter. [N.D.C.C. section 30.1-36-04\(5\)](#).



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SUPPORTER

In law, a "Supporter" is a person that has signed a Supported Decision-Making Agreement, agreeing to provide assistance to the Named Individual. [N.D.C.C. section 30.1-36-01\(5\)](#).

- A Supporter cannot act as a surrogate (substitute) decision-maker or sign documents on behalf of the Named Individual. [N.D.C.C. section 30.1-36-04\(7\)](#).

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SDM Agreement

SDM AGREEMENT

"Supported Decision-Making Agreement" in ND law means a written, signed, dated, and witnessed understanding (agreement) between a Named Individual and a trusted adult (Supporter) who agrees to provide assistance for decision-making to maximize the Named Individual's ability to make informed, voluntary choices, including choices within:

- a. Health care.
- b. Residence.
- c. Finances.
- d. Education.
- e. Legal affairs.
- f. Vocation. [N.D.C.C. section 30.1-36-01\(4\)](#).

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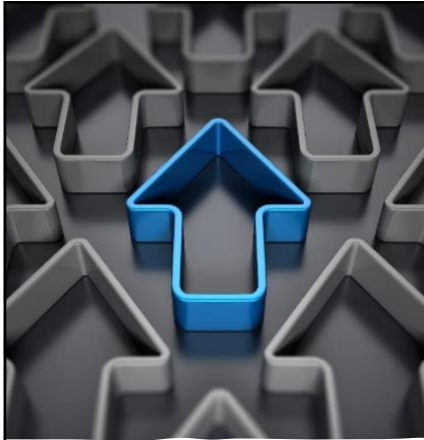
SDM AGREEMENT

The existence or contents of a Supported Decision-Making Agreement may not be used as evidence of incapacity or incompetence! [N.D.C.C. section 30.1-36-04\(06\)](#).

Supported Decision-Making under North Dakota law presumes the Individual has the capacity to enter a SDM agreement and this presumption can only be rebutted by clear and convincing evidence. [N.D.C.C. section 30.1-36-04\(1\)](#).

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SDM AS A GUARDIANSHIP ALTERNATIVE

Guardianship laws require a court to find clear and convincing evidence that there is no alternative resource plan in lieu of guardianship to safeguard the proposed ward's health, safety, or habilitation per [N.D.C.C. section 30.1-28-04\(2\)\(c\)\(2\)](#).



Supported decision-making can be an alternative resource plan instead of a guardianship.

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ADVANTAGES OF SDM OVER GUARDIANSHIP

- Only the court can change a guardianship.
- SDM Agreements do not go to court.
- SDM Agreements are made between Named Individuals and Supporters.
- SDM Agreements are easily changed or ended.
- An Individual can rely on multiple Supporters who have different strengths, expertise, and abilities to help them versus one guardian.



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SDM IS A NATURAL FIT WITH GUARDIANSHIP

[N.D.C.C. section 30.1-28-12\(5\)\(b\)](#) already requires, under General Powers and Duties of a Guardian, for a guardian to involve the ward as fully as is practicable in making decisions with respect to the ward's living arrangements, health care, and other aspects of the ward's care.

SDM provides the framework for that involvement to occur.



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TOPIC THREE - LET'S TALK ABOUT IT

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OPENING THE DOOR TO SDM

Think & talk about choices together. (This may take time and repeated conversations - be patient & listen!)

Questions to ask:

- What kind of choices have you made?
- What choice do you want to talk about today?
- Who made the choice? (you by yourself, you with someone's help (who?), someone else (who?))
- How did you make the choice?
- What did you like or not like about making the choice?
- Can you think of anything that would have helped you make the choice better?

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USE SDM TO BUILD CAPACITY

Start small.

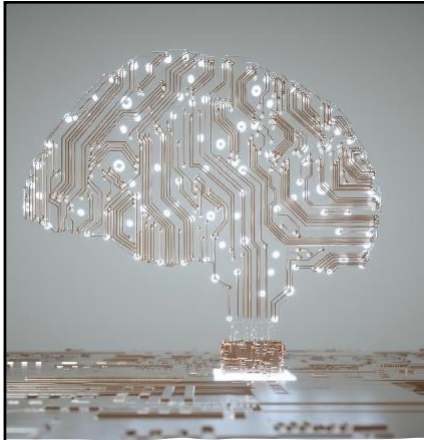
Talk with the Individual about decisions they would like to make and choose one to start with.

Practice Supported Decision-Making. Ask the Individual if there is anything they need to make the decision (time - if so, how much?, information, help telling others about the decision, etc.)

Ask the Individual if they want anyone to help them make the decision. Identify who those people are. Talk with Supporters about their roles.

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BRAINSTORM

www.Supporteddecisionmaking.org has a Brainstorming Guide which is a great resource.

Protection & Advocacy has developed a [worksheet](#) to help Individual Decision-Makers work through what kinds of decisions they may want to make and how they want to make those decisions.

SDM Agreements are not intended to be permanent! Trial and error is ok (live and learn).

No decision is too big or too small.

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IDENTIFYING SUPPORTERS

Supported decision-making is about the choice of the Individual and they alone get to choose who to ask to be a Supporter.

Supporters can:

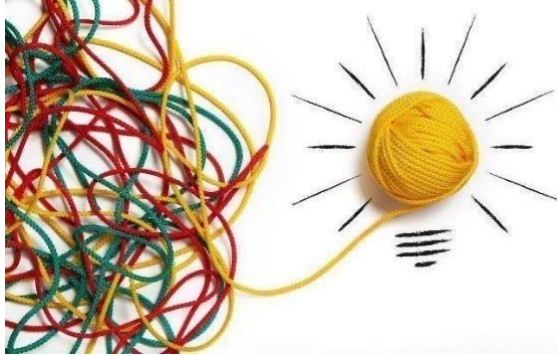
- Choose not to be a Supporter when asked
- Move away, get sick, etc.

Keeping these things in mind helps set up the Individual for success when looking at a Supported Decision-Making arrangement.

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IDENTIFYING SUPPORTERS



Individuals may not have readily identifiable supporters or a robust natural supporter network.

Brainstorm/explore people in the Individual's life as potential Supporters, looking at people they look up to, friends, family, co-workers, skilled help, neighbors, religious affiliations, etc.

Ask: Who do you trust? Whose opinions do you want? Who can you say no to? Who listens to you on a regular basis? Who is easy to talk to?

This [worksheet](#) may help an Individual identify potential Supporters.

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WANTED: SDM SUPPORTER

Supporters should be:

- Good listeners and able to understand an Individual's values and preferences.
- Able to gather and understand information.
- Able to follow directions without judgment and put aside their own values and beliefs.
- Able to assist even when the decision seems "risky" or "unwise". Dignity of Risk.
- Able to communicate decisions clearly on behalf of the Individual.

Remember – SUPPORTERS CAN'T MAKE DECISIONS!

SDM does not give a Supporter the ability to act as a surrogate decision-maker or sign documents on behalf of an Individual. [N.D.C.C. section 30.1-36-04\(7\)](#).



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SUPPORTING SUPPORTERS

Supporters may be persons who have or have had substituted decision-making capacity (guardians or persons who have informally acted as an Individual's guardian) for the Individual Decision-Maker.

SDM flips this model on its head and requires the Supporter to "de-invest" themselves in the decisions of the Individual. It is a repositioning.

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KNOW THY INDIVIDUAL

Knowledge of the Individual and their disability(ies) is fundamental.

Think about:

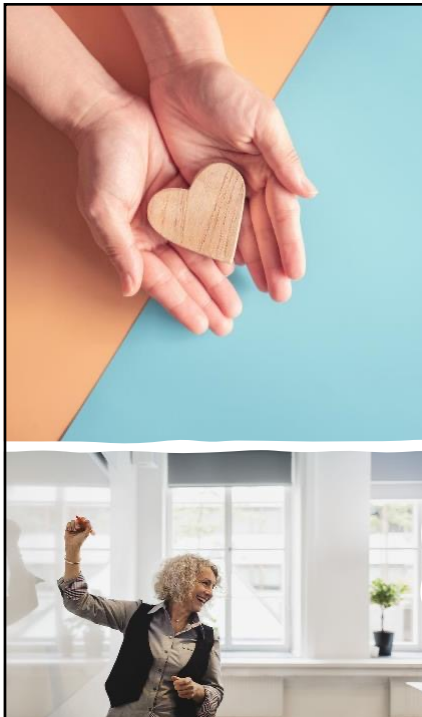
- How does the Individual communicate best?
- What kind of information is most meaningful? (consider alternate formats)
- What is the person's understanding of the decision? (ask "What did we just talk about?")

Ask:

- If there is anything else the Individual wants to know.
- How much time the Individual would like to make the decision.
- If there is someone else the Individual would like to talk about the decision with.

Considering using assistive technology (AT)

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VOLUNTARINESS

Remember the Supporter is not deciding anything - the Supporter shouldn't have any "skin in the game"!



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EYE ON THE PRIZE

Focus on the decision-making process - the HOW, and not the outcome - the WHAT.

Example: Individual says, "I want to move out".

A great response to this is: "What I'm hearing is you may want supports to decide where else you'd like to live."

This is better than just an ok response of: "Do you want someone to help you choose another apartment?"

Open-ended! Make sure your words aren't in any way limiting what kind of decision(s) is/are on the table.



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PRACTICAL CONSIDERATIONS

The American Bar Association (ABA) has developed the [PRACTICAL Tool](#) to assist lawyers in identifying less restrictive decision-making options. You don't have to be a lawyer to be practical!

- P** - Presume guardianship is not needed.
- R** - Reason. Clearly identify the reason for concern.
- A** - Ask if a triggering concern may be caused by temporary or reversible conditions.
- C** - Community. Can concerns be addressed by connecting the individual to family or community resources and making accommodations.
- T** - Team. Ask the person whether he or she already has developed a decision-making team.
- I** - Identify abilities, strengths, and limitations in decision-making.
- C** - Challenges. Screen for and address any potential challenges presented by identified supports and supporters.
- A** - Appoint legal supporter or surrogate consistent with the individual's values and preferences.
- L** - Limit any necessary guardianship petition and order.

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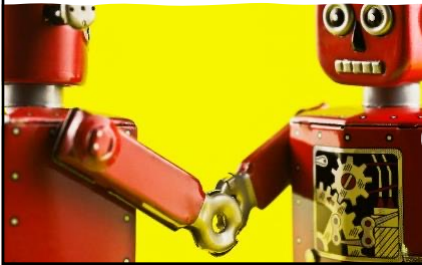
TOPIC FOUR - DO I NEED IT IN
WRITING?

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SHORT ANSWER = NO

No, you can use SDM informally and without a written agreement. There are benefits and protections if it is in writing, however.



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BENEFITS & ADVANTAGES OF SDM WRITTEN AGREEMENT

An Individual may sign authorizations to allow others to disclose confidential documentation or information to a Supporter. The Supporter may only obtain confidential information about the Individual with an appropriate written authorization. [N.D.C.C. section 30.1-36-02.](#)

This can be used to obtain information such as health, education, or financial records.



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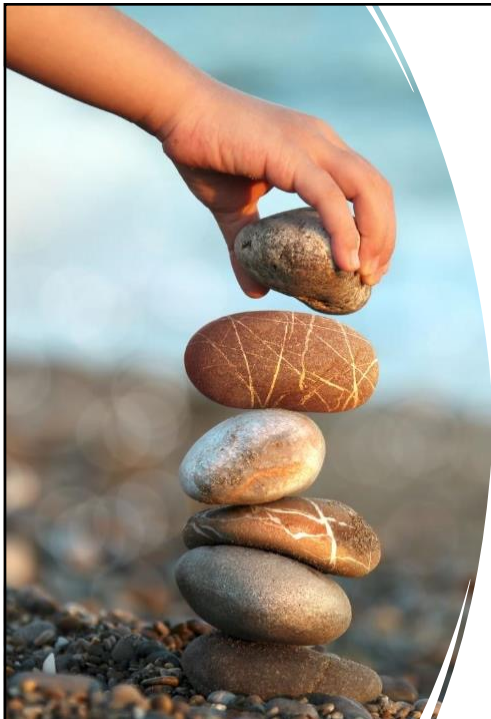
SDM WRITTEN AGREEMENT - LIABILITY PROTECTION - SUPPORTER

Generally, if a Supporter is doing something in "good faith", meaning honestly and believing they're doing the right thing, they are not going to be liable for an act, UNLESS they are:

- Reckless
- Grossly negligent
- Or they've intentionally committed misconduct. [N.D.C.C. section 30.1-36-03.](#)

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SDM WRITTEN AGREEMENT - LIABILITY PROTECTION - THIRD PARTY

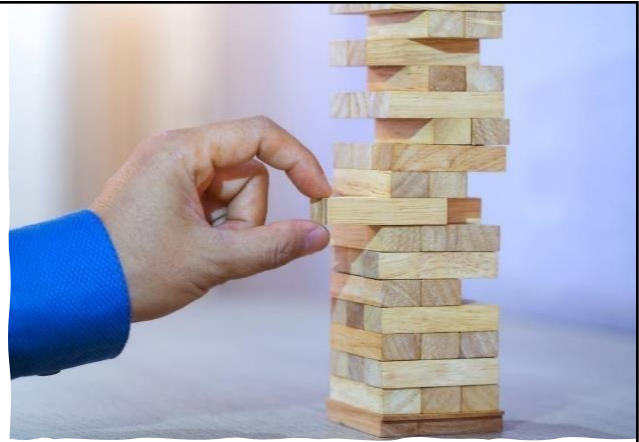
Third parties receiving a copy of a SDM Agreement should rely on the Agreement unless there is:

- A reason to believe the Named Individual is being abused, neglected or exploited by the Supporter.
- Actual knowledge or notice the SDM Agreement is invalid or has been terminated. [N.D.C.C. section 30.1-36-08\(1\).](#)

Third parties are generally protected from liability so long as they are doing something in good faith and in reliance on a Supported Decision-Making Agreement. [N.D.C.C. section 30.1-36-08\(2\).](#)

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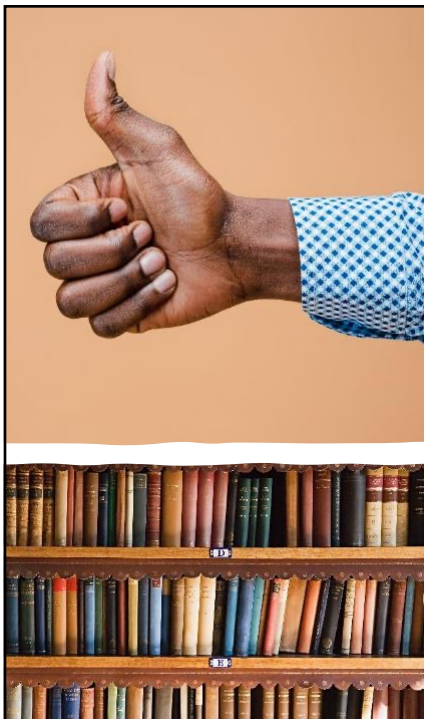
SDM WRITTEN AGREEMENT - NO LIABILITY PROTECTION - THIRD PARTY

A third person is not protected from charges of professional misconduct & is not immune from liability for:

- Acting inconsistently with the known expressed wishes of a Named Individual or
- Failing to provide documents, records, or other information to either a Named Individual or a Supporter who has written authorization for lawful access to or copies of the information. [N.D.C.C. section 30.1-36-08\(4\)](#).

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SDM WRITTEN AGREEMENT - LIABILITY PROTECTION - AUTHORIZATIONS

A person or organization who releases personal information about a Named Individual to a Supporter who has written authorization to receive that information, is generally protected from allegations of improper sharing UNLESS they:

- Know or should know that the Named Individual has revoked the authorization
- Know or should know that the SDM Agreement is invalid.
- Knowingly or recklessly disclose information beyond the scope of the authorization. [N.D.C.C. section 30.1-36-08\(3\)](#).

The Supporter can't allow unauthorized access to or disclosure of any confidential documents, records, or other information about the Individual unless the Individual has told them to do so. [N.D.C.C. section 30.1-36-06](#).

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SDM AGREEMENT - WRITTEN REQUIREMENTS

SDM Agreements must be notarized OR witnessed. A notary public or two qualified witnesses must verify in writing the signatures to a Supported Decision-Making Agreement.

To be a qualified witness, the witness must:

- Not be a party to the agreement;
- Be at least eighteen years of age;
- Be competent;
- Not be an employee or agent of a Supporter in the agreement; and
- Not be a creditor of the Named Individual. [N.D.C.C. section 301-36-07](#).

The following format is not mandatory, but any Supported Decision-Making Agreement template must be substantially equivalent as described in North Dakota Century Code: [N.D.C.C. Chapter 30-1-36](#)

Supported Decision-Making Agreement

This is a Supported Decision-Making Agreement of the following Named Individual:

Name: _____ Date of Birth: _____

Address: _____

Phone: (work) _____ (home) _____ (cell) _____

Email: _____

I am voluntarily entering into this Agreement with the following Supporter whom I have chosen, and we agree will help me make some decisions. My Supporter does not have authority to make decision(s) for me.

Supporter's Name: _____ Date of Birth: _____

Address: _____

Phone: (work) _____ (home) _____ (cell) _____

Email: _____

Relationship to me: _____

SDM AGREEMENT - TEMPLATE

There is no required format for SDM Agreements in ND law aside from having it witnessed or notarized.

[North Dakota Protection & Advocacy Project](#) has a [SDM Agreement Template](#) available on its website.

SDM Agreements are not filed with a court or any other entity, they are to be kept by the parties - Individual and Supporter.



SDM AGREEMENT CELEBRATION

A SDM Agreement is a BIG DEAL for many Individual Decision-Makers. It may represent the first time the Individual has ever felt the power of choice and it is a reason to celebrate!

SDM AGREEMENT - TERMINATION

How do Supported Decision-Making Agreements end? There are a variety of ways:

Supported Decision-Making Agreements can be Terminated by the:			
	Individual notifying Supporter	Supporter notifying Individual	Court
Orally	x		
Through an assistive technology (AT) device	x		
By any other act showing intent	x		
In writing	x	x	
By any additional method specified in the SDM Agreement	x	x	x
Convicting Supporter of a crime involving abuse, neglect, or exploitation			x
Issuing a restraining order to protect the Individual from the Supporter			x
Determining that the Supporter lacks capacity to make or communicate responsible decisions concerning matters affecting the health or safety of the Individual			x

QUESTIONS?

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RESOURCES

North Dakota Resources

SDM Laws: [North Dakota Century Code Chapter 30.1-36](#)

[Alternatives to Guardianship](#) - Disability Rights North Dakota

[Supported Decision-Making | Protection Advocacy Project, North Dakota \(ndpanda.org\)](#) (worksheets, A Guide to Independence, SDM Template, FAQs, and more)

National/International Resources

[Mental Capacity & SDM](#) (UK Social Care Institute for Excellence)

[The Jenny Hatch Story](#) (first SDM case in the U.S.)

[Stories of SDM](#) - Impacts

[Easy Read Supported Decision-Making materials](#) (People First New Zealand)

[National Resource Center for Supported Decision-Making](#)

[Supported Decision-Making Brainstorming Guide](#)

American Bar Association (ABA) [PRACTICAL Tool](#) to identify less restrictive decision-making options

[Fourth National Guardianship Summit: Maximizing Autonomy & Ensuring Accountability](#) - May 2021 Recommendations

[Finding the Right Fit: Decision-Making Supports and Guardianship](#) (can sign up for a free account and take the course or download the slide deck in .pdf)

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SUMMARY

Supported Decision-Making is a tool which, when used formally or informally, can support an Individual's right to be their own decision-maker. It is an alternative to guardianship and a tool which can be used within guardianship to build decision-making capacity and support increased limitations on guardianship. Many Individuals may be able to restore capacity and end guardianships using SDM.

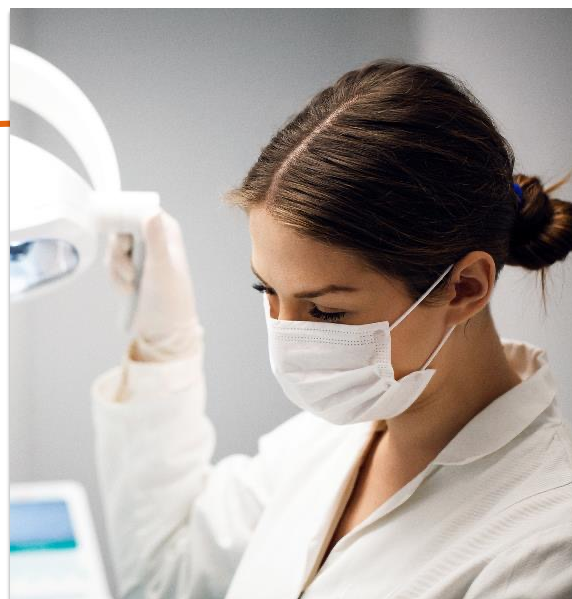


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SCENARIO - CHESTER

Chester goes to the dentist. The dentist identifies a need for Chester to have surgery and wants to do the surgery that day. Chester is accompanied by Janice. The dentist asks Janice to sign a consent for Chester to have surgery.

Chester doesn't have a guardian, what should Janice do?



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SCENARIO - CHESTER

Janice can tell the dentist this is Chester's decision, and he may need some time to make it.

Janice asks if Chester can think and talk about it while the dentist sees the next patient or if he can take information home. Then Chester can talk about it with people he trusts, or maybe just with Janice.



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SCENARIO - CHESTER

WHAT JANICE DOES

She reviews the surgery form with Chester.

She asks if he's had surgery before and talks about that.

She also asks if he wants to talk to anyone else about this decision. He doesn't.

Finally, Janice asks if Chester wants to sign the form and have the surgery.

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SCENARIO - CHESTER



The right to make this decision is Chester's so long as there is not a guardian with legal authority to make that decision.



Even if there is a guardian with authority, this same process can be used to empower Chester to make an informed, safe decision for himself as an individual decision-maker.

If the guardian has ultimate decision-making power here, the decision is ultimately theirs. However, this can be an opportunity to build Chester's decision-making capacity.

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