This information is designed to aid practitioners in making decisions about appropriate care. This document does not define a standard of care nor should it be interpreted as legal advice. Variations in practice may be warranted based on the needs of the individual patient, resources, and limitations unique to the institution or type of practice.

Executive Summary:

Physicians doing assessments of competency must have valid consent and understand various forms of consent, including informed consent of a patient or of a substitute decision maker. The patient being assessed is presumed to be competent until/unless evaluation determines otherwise. Physicians should also understand the legal definitions of assault and battery.

Competency is the mental ability to understand the nature and consequences of a decision in one or more areas of life under consideration, such as financial management or health care decisions.

The focus is a process standard, assessing the patient’s exercise of particular decision-making abilities, not the decision's content. The determination should be time limited and reassessed periodically.

Generally one presumes competency in an adult, making an assessment only if there is reason to believe that the patient is repeatedly or continuously unable to conduct his/her personal affairs safely and properly. When there are concerns about an individual’s competence, perhaps raised by the treating physician, the burden of proof is on the person/persons who raise the concern.

The physician should make task-specific assessments of risk, doing so objectively, openly and fairly. The key element is the patient's ability to make and execute choices. There may need to be collateral information from other professionals, family, or co-workers.

Any resulting conclusion should restrict the patient's autonomy as little as possible.

Physicians should be familiar with certain important legislative policies and principles:

- Dependent Adults Act (Guardianship and Trusteeship)
- Emergency Doctrine
- Mental Health Act
- Personal Directives Act
- Powers of Attorney Act
- Program appointed Benefits Administrator (informal trustee)
- Health Information Act
Assistance is available through the regional offices of the Public Guardian and Public Trustee. Advice from an Ethics Committee may be valuable as are the opinions of appropriate other health care consultants. It is important to document all communications and deliberations carefully, including the facts and the reasons for the conclusion reached concerning the patient's competency.

**Preamble:**

A physician undertaking assessment of competency of a patient must have a valid consent to do so. Failure to do so may expose the physician to litigation or an ethical challenge.

The prudent physician should understand the concepts of implied consent, voluntary consent, informed consent, competence to consent, and assault and battery. These are well set out in a booklet provided by the Canadian Medical Protective Association, "Consent, a Guide for Canadian Physicians", Second Edition, 1991.

**Competency:**

Competency can be simply defined as the mental ability to understand the nature and consequences of a decision. To make valid decisions in our everyday life, we must be competent. Some prefer the term "capacity" and restrict the words "competency" and "incompetency" to formal judicial determinations. This document will use the words interchangeably.

Competency is no longer viewed as a global state or condition (i.e., absence or presence of capacity for all tasks). Rather, the notion of restricted incapacity for specific areas has become generally accepted. In other words, we may be incompetent in one or more areas of life but remain competent in others. Examples of particular types of partial competence include, but are not restricted to, competence to manage financial affairs, to make health care decisions, to choose a place of residence, to grant Power of Attorney, to make a will, to instruct a lawyer, to drive a motor vehicle and/or to participate in a research study.

To assess capacity or competence in a specific area, physicians should use a **process standard** in their determination. In this, the physician focuses on assessing the patient's exercise of particular abilities in the decision-making process, and not on the specific content of the decision (which would be called an **outcome standard**) or on the particular characteristics of the individual (this would be called a **status or category standard**: if, for example, it were decided that all people with a diagnosis of Alzheimer's disease are globally incompetent).

Most feel that a determination of incapacity in a given area or areas should be time limited, requiring periodic reassessments. It must be emphasized that, even when an individual is deemed incompetent in a given area, he/she should be helped to participate as much as possible in decision-making.

**Assessments of Competency or Capacity:**

This section addresses the issue of a **functional standard**. A physician may be requested to assess the capacity of a patient. The primary goal of such an assessment is to respect the individual's autonomy as far as possible, as a determination of incompetence will deprive an individual of the right to make certain decisions for him/herself. There is a general presumption of capacity in adults. Most assessments/determinations never reach the courts. Practical considerations dictate that informal assessments of capacity occur frequently. A competency assessment, particularly a formal one, can humiliate or upset the allegedly incompetent person. **Make sure the assessment (whether formal or informal) is necessary.**

The trigger for an assessment of competency generally is that others believe that someone has become repeatedly or continuously incapable of conducting some aspect of his/her personal affairs without harming him/herself or others. The burden of proof is on those who raised the concern. This is so because the general presumption will be that the individual is competent, and no person willingly displays lack of competence. It is important therefore, that all available collateral evidence be made available for careful evaluation.
Several questions should be asked before starting the evaluation. Will a competency assessment solve the problem at hand? Is a voluntary solution possible? The risk for the allegedly incompetent person must be determined. For this risk assessment the following questions should be asked:

- Is the problem new or old?
- Are there actual examples of failure or is it all theoretical? Are these bad decisions likely to occur or are they only a remote possibility?
- If the person does make an unwise decision, how severe is the risk to him/her from this decision?
- Will the decisions harm others?
- It must be emphasized that a competent individual can choose to place him/herself at risk. An individual who does not have the capacity to understand the situation may require protection from him/herself. Is the patient aware of the risk?
- Can or will he/she take steps to remedy the situation?
- Will he/she accept help?

Assessments should focus on the specific tasks about which there is concern in realistic circumstances (in other words it should be task-specific):

- Try to assess individuals at their best.
- Elderly individuals should be assessed early in the day; use a quiet familiar location; and compensate for physiological or social impediments such as hearing loss or preferred language, etc.
- Look for reversible illnesses or conditions.
- Keep assessment sessions short so as to avoid fatigue.
- Make sure that all needed information is provided.
- Do not try to trick the patient and make sure that he/she understands what you are doing as far as possible.
- Point out “errors” and allow an opportunity to explain.
- Focus on abilities to make and execute choices rather than focusing on the decisions themselves. For example, in the assessment of the capacity to consent to treatment, determine whether the person has the abilities to comprehend relevant information, to deliberate about the choices in accordance with personal values and goals, and to communicate (verbally or written) his/her choice to others.

There is no "cookbook" approach that one can advocate. Assessments should be tailored to the needs of the patient and the situation. Neither performance on a standard cognitive test such as the Folstein Mini-Mental State Examination nor the presence of a particular condition such as Alzheimer's is itself a sufficient basis on which to conclude that a person is incompetent to perform a specific task. Do not be reluctant to consult other physicians (for example psychiatrists, neurologists, geriatricians) or other health care workers (for example psychologists, occupational therapists). Try to obtain collateral information as this is normally needed to make an accurate assessment. The family or other health care workers who know the individual well can provide this information. Assessment unfortunately remains a somewhat uncertain procedure.

If, at the end of the assessment, the conclusion is that the individual has limited capacity, remember to try to restrict autonomy only as far as is absolutely necessary (the least restrictive alternative) and promote the patient’s “best interests”.

**The Law and Competency:**

<table>
<thead>
<tr>
<th>Area</th>
<th>Cognition Status</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>Competent¹</td>
</tr>
<tr>
<td>Person (including Health Care)</td>
<td>Personal Directive</td>
</tr>
<tr>
<td>Estate</td>
<td>Enduring Power of Attorney</td>
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</table>
Questions may arise in the course of health care as to a patient's capacity to make health care decisions. In Alberta, if an adult is mentally incapable of consenting to health care, the only person who has legal authority to consent on his/her behalf is a guardian appointed under the Dependent Adults Act or Agent named under the Personal Directives Act, unless the patient is detained in a psychiatric facility as a formal patient under the Mental Health Act, at which point family members can provide substitute consent.

Treatment can be given without consent if there is a true emergency:

- it is a matter of life or death, and
- the patient or guardian cannot be consulted, and
- there is no available record which clearly states the patient's desire not to receive the proposed form of treatment.

In urgent situations where the patient is felt to be unable to provide informed consent and no guardian has been appointed, the practice in Alberta hospitals is to permit treatment if two independent physicians are willing to sign certificates stating that there is a need for the treatment but the patient cannot consent to it by reason of mental or physical disability of understanding or consenting. Once based upon the common law Emergency Doctrine, it is now enshrined in Section 29 of the Dependent Adults Act (RSA 2000).

From a practical standpoint, physicians should consult with the family of the individual and receive their approval prior to performing the treatment under consideration. Unlike some provinces, Alberta does not have legislation expressly authorizing family members to provide substitute consent.

It is possible to pursue guardianship under the Alberta Dependent Adults Act. Guardianship is a legal process which gives an individual, called a guardian, the authority and responsibility to make decisions on personal and health matters on behalf of a dependent adult. The Court of Queen’s Bench, Surrogate Division grants the guardianship order. The court can appoint a substitute decision-maker, where needed, for those Albertans 18 years of age or older who are unable to make personal decisions for themselves. The appointment must be in the best interest of the dependent adult and result in a substantial benefit to him or her.

The Dependent Adults Act requires that an application for guardianship include a medical or psychological report on a specified form (attached) as prescribed in the regulations. A physician who makes such a report for the court does not acquire any liability for making the report, if the report is made in good faith and he/she has reasonable and probable grounds to believe the report is true. These reports must be completed carefully as the court relies heavily on them in making its decisions. There is substantial cost involved and it may take in the order of 8 weeks for the application to be processed. The appointed guardian will periodically have to make reports to the court and may be called upon to explain his/her actions at any time to the court.

Physicians can also look for a personal directive, as provided in the Personal Directives Act, which specifies an agent to act on behalf of the individual. This agent should be someone the person knows and trusts. This agent should use a substituted judgment standard, unless otherwise specified in the personal directive, attempting to determine what that person would have chosen if able to speak for him/herself. However, if there was no clear direction from the patient or it is not possible to get a substituted judgment from someone who knows him/her well, then the standard becomes one of "best interest" as would be determined by a "reasonable person."

The Powers of Attorney Act provides that an individual who is no longer mentally competent to manage his/her affairs can have that authority exercised by the Attorney under that document. This relates only to an individual's estate and not to the care of his/her person. Establishment of such power must be prepared before the onset of a disabling condition. A medical report might be required if capacity to execute an enduring power of attorney is in question.

An informal trustee, sometimes requiring a supplementary medical report, can be appointed only to manage benefits under Old Age Security, Canada Pension Plan, Canadian Pension Commission, Veterans Affairs, Assured Income for the Severely Handicapped (AISH), and Supports for Independence (SFI). The relevant government department names an informal trustee.
Concluding Remarks:

This is a difficult area with no clear absolutes. If in doubt, remember to communicate, consult, and document. The regional offices of the Public Guardian are always available to assist. Obtain information from those who know the patient well, especially from family members. Communicate with them, letting them know the concerns and problems you are facing. Try to ensure that they agree with your approach. Consult with other physicians and other health care workers as needed. If available, you may wish to consult an Ethics Committee. Document your communications and deliberations carefully, stating the facts and outlining the reasoning. This will be your best defense against claims of malpractice.

Using advanced directives (AD) to guide decision making for a hospitalized patient.

Modified from: Clinics in Geriatric Medicine, 1998, 14:827.
Suggested Readings:

Competency to make a will, AM J Psychiatry, 1992, 149:169-174.
Living Will, Centre for Bioethics, U. of Toronto.
A Guide for Consumers and Care-givers (Mental Health Act of Alberta), Canadian Mental Health Association.
Answers to Your Questions on the Personal Directives Act—A Guide for Physicians, G. Robertson

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- Mr. Colin M. Grant, Office of the Public Guardian, Calgary
- Mr. Craig Boyer, lawyer with Bryan and Co., Edmonton
SCHEDULE

FORM 1

REPORT OF A PHYSICIAN OR A PSYCHOLOGIST

Patient’s Name: _______________________________ Birthdate: _______________________________

Address: _________________________________________________________________________________

A* is repeatedly or continuously unable

(i) to care for himself/herself*, and

(ii) to make reasonable judgments in respect of matters relating to himself/herself*;

B* is

(i) unable to make reasonable judgments in respect of matters relating to all or any part of his/her* estate, and

(ii) in need of a trustee

I have formed my opinion based on the following information, observations or symptoms:

(1) ______________________________________________________________________________________

(2) ______________________________________________________________________________________

Diagnosis: ________________________________________________________________________________

Prognosis: ________________________________________________________________________________

Based on this, I am of the opinion that it would be in his/her* best interests for a _____________________ to be appointed for him/her*.

_________________________ (guardian)  __________________________ (trustee)*

(physician's or psychologist's name)  (physician/psychologist) *

_________________________ (signature)  ______________________________ (address)  __________________ (date)

* Delete whichever or what is not applicable (including, if appropriate, the whole of paragraph A or B)