

A Proposed Model for Assessing Defendant Competence to Self-Represent

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The increasing number of criminal defendants who are choosing to self-represent poses special challenges for legal systems with regard to the types of limits that should be placed on a defendant's basic human right to defend himself without the assistance of counsel. While courts strive to respect the dignity and autonomy of the defendant that are encompassed in this right, they also want to ensure that justice is delivered and the dignity of the courtroom is maintained. The Supreme Court of the United States, in its opinion in *Indiana v. Edwards* (2008), held that while the right to self-represent recognized in *Faretta v. California* (1975) remains, states and trial judges can place limits on a defendant's right to self-representation when a defendant lacks the mental capacities needed to prepare and conduct an adequate defense. Following the court's lead, we first examine the types and range of tasks that a defendant who chooses to self-represent must perform. Based on this analysis, we propose a five-part model that forensic practitioners can use as a conceptual framework for assessing whether a defendant has deficits that would affect his competence to perform critical self-representation tasks. The five areas that the model recommends practitioners assess are whether a defendant can engage in goal-directed behaviors, has sufficient communication skills, can engage in constructive social intercourse, can control his emotions in an adversarial arena, and has the cognitive abilities needed to argue his case adequately. It is recommended that practitioners use the model in their testimony to provide the trier of fact with a comprehensive report of the areas in which a defendant has deficits that will prevent him from protecting his interests in receiving a fair and equitable trial.

J Am Acad Psychiatry Law 44:425–36, 2016

Criminal defendants who choose to represent themselves at trial without attorneys (hereinafter, self-represent) create special challenges for court systems. Judges must balance ensuring that a self-represented defendant receives a fair trial with preserving court decorum and the procedural integrity of the trial. Although it is generally agreed that the right to self-represent is not absolute and some limits can be placed on this right, courts tend to be reluctant to deny a defendant the right to self-represent, as it is considered part of the recognized right to a fair trial,

which involves being able to confront one's accusers directly.

The Supreme Court first recognized the right of a defendant to self-represent under the Sixth Amendment in *Faretta v. California* (1975).¹ Until its more recent decision in *Indiana v. Edwards* (2008),² the Supreme Court did not specifically address on the question of the competence of a defendant to conduct his own trial. This failure has resulted in a blurring of the line between the competence to stand trial and the competence to self-represent in many courtrooms. In *Edwards*, the Court attempted to rectify the confusion by making it clear that there is a distinction between the two, and that courts and states can place limits on whether a defendant can self-represent when the defendant lacks the functional legal capacity needed to prepare adequately and to conduct his defense.

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Disclosures of financial or other potential conflicts of interest: None.

In this article, we review the challenges courts and forensic practitioners face in determining whether a defendant is competent to self-represent and the distinction the *Edwards* Court makes between the passive understanding needed to stand trial and the functional legal abilities needed to self-represent. Based on this review, we argue that assessments of a defendant's competency to self-represent should begin with a clear understanding of the tasks that a defendant needs to perform to mount an adequate defense. We then analyze the cognitive and behavioral demands that execution of these tasks places on a defendant and propose a conceptual model of the types of capacities that should be reviewed by forensic practitioners and courts in assessing whether a defendant has mental and emotional deficits that preclude him from adequately performing these tasks in the course of representing himself.

Note for clarity that this discussion presumes that basic competency to stand trial has been established at the outset. This assessment also assumes that awareness, not only of the charges, but also of the extent and purpose of punishment has been established.

Establishing a model that links cognitive and behavioral capacities to the legal tasks involved in self-representation is critical to ensuring that a defendant can proactively, or at a minimum, actively pursue his interests in receiving a fair trial. Using this model, forensic practitioners can aid judges in making more equitable determinations about whether to grant a defendant's request by showing judges specifically how and where a defendant's deficits will affect his ability to self-represent. Finally, this approach can help relieve the strains placed on court systems by self-representing defendants who can, as a result of mental and emotional deficits, consume valid court resources and time by pursuing irrelevant lines of inquiry and arguments and disrupt courtroom decorum and the orderly progression of justice. Needless to add, our conceptual model is a heuristic device, neither a standard nor a rule.

The Burgeoning Challenge

The increasing number of defendants who choose to self-represent and the escalating complexity of the legal system make the development of a model for assessing a defendant's competence to self-represent a pressing problem for the American legal system. In recent years there has been a surge in self-representa-

tion in civil cases.³ In criminal cases, it has been more difficult to document such increases because most states do not collect this type of data across county court districts.

There are indications, however, that more defendants are choosing to self-represent. A 2010 survey of state court judges by the American Bar Association Coalition for Justice found that the number of criminal defendants who self-represent is indeed increasing and creating special challenges for courts. Sixty percent of the 1,175 judges in the survey reported that more litigants in their courts were choosing to self-represent. When this analysis was broken down to focus on the 107 judges in the survey who exclusively handle criminal cases rather than both civil and criminal cases, 29 percent of the judges reported an increase in self-representation.⁴ Additional studies are needed in this area, but these findings suggest that the increase in self-representation in civil cases is spilling over into the criminal justice system.

Given the reductions in funding in recent years of public defender systems, both at the county and state level, and the enormous fees successful criminal defense attorneys now charge, it is likely that there will be continued increases in defendant self-representation in criminal cases. A 2007 Department of Justice survey of county-based and local defender offices found that attorneys in 73 percent of these offices had caseloads that exceeded the American Bar Association-recommended maximum. State public defender offices were found to be equally overburdened.⁵ From 1999 to 2007, caseloads in state offices increased by 20 percent on average, but attorney staffing increased by only 4 percent.⁶ Direct state funding of public defender services has also been decreasing. Average state expenditures for defender offices dropped 1.1 percent annually from 2008 through 2012, with the largest yearly reduction occurring from 2011 through 2012.⁷

These cuts in funding in which public defender attorneys are forced to carry heavy caseloads create overstressed attorneys who cannot fully devote their attention to any one defendant. Furthermore, research shows that defendants with publicly funded attorneys are found guilty more often than defendants with private attorneys.⁸ Thus, it is not surprising that defendants often believe that they could do a better job.

Similarly, even if a defendant can afford an attorney, most defendants lack the money needed to hire

a full-time team of top criminal defense lawyers. As a result, they too are likely to become disillusioned and consider self-representation when they realize that their limited resources can buy only a small amount of their attorney's attention. In accord with this thesis, Mossman and Dunseith⁹ found that the most frequent reason cited by criminal defendants who chose to self-represent was dissatisfaction with their attorney. Similarly, in her study of *pro se* defendants, Hashimoto¹⁰ found that more than half of the *pro se* defendants in her Federal Docketing Database initially had counsel and had asked the judge to appoint new counsel before they decided to represent themselves. Research further suggests that defendants' concerns about the efficacy of their attorneys are often justified. In a study of cases of wrongfully convicted defendants who were subsequently exonerated, the Innocence Project found that ineffective assistance of counsel was an important contributory factor in the miscarriages of justice that occurred in those cases.¹¹

The problem of the increasing number of defendants choosing to self-represent is further compounded by the increasing complexity of the criminal justice system. Today, defendants who self-represent must navigate a myriad of convoluted criminal procedures finely honed by years of litigation and also must be prepared to discredit sophisticated documentary and biological evidence that prosecutors can now readily marshal because of advances in technology and science.

The result is that self-representation has become a challenging endeavor, even for defendants with legal expertise. Unfortunately, because of the difficulties in collecting data in this area, little research has been done on the ability of defendants to meet the types of challenges presented by contemporary court systems. The aforementioned survey of state court judges by the American Bar Association Coalition of Justice is one of the few studies that have examined how self-representing defendants fare. In their survey in which judges were asked about defendants' competence to self-represent, 62 percent of the judges reported that litigants who self-represent have worse outcomes than those who have counsel. When asked the source of these negative outcomes, 94 percent of the judges said that defendants failed to present evidence that was essential to supporting their case. Eighty-nine percent said that defendants were hurt by procedural errors that they made. Eighty-five percent reported

that defendants conducted poor witness examinations. Eighty-one percent reported that defendants did not object properly to evidence and seventy-seven percent said that defendants hurt their cases by making ineffective arguments. Although these results included all judges regardless of the court on which they sat, there is no reason to presume that their findings do not apply to most civil and criminal litigants, given the similarities in the types of tasks that a litigant must perform in both types of trials.⁴

In contrast to these findings, the study by Hashimoto¹⁰ is frequently cited as evidence that defendants who self-represent fare as well as defendants who are represented by counsel. This study, however, did not provide strong evidence to support this conclusion. As Hashimoto meticulously detailed in her law review article, her study was fraught with methodological limitations that precluded definitive conclusions about the effectiveness of self-represented defendants. The number of self-represented defendants in state and federal databases that she analyzed was so small, relative to the number of represented defendants (0.5% in the state database), that outcome comparisons between the two groups were not statistically valid. Moreover, in more than half of the defendants in both the state and federal databases, data were missing on the type of representation a defendant actually had. In addition, as Hashimoto pointed out, there were no data on the strength of the evidence against each defendant, a point making moot the validity of comparisons between represented and self-represented defendants. Finally, it should be noted that, because of the small number of self-represented defendants in the databases, cases could not be broken down by type of felony or misdemeanor, a flaw that again renders comparisons across cases of dubious value.

The Conflict Between Self-Representation and the Right to a Fair Trial

In developing assessment tools to aid judges in dealing equitably with the increasing number of defendants who request to self-represent, it is important for forensic practitioners to be cognizant of the underlying dilemma that judges face in making decisions concerning a defendant's competence to self-represent. On the one hand, judges are reluctant to deny a defendant the right to self-represent, as it is closely linked to the individual autonomy and dignity that the Constitution envisions for all people.

On the other hand, judges are tasked with ensuring that the legal system delivers fair and impartial justice. In this capacity, most judges are acutely aware that allowing a defendant to represent himself, when he lacks requisite competencies and emotional stability, can result in a serious miscarriage of justice and may damage public perceptions that courts are fair and equitable instruments of justice.

This tension between these two moral mandates can be seen in Supreme Court decisions in this area. Since the Court first recognized a defendant's right to self-represent in *Faretta*, it has alternately embraced both mandates with split decisions in each case. In *Faretta* the majority took the position that it was more important as part of preserving a defendant's dignity and autonomy to recognize a defendant's right to self-represent, even if it resulted in an unjust outcome. In delivering the opinion of the Court, Justice Stewart stated, "And although he [the defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law'" (Ref. 1, p 834). The minority disagreed. Writing the dissenting opinion for the minority, Justice Blackmun argued that this respect for individual autonomy "ignores the established principle that the interest of the State in a criminal prosecution 'is not that it shall win a case, but that justice shall be done'" (Ref. 1, p 849).

In *Godinez v. Moran*,¹² the Supreme Court addressed whether the competency standard for pleading guilty or waiving the right to counsel is higher than the standard for competency to stand trial. The majority reaffirmed that an individual's right to make this decision, even when it is to his detriment, is more important than ensuring that justice is done. Writing for the minority, Justice Blackmun again strongly condemned his fellow justices for putting individual autonomy before justice. He wrote, "To try, convict and punish one so helpless to defend himself contravenes fundamental principles of fairness and impugns the integrity of our criminal justice system" (Ref. 12, p 417).

In *Indiana v. Edwards*, the majority switched its emphasis from preserving an individual's autonomy and dignity to protecting the integrity of the judicial process. In this case, Justice Breyer, who delivered the majority opinion, stated:

[I]n our view, a right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental

capacity to conduct his defense without the assistance of counsel. . . . Moreover, as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial (Ref. 2, pp 176, 177).

Conversely, Justice Scalia, in a strongly worded dissenting opinion, argued that respect for the dignity and autonomy of the individual should prevail regardless of the outcome. He noted that the dignity of the individual that *Faretta* intended to protect, "is not the defendant's making a fool of himself by presenting an amateurish or even an incoherent defense. Rather, the dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State—the dignity of individual choice" (Ref. 2, pp 186, 187).

This shift in the *Edwards* Court may have occurred, in part, because today, 40 years after *Faretta*, there is much greater awareness of the impairments associated with mental illness and other disabilities. However, judges are still reluctant to abandon their commitment to preserving the dignity and autonomy of defendants and tend to accept rather than reject defendants' requests to self-represent. In accord with this respect for the dignity and autonomy of defendants, judges are also often more lenient on self-represented defendants, even though the Supreme Court of the United States has stated that defendants have no constitutional right to receive assistance from judges.¹³ In other instances, judges appoint standby counsel who provide instruction and assistance to the defendant as needed during the trial. More recently, as part of this effort to protect a defendant's right to self-represent, court systems have begun to provide self-help centers, online instructional websites and, in some cases, even staff to advise and tutor defendants.

Despite the efforts of legal systems and courts to provide defendants with standby counsel and assist defendants who choose to self-represent, serious questions can be raised concerning whether these interventions accomplish their goal of ensuring that a defendant receives a fair trial. Defendants often are resistant to the appointment of standby counsel, because they consider it a dilution of their right to self-representation.^{2,9} With regard to the movement to provide defendants with the legal and technical knowledge to conduct their own defense, no studies to date have examined the effectiveness of this approach. More important, however, these approaches

evade the real question, which is whether a defendant can cognitively launch an adequate defense or even assist appointed counsel and thus receive the fair trial envisioned by the Constitution.

Functional Legal Ability Versus Passive Understanding

The United States Supreme Court in its decision in *Indiana v. Edwards* suggests a more pragmatic approach that addresses whether a defendant has the “functional legal ability” to act as his own counsel, namely the ability to perform the essential legal tasks needed to self-represent, rather than simply a passive understanding of the proceedings and charges against him (Ref. 2, p 176).

In its opinion, the Court distinguished *Edwards* from its earlier ruling in *Godinez*¹² in which it held that the test used in *Dusky v. United States*¹⁴ to assess a defendant’s competence to stand trial could also be used to determine whether a defendant could self-represent. Under the *Dusky* test, a defendant is competent if “he has sufficient present ability to consult with his lawyer with a reasonable degree of understanding—and whether he has a rational as well as factual understanding of the proceedings against him” (Ref. 14, p 402). The Court pointed out that this test applied in *Godinez*, because the defendant simply wanted to represent himself to enter a guilty plea, but not in *Edwards* in which the defendant wanted actually to conduct his own defense. The Court further stated that although the *Dusky* test is a useful starting point, it is not sufficient as a test for a defendant’s competence to conduct his own defense.² The Court in *Edwards* further noted that in contrast to the passive understanding that a defendant needs under the *Dusky* test for competence to stand trial, self-representation is much more cognitively and legally demanding than simply being able to consult with one’s lawyer. To conduct his own defense adequately, a defendant must become an actor rather than a bystander. He must have “functional legal ability” (Ref. 2, p 176), a term quoted by the Court from the MacArthur studies of adjudicative competence.¹⁵ As used by the Court, functional legal ability means that the defendant must have the capacities needed to initiate, execute, and orchestrate the series of complex tasks that conducting a trial entails. Quoting from *McKaskle v. Wiggins*¹³, the Court noted that this included tasks such as “the organization of the defense, making motions, arguing points

of law, participating in *voir dire*, questioning witnesses and addressing the court and jury” (Ref. 2, p 176).

Despite making a clear distinction between the capacities needed to stand trial and those needed to conduct a trial, the Court in *Edwards* did not provide a clear test to be used in determining whether a defendant has the functional legal ability to represent himself. The Court explained that in this situation a single test is inappropriate because mental illness is not a unitary concept that lends itself to the application of one specific standard. In accord with this approach, the Court stated that the decision of whether to grant a defendant’s request should be left to the discretion of the trial judge who “will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant” (Ref. 2, p 177). Thus, the *Edwards* Court left the door open for forensic practitioners to play an important role in educating courts with regard to the types and range of deficits that could impede a defendant from effectively executing those tasks critical to mounting an adequate defense.

Among forensic practitioners, the *Edwards* case has generated a great deal of discussion with regard to their role and the form of their testimony and some confusion as to the proper test to use. Some commentators, in reviewing the *Edwards* opinion, have even suggested that forensic practitioners should wait for courts to provide additional guidance before wading into this arena.¹⁶

This uncertainty and confusion is in part because *Edwards* departs from the Supreme Court’s earlier decisions in the area of a defendant’s competence to make legal decisions. Although some legal scholars have argued that the Court’s test in *Godinez* for competence to self-represent is inadequate and should have been expanded to include measures of the defendant’s decisional competency and his motivations for wishing to self-represent, the ruling in *Edwards* goes even further.^{17,18} It suggests that forensic assessments should move beyond simply examining a defendant’s covert cognitive processes and instead include measures of a defendant’s capacity to execute the legal tasks involved in self-representation.

The uncertainty and confusion the *Edwards* decision has introduced into the forensic arena has also been compounded by the fact that the Supreme Court merely ruled that states and courts could hold

defendants to a higher standard than *Dusky* rather than that they must hold them to a higher standard. As a result, many courts continue to apply the *Dusky* standard used in *Godinez* in determining whether a defendant is competent to self-represent and never reach the more complex question of whether the defendant has minimal functional legal ability.¹⁹ In accord with this approach, some practitioners are still using the well-established *Dusky* measures, which focus on assessing whether the defendant understands the charges against him, has a rudimentary knowledge of how the criminal justice system works, is able to communicate with his attorney, is able to consider rationally his options at various points in the process and is able to manage his behavior in the courtroom.^{20,21} (See the 22-item MacArthur Competence Assessment Tool—Criminal Adjudication (MacCAT-CA)²², the 13-item Competence to Stand Trial Assessment Instrument (CAI),²³ and the 11 McGarry criteria.²⁴) Other practitioners have continued to focus on whether the defendant has a mental illness regardless of the illness's bearing on the defendant's ability to self-represent.¹⁹

These approaches are a useful starting point, as a defendant's severe mental illness or failure to meet the *Dusky* standards may at times be sufficient to disqualify a defendant from representing himself. However, in continuing to rely primarily on *Dusky* or the severity of a defendant's mental illness, forensic practitioners miss an important opportunity to educate courts about the types of deficits that can impede a defendant from self-representing effectively. In addition, in clinging to these approaches, forensic practitioners fail to take advantage of courts' increased awareness of the special challenges posed by mental illness and cognitive and emotional deficits for defendants who choose to self-represent.

In an effort to raise the level of discourse with regard to how forensic practitioners should proceed in developing measures of defendant competence to self-represent, Knoll and colleagues surveyed trial judges and forensic practitioners to identify the factors that they believed were important in making assessments of a defendant's competence to self-represent.^{25,26} The sample of trial court judges was too small to produce definitive results (18 judges responded to the survey), but the judges mentioned cognitive impairments, mental illness and intellectual and analytical abilities as important factors.²⁵ In a follow-up survey of forensic practitioners

in which they were asked the standard of competence on the McGarry scale that they would use to rate defendants who wished to self-represent versus the standard they would use to evaluate the competence of defendants to stand trial, practitioners identified the following three McGarry criteria as calling for a higher standard of competence in evaluating defendants who wished to self-represent: the capacity to plan a legal defense, to appraise available legal defenses, and to question and challenge witnesses.²⁶

Although these approaches are an important first step, to date no tools have been specifically developed to help practitioners assess whether defendants lack the cognitive right stuff needed to conduct their own defense. Moreover, given the Court's failure in *Edwards* to delineate clearly what constitutes functional legal ability, a comprehensive model of the types of capacities that such measures should assess is sorely lacking. We aim to rectify this situation.

Key Elements of Functional Legal Ability

Having a detailed list of the range and nature of the tasks that a defendant and his attorney must complete in the course of preparing and executing a defense is important. The list makes it easier for forensic practitioners to determine which types of deficits are most likely to be detrimental to a defendant's ability to self-represent. In addition, linking specific deficits to the tasks a defendant must perform in the course of executing a trial will make it easier for judges to make reasoned and impartial decisions concerning a defendant's competency to self-represent. Finally, by focusing on tasks, it is not necessary to wade into matters relating to a defendant's legal expertise, which most forensic practitioners are rightfully wont to do.

Finally, this approach will reinforce the fact that mental illness *per se* does not preclude a defendant's representing himself. Rather, it is the inability of the defendant to perform critical self-representation tasks that is the source of disqualification.

A list of the key tasks that a defendant must perform appears in Table 1. As it shows, the defendant must initially acquire a basic understanding of the rules of criminal procedure and evidence. The bulk of the remaining tasks involved fall under the rubric of pretrial preparation. The defendant must investigate all circumstances and facts that are relevant to the case against him and develop his theory of the case.²⁷ This involves interviewing witnesses, col-

Table 1 Functional Legal Competencies Needed to Self-Represent

Master Basics of Criminal Procedure and Evidence	
Comprehend and adhere to the rules of criminal procedure	
Comprehend, apply and execute the rules of evidence	
	Learn scripts for entering exhibits into evidence.
	Learn available exclusionary challenges to prosecution evidence.
Pre-Trial Preparation	
Investigate and Compile Relevant Facts	
	Interview witnesses.
	Collect documents that bear on the circumstances of the case.
Develop a Theory of the Case	
	Analyze and identify evidence in support of and against the charges.
	Identify plausible legal defenses to the charges.
Prepare Motions	
	Identify motions that need to be filed to protect constitutional and procedural rights.
	Develop arguments in support of motions.
	Research and cite relevant law and cases in support of arguments.
	Write memos to present arguments in support of motions.
	Prepare and submit motions to the court in accord with procedural requirements.
Prepare for Direct Examinations	
	Identify witnesses to call to support defense and prepare subpoenas.
	Prepare direct examination questions for each witness.
	Decide on evidence to be admitted in support of testimony.
Decide on Jury Strategy	
	Decide on type of jurors who will be favorable to case.
	Prepare voir dire questions.
Trial Tasks	
Select Jurors	
	Review jury questionnaires and identify jurors to challenge.
	Conduct voir dire and exercise preemptory challenges.
Deliver Opening Statement	
Conduct Direct Examinations of Witnesses and Experts	
	Follow pre-prepared script and keep witnesses on point.
	Respond to prosecutor's objections to direct questions.
	Enter supporting materials into evidence.
Conduct Cross Examinations of Prosecution Witnesses	
	Listen to the testimony of prosecution witnesses.
	Object to violations of the rules of evidence.
	Develop cross examination strategies based on witness testimony, supporting materials entered into evidence and materials collected during discovery.
Deliver Closing Argument	
	Review and analyze evidence presented by prosecution.
	Identify points of rebuttal based on evidence presented during trial.
	Create coherent story in support of innocence of charges.

lecting relevant documents, analyzing the evidence against him, and identifying plausible defenses to the charges he faces.²⁸

Practice in presenting the appropriate motions is also an important part of pretrial preparation. It is

critical that the defendant file certain types of motions or he will lose important Constitutional rights. For example, if evidence against him was obtained by an illegal search or seizure, he must file a motion to suppress the evidence. If the defendant fails to file such a motion within the time frame dictated by the court, he will lose this Constitutional right.

One of the most important motions a defendant needs to file is one to compel the prosecution to produce exculpatory information and material in its possession. While Rule 3.8 of the American Bar Association's *Model Rules of Professional Conduct*²⁹ requires that prosecutors voluntarily produce this material in a timely manner, this often does not occur in practice.³⁰ Thus, in accord with good trial practice it is recommended that defendants file repeated motions requesting exculpatory evidence throughout the course of the trial to ensure its production by the prosecution.³¹

In addition to filing discovery motions, the defendant should file motions to exclude evidence if the government has violated his Constitutional rights under the Fourth, Fifth, and Sixth Amendments. These include motions to suppress evidence that was obtained through illegal searches and seizures, to exclude confessions obtained in violation of a defendant's *Miranda* rights and to oppose other actions by the government that compromise the defendant's right to a fair trial.

After the defendant has reviewed the evidence, developed his theory of the case and selected his defenses, the final part of pretrial preparation involves decisions centering on which witnesses he will call and what questions he will ask them on direct. The defendant must also decide which documents, exhibits, and other types of material evidence he wishes to have admitted into evidence to support his case. In addition, he must prepare his opening statement to the jury, in which he coherently explains his theory of the case, decide on the types of jurors he wants and, in jurisdictions that allow questioning of potential jurors, he must prepare *voir dire* questions.^{28,32}

The most challenging and stressful part of the process, however, is the actual trial in front of the judge and jury.

In a trial, the defendant must deliver his opening statement, conduct direct and cross examinations, object to violations of the rules of evidence, respond to the prosecutor's objections, and enter documents and exhibits into evidence following the strict scripts

for authentication and proof of legal relevance dictated by the rules of evidence. Finally, he must deliver a closing argument that summarizes his case and rebuts the allegations of the prosecutor.^{28,32,33}

In considering the tasks needed to conduct a trial, it is also important to note that many cases do not go to trial, because the prosecution and defense negotiate a plea agreement. Thus, a defendant must also have the ability to negotiate effectively with the prosecution to protect his interests if the opportunity arises to plea bargain.

A Five-Part Mental Competency Model

The goal of this model is to provide a framework that forensic practitioners can use to assess comprehensively the full range of a defendant's behaviors that may affect his ability to self-represent, with the goal of providing the court with a more in-depth and nuanced analysis of the needed competencies. We presume that before using this model, practitioners will first determine whether a defendant is competent to stand trial, if the court has not already established his competency. Forensic psychiatrists should also consider psychological tests for the various deficits to be discussed herein when it would be helpful to use them.

As discussed earlier in the article and as shown by the list of tasks detailed in Table 1, an assessment of a defendant's competence to self-represent is much more complex than an assessment of a defendant's competence to stand trial and thus, encompasses a wider range of behaviors. As a result, the model is not designed to provide the court with a definitive yes or no answer in assessments of a defendant's competence to self-represent. Instead, it is a conceptual tool that practitioners can use in their testimony to provide the judge with a comprehensive picture of what a defendant can and cannot do, in order that the judge can make a data-driven decision as to whether to grant the defendant's request to self-represent or to provide standby counsel to the defendant in areas where the defendant has particular deficits.

We further stress that the expert's role is to advise the court and not to provide the finder of fact with a neatly packaged conclusion as to the question at hand. Attorneys are taught in law school to ask their expert to finish his direct testimony with a definitive "yea" or "nay" answer. Some judges, however, are well aware that this is simply a *pro forma* response and they may not give it much weight; others insist on

ultimate issue testimony. Thus, in using our model, we recommend that practitioners view their role as simply providing an objective and comprehensive assessment of a defendant's deficits or lack thereof.

In using the model to assess whether a defendant has the mental and emotional capacities to represent himself, we propose five key questions that forensic practitioners should ask in their evaluations. These have been selected, as deficits in these areas directly affect a defendant's ability to perform the tasks described in the preceding section and listed in Table 1.

The questions are: Can the defendant engage in goal-oriented behaviors? Does the defendant have sufficient oral and written communication skills? Does the defendant have the ability to conform his social behavior to accepted norms? Is the defendant able to control his emotions in an adversarial arena? Is the defendant able to perform the basic cognitive functions needed to construct a legally logical defense and to make arguments in support of his position?

In the description of the model that follows, we provide examples of the types of emotional and mental deficits and incapacities that could interfere with a defendant's ability to perform adequately in each critical area. These examples in no way encompass the full range and types of deficits that a forensic practitioner may identify as critical to a defendant's performance. We also note that in some cases, cognitive neuroscientists have developed behavioral tests that may be of use in identifying deficits in cognitive functioning that can impinge on a defendant's capacity to self-represent. A well recognized example is the Wisconsin Card Sorting Test.

Goal-Oriented Behaviors

As detailed in the previous section, a defendant must be able to engage in and orchestrate a series of interlinked goal-oriented behaviors as part of trying to prove his innocence. Individuals with impairments in those cognitive processes that control goal-oriented behaviors have great difficulty in both making and executing goal-directed decisions. They are easily distracted by unrelated informational inputs and often are unable to select information from memory that is relevant to the demands of the task at hand or to inhibit the retrieval of information that is irrelevant. When required to perform multiple tasks in support of a goal, they have difficulty switching

between tasks and making the needed adjustments when the task demands change (Ref. 34, p 508).

These types of impairments are often hard to detect because people with these types of impairments can exhibit perfectly normal behavior. Their impairments become apparent only when they are required to do complex goal-oriented tasks, similar to those involved in preparing for and conducting a trial or following court protocols.

In assessing defendants with major mental illnesses, it is easy to overlook these types of impairments because of the other more flagrant symptoms that they manifest. Some symptoms of mental illness, however, suggest that serious mental illnesses, even when in remission, contribute to the impairment of cognitive processes that control goal-directed behaviors. For example, individuals with schizophrenia often display what is termed "thought disorder." Many of the common symptoms of thought disorder revolve around an inability to engage in the type of goal-directed communications that is essential to presenting one's thoughts and ideas. Thus, individuals who have thought disorder have trouble staying focused on what they are saying. They wander off to other topics in mid-sentence or become totally distracted by an irrelevant stimulus in their environment. In some cases they even become stuck on one word, saying it over and over again, a symptom that makes it impossible for them to complete their thoughts in a meaningful fashion.³⁵

This inability to complete thoughts and to follow a thought to its logical conclusion would be a serious handicap in completing trial tasks such as writing motions and managing and organizing case-related materials. It also could interfere with a defendant's ability to create a compelling story of his innocence from the maze of conflicting evidentiary details that characterize most cases.

Oral and Written Communication Skills

Language is the primary medium through which legal disputes are mediated in civilized society. Without language, the current legal system would not exist. Thus, almost every task a defendant must perform in the course of representing himself involves the ability to use oral and written language for purposes of communication and writing motions.

Dyslexia and other language impairments are obviously serious impediments to a defendant who wishes to represent himself. The types of communi-

cation problems seen in patients with mental illness also can seriously interfere with the ability of a defendant to serve as his own counsel. For example, the garbled illogical utterances of a defendant with formal thought disorder would affect his ability to communicate with a judge and jury. The inability of a defendant to complete utterances, which is called blocking, could make it impossible for him to deliver an opening statement. Other disturbances such as echolalia (in which a defendant persistently repeats the speech of the people around him) would disrupt court room processes. Similarly, the symptom of pressure of speech, in which a defendant is unable to stop speaking despite the attempts of others to interrupt him, could create untenable conditions in the courtroom that would make it impossible to continue the trial.³⁵

Conforming Social Behavior

Impairments in social behavior would not appear on the surface to affect a defendant's mental competence to conduct his defense. A defendant who represents himself, however, cannot operate in an isolation bubble. Preparing for and conducting a trial requires the defendant to interact with witnesses, judges, court personnel, and opposing counsel. Most important, he must persuade the jury to adopt his view of the case. Social skills are particularly important in these tasks. Judges, court personnel, and witnesses will all be more helpful if a defendant can successfully engage in appropriate social behavior and cooperate with others.³⁶⁻³⁹

Good social skills are rooted in the ability of an individual to construct a realistic sense of self, make accurate inferences about the mental states of others, and conform his behavior to social rules and norms. Each of these areas of potential dysfunction can seriously interfere with a defendant's mental competence to represent himself.

Unrealistic Sense of Self

Psychological research has found that, in general, we have an overly optimistic sense of self and our abilities, but this rosy view of self typically does not stray too far from reality.⁴⁰ However, in some people with brain damage or certain forms of mental illnesses, this link to reality is lost, resulting in an exaggerated self-regard and gross overestimation of their abilities (Ref. 34, pp 570-1).

A distorted sense of self can put a defendant who represents himself at a disadvantage because he is

likely to discount or disregard the expert advice and assistance of others. For example, judges at times give defendants who represent themselves advice and help as they struggle to navigate courtroom procedures.⁴ A defendant with an unrealistic view of his abilities is likely to disregard this advice and, as a result, make it impossible for the judge to manage the proceedings and ensure that required protocols are followed.

Inability to Infer Accurately the Mental States of Others

Recent research suggests that the same cognitive processes that a person uses to construct a sense of self are involved when a person tries to infer the mental states of others. Thus, a defendant who lacks a realistic sense of self is also likely to be seriously handicapped in his ability to infer accurately the mental states of others.⁴¹ Such individuals can, on the basis of the flimsiest evidence, perceive others as intent on doing them harm. As a result, a defendant with paranoia is likely to view courtroom personnel, the opposing attorney, and judge with great suspicion and express his fear of them in outbursts of anger and hostility and refusals to cooperate. Moreover, such a defendant may even take offense at the testimony of his own favorable witnesses.³⁵

The ability to infer the mental states of others also impinges on a defendant's ability to take the perspective of others. This ability, which is often found lacking in persons with schizophrenia or bipolar disorder, is essential to effective representation. Attorneys who can see a situation from the viewpoint of the other side are better able to represent their clients because they can anticipate how a certain argument or stratagem will influence the jury.

Conform Behavior to Courtroom Norms

The courtroom is laden with formal rules and procedures that explicitly dictate the behavior of the participants. Individuals, such as those with Asperger's syndrome and autism, who are inner directed, often fail to notice social cues that indicate that they are behaving inappropriately. As a consequence, it is difficult for such persons to learn social rules and correct behavior. In the courtroom, this obliviousness to social norms is likely to translate into an inability to follow or learn prescribed trial procedures and the rigid rules of court decorum. Even with the judge's assistance it is unlikely that the defendant with this type of impairment could conform his behavior to the required protocols (Ref. 34, pp 561–3).

Controlling Emotions

The courtroom can be a highly stressful environment for anyone, especially the uninitiated. A defendant who has no legal experience is likely to find the experience taxing on his ability to control his emotions and remain focused on presenting his own case. Defendants with various mental illnesses frequently find it hard to control their emotions in any circumstance, let alone one fraught with unpredictability and involving such high stakes as a long prison term. Thus, forensic practitioners should examine a defendant's ability to exercise impulse control in stressful environments. A defendant's medical records should also be reviewed to make sure that he is not subject to debilitating panic attacks and other types of anxiety disorders that could paralyze him in the courtroom and make it impossible for him to proceed.

Cognitive Abilities

To build an adequate defense to the charges against him, a defendant must be able to construct relevant fact-based arguments that convince the court and jury of his innocence and support the motions that he files to protect his procedural and constitutional rights. This requires that the defendant be able to identify and distinguish the facts embedded in witness statements and discovery materials that help his case and then effectively integrate these facts into the legal arguments that they support. In addition, a defendant must have the cognitive capacity to connect facts and law in a logical sequence that supports the propositions in these arguments. If a defendant lacks these cognitive abilities, his arguments are unlikely to make sense, and, as a result, he will both literally and figuratively be unable to exercise his basic human right to be heard by the court and jury.

An inability to exercise the types of cognitive flexibility needed to perform such tasks can often be identified with the Wisconsin Card Sorting Test, which measures a person's ability to inhibit information that is irrelevant to the task at hand and to switch between conceptual categories in response to changes in sorting rules (Ref. 42, pp 587–8). Individuals with schizophrenia, bipolar disorder, or major depression perform poorly on this test. Their performance suggests that they may be impaired in their ability to execute the types of cognitive tasks involved in manipulating concepts and matching facts to propositions that are central to constructing relevant fact-based arguments. This impairment is particularly

marked in those with paranoid schizophrenia whose obsessive attention to details may suggest that they would be good at constructing arguments. Instead, they make significantly more of the types of perseverative errors (inappropriate repetition and harping) that signify a lesser ability to switch between sorting categories than those with nonparanoid schizophrenia.^{43,44}

Individuals with the loosened associations found in thought disorder are also unlikely to be able to construct the associative and logical links between concepts and words that are key to producing meaningful arguments.³⁵ Similarly, defendants with delusions and other distortions of reality found in psychosis may find it difficult to accept the verity of witness statements that both buttress and detract from their arguments.³⁵

Finally, it is important to take into consideration in any assessment the impact of antipsychotic drugs on cognitive functioning. Courts often take the position that a defendant who lacks competence to stand trial due to mental illness can be rehabilitated with antipsychotic drugs. Although studies have produced mixed results, there is evidence that some antipsychotic drugs can impair cognitive functioning or, at the very least, fail to improve cognitive functioning. Therefore, even though a defendant complying with treatment with antipsychotic drugs is no longer displaying symptoms of flagrant mental illness, whether the patient retains or lacks the cognitive abilities needed to self-represent should be assessed by the examiner.⁴⁵

Conclusion

The five-part mental competency model that we have proposed provides practitioners with guidelines for assessing a defendant's ability to execute the complex series of tasks involved in preparing for and conducting a defense. Moreover, it has the advantage of providing a means for practitioners to identify the specific areas in which a defendant has severe limitations and needs targeted assistance. As the table of tasks presented in this article demonstrates, competence to self-represent effectively embraces multiple capacities. Therefore, it should not be treated as a unitary concept that either qualifies or disqualifies a defendant to represent himself.

We thus recommend that practitioners use the proposed conceptual model to provide more nuanced analyses of defendants' capacities, so that court

systems can respond to defendants' needs in more constructive ways. For example, in the case of a defendant who has deficits in the area of goal-directed behavior, courts could provide him with an administrative assistant to make sure he completes all of the necessary pretrial tasks or standby counsel to assist him in navigating the complicated web of court procedures. A defendant who lacks oral and written communication skills may benefit from the assistance of court-appointed counsel who can help him use appropriate legal modes of communication to present his arguments and defense. Coaches and mental health practitioners could be assigned to help a defendant who has deficits in social behavior. Where a defendant is unable to control his emotions, courts may, in the interests of justice and preserving the appearance of a fair trial, choose to deny a defendant the right to self-represent.

Finally, the model provides forensic practitioners with a pragmatic tool that they can use as part of balancing "their competing duties to the individual and society."⁴⁶ In helping the court determine whether an individual who wishes to self-represent has the requisite capacities, practitioners serve the interests of society in seeing that justice is delivered fairly and equitably and, at the same time, ensure that an individual's human dignity and autonomy, as embodied in his right to defend himself against criminal charges, are respected.

Acknowledgment

The authors thank members of the Program in Psychiatry and Law, Department of Psychiatry, Beth Israel Deaconess Medical Center, Harvard Medical School, for their critical review.

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