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## The Role of “Coordinating Discovery Attorneys” in Multidefendant Federal Criminal Cases

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# THE ROLE OF “COORDINATING DISCOVERY ATTORNEYS” IN MULTIDEFENDANT FEDERAL CRIMINAL CASES

*Hannah Silverman\**

*The twenty-first century’s technological revolution has shifted the practice of law, including litigation, from being primarily paper-based to paperless. To manage the increasingly complex organization and review of evidence in civil and criminal cases, attorneys outsource legal tasks, work on teams, and use discovery coordinators.*

*This Note examines the development of court-appointed coordinating discovery attorneys and their role in multidefendant federal criminal trials involving voluminous discovery. With a background in criminal defense and electronic discovery, these lawyers provide hands-on assistance as a way to cut costs, help overburdened and underfunded defense counsel, and improve representation of criminal defendants. In 2014, however, one district court judge denied the appointment of a coordinating discovery attorney, citing the role’s seemingly insurmountable ethical complexities. Since then, no court or legal scholar has studied how coordinating discovery attorneys can best promote fairness and efficiency consistent with the ethics rules. After examining how the American Bar Association’s Model Rules of Professional Conduct apply to this role, this Note concludes that by carefully circumscribing the role and establishing proper ground rules, coordinating discovery attorneys can provide beneficial and substantive legal assistance to multiple codefendants at once.*

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#### INTRODUCTION

Even in the days where discovery in document-heavy cases was physical, finding important documents was sometimes like searching for a needle in a haystack.<sup>1</sup> Since then, the volume of records has increased exponentially, and the forms of discovery have become more complex.<sup>2</sup> Now, lawyers usually find the “smoking gun” in electronically stored information (ESI)—sometimes in the minutia of metadata.<sup>3</sup> Once an anomaly in discovery, ESI is the new norm.

With these rapid technological changes, it is unrealistic to expect one lawyer to collect, organize, and review every piece of documentary evidence and discover the ones that matter.<sup>4</sup> To help navigate these discovery labyrinths, lawyers have turned to coordinators, consultants, contractors, and

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1. Orin S. Kerr, *Digital Evidence and the New Criminal Procedure*, 105 COLUM. L. REV. 279, 303 (2005).

2. See DOUGLASS MITCHELL & SEAN BRODERICK, RECOMMENDED E-DISCOVERY PRACTICES FOR FEDERAL CRIMINAL JUSTICE ACT CASES 1–2 (2009), <https://www.fd.org/sites/default/files/Litigation%20Support/recommended-e-discovery-practices.pdf> [<https://perma.cc/44P7-QKVP>].

3. See *id.* at 3.

4. See *id.*

outside experts. In class actions and multidistrict litigation, plaintiffs may retain lead counsel or liaison counsel to streamline discovery efforts.<sup>5</sup> In high-volume white collar prosecutions, privately retained defense attorneys may outsource their discovery review.<sup>6</sup> In cases involving indigent defendants, however, there is an imbalance between the government, with seemingly limitless resources to investigate, organize, and review ESI, and court-appointed defense attorneys, who often have few resources to coordinate their efforts.<sup>7</sup> This inequity places criminal defendants, especially those unable to retain counsel, at risk of overlooking exculpatory evidence.<sup>8</sup>

Coordinating discovery attorneys (CDAs) play an increasingly popular role in multidistrict federal criminal cases and have the potential to level the playing field. Under contract with the Administrative Office of the United States Courts (AOUSC), CDAs are criminal defense attorneys “who have technological knowledge and experience, resources, and staff to effectively manage complex ESI in multiple defendant cases.”<sup>9</sup> In recent years, CDAs have been recognized for offering court-appointed defense attorneys in multidistrict cases a unique resource they would not otherwise have: an additional attorney that, simply put, bears the burden of managing discovery on behalf of all the defendants.<sup>10</sup>

CDA assistance on federal Criminal Justice Act of 1964<sup>11</sup> (CJA) cases with voluminous electronic discovery eliminates duplicative and costly efforts that would normally fall on the shoulders of the often underfunded

5. See generally MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004).

6. Brandon James Fischer, Note, *Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad*, 16 SW. J. INT’L L. 451, 459 (2010).

7. Letter from Sean Broderick, Nat’l Litig. Support Adm’r, Admin. Off. of U.S. Courts, to CJA Study Comm. 2–3 (Feb. 19, 2016), <https://cjastudy.fd.org/sites/default/files/hearing-archives/san-francisco-california/pdf/seanbrodericksan-franwrittentestimony-done.pdf> [<https://perma.cc/KLA5-A4AL>].

8. Daniel B. Garrie & Daniel K. Gelb, *E-Discovery in Criminal Cases: A Need for Specific Rules*, 43 SUFFOLK U. L. REV. 393, 400 (2010).

9. JOINT ELEC. TECH. WORKING GRP., RECOMMENDATIONS FOR ELECTRONICALLY STORED INFORMATION (ESI) DISCOVERY PRODUCTION IN FEDERAL CRIMINAL CASES, at Strategies, Page 11 (2012), <https://www.fd.org/sites/default/files/Litigation%20Support/final-esi-protocol.pdf> [<https://perma.cc/URF2-YL5Y>] [hereinafter “ESI PROTOCOL”].

10. See, e.g., *United States v. Hernandez*, No. 14 Cr. 499 (KBF), 2014 WL 4510266, at \*2 (S.D.N.Y. Sept. 12, 2014).

11. Pub. L. No. 88-455, 78 Stat. 552 (codified as amended at 18 U.S.C. § 3006A (2012)). Congress passed the CJA in 1964 to establish a method for appointing and compensating attorneys who represent indigent defendants unable to retain counsel in federal criminal proceedings. See generally *id.*; see also *Defender Services*, U.S. CTS., <http://www.uscourts.gov/services-forms/defender-services> [<https://perma.cc/P5VF-49Y9>] (last visited Nov. 12, 2019). In 1970, Congress amended the CJA, sanctioning districts to establish federal defender organizations (FDOs) to serve as counterparts to federal prosecutors and as a resource to appointed counsel who represent at least two hundred persons annually. See Pub. L. No. 91-447, § 1, 84 Stat. 916, 916 (1970). Most attorneys that work with CDAs are appointed pursuant to the CJA. See *Direct Assistance for CJA Panel*, DEF. SERVICES OFF., <https://www.fd.org/litigation-support/direct-assistance-cja-panel> [<https://perma.cc/8FZN-4MXZ>] (last visited Nov. 12, 2019).

defense attorneys.<sup>12</sup> CDAs create a more cost-efficient and thorough discovery process by allowing court-appointed counsel to focus on case strategy rather than uploading, centralizing, and overseeing “millions of discovery items.”<sup>13</sup> Until Judge Katherine Forrest, then U.S. district judge for the Southern District of New York, challenged the role’s ethical implications in the 2014 decision *United States v. Hernandez*,<sup>14</sup> CDAs provided resource-constrained defense teams with the ability to lean on one attorney with the necessary expertise to manage large document productions.<sup>15</sup> This Note explores whether Judge Forrest’s concerns are as significant as she thought or whether CDAs can, in their limited role, serve a more substantive purpose to enhance defendants’ quality of representation.

Part I of this Note provides relevant background information about ESI and its effects on the discovery process in criminal cases. This Part also describes how ESI’s increasing complexity has impacted the average lawyer’s ability to thoroughly conduct discovery. This Part shows that these technologically driven changes have influenced the creation and continued need for CDA assistance. Part II traces the CDA’s role from 1993 to now, highlighting one district judge’s refusal to appoint a CDA in light of ethical concerns. This Part also discusses her decision’s impact on CDAs’ responsibilities. Part III explores the American Bar Association’s (ABA) Model Rules of Professional Conduct (“Model Rules”) related to CDAs’ assistance on multidefendant federal criminal cases<sup>16</sup> and concludes that any ethics issues can be cured through informed consent, carefully created ground rules, and judicial oversight.<sup>17</sup>

#### I. THE GROWTH OF ESI IN DISCOVERY: NEW PROBLEMS FOR CRIMINAL DEFENSE LAWYERS AND A SOLUTION IN CDAS

Our daily technology consumption—and the extensive digital information created as a result—continues to create new sources of discoverable ESI. Part I.A first describes ESI and how its growth increasingly burdens criminal defense attorneys as they prepare for trial. Part I.B then examines how this burden necessitates teamwork—namely attorneys seeking outside help from coordinators who have expertise in managing voluminous ESI. Finally, Part

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12. ESI PROTOCOL, *supra* note 9, at Recommendations, Page 1.

13. Letter from Russell M. Aoki to Hon. Kathleen Cardone, Chair, Ad Hoc Comm. to Review Criminal Justice Act Program 2 (Feb. 17, 2016), <https://cjastudy.fd.org/sites/default/files/hearing-archives/san-francisco-california/pdf/russaokisan-franwrittentestimony-done.pdf> [<https://perma.cc/M8UN-S44A>].

14. No. 14 Cr. 499 (KBF), 2014 WL 4510266 (S.D.N.Y. Sept. 12, 2014).

15. *See infra* note 129 and accompanying text.

16. The Model Rules function only as a “national framework for implementation of standards of professional conduct.” Tonia Lucio, *Standards and Regulation of Professional Conduct in Federal Practice*, FED. LAW., July 2017, at 50, 52. Each federal court determines its own standards of professional conduct—often applying the rules “adopted by the state in which the federal court sits.” *Id.* at 51. Nonetheless, the Model Rules’ principles are “fairly universal” and provide “useful guidance across jurisdictions.” *Id.* at 52.

17. While this Note analyzes the CDA’s role at the federal level, the analysis could apply at the state level, provided that a state creates a similar role for multidefendant criminal cases.

I.C introduces CDAs as a form of coordination and explains how the role streamlines discovery processes and expedites defense counsels' efforts in multidefendant criminal trials.

#### A. *An Overview on ESI*

Our ever-growing use of electronics—cell phones, computers, thumb drives, cloud computing, and the like—has swelled the amount of ESI in the world.<sup>18</sup> In 1996, only 5 percent of discoverable documents originated from an electronic source.<sup>19</sup> Now, over 90 percent of global communications are generated electronically.<sup>20</sup> By 2020, the amount of digital data is expected to reach forty-four zettabytes, and the total “bits” in the digital universe will surpass the number of stars in the physical universe.<sup>21</sup>

Due to the tremendous growth in digital data, discovery practice no longer entails two parties exchanging paper documents.<sup>22</sup> Criminal cases are no exception to this shift.<sup>23</sup> Because ESI grows in size and complexity each year, managing and reviewing such evidence presents a significant challenge for criminal defense attorneys.<sup>24</sup> In one multidefendant federal criminal trial, court-appointed counsel had to find a method to systematize and review “240,000 images on 19 DVDs and CD Roms, an additional 185 banker boxes of paper documents (approximately 460,000 pages), and 30 forensic images

18. See Andrew Jay Peck, *Foreword*, 26 REGENT U. L. REV. 1, 2–3 (2013); see also Jonathan Shaw, *Why “Big Data” Is a Big Deal: Information Science Promises to Change the World*, HARV. MAG. (Mar.–Apr. 2014), <http://harvardmagazine.com/2014/03/why-big-data-is-a-big-deal> [<https://perma.cc/KDC6-5NYK>] (“The data flow so fast that the total accumulation of the past two years—a zettabyte—dwarfs the prior record of human civilization.”).

19. Vlad J. Kroll, Note, *Default Production of Electronically Stored Information Under the Federal Rules of Civil Procedure: The Requirements of Rule 34(b)*, 59 HASTINGS L.J. 221, 221 (2007).

20. See *The (2004) Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 5 SEDONA CONF. J. 151, 151 (2004).

21. See *The Digital Universe of Opportunities: Rich Data & the Increasing Value of the Internet of Things*, EMC<sup>2</sup> (Apr. 2014), <https://www.emc.com/collateral/analyst-reports/idc-digital-universe-2014.pdf> [<https://perma.cc/JQ49-VAG2>].

22. See Seth Katsuya Endo, *Technological Opacity & Procedural Injustice*, 59 B.C. L. REV. 821, 840 (2018).

23. See, e.g., *United States v. Quinones*, No. 13–CR–83S, 2015 WL 6696484, at \*2 (W.D.N.Y. Nov. 2, 2015) (noting that as technology becomes more widespread, the government inevitably will produce more ESI as the original source of evidence); see also Daniel B. Garrie et al., “*Criminal Cases Gone Paperless*”: *Hanging with the Wrong Crowd*, 47 SAN DIEGO L. REV. 521, 522 (2010). The court in *Quinones* emphasized that collecting “thousands of hours of continuous video footage is an example of discovery not possible as recently as 10–15 years ago, because the recording and storage technology either did not exist yet or was prohibitively expensive.” *Quinones*, 2015 WL 6696484, at \*2.

24. See MITCHELL & BRODERICK, *supra* note 2, at 1–2. The ESI produced in criminal proceedings usually includes some or all of the following material: (1) investigative materials, (2) witness statements, (3) documentation of tangible objects, (4) third parties’ digital devices, (5) photographs and video/audio recordings, (6) Title III wiretap information, (7) court records, (8) tests and examinations, (9) expert material, (10) immunity and plea agreements, and (11) discovery material with special production considerations, like child pornography or trade secrets. See ESI PROTOCOL, *supra* note 9, at Strategies, Pages 1–2.

of computers, servers and thumb drives which held approximately 4.3 terabytes of data.”<sup>25</sup> Collecting, processing, and analyzing this mass of data is a daunting undertaking.<sup>26</sup>

Legal scholars, particularly judges, have expressed that this rise in ESI challenges effective representation.<sup>27</sup> Federal judges have observed that the average lawyer lacks the legal and technical expertise to advise their clients about the ESI affecting their cases.<sup>28</sup> One judge remarked that the majority of attorneys “have significant gaps in their understanding of e-discovery principles.”<sup>29</sup> Nonetheless, practitioners recognize that this new reality cannot be ignored, and effective advocacy requires adapting to technological advances.<sup>30</sup>

Especially in criminal cases, ESI can play a uniquely important role.<sup>31</sup> Unlike hard copy documents and tangible evidence, like guns or clothing, ESI may contain evidence that the prosecution—the custodian of the evidence—may not realize is exculpatory.<sup>32</sup> Because the criminal justice system lacks the procedural tools that provide criminal defendants with prompt access to ESI, defense attorneys must be prepared to request ESI from the prosecution or convince the court that the exchange of ESI is required to

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25. See MITCHELL & BRODERICK, *supra* note 2, at 2. “The reality is that in 2018, ‘document dumps’ are no longer relegated to white collar and/or corporate cases. Increasingly, large quantities of discovery are turned over in a wide variety of matters involving individual defendants.” Drew Findling, *From the President: Unable to Bear the Weight of the ‘Document Dump’: A Heavy Burden on Individuals*, NAT’L ASS’N CRIM. DEF. LAW. 5, <https://www.nacdl.org/Article/September-October2018-FromthePresidentUnabletoBear> [<https://perma.cc/77Y3-B3ST>] (last visited Nov. 12, 2019).

26. See MITCHELL & BRODERICK, *supra* note 2, at 2.

27. See, e.g., Aebra Coe, *Judges Lack Faith in Attys’ E-Discovery Skills, Survey Says*, LAW360 (Jan. 28, 2016), <http://www.law360.com/articles/751961/judges-lack-faith-in-attys-e-discovery-skills-survey-says> [<https://perma.cc/EU7E-V35W>].

28. *Id.* (“Disruptive change is needed if lawyers are to become e-discovery competent.”).

29. *Id.*

30. Samantha V. Ettari & Noah Hertz-Bunzl, *Ethical E-Discovery: Core Competencies for New York Lawyers*, N.Y.L.J. (Nov. 2, 2015), <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=66677> [<https://perma.cc/F3R8-UWM6>].

31. See, e.g., Garrie et al., *supra* note 23, at 523.

32. *Id.* This is significant because prosecutors are required to provide the defendant with any evidence in the prosecution’s possession that tends to negate the defendant’s guilt. See *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963) (holding that prosecutorial suppression of exculpatory evidence constitutes a due process violation).

mount a full and fair defense.<sup>33</sup> The Federal Judicial Center<sup>34</sup> has asserted that “[d]efense counsel’s effectiveness may depend on whether he or she has reviewed and understands the e-discovery in time to enter into informed plea negotiations.”<sup>35</sup>

The dramatic increase and complexity of ESI has made the discovery process exorbitantly expensive.<sup>36</sup> The RAND Institute for Civil Justice reported that, in 2012, costs of reviewing discovery material contributed 70 percent or more to the total costs of document production in over 50 percent of reported cases.<sup>37</sup> Assuming billable rates for law firm associates average between \$200 and \$500 per hour, the cost to review one gigabyte of data can exceed \$30,000.<sup>38</sup> Often, civil attorneys delegate discovery tasks to temporary contract attorneys, costing about \$40 to \$70 per hour, and up to \$300 for a higher-priced firm to review.<sup>39</sup> In the criminal context, while all defendants are entitled to build a defense, not all have the resources to employ e-discovery vendors or contract attorneys to help streamline review efforts.<sup>40</sup>

As long as technology continues to control how humans communicate and how evidence develops, criminal defendants will seek ESI from the

33. *See, e.g.*, Garrie et al., *supra* note 23, at 523. Nina Morrison, a senior staff attorney at the Innocence Project, observed that the self-enforcing and subjective nature of *Brady* productions is problematic because the rule demands “prosecutors who are competitive to do something that can harm their chances to win a case.” J. Brian Charles, *More States Forcing Prosecutors to Hand Over Evidence—Even When It Hurts Their Case*, GOVERNING (Apr. 20, 2018, 3:00 AM), <http://www.governing.com/topics/public-justice-safety/gov-criminal-justice-reform-brady-evidence-lc.html> [<https://perma.cc/TQ3M-FTHK>]. In light of prosecutorial subjectivity, some states have strengthened *Brady*’s protections. *Id.* Since 2004, Ohio, North Carolina, and Texas have all adopted “open-file” reforms, permitting both the prosecution and defense to examine any and all files possessed by law enforcement agencies, felony investigators, and/or prosecutors. *Id.* In 2018, New York state judges began ordering prosecutors to give the defense not only evidence that may be favorable to the defense but also to affirmatively seek exculpatory information from law enforcement. *Id.* Efforts to reform *Brady* at the federal level, however, have been unsuccessful. *Id.*

34. The Federal Judicial Center is the research and education agency of the federal judiciary. *About the FJC*, FED. JUD. CTR., <https://www.fjc.gov/about> [<https://perma.cc/ZP7Q-YX8V>] (last visited Nov. 12, 2019).

35. *See* SEAN BRODERICK ET AL., CRIMINAL E-DISCOVERY: A POCKET GUIDE FOR JUDGES 3 (2015), <https://www.fjc.gov/sites/default/files/2016/Criminal%20e-Discovery.pdf> [<https://perma.cc/5WCW-2GTJ>]; *see also* Garrie & Gelb, *supra* note 8, at 394 (“Criminal defense lawyers are as obligated as their civil law brethren to be conversant with electronic discovery and its various attendant forms of electronically stored information in order to effectively represent their clients.”).

36. *See* Endo, *supra* note 22, at 840.

37. NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY 41 (2012), [http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND\\_MG1208.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf) [<https://perma.cc/4T74-JDAF>].

38. *See The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 15 SEDONA CONF. J. 217, 220 (2014). “[A]ssuming one gigabyte equals 80,000 pages and assuming that an associate billing \$200 per hour can review 50 documents per hour at 10 pages in length, such a review would take 160 hours at \$200/hr., or approximately \$32,000.” *Id.* at 229 n.18.

39. PACE & ZAKARAS, *supra* note 37, at 26.

40. Garrie & Gelb, *supra* note 8, at 402–03.



government and third parties to understand the strength of the case against them.<sup>41</sup> Defense attorneys who fail to request and review ESI risk breaching their ethical responsibilities<sup>42</sup> and depriving their clients of an adequate defense.<sup>43</sup> While finding, organizing, and reviewing ESI is a cost issue in both criminal and civil proceedings, the failure to manage ESI effectively in a criminal matter may result in a defendant's loss of liberty.<sup>44</sup>

### B. Complex Discovery and the Demand for Coordination

Decades before ESI was a relevant topic, the legal field instituted cost-effective measures to confront intricate cases on trial dockets.<sup>45</sup> The *Manual for Complex Litigation* (the “*Manual*”), first published in 1969, has become an important resource that guides judges and lawyers in their management of class action suits and multidistrict litigation (MDL).<sup>46</sup> The *Manual* recognizes that in complex cases with multiple parties and extensive discovery, conventional procedures—where every attorney on the case receives and reviews all the evidence, files and argues motions, and examines witnesses—are prohibitively wasteful and burdensome to both the parties and the court.<sup>47</sup>

To reduce this burden, the *Manual* encourages attorneys to coordinate their efforts, or the court to authorize one or more attorneys to handle particular aspects of the litigation on behalf of other counsel and their clients.<sup>48</sup> Lead counsel, for example, may be charged with drafting and presenting arguments on substantive and procedural matters, working with opposing counsel to create and implement a litigation plan, organizing discovery

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41. *See id.* at 402.

42. The Model Rules implicitly acknowledge an attorney's duty to investigate the facts and circumstances relating to his or her client's case. MODEL RULES OF PROF'L CONDUCT r. 3.1 cmt. 2 (AM. BAR ASS'N 2018) (“What is required of lawyers . . . is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions.”). The ABA's Defense Function Standards set a clearer obligation on criminal defense lawyers. *See, e.g.*, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-4.1(c) (AM. BAR ASS'N 2015) (directing criminal defense counsel to undertake a prompt investigation, including “efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation”).

43. Garrie & Gelb, *supra* note 8, at 402–03.

44. *See id.*

45. *See, e.g.*, Christine Durham, *Taming the “Monster Case”: Management of Complex Litigation*, 4 LAW & INEQ. 123, 124 (1986) (“Fair and efficient resolution of complex litigation depends upon . . . the collaboration of the judge and the attorneys in developing, implementing, and monitoring a positive plan for the conduct of pretrial and trial proceedings.”).

46. *See generally* MANUAL FOR COMPLEX LITIGATION, *supra* note 5. Chief Justice Earl Warren first created the Coordinating Committee for Multiple Litigation of the United States Districts Courts to coordinate discovery among large-scale antitrust cases. *See* Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 123 (2015). Chief Justice Warren's project was successful and later codified. *Id.*

47. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 5, § 10.22.

48. *See id.*

requests and responses, examining deponents, and employing experts on behalf of other counsel.<sup>49</sup> And liaison counsel may be charged with administrative tasks, such as receiving and distributing orders, motions, and briefs, convening meetings of counsel, managing document depositories, and resolving scheduling conflicts for a team of attorneys.<sup>50</sup> Delegating and streamlining these various responsibilities improves the flow of litigation without risking fairness to the parties.<sup>51</sup>

Joint defense groups and judicial recognition of the joint defense privilege<sup>52</sup> exemplify how judges encourage attorneys to coordinate, among other things, ESI. Joint defense groups enable codefendants to share the weight of preparing for trial, including researching common legal issues, preparing motions, writing briefs, reviewing evidence, and developing strategy.<sup>53</sup> Further, teams can split the costs of experts, consultants, and third-party vendors, as well as the costs involved with creating and managing discovery databases.<sup>54</sup> Coordinating labor and pooling expenses between codefendants allows defense counsel to review the government's case more thoroughly while minimizing litigation expenses on the parties and the court.<sup>55</sup>

### C. CDAs: *The New Coordinators*

CDAs are similar to these other modes of coordination. Mindful of both the "overburdened criminal docket" and "the enormous burdens posed on the courts and lawyers by complex criminal cases," Judge Jack Weinstein, senior U.S. district judge for the Eastern District of New York, first appointed "administrative coordinating counsel" in related multidefendant criminal prosecutions.<sup>56</sup> Years later, the Joint Electronic Technology Working Group (JETWG)<sup>57</sup> formalized the role when drafting its *Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal*

49. *See id.* § 10.221.

50. *See id.* Other examples of coordinating roles in MDL include special masters, trial counsel, issue committees, and steering committees. *See* Redish & Karaba, *supra* note 46, at 123.

51. *See* Redish & Karaba, *supra* note 46, at 123.

52. *See, e.g.,* *United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997) (recognizing that the "common interest" or "joint defense" doctrine "generally allows a defendant to assert the attorney-client privilege to protect his statements made in confidence not to his own lawyer, but to an attorney for a co-defendant for a common purpose related to the defense of both" (quoting *United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1985))).

53. Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 *FORDHAM L. REV.* 871, 882 (1996).

54. Bradley C. Nahrstadt & W. Brandon Rogers, *In Unity There Is Strength: The Advantages (and Disadvantages) of Joint Defense Groups*, 80 *DEF. COUNS. J.* 29, 29 (2013).

55. Bartel, *supra* note 53, at 885.

56. *United States v. Mosquera*, 813 F. Supp. 962, 965 (E.D.N.Y. 1993).

57. The Director of the AOUSC and the U.S. attorney general established the JETWG in 1998 to develop and recommend best practices for ESI discovery in federal criminal cases. *See* ESI PROTOCOL, *supra* note 9, at Introduction, Page 1. The group consists of representatives from the Defender Services Office (DSO), the Department of Justice (DOJ), FDOs, private CJA attorneys, and liaisons from the federal judiciary and other AOUSC offices. *Id.*

*Criminal Cases* (the “*ESI Protocol*”) in 2012.<sup>58</sup> The JETWG specified that CDAs are criminal defense attorneys who are well versed in managing large volumes of ESI to improve review strategies in multiple defendant criminal cases.<sup>59</sup> Once appointed on a multidefendant federal criminal matter, CDAs address the timing and format of discovery productions, identify potential discovery issues, and help maintain the discovery material’s evidentiary integrity.<sup>60</sup> CDAs’ responsibilities carry significant advantages for the parties, defense counsel, and the court: for example, CDAs (1) ensure discovery productions are provided to defense counsel in a timely and useful form, (2) assess defense counsels’ litigation support needs and find the resources to meet them, (3) organize discovery material in the most efficient and effective fashion, (4) lower the costs of litigation support software, hardware, and third-party services, and (5) eliminate duplicative work.<sup>61</sup>

While the CDA’s role has changed over the last few decades, there is little literature investigating the value of the role, either in its original or current form. Despite one judge’s sense that the role engenders ethics issues, this Note argues that a more “unleashed” CDA is not only ethically sound but also advances the goals at the core of the Model Rules.

## II. CDA TIMELINE

This Part illustrates how CDAs have changed over time. Part II.A traces the role’s decades-old underpinnings in Judge Weinstein’s courtroom to a new stage before Judge Marsha Pechman, senior U.S. district judge for the Western District of Washington. Part II.A also describes how the JETWG’s *ESI Protocol* formalized and nationalized the previously regional CDA. As the climactic moment in this Note’s “story,” Part II.B examines Judge Forrest’s 2014 decision<sup>62</sup> to reject the appointment of a CDA and explores defense counsels’ motion to reconsider Judge Forrest’s decision. Finally, Part II.C describes how Judge Forrest’s decision narrowed the CDA’s scope moving forward.

### A. Pre-Hernandez

The CDA’s evolution has been anything but static. This section follows the role’s transformation from 1993 to 2014. Part II.A.1 first describes Judge Weinstein’s innovative idea to appoint coordinating counsel, attorney Eleanor Jackson Piel, in related multidefendant criminal cases. This section also describes Ms. Piel’s impact on the case’s outcome. Part II.A.2 addresses

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58. *Id.*

59. *Id.* at Strategies, Page 11.

60. Memorandum from Sean Broderick, Nat’l Litig. Support Adm’r, Admin. Off. of U.S. Courts, to Fed. Pub./Cmty. Defs. & Panel Attorney Dist. Representatives 1 (June 11, 2018), [https://www.fed.org/sites/default/files/litigation\\_support/2018-06-11-cda-announcement.pdf](https://www.fed.org/sites/default/files/litigation_support/2018-06-11-cda-announcement.pdf) [<https://perma.cc/4C6K-SA2B>] [hereinafter Memorandum from Sean Broderick].

61. *Id.* at 2.

62. *United States v. Hernandez*, No. 14 Cr. 499 (KBF), 2014 WL 4510266 (S.D.N.Y. Sept. 12, 2014).

Judge Pechman and attorney Russell Aoki's reimagination of the role in a 2003 fraud prosecution. Next, Part II.A.3 explores the JETWG's *ESI Protocol*, detailing the various recommendations that defense counsel should take when managing complex cases with voluminous ESI, including appointing CDAs. Finally, Part II.A.4 analyzes the orders to appoint CDAs from 2012 to 2014, highlighting the broad role visualized prior to Judge Forrest's impactful decision.

### 1. 1993: Judge Weinstein's Model

In 1993, Judge Weinstein first appointed "administrative coordinating counsel" in *United States v. Mosquera*,<sup>63</sup> a multidefendant narcotics and money laundering prosecution. As a "pilot project" pursuant to section 3006A(a) of the CJA,<sup>64</sup> Judge Weinstein found that the eighteen Spanish-speaking defendants, the corresponding number of lawyers, and the burdensome discovery—including roughly 10,000 documents, 550 tape recordings, and document translations—warranted the appointment of a coordinating attorney.<sup>65</sup> The court observed that its authority to maintain an efficient docket and a broad reading of the Federal Rules of Criminal Procedure—"construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay"—further justified the appointment for good cause.<sup>66</sup>

With Rule 44 of the Federal Rules of Criminal Procedure in mind,<sup>67</sup> Judge Weinstein assured that this coordinating attorney would not infringe on any one defendant's right to loyal and zealous counsel.<sup>68</sup> In fact, Judge Weinstein rejected the recommendation of the *Judges' Manual for the Management of Complex Criminal Jury Trials* to select one defense attorney on the case to

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63. 813 F. Supp. 962 (E.D.N.Y. 1993).

64. See 18 U.S.C. § 3006A(a) (2012) (authorizing the court to furnish "investigative, expert, and other services necessary for adequate representation").

65. See *Mosquera*, 813 F. Supp. at 967.

66. *Id.* at 966–68. Judge Weinstein presented the statistics behind what he called an "exploding criminal docket": between 1991 and 1992, there was a 14.8 percent increase in criminal filings and an 11.5 percent increase in the number of criminal defendants in the Eastern District of New York. *Id.* at 965. Today, the federal docket remains congested. While there was only a 0.6 percent increase in criminal filings and a 7.3 percent decline in the number of criminal defendants in the Eastern District of New York between 2017 and 2018, nationally, statistics showed an 8.7 percent increase in criminal filings and a 7.5 percent increase in the number of criminal defendants over that same time period. *Federal Judicial Caseload Statistics 2018 Tables*, U.S. CTS., <http://www.uscourts.gov/federal-judicial-caseload-statistics-2018-tables> [<https://perma.cc/DKD3-EW6V>] (last visited Nov. 12, 2019) (Scroll down to "U.S. District Courts—Criminal," follow hyperlinks to "Criminal Defendants Filed, Terminated, and Pending (Including Transfers)" and "Criminal Cases Filed, Terminated, and Pending (Including Transfers)" and download data tables.)

67. "[T]he court must take appropriate measures to protect each defendant's right to counsel." FED. R. CRIM. P. 44(c)(2). Judge Weinstein underscored that Rule 44 implores judges to "ensure that no conflicts of interest arise where two or more defendants are represented by the same counsel." See *Mosquera*, 813 F. Supp. at 967.

68. See *Mosquera*, 813 F. Supp. at 967 ("Such coordination will not impinge on the right of each defendant to independent counsel and full individual due process.").

act as lead counsel for the defense as a whole.<sup>69</sup> Especially in drug cases where the lead defendant may use his or her control to disadvantage the other codefendants, Judge Weinstein decided that appointing an attorney of record to act as the coordinator for the group could lead to conflicts of interest.<sup>70</sup> Judge Weinstein found, however, that an independent coordinator, who is “limited to ensuring the smooth administration of the case and the coordination of efforts among defense counsel,” can avoid conflicts and act “consistent[ly] with due process.”<sup>71</sup>

To that end, the court appointed Eleanor Jackson Piel as coordinating counsel, specifying that she would not represent any one particular defendant and instead would act “for the defense” universally.<sup>72</sup> Judge Weinstein further clarified that Ms. Piel’s role would be limited: she could not negotiate plea deals between any defendant and the government, appear on substantive or procedural motion, communicate *ex parte* with the court, or advise any defendant or attorney of record directly.<sup>73</sup> The court authorized Ms. Piel to, among other things, (1) coordinate communications with the court and the government,<sup>74</sup> (2) use computers or other technological means to expedite the organization and review of discovery, (3) locate discovery material relating to individual defendants, (4) make evidence accessible to defense counsel and defendants, (5) retain paraprofessionals to perform document-related tasks, (6) obtain interpreters, (6) arrange and host meetings for defense counsel, and, more generally, (7) “take such further action as will assist the court and defense counsel in expediting the case and providing due process at the least possible cost to the government.”<sup>75</sup> Judge Weinstein also emphasized that each defendant consented to the appointment of the discovery coordinator with the understanding that this attorney would provide administrative rather than legal assistance and that each defendant’s attorney would retain sole representational obligations.<sup>76</sup>

According to Ms. Piel’s postlitigation report,<sup>77</sup> *Mosquera* ended one year later in two dismissals and guilty pleas for the remaining defendants.<sup>78</sup> In her report, Ms. Piel stated that without her aid, the expedited outcome—a

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *See id.*

74. The court permitted the coordinator to liaise with the government on administrative matters only, unless all defense counsel requested otherwise. *See id.*

75. *Id.*

76. *See id.*

77. Report of Coordinating Counsel to the Court, *United States v. Mosquera*, No. CR 92–1228 (JBW) (E.D.N.Y. Mar. 17, 1994), 1994 WL 593977, at \*1.

78. *Id.* The court appointed Professor Gerard D. Lynch to review Ms. Piel’s report and determine whether her role in *Mosquera* would be valuable in future complex federal criminal cases. *See id.* Presently, courts do not ask CDAs to submit a report at the end of a case, though some judges nonetheless request progress updates throughout the trial. *See, e.g.*, Order at 3, *United States v. Benzer*, No. 13-Cr-18 (D. Nev. Aug. 7, 2015), ECF No. 732 (listing the twenty-five sealed status reports filed by the CDA, Mr. Aoki).

global plea within one year—would not have occurred.<sup>79</sup> She concluded that the appointment of a coordinating attorney would benefit similar multidefendant cases in the future, noting that “[t]he aid of a coordinating counsel permits an advocate to operate on behalf of the defendants with no risk to any one defendant’s case, thus fortifying the independence of each of the defense counsel.”<sup>80</sup>

Ms. Piel’s report identified several tasks that helped the defense team secure a quick resolution.<sup>81</sup> Throughout the pretrial process, Ms. Piel repeatedly requested discovery from the government through phone calls, letters, and motions.<sup>82</sup> She underscored that her ability to press the government for evidence took significant pressure off the attorneys of record since she could “make demands . . . without fear of recrimination in acting on behalf of *all* the defendants and their counsel.”<sup>83</sup> Moreover, because the global plea’s terms involved a substantial downward modification from the Federal Sentencing Guidelines, defense counsel relied on Ms. Piel to determine whether the court could legally impose a sentence below the guidelines’ range.<sup>84</sup> Ms. Piel also assisted the defense attorneys with formulating their sentencing arguments to the court.<sup>85</sup>

Although these tasks surpassed “administrative assistance” as defined in Judge Weinstein’s order,<sup>86</sup> Ms. Piel’s contributions “equalize[d] the equation and enforce[d] the underlying concept of ‘due process of law.’”<sup>87</sup> Without impinging on any defendant’s right to zealous and loyal counsel, Ms. Piel “expedite[d] the proceedings and . . . coordinate[d] matters which might otherwise take up valuable court time.”<sup>88</sup> Despite this successful “pilot project” that benefitted the defendants, the government, and the court,<sup>89</sup> few district courts followed this case’s precedent.<sup>90</sup>

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79. See Report of Coordinating Counsel to the Court, *supra* note 77, at \*15 (“There is no doubt in my mind that my functioning in this case contributed to a conclusion which occurred more rapidly than it otherwise might have occurred had there been no coordinating counsel.”).

80. See *id.* at \*16.

81. See *id.* at \*17–19.

82. See *id.* at \*17. In one letter to the government, Ms. Piel wrote, “[w]ith regard to discovery under FRCP Rule 16(a)(1)(A), this is a request that you turn over to each of the defense counsel a list of all conversations attributed to each individual defendant.” *Id.* at \*6. Unless Ms. Piel received authority from all defense counsel, such communication with the prosecution surpassed Judge Weinstein’s order granting Ms. Piel the ability to “coordinate communication with the government on administrative matters only.” *United States v. Mosquera*, 813 F. Supp. 962, 968 (E.D.N.Y. 1993).

83. Report of Coordinating Counsel to the Court, *supra* note 77, at \*16.

84. *Id.* at \*14.

85. See *id.* Ms. Piel convinced the attorneys of record to brief and argue the issue to persuade the court that departing from the guidelines was both judicially desirable and consistent with the sentencing guidelines’ purpose. See *id.*

86. *Mosquera*, 813 F. Supp. at 968.

87. Report of Coordinating Counsel to the Court, *supra* note 77, at \*16.

88. *Id.* at \*1.

89. See *id.*

90. *But see, e.g.*, Order, *United States v. Stephenson*, No. 93-CR-157 (D. Conn. Dec. 10, 1993), ECF No. 330 (appointing Jeremiah Donovan as administrative coordinating counsel for the defense); Pre-Trial Conference, *United States v. Felipe*, No. 94-CR-395 (S.D.N.Y. July

## 2. 2005: Reemergence of Coordinating Attorneys in Federal Criminal Trials

Appointing CDAs in their current form began with the help of Judge Pechman and Washington attorney Russell M. Aoki.<sup>91</sup> In 2003, Judge Pechman presided over a \$92 million securities fraud prosecution against Kevin Lawrence and his health and fitness company, Znetix.<sup>92</sup> The discovery material included nearly 1.5 million pages of scanned documents.<sup>93</sup> This high volume of ESI caused logistical problems for both the parties and the court.<sup>94</sup> In 2005, after the trial had concluded, Judge Pechman convened a group of Defender Services Office (DSO) attorneys and the U.S. attorney for the Western District of Washington to discuss more efficient and cost-effective methods to manage ESI in large criminal cases.<sup>95</sup> This group included Mr. Aoki, then the CJA Panel attorney appointed to represent Mr. Lawrence.<sup>96</sup>

Under Judge Pechman's stewardship, Mr. Aoki helped draft "best practices policies," a set of recommendations created to ensure efficient management of cases with voluminous ESI.<sup>97</sup> To implement the policies and develop new techniques to assist criminal defense attorneys in complex cases, the district court began appointing Mr. Aoki as a CDA in 2005.<sup>98</sup> In 2011, after this program's success in Washington, the DSO contracted with Mr. Aoki to provide the same services across the country.<sup>99</sup>

## 3. 2012: JETWG's Formal Recommendation to Appoint CDAs

Recognizing CDAs' success in Washington and attorneys' inexperience with ESI in criminal cases, the JETWG published the *ESI Protocol* in 2012.<sup>100</sup> While nonbinding, the *ESI Protocol* endorses a set of procedures to

8, 1994), ECF No. 53 (designating the case as unusual and complex and discussing the appointment of administrative coordinating counsel).

91. Letter from Russell M. Aoki to Hon. Kathleen Cardone, *supra* note 13, at 1.

92. *See generally* United States v. Lawrence, No. 02-cr-00260-MJP (W.D. Wash. Nov. 25, 2003).

93. *See* Tom O'Connor, *Understanding eDiscovery in Criminal Cases: eDiscovery Best Practices*, EDISCOVERY DAILY BLOG (Jan. 15, 2018), <https://ediscovery.co/ediscoverydaily/electronic-discovery/understanding-ediscovery-criminal-cases-ediscovery-best-practices> [<https://perma.cc/M6NT-99JD>]; *see also* Declaration of Russell M. Aoki in Support of Defendant Omar Latson's Ex Parte Motion for Appointment of Coordinating Discovery Attorney Russell M. Aoki at 3, United States v. Washington, No. 16-cr-06125 (W.D.N.Y. June 15, 2016), ECF No. 48 [hereinafter Aoki Declaration].

94. *See* O'Connor, *supra* note 93.

95. *See id.*

96. *See id.*

97. Letter from Russell M. Aoki to Hon. Kathleen Cardone, *supra* note 13, at 1.

98. *Id.*; *see also* Aoki Declaration, *supra* note 93, at 4.

99. Letter from Russell M. Aoki to Hon. Kathleen Cardone, *supra* note 13, at 1 ("I have been appointed by U.S. District Courts over 60 times.").

100. *See generally* ESI PROTOCOL, *supra* note 9. The *ESI Protocol* contains an introduction, the recommendations themselves, commentary that addresses technical and logistical issues in more detail, and an "ESI Discovery Production Checklist." *See generally* ESI PROTOCOL, *supra* note 9. The *ESI Protocol's* "[r]ecommendations are designed to

govern the production and management of ESI.<sup>101</sup> Guided by common law, local rules, and the experiences of veteran prosecutors and defense counsel, the *ESI Protocol* “provide[s] courts and litigants with . . . concrete strategies for improving efficiency, minimizing expense, increasing security, and decreasing frustration and litigation.”<sup>102</sup>

The *ESI Protocol* explains that ESI, while complicated, opens the door to greater efficiencies and cost-saving opportunities within the criminal justice system.<sup>103</sup> To realize these benefits, criminal attorneys must educate themselves and employ the best practices for managing e-discovery in multidefendant cases.<sup>104</sup> One best practice in criminal cases with voluminous ESI is to request the appointment of a CDA to streamline the e-discovery process.<sup>105</sup> In February 2016, sixty federal courts had active cases with court-appointed CDAs.<sup>106</sup>

Because there are only five CDAs working nationally,<sup>107</sup> the DSO’s National Litigation Support Team (NLST)<sup>108</sup> limits the number of cases that CDAs can work on at a time based on several factors, including (1) the number of codefendants, (2) the volume of discovery or unusual technological issues, (3) the geographic location of the prosecution, (4) the timing of defense counsel’s request for CDA assistance, and (5) the CDA’s workload.<sup>109</sup> All factors need not be present to warrant a CDA’s assistance,

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encourage early discussion of electronic discovery issues through ‘meet and confers,’ the exchange of data in industry standard or reasonably usable formats, and resolution of disputes without court involvement where possible.” Letter from Sean Broderick to CJA Study Comm., *supra* note 7, at 5.

101. Letter from Sean Broderick to CJA Study Comm., *supra* note 7, at 5. Unlike the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure do not contain established procedures for handling e-discovery. *Id.* The *ESI Protocol*, therefore, is an essential resource for federal criminal attorneys who were previously uncertain about how to manage ESI. *Id.*

102. SEAN BRODERICK ET AL., *supra* note 35, at 4.

103. See *ESI PROTOCOL*, *supra* note 9, at Introduction, Page 1.

104. *Id.*

105. See *ESI Protocol*, DEF. SERVICES OFF., <https://www.fd.org/litigation-support/Joint-Electronic-Technology-Working-Group/esi-protocol> [<https://perma.cc/KEX7-3MLD>] (last visited Nov. 12, 2019).

106. Letter from Sean Broderick to CJA Study Comm., *supra* note 7, at 6. In 2016, Russell Aoki maintained that nearly seventy different courts had appointed him as a CDA across the country. See Aoki Declaration, *supra* note 93, at 2.

107. In June 2018, the DSO announced its decision to increase the number of CDAs from three to five to meet the demand for CDA assistance. See Memorandum from Sean Broderick, *supra* note 60, at 1. The five CDAs assisting CJA counsel with managing voluminous ESI in select federal cases are Angela Campbell, Julie de Almeida, John Ellis, Russell Aoki, and Emma Greenwood. *Id.*

108. The NLST works with defense counsel to manage criminal cases with a large number of defendants, voluminous discovery, or complicated e-discovery issues. *Direct Assistance for CJA Panel*, *supra* note 11. The NLST also trains and educates FDO staff and CJA practitioners on strategies for addressing ESI and methods for choosing appropriate resources and beneficial ways of using technology in cases. *Id.* Finally, the NLST manages the CDAs working nationally. *Id.*

109. See *Coordinating Discovery Attorneys*, DEF. SERVICES OFF., <https://www.fd.org/litigation-support/coordinating-discovery-attorneys> [<https://perma.cc/B6XL-N2E7>] (last visited Nov. 12, 2019).



and the NLST weighs the factors against the seriousness of the alleged crime(s).<sup>110</sup> Once an NLST administrator determines that a CDA's support is justified, CJA counsel must petition the court ex parte to appoint a CDA.<sup>111</sup>

#### 4. 2012–2014: Appointing CDAs pre-*Hernandez*

Prior to September 12, 2014, when Judge Forrest denied the appointment of a CDA, orders appointing CDAs did not clearly define the duties or scope of the role. This indefiniteness may have stemmed from the *ESI Protocol*'s vague guidance that, in a multidefendant federal criminal prosecution, defendants should “seek the appointment of a [CDA] and authorize that person to accept, on behalf of all defense counsel, the ESI discovery produced by the government.”<sup>112</sup> It also ambiguously states that CDAs may “provide additional in-depth and significant hands-on assistance to CJA panel attorneys and [federal defender organization] staff,” without defining “in-depth” or “significant.”<sup>113</sup> The *ESI Protocol* offers no further instruction other than that “[g]enerally, the format of production should be the same for all defendants”—mindful of defendants’ potentially divergent “needs and interests.”<sup>114</sup>

Without defined responsibilities or restrictions, most orders between 2012 and 2014 appointed the CDA “for the defendants,” adding that the CDA’s duties were “defined within [the] Order along with the basis for her appointment.”<sup>115</sup> The orders then provided the reason behind the appointment, the allegations against the defendants, and a description of the extensive ESI.<sup>116</sup> Finally, the orders detailed the CDAs’ general duties:

The Coordinating Attorney shall oversee any discovery issues that are common to all of the defendants, including the use of interpreters to translate selected pleadings and discovery. The Coordinating Attorney shall address discovery issues to avoid potential duplicative costs that would be incurred if defense counsel were to employ support services or staff to organize the discovery. The Coordinating Discovery Attorney shall assess the most effective and cost-efficient manner in which to organize the

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110. *See id.*

111. *See id.*

112. *See* ESI PROTOCOL, *supra* note 9, at Strategies, Page 11. The *ESI Protocol* states that defendants alternatively can authorize one or two of the attorneys of record to act as the coordinating attorney. *Id.* This Note assumes, however, that the CDA is an AOUSC-contracted attorney rather than an attorney who is already appointed to represent an individual defendant in the case.

113. *See id.*

114. *See id.*

115. *See, e.g.,* Order Appointing Emma M. Greenwood as Coordinating Attorney at 2, *United States v. Franco*, No. 12 Cr. 932 (S.D.N.Y. Apr. 3, 2013), ECF No. 48 (emphasis added); *see also* Order for Appointment of Coordinating Discovery Attorney at 1, *United States v. Ortiz*, No. Cr 12-0119 (N.D. Cal. May 15, 2012), ECF No. 109 (“Attorney Blair Perilman is appointed as Coordinating Discovery Attorney for the CJA defendants.”).

116. *See, e.g.,* Order Appointing Emma M. Greenwood as Coordinating Attorney, *supra* note 115, at 2 (noting allegations of “a conspiracy to distribute narcotics” and ESI that included “a variety of scanned documents, consensually monitored telephone calls, wiretaps with corresponding line sheets and/or transcripts, and up to eight (8) terabytes of video files”).

discovery, utilizing methods such as the creation of a discovery index, that will benefit all defendants. The Coordinating Attorney shall seek input from defense counsel as to their assessment on general discovery issues. The Government shall work with the Coordinating Attorney to provide discovery in a timely manner . . . .<sup>117</sup>

Unlike Judge Weinstein, judges from 2012 to 2014 appointed CDAs without mentioning potential ethical conflicts. They also failed to define the bounds of CDAs' responsibilities or indicate whether the defendants needed to provide informed consent.

### B. Hernandez: *Why Orders to Appoint CDAs Changed*

This section discusses Judge Forrest's decision denying the appointment of a CDA in *Hernandez* and confronts how her decision affected orders to appoint CDAs moving forward. Part II.B.1 concentrates on the pretrial conference regarding defense counsel's motion to appoint a CDA. Part II.B.2 discusses *Hernandez* itself, exploring Judge Forrest's reasons to deny the appointment. Finally, Part II.B.3 considers defense counsel's motion for reconsideration and Judge Forrest's denial of that motion.

#### 1. Pretrial Conference Regarding Defense Counsel's Motion to Appoint a CDA

In *United States v. Hernandez*, the court convened the parties to discuss defense counsel's motion to appoint Emma Greenwood, a CDA, on behalf of the nine defendants charged with participating in a narcotics conspiracy.<sup>118</sup> During the colloquy, Judge Forrest warned that ethics issues would arise if the CDA's responsibilities exceeded administrative tasks, such as accepting ESI on behalf of all defense counsel, creating a repository for the information, ensuring that defense counsel has the necessary technical support, controlling costs by seeking low-cost vendors, and advancing cost-sharing opportunities with the government.<sup>119</sup> To the extent Ms. Greenwood would substantively review the discovery material on behalf of the nine different defendants, Judge Forrest theorized that Ms. Greenwood would form nine conflicting attorney-client relationships.<sup>120</sup> If Ms. Greenwood's tasks were "entirely repository-like," however, then the court contended that a vendor, not an attorney, should fill the role.<sup>121</sup> The court further cautioned that, without client consent, defense counsel could not off-load discovery responsibilities, like verifying that all appropriate discovery material had

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117. Order for Appointment of Coordinating Discovery Attorney, *supra* note 115, at 1; *see also* Order Appointing Emma M. Greenwood as Coordinating Attorney, *supra* note 115, at 2; Order to Appoint Russell M. Aoki and Emma Greenwood as Coordinating Discovery Attorneys at 2, *United States v. Sierra*, No. 11 Cr. 1032 (S.D.N.Y. Jan. 3, 2012), ECF No. 146.

118. Conference at 6, *United States v. Hernandez*, No. 14 Cr. 499 (S.D.N.Y. Sept. 10, 2014), ECF No. 70.

119. *Id.*

120. *Id.* at 8.

121. *Id.* at 9.

been received from the government, to another attorney: “at no time can any of the defense counsel not have full, entire, 360-degree responsibility for all aspects of the discovery process for their client.”<sup>122</sup>

The court also questioned how each defendant’s communications would remain confidential.<sup>123</sup> Assume defendant A’s attorney of record asked the CDA to run a search to find whether A was on a particular phone call that discussed the alleged crime or to find whether defendants B or C were more or less involved.<sup>124</sup> It may be, Judge Forrest suggested, that A’s attorney would not want B’s and C’s attorneys to find out about the search and results.<sup>125</sup> Judge Forrest asked what protections would be put in place to ensure these communications between the CDA and A’s attorney remained confidential to protect the defendants’ potentially divergent interests.<sup>126</sup>

## 2. Judge Forrest’s Decision

Two days after the pretrial conference, Judge Forrest denied defense counsel’s request to appoint the CDA.<sup>127</sup> The court reasoned that there are “obvious ethical and legal issues implicated by any court’s appointment of an attorney to act on behalf of multiple defendants in a criminal case,” due to, among other things, the absence of a well-defined, single list of CDAs’ tasks.<sup>128</sup> Until *Hernandez*, no other reported decision denied the appointment of a CDA. Instead, many judges expressed their appreciation for this cost-saving and judicially efficient role.<sup>129</sup>

Because CDAs are attorneys, owing a duty of undivided loyalty to their clients, Judge Forrest surmised that *one* CDA cannot manage discovery on behalf of *multiple* defendants without violating this duty.<sup>130</sup> Judge Forrest

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122. *Id.* at 8–9.

123. *See id.* at 9.

124. *See id.*

125. *See id.*

126. *See id.*

127. *United States v. Hernandez*, No. 14 Cr. 499 (KBF), 2014 WL 4510266, at \*1 (S.D.N.Y. Sept. 12, 2014).

128. *See id.* at \*2.

129. *See, e.g., United States v. Vujanic*, No. 3:09–CR–249–D (17), 2014 WL 3868448, at \*2 (N.D. Tex. Aug. 6, 2014) (“Vujanic will have the benefit of [the CDA’s] extensive prior experience in this case when attempting to narrow his examination of the discovery that the government has produced.”); *United States v. Sierra*, No. 11 Cr. 1032 (PAE), 2012 WL 2866417, at \*2 (S.D.N.Y. July 11, 2012) (acknowledging “the organized and vigorous efforts of . . . the coordinating discovery attorneys to make this discovery available to the defense promptly and in a user-friendly fashion,” guaranteeing that the evidence was “promptly and meaningfully reviewable by the defendants”).

130. *Hernandez*, 2014 WL 4510266, at \*4 (“No attorney can be designated to bear [the] responsibility [of ensuring defense counsel has access to his or her client’s full story] on behalf of more than one defendant without a *Curcio* hearing . . .” (citing *United States v. Curcio*, 680 F.2d 881, 887 (2d Cir. 1982))). A district court conducts a *Curcio* hearing to determine whether a defendant who intends to waive conflict-free representation is both competent and makes a knowing, voluntary, and intelligent waiver. *See Curcio*, 680 F.2d at 887. To assess the validity of a defendant’s waiver, many jurisdictions follow the Second Circuit’s established procedure: (1) advise the defendant of his or her right to conflict-free counsel, (2) instruct the defendant as to the dangers inherent in being represented by one attorney with

highlighted that each criminal defendant enjoys a Sixth Amendment right to conflict-free and effective assistance of counsel.<sup>131</sup> She noted that this right is so fundamental to the proper administration of the criminal justice system that insisting on it may be necessary despite defendants' stated preference to be jointly represented with waived conflicts.<sup>132</sup> The court posited that perhaps CDAs are not expected to act as attorneys or partake in a strategic capacity.<sup>133</sup> In that case, the court wondered why an attorney—rather than a third-party vendor who could avoid forming multiple attorney-client relationships—should act as the coordinator at all.<sup>134</sup>

The court anticipated that Ms. Greenwood's substantive involvement on the case would lead to ethical quandaries related to conflicts of interest, confidentiality, and competence. Judge Forrest wrote that any task related to discovery in a criminal case could have "substantive aspects," including: (1) guaranteeing that discovery materials are received and loaded onto a database for review, (2) tagging, indexing, or searching the ESI, (3) liaising with the prosecution beyond "a 'mail drop' capacity," (4) negotiating or requesting discovery materials, and (5) "conducting substantive document review."<sup>135</sup>

Judge Forrest acknowledged that coordinating ESI may achieve efficiencies and free underfunded CJA-appointed counsel from replicating administrative tasks.<sup>136</sup> However, since each individual attorney would otherwise perform the tasks delegated to Ms. Greenwood pursuant to defense counsel's motion, the court found that this role would exceed convenient coordination.<sup>137</sup> Moreover, because the "[h]ow, why, when, and to what extent" each defendant participated in the alleged crimes will differ, defense counsel must cater their review of evidence to uncover each defendant's unique story and ultimately strategize a unique defense.<sup>138</sup> If one CDA is responsible for uncovering nine different defendants' stories, Judge Forrest deduced, then "she will have responsibilities to all defendants at the same time."<sup>139</sup> The attorneys of record cannot, therefore, delegate all substantive

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divided loyalties, (3) permit the defendant to confer with chosen counsel, (4) encourage the defendant to seek independent advice, (5) allow reasonable time for deliberation and decision, and (6) engage in an open discussion to ensure that defendant understands the risks. *See United States v. Rodriguez*, 968 F.2d 130, 138–39 (2d Cir. 1992).

131. *See Hernandez*, 2014 WL 4510266, at \*3 (citing *Wood v. Georgia*, 450 U.S. 261, 271 (1981)).

132. *See id.*

133. *See id.* at \*4.

134. *See id.* at \*5 (emphasizing that if the reasons to seek the appointment of an attorney rather than a nonattorney vendor are to preserve attorney-client privilege or undertake responsibilities that require legal training, then the ethics problems concerning joint representation remain).

135. *Id.* at \*5–6.

136. *See id.* at \*3–4.

137. *See id.* at \*6.

138. *See id.* at \*3 ("Discovery may reveal that a defendant was 'only present' at a particular time; or not present at all; or heavily involved; or minimally involved; or was giving orders; or was receiving orders; or withdrew from the conspiracy at a particular point in time.").

139. *See id.* at \*4.

discovery tasks to a single attorney on behalf of all the defendants without violating their clients' right to conflict-free counsel.<sup>140</sup>

Finally, Judge Forrest raised a concern regarding the lawyers' competence.<sup>141</sup> Specifically, the court feared that the attorneys of record would rely on the CDA's technical expertise and inevitably inhibit their own fluency with legal technology.<sup>142</sup> Managing complex discovery, Judge Forrest urged, should not become a specialized task that only few lawyers can handle.<sup>143</sup> Judge Forrest asserted that if judges repeatedly appointed CDAs on multidefendant federal criminal cases, defense counsel would lose the technological competence that the Model Rules require.<sup>144</sup>

### 3. Motion for Reconsideration

In their motion for reconsideration, defense counsel attempted to quell Judge Forrest's concerns by reconceptualizing the CDA's role as nonrepresentational.<sup>145</sup> Rather than acting as an attorney for nine defendants, defense counsel wrote, Ms. Greenwood would provide litigation support services to the defense team as a whole.<sup>146</sup> In her supporting declaration, Ms. Greenwood described her contract with the DSO, which provided that she would manage data and document workflow, ensure the case remains on schedule as it relates to discovery, and overcome logistical problems as they arise.<sup>147</sup> Ms. Greenwood's individualized assistance, she averred, would be limited to "evaluat[ing] each assigned lawyer's level of computer sophistication" as well as instituting any work product protections to maintain privileges across defendants.<sup>148</sup>

The attorneys of record, not the CDA, would remain accountable for any errors in the discovery process.<sup>149</sup> Neither the DSO contract nor Ms. Greenwood's proposed responsibilities included giving legal advice, strategizing with defense counsel, communicating directly with defendants, making substantive judgments about the probative value of evidence, or participating in any trial proceedings.<sup>150</sup> Rather, defense counsel vowed Ms.

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140. *See id.*; *see also* United States v. Curcio, 680 F.2d 881, 887 (2d Cir. 1982) ("[A] possible conflict inheres in almost every instance of multiple representation, in part because the interests of the defendants may diverge at virtually every stage of the proceeding." (quoting Cuyler v. Sullivan, 446 U.S. 335, 348 (1980))); *supra* note 130 and accompanying text.

141. *See Hernandez*, 2014 WL 4510266, at \*7.

142. *Id.*

143. *Id.*

144. *See id.*; *see also* MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2018).

145. *See generally* Motion for Reconsideration, United States v. Hernandez, 14 Cr. 499 (S.D.N.Y. Sept. 19, 2014), ECF No. 69.

146. *See id.* at 2; *see also* Declaration at 2, United States v. Hernandez, 14 Cr. 499 (S.D.N.Y. Sept. 19, 2014), ECF No. 69-1 ("As a CDA, I address global discovery matters; matters involving individual discovery are beyond my purview as CDA and left to the client's respective defense counsel.").

147. *See* Declaration, *supra* note 146, at 2.

148. *See id.*

149. Motion for Reconsideration, *supra* note 145, at 5.

150. *See id.* at 4; *see also* Declaration, *supra* note 146, at 2.

Greenwood would only assemble and systematize global discovery.<sup>151</sup> This work would include objective, but not subjective, coding and negotiating with the government about the quantity and format of the ESI, but not its substance or content.<sup>152</sup> Defense counsel argued that because CDAs do not serve defendants' unique individual interests, but only their common interests, no conflict of interest would arise.<sup>153</sup> Ms. Greenwood's role, defense counsel analogized, is similar to a liaison attorney in a class action or MDL: while she would help gather, organize, distribute, and review the ESI to streamline the discovery process, she would not enter into any attorney-client relationships.<sup>154</sup>

Regarding confidentiality, Ms. Greenwood claimed that her law degree would only help preserve confidences.<sup>155</sup> To help avoid breaches of confidentiality, Ms. Greenwood maintained that she would keep annotations and tags created by one defense attorney separate from other defense attorneys sharing the same discovery database.<sup>156</sup> Defense counsel affirmed that the attorney-client privilege protects CDAs' communications with the defense team under the work-product doctrine since "the purpose of the communication is to assist the attorney in rendering advice to the client."<sup>157</sup>

With respect to competence, defense counsel stated that CDAs are authorized to train defense attorneys on the technological complexities of managing voluminous ESI.<sup>158</sup> Therefore, working with Ms. Greenwood would enable counsel to gain, not lose, technological skills and become more familiar with how to manage ESI in future cases.<sup>159</sup>

Judge Forrest denied defense counsel's motion for reconsideration, however, writing that "the [c]ourt does not believe [the CDA's responsibilities] are categorically non-representational."<sup>160</sup> Defense counsel did not persuade Judge Forrest that CDAs provide litigation support services

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151. See Motion for Reconsideration, *supra* note 145, at 4. In another case, Mr. Aoki described how CDAs systematize discovery. See Aoki Declaration, *supra* note 93, at 3. Mr. Aoki explained that once CDAs receive and catalog the discovery, they add discovery information into a spreadsheet, including the date, Bates numbers, defendant names, document type, event dates, and other information allowing the attorney to find relevant material to his or her client. See *id.* CDAs also hyperlink each discovery item into the spreadsheet, so that the individual lawyers need not scan a long index and then swap in the disc containing the relevant ESI. See *id.* Instead, the attorneys of record can click open the hyperlink and the document, photograph, audio, or video file will open. See *id.*

152. Motion for Reconsideration, *supra* note 145, at 7.

153. See *id.* at 4.

154. See *id.* at 5.

155. See Declaration, *supra* note 146, at 3.

156. *Id.*

157. Motion for Reconsideration, *supra* note 145, at 7 (quoting *United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011)).

158. *Id.* at 7–8.

159. *Id.*; see also Declaration, *supra* note 146, at 3 (quoting Ms. Greenwood's contract, which specifies that she will "[p]rovide training and support services to the defense teams as a group and individually").

160. See Order at 1, *United States v. Hernandez*, 14 Cr. 499 (S.D.N.Y. Sept. 22, 2014) (denying defense counsel's motion for reconsideration).

as consultants rather than legal representatives or that Ms. Greenwood could avoid conflicting duties of loyalty.<sup>161</sup>

*C. Post-Hernandez: Ramifications of Judge Forrest's Decision*

Judge Forrest's opinion affected the way defense attorneys now draft proposed orders to appoint CDAs. Prior to *Hernandez*, CDAs had broader authority to act. In *Mosquera*, Judge Weinstein authorized Ms. Piel to "take such further action as will assist the court and defense counsel in expediting the case and providing due process at the least possible cost to the government."<sup>162</sup> Although Judge Weinstein also delineated more administrative duties, such as securing space to store documents and obtaining interpreters,<sup>163</sup> this broad grant of authority authorized Ms. Piel to, for example, engage in legal research, obtain court orders permitting the defendants to listen to tapes at their respective institutions, and implore the government, via letters and phone calls, to meet its discovery obligations.<sup>164</sup>

Judges now appoint CDAs "for defense counsel," rather than for the defendants themselves.<sup>165</sup> Further, CDAs' responsibilities remain consistent across orders:

- Managing and, unless otherwise agreed upon with the government, distributing discovery produced by the government and relevant third party information common to all defendants;
- Assessing the amount and type of case data to determine what types of technology should be evaluated and used so that duplicative costs are avoided and the most efficient and cost-effective methods are identified;
- Acting as a liaison with federal prosecutors to ensure the timely and effective exchange of discovery;
- Identifying, evaluating, and engaging third-party vendors and other litigation support services;
- Assessing the needs of individual parties and further identifying any additional vendor support that may be required—including copying, scanning, forensic imaging, data processing, data hosting, trial presentation, and other technology depending on the nature of the case;
- Identifying any additional human resources that may be needed by the individual parties for the organization and substantive review of information;
- Providing training and support services to the defense teams as a group and individually; and

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161. *See id.*

162. *United States v. Mosquera*, 813 F. Supp. 962, 968 (E.D.N.Y. 1993).

163. *See id.*

164. *See* Report of Coordinating Counsel to the Court, *supra* note 77, at \*18.

165. *See, e.g.*, Order Appointing Shazzie Naseem as Coordinating Discovery Attorney at 1, *United States v. Goode*, No. 16 Cr. 529 (NSR) (S.D.N.Y. Sept. 19, 2016), ECF No. 33.

- Assisting CJA panel attorneys in the preparation and presentation of budgets and funding requests to the court.<sup>166</sup>

Current orders also state that CDAs do not provide representation and therefore do not enter into attorney-client relationships with any defendants.<sup>167</sup> Recent case law demonstrates that CDAs act only administratively; they consolidate and ease defense counsels' discovery review and assist with technology.<sup>168</sup>

Within this nonlegal scope, an e-discovery vendor or offshore consultant likely could handle most current CDA tasks. However, there are several key advantages to appointing a CDA: (1) the government is likely more willing to collaborate with CDAs rather than nonattorney vendors or offshore consultants who may not be working face-to-face with the defense team, (2) CDAs understand defense counsels' need to find certain kinds of discovery material whereas vendors cater to civil litigants and are unaccustomed to addressing concerns particular to criminal cases, (3) CDAs reduce expenses by seeking low-cost vendors and advancing cost-sharing opportunities with the government, (4) CDAs use their own criminal defense experience to better understand case strategy and review techniques, and (5) CDAs preserve attorney-client privilege.<sup>169</sup>

### III. UNDERSTANDING AND RESOLVING THE ETHICS ISSUES

While courts are appointing CDAs at a growing rate, no court or legal scholar has considered how CDAs can expand their role within the ethical confines. As Part II of this Note explained, CDAs presently hold an administrative role in multidefendant federal criminal trials with voluminous ESI and do not purport to exercise legal judgment.<sup>170</sup> Prior to *Hernandez*, however, CDAs were free to act with greater responsibility.<sup>171</sup>

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166. *E.g., id.* Some post-*Hernandez* orders omit the final bullet point. *See, e.g.,* Order Appointing Emma M. Greenwood as Coordinating Discovery Attorney at 1–2, *United States v. Valdez*, 18 Cr. 71 (D.R.I. Nov. 14, 2017), ECF No. 20.

167. *See, e.g.,* Order Appointing Emma M. Greenwood as Coordinating Discovery Attorney at 2, *United States v. Nunez*, No. 17 Cr. 438 (VEC) (S.D.N.Y. Aug. 24, 2017), ECF No. 48.

168. *See United States v. Galloway*, No. 1:17-cr-01235-WJ, 2018 WL 2994409, at \*4 n.2 (D.N.M. June 14, 2018) (appointing a CDA “to assist counsel in organizing the material”); *United States v. Budovsky*, 13cr00368 (DLC), 2016 WL 386133, at \*3 (S.D.N.Y. Jan. 28, 2016) (appointing a CDA “to provide technology assistance”); *United States v. Martin*, No. 8:12-cv-205-T-17MAP, 2015 WL 4623711, at \*1 (M.D. Fla. July 31, 2015) (appointing a CDA “for the benefit of a centralized electronic database”).

169. *See generally* Letter from Russell M. Aoki to Hon. Kathleen Cardone, *supra* note 13.

170. *See supra* notes 150, 166, 168 and accompanying text. “A CDA’s criminal defense attorney credentials are relevant only because they give the CDA practical experience in handling voluminous discovery in criminal cases: many criminal defense attorneys lack such experience, and most technology vendors deal mainly with civil litigation.” *See Motion for Reconsideration, supra* note 145, at 4.

171. *See supra* notes 81–88, 117 and accompanying text. In her 2014 decision, Judge Forrest noted the historically “broad-ranging CDA appointments.” *United States v. Hernandez*, No. 14 Cr. 499 (KBF), 2014 WL 4510266, at \*2 (S.D.N.Y. Sept. 12, 2014).



Although the CDA's role has shifted throughout the past few decades, this Part tests Judge Forrest's intuition—that CDAs “raise serious [ethical] concerns”<sup>172</sup>—under the most robust construction. To clarify this construction's broad scope, this Part envisions a scheme that mirrors Ms. Piel's assumed role in *Mosquera*<sup>173</sup> and departs from the clerical, post-2014 CDA. Limited only by their discovery focus, the “unleashed” CDA can:

(1) Help with subjective coding. Objective coding is limited to tagging a document by its date, time, sender, or recipient.<sup>174</sup> This Note presumes that CDAs can tag a document based on whether it might be helpful to one or more defendants.

(2) Search discovery databases substantively. Rather than merely searching for documents that, for example, have the word “gun,” CDAs can help construct and run searches that will unmask more critical themes that could inform plea or trial decisions.

(3) Offer defense counsel evidence that may help with his or her theory of the case. While CDAs cannot propose theories of the case, the attorneys of record may give their theory of the case to CDAs and, in return, CDAs can locate ESI that promotes or undermines that theory.

(4) Press the government to hand over discovery and determine the material among the voluminous ESI that pertains to each defendant.<sup>175</sup>

(5) Conduct legal research and develop discovery arguments relevant to all the defendants. If a global issue materializes during plea negotiations or trial, then defense counsel can seek CDA assistance.<sup>176</sup>

Some exceptions apply. CDAs *cannot*:

(1) Counsel individual defendants directly.  
(2) Negotiate plea offers with the government.  
(3) Help defense counsel strategize legal theories for individual defendants.

(4) Present any part of the case to the court, including opening arguments, direct or cross examinations, and summations. However, if a judge asks a

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172. *Hernandez*, 2014 WL 4510266, at \*5.

173. While Judge Weinstein imagined an administrative coordinator, Ms. Piel adopted a more substantive role. *See supra* notes 77–87 and accompanying text.

174. *See Aoki Declaration*, *supra* note 93, at 4.

175. *Compare* Report of Coordinating Counsel to the Court, *supra* note 77, at \*5 (“Counsel appeared to welcome a coordinating advocate and urged [Ms. Piel] to ascertain from the government what particular evidence out of the mass of tapes and other material the prosecution intended to offer in evidence against each of the defendants.”), *with* Order Appointing Shazzie Naseem as Coordinating Discovery Attorney, *supra* note 165, at 2 (“Discovery issues specific to any particular defendant shall be addressed by defense counsel directly with the Government and not through the Coordinating Discovery Attorney.”).

176. Again, Ms. Piel's role provides guidance. Report of Coordinating Counsel to the Court, *supra* note 77, at \*14 (“I assisted in the research in developing the legal arguments which we hoped would persuade the Court. Each counsel was requested to write up what might be pertinent to his/her own case concerning the justification for a downward modification.”); *see also supra* notes 84–85 and accompanying text.

CDA for a discovery status report or to answer questions in open court about the case, the CDA should be permitted to answer.<sup>177</sup>

This scope assumes CDAs can also still perform the administrative duties set out in orders post-2014.<sup>178</sup>

Part III concludes that courts should not hesitate to appoint CDAs under the most robust scheme. Even if ethics issues arise from CDAs acting with greater authority, they are surmountable. Part III.A explains limited-scope arrangements and lays out how CDAs' limited scope enables them to perform legal work for codefendants without violating the Model Rules. Part III.B describes potential conflicts of interest that may emerge but concludes that they will rarely arise and are waivable. Part III.C evaluates how CDAs can ethically maintain codefendants' confidences. Finally, Part III.D argues that CDAs' assistance will not reduce other defense attorneys' technological competence.

#### *A. Scope of Representation*

Model Rule 1.2(c) permits lawyers to limit the scope of their representation "if the limitation is reasonable under the circumstances and the client gives informed consent."<sup>179</sup> This ethical principle is not controversial, as "virtually all legal representations are limited in scope to some degree."<sup>180</sup> Encouraging limited-scope representations enables private lawyers to work in a more efficient legal services market and public interest lawyers to increase low-income persons' access to legal services.<sup>181</sup>

177. *See supra* note 78 and accompanying text.

178. *See supra* notes 165–68 and accompanying text. If CDAs *only* supplied administrative services that nonlawyers also could provide—"law-related services"—CDAs would not be burdened by the Model Rules, so long as they made their nonrepresentational role clear to the defendants. *See* MODEL RULES OF PROF'L CONDUCT r. 5.7 cmt. 3 (AM. BAR ASS'N 2018) (explaining that the Model Rules apply "unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply"). While Model Rule 5.7 uses several examples, including accounting, lobbying, economic analysis, and tax preparation, to illustrate law-related services, CDAs' administrative tasks, such as document management and litigation support services, clearly fall within the law-related services umbrella. *See id.* r. 5.7 cmt. 9; *see also* Mary C. Daly & Carole Silver, *Flattening the World of Legal Services?: The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEO. J. INT'L L. 401, 404 (2007); Hugh D. Spitzer, *Model Rule 5.7 and Lawyers in Government Jobs—How Can They Ever Be "Non-Lawyers"?*, 30 GEO. J. LEGAL ETHICS 45, 47 (2017). This Part assumes, however, that CDAs' duties exceed law-related services and, therefore, explores the applicable Model Rules governing lawyer-client relationships.

179. MODEL RULES OF PROF'L CONDUCT r. 1.2(c). The ABA defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." *Id.* r. 1.0(e).

180. Susan D. Carle, *The Settlement Problem in Public Interest Law*, 29 STAN. L. & POL'Y REV. 1, 14 (2018) ("Lawyers and clients together define the scope of the legal problem or problems they intend for the lawyer to address, and lawyers then typically draft a provision defining the scope of the representation being undertaken, which they include in the retainer agreement they offer the client.")

181. ABA SECTION OF LITIG., HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE 4 (2003), <https://>

Limited-scope arrangements, or “unbundled” legal services, are used, for example, to execute discrete transactions<sup>182</sup> or to aid low-income civil clients—without the right to counsel—in both housing<sup>183</sup> and family law settings.<sup>184</sup> From motion practice to discovery, judges have begun employing limited-scope arrangements in their courtrooms to control litigation costs and expedite solutions.<sup>185</sup>

While Model Rule 1.2(c) gives lawyers “substantial latitude” to form limited-scope relationships, “the limitation must be reasonable under the circumstances.”<sup>186</sup> If a client requests general information or advice about a straightforward legal issue, for instance, the lawyer and client may agree to limit the representation to a brief telephone conversation, so long as the call is “sufficient to yield advice upon which the client could rely.”<sup>187</sup> Further, limited scope does not mean limited competence; lawyers still have a duty to provide competent representation,<sup>188</sup> as well as comport with all other ethics rules, like loyalty and confidentiality.<sup>189</sup>

Examples of limited-scope arrangements in other settings demonstrate how CDAs can ethically limit the scope of their representations. In the corporate context, clients regularly separate a single transaction into discrete tasks, instructing different lawyers to perform independent segments of the

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[www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_scl\\_aid\\_handbook\\_on\\_limited\\_scope\\_legal\\_assistance.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_scl_aid_handbook_on_limited_scope_legal_assistance.authcheckdam.pdf) [https://perma.cc/T7QZ-245X]; see also ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., RESOLUTION WITH REPORT NO. 108, at 44 (2013), [https://www.americanbar.org/content/dam/aba/administrative/delivery\\_legal\\_services/ls\\_del\\_unbundling\\_resolution\\_108.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_resolution_108.authcheckdam.pdf) [https://perma.cc/PL69-UQUU] (“[T]he American Bar Association encourages practitioners, when appropriate, to consider limiting the scope of their representation, including the unbundling of legal services as a means of increasing access to legal services.”).

182. See, e.g., *In re Slabbinck*, 482 B.R. 576, 589 (Bankr. E.D. Mich. 2012) (holding that an agreement to limit an attorney’s legal services in connection with an individual bankruptcy case by unbundling the pre- and postpetition legal services is ethically permissible).

183. See James G. Mandilk, Note, *Attorney for the Day: Measuring the Efficacy of In-Court Limited-Scope Representation*, 127 YALE L.J. 1828, 1840–48 (2018) (describing several legal aid organizations that provide unbundled legal services in housing cases).

184. See Michele N. Struffolino, *Limited Scope Not Limited Competence: Skills Needed to Provide Increased Access to Justice Through Unbundled Legal Services in Domestic-Relations Matters*, 56 S. TEX. L. REV. 159, 168 (2014) (“Domestic-relations attorneys routinely limit the scope of their services to review a mediated divorce agreement without being obliged to advocate for a better resolution or to do further investigation.”).

185. See, e.g., Morris A. Ratner, *Restraining Lawyers: From “Cases” to “Tasks,”* 85 FORDHAM L. REV. 2151, 2151 (2017) (underscoring the new “judicial management” trend, which involves transforming “cases” into “tasks” as “the most efficient route to a resolution”).

186. MODEL RULES OF PROF’L CONDUCT r. 1.2 cmt. 7 (AM. BAR ASS’N 2018).

187. *Id.*

188. *Id.* For a limited-scope representation to be competent, the lawyer (1) must “render practical service to the client” and (2) “may not materially impair the client’s rights.” N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 604 (1989), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=5349> [https://perma.cc/4XPG-NPGR].

189. See, e.g., D.C. Bar Legal Ethics Comm., Op. 330 (2004), <https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion330.cfm> [https://perma.cc/4UMC-EQDT] (affirming that limited scope arrangements are ethically sound unless they “sweep away the applicable rules of professional conduct”).

transaction.<sup>190</sup> In lieu of one full-service lawyer, a corporate client may ask lawyer A to conduct due diligence, lawyer B to advise on the transaction's tax implications, lawyer C to counsel on financing matters, and lawyer D to prepare the legal documents.<sup>191</sup> The ABA recognizes that unbundling enables clients to meet their preferences and retain experts in specific areas of the law, while reducing the transaction's overall costs.<sup>192</sup>

In the litigation context, lawyers similarly limit the scope of their representations to discrete tasks.<sup>193</sup> For example, a lawyer who is primarily responsible for a matter but not admitted to that matter's jurisdiction—lead counsel—will commonly seek support from local counsel.<sup>194</sup> Although the designation of “local counsel” does not on its own “limit the attorney's role” or “narrow her ethical obligations to the client,” she “may circumscribe her role by entering into an agreement to limit the scope of representation” pursuant to Model Rule 1.2.<sup>195</sup> If the circumscription is reasonable and the client provides informed consent,<sup>196</sup> then local counsel's ethical obligations, including diligence, competence, and confidentiality, only apply to the specified tasks agreed to at the outset of the representation.<sup>197</sup> Suppose, as the New York City Bar Association (NYCBA) did, that lead counsel asks local counsel “to review the legal analysis in a summary judgment motion prepared by lead counsel, but to assume that the factual recitations are accurate.”<sup>198</sup> The NYCBA concluded that such a limitation is reasonable and that local counsel's ethical obligations only extend to reviewing the legal arguments.<sup>199</sup>

Notably, limited-scope representations are not confined to scenarios where multiple lawyers represent one client. Rather, it is routine for one lawyer to represent multiple parties under a limited-scope arrangement. Several individuals interested in creating a business entity or joint venture, for

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190. ABA SECTION OF LITIG., *supra* note 181, at 5.

191. *See id.*

192. *See id.* at 6.

193. *See* Bruce A. Green, *The Right to Two Criminal Defense Lawyers*, 69 MERCER L. REV. 675, 677 (2018) (“[T]wo solo practitioners may join forces on a large matter, or a lawyer conducting most of the representation independently may bring another lawyer into the matter for a discrete task, such as to draft motions or to consult on an issue where the second lawyer has particular expertise.”); Stephen C. Sieberson, *Two Lawyers, One Client, and the Duty to Communicate: A Gap in Rules 1.2 and 1.4*, 11 U.N.H. L. REV. 27, 30 (2013) (recognizing that one lawyer often engages a second lawyer as cocounsel “to share responsibility . . . in a matter because of its size or complexity”).

194. N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2015-4 (2015), <https://www2.nycbar.org/pdf/report/uploads/20072917-FormalOpinion2015-4DutiesofLocalCounsel.pdf> [<https://perma.cc/R29Q-38CQ>] [hereinafter Opinion 2015-4].

195. *Id.*

196. MODEL RULES OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 2018).

197. Opinion 2015-4, *supra* note 194, at 2 (“A written agreement that clearly limits the role of local counsel can benefit all parties by managing expectations, avoiding misunderstandings about the scope of the lawyer's responsibilities, minimizing disputes over the allocation of responsibility between lead counsel and local counsel, and managing costs.”).

198. *Id.*

199. *Id.* at 4. The NYCBA stressed, however, that local counsel “may not ignore obvious factual inaccuracies contained in the motion papers.” *Id.*

instance, may seek one lawyer's assistance for the sole purpose of drafting the agreement's terms.<sup>200</sup> This limited-scope lawyer is sometimes called a "scrivener," charged with preparing the agreement according to prenegotiated terms, "making it legally understandable and enforceable by all."<sup>201</sup> Although the scrivener may "identify structural flaws in the negotiated terms that might interfere with the smooth operation of the transaction," she may not advise on or propose terms that may benefit one party over another.<sup>202</sup> Similarly, several states' bars have opined that representing both the buyer and seller (or lender and borrower) in a noncomplex real estate transaction is ethically permissible, so long as the parties previously agreed to standard contract terms, such as "price, time and manner of payment."<sup>203</sup> The Massachusetts Bar Association maintained that a lawyer who receives the informed consent of both the lender and borrower can "obvious[ly]" represent both parties competently "in connection with such limited duties."<sup>204</sup> Such a limitation provides clients with "economic and professional benefits," including reduced legal costs and "representation by a lawyer with expertise in real estate and with familiarity with the borrower-client's purchase of real estate and the lender-client's policies and procedures."<sup>205</sup>

Comparable advantages result in the criminal context where CDAs supplement, but not substitute, full-service counsel's representation. Because CJA-appointed counsel and public defenders often lack the resources, time, and skill to cull discovery, defendants receive more effective representation when CDAs provided additional discovery assistance.<sup>206</sup> CDAs also cut costs by streamlining the work that multiple defense attorneys otherwise have to do themselves.<sup>207</sup>

CDAs' limited-scope duties only serve to enhance the defendants' representation. In fact, because CDAs "have experience working on CJA

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200. See, e.g., Henry Ordower, *Toward a Multiple Party Representation Model: Moderating Power Disparity*, 64 OHIO ST. L.J. 1263, 1274-75 (2003); Gretchen L. Jankowski, Comment, *The Ethics Involved in Representing Multiple Parties in a Business Transaction: How to Avoid Being Caught Between Scylla and Charybdis Within the Confines of the Maryland Disciplinary Rules*, 23 U. BALT. L. REV. 179, 203 (1993).

201. Ordower, *supra* note 200, at 1275.

202. *Id.*

203. See, e.g., N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 611 (1990), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=5622> [<https://perma.cc/TM33-7VEJ>]; see also Mass. Bar Ass'n, Ethics Op. 90-3 (1990), <https://www.massbar.org/publications/ethics-opinions/ethics-opinions-1990-opinion-no-90-3> [<https://perma.cc/VD96-6L8B>] [hereinafter Opinion 90-3] (holding that an attorney may represent both the borrower and lender in a real estate purchase "provided the attorney has carefully reviewed the loan documents and found no apparent unresolved disqualifying conflicts between the interests of the borrower and the lender and if the attorney has obtained the informed consent of both borrower and lender after full disclosure").

204. Opinion 90-3, *supra* note 203.

205. *Id.*

206. Letter from Sean Broderick to CJA Study Comm., *supra* note 7, at 2 (explaining that the "disparity of resources" between CJA-appointed counsel and the DOJ, including money, personnel, and training "often overshadows all other problems for federal CJA practitioners").

207. Letter from Russell M. Aoki to Hon. Kathleen Cardone, *supra* note 13, at 4.

cases and are knowledgeable about . . . [how] to manage discovery in federal criminal litigation,” they are uniquely qualified to provide competent representation in the limited scope of discovery.<sup>208</sup> Even under the most robust scheme, so long as each defendant understands the CDA’s role, consents to the limited scope, and receives competent representation from the CDA, then Rule 1.2(c) is satisfied.<sup>209</sup> Because CDAs represent more than one defendant in a limited scope, however, other potential ethics issues arise, such as conflicts of interest and confidentiality. Parts III.B and III.C explore these issues.

### *B. Conflicts of Interest*

The Model Rules provide that a lawyer cannot concurrently represent multiple clients if the representation would involve a conflict of interest.<sup>210</sup> Specifically, Model Rule 1.7(a) prohibits representations that (1) are directly adverse or (2) present a “significant risk” that the lawyer’s responsibilities to one client “will be materially limited by the lawyer’s responsibilities to another client.”<sup>211</sup> Despite a conflict, Model Rule 1.7(b) allows a lawyer to undertake a joint representation, provided that (1) the lawyer reasonably believes she can competently and diligently represent coclients and (2) each client provides informed consent in writing.<sup>212</sup>

Although there almost always will be conflicts between coclients, those conflicts do not always prohibit joint representation.<sup>213</sup> For instance, a lawyer may, with informed consent, concurrently represent two or more clients seeking to form a joint venture, even though the lawyer may not be able to “recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the others.”<sup>214</sup> Similarly, a lawyer may represent coplaintiffs in a securities action where the coclients have

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208. See Memorandum from Theodore Lidz, Assistant Dir., Off. of Def. Servs., to Judges & Clerks, U.S. Dist. Court 1 (Sept. 4, 2012), [http://www.miefdo.org/forms/Services\\_of\\_Coordinating\\_Discovery\\_Attorneys.pdf](http://www.miefdo.org/forms/Services_of_Coordinating_Discovery_Attorneys.pdf) [<https://perma.cc/K36N-H4VA>].

209. Cf. *In re Samad*, 51 A.3d 486, 497 (D.C. 2012) (observing that any limit on the scope of an attorney’s services, even if memorialized in a retainer agreement, must be explained to the client to ensure the delineated scope is clearly understood).

210. MODEL RULES OF PROF’L CONDUCT r. 1.7 (AM. BAR ASS’N 2018).

211. *Id.* r. 1.7(a).

212. *Id.* r. 1.7(b). Before each client can provide informed consent, a conflicted lawyer must communicate “the nature of the conflict of interest in such detail so that [the multiple clients] can understand the reasons why it may be desirable for each to have independent counsel, with undivided loyalty to the interests of each of them.” *Unified Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339, 1346 (9th Cir. 1981) (quoting *In re Boivin*, 533 P.2d 171 (Or. 1975)); see also *IBM Corp. v. Levin*, 579 F.2d 271, 282 (3d Cir. 1978) (“[F]ull and effective disclosure of all the relevant facts must be made and brought home to the prospective client.”).

213. “[I]nformed consent . . . is effective with respect to most conflicts of interest.” RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 122 cmt. a (AM. LAW INST. 2000).

214. MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. 8. In the nonlitigation context, “common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them.” *Id.* r. 1.7 cmt. 28.

“knowledge of a possible conflict of interest” and nevertheless “reaffirm their desire” to be jointly represented.<sup>215</sup>

In a criminal matter, however, representing codefendants presents thorny ethical consequences. The ABA has warned that the potential conflicts are “so grave that ordinarily a lawyer should decline” to represent criminal codefendants in the same case.<sup>216</sup> Since codefendants almost never share the same legal interests, when one full-fledged lawyer concurrently represents several defendants, “a minefield of potential conflicts” arise.<sup>217</sup> From indictment and plea negotiations to trial and sentencing, conflicts of interest may materialize at each stage due to “either factual antagonism[s] or more subtle differences that an . . . attorney might exploit in comparing and contrasting the individual codefendants.”<sup>218</sup> Because these conflicts often jeopardize fair and loyal representation, district courts have “substantial latitude” to refuse defendants’ conflict waivers.<sup>219</sup>

While one full-service lawyer’s joint representation of codefendants clearly engenders “grave” ethical conflicts, there is only a minimal, conjectural risk that a limited-scope CDA would create loyalty issues. Judge Forrest exaggerated the risk in *Hernandez*.<sup>220</sup> Although she questioned how appointing a CDA “to manage discovery on behalf of *multiple* defendants . . . square[s] with th[e] duty” of undivided loyalty, she did not attempt to answer her own inquiry by exploring how the ethics rules apply.<sup>221</sup> Instead, Judge Forrest simply denied the appointment, resolving that the CDA cannot ethically “have responsibilities to all defendants at the same time.”<sup>222</sup>

Even when CDAs act with broader authority than Judge Forrest contemplated, the traditional concerns with joint representation in criminal

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215. *Como v. Commerce Oil Co.*, 607 F. Supp. 335, 342 (S.D.N.Y. 1985) (finding joint representation of plaintiffs in a securities action proper where the defendants argued that one of the plaintiffs, rather than the defendants, was responsible for the injuries to the group); *see also* *Hamilton v. Merrill Lynch*, 645 F. Supp. 60, 62 (E.D. Pa. 1986) (same). In the litigation context, representation of coparties is permitted if there is no “substantial discrepancy” among positions, testimony, or settlement expectations. MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. 23.

216. MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. 23. “The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney.” *United States v. Carrigan*, 543 F.2d 1053, 1058 (2d Cir. 1976) (Lumbard, J., concurring); *see also* *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 486 n.8 (1978).

217. *United States v. Stepney*, 246 F. Supp. 2d 1069, 1083 (N.D. Cal. 2003).

218. Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 273 (1982).

219. *See* *Wheat v. United States*, 486 U.S. 153, 163 (1988); *see also* *United States v. Cain*, 671 F.3d 271, 294 (2d Cir. 2012); *United States v. Combs*, 222 F.3d 353, 361 (7th Cir. 2000); *United States v. Moscony*, 927 F.2d 742, 750 (3d Cir. 1991).

220. *See generally* *United States v. Hernandez*, No. 14 Cr. 499 (KBF), 2014 WL 4510266 (S.D.N.Y. Sept. 12, 2014).

221. *See id.* at \*4.

222. *Id.*

cases are not present. CDAs do not appear in court on behalf of any single defendant, counsel defendants directly, make strategic decisions, cross-examine witnesses, or advise on or negotiate plea agreements.<sup>223</sup> These exclusions remove significant areas of adversity.<sup>224</sup> CDAs never present evidence to the court that may benefit one codefendant and harm others.<sup>225</sup> CDAs also do not make closing statements or argue during sentencing that, for example, defendant X is more blameworthy than defendant Y.<sup>226</sup> Finally, because the attorneys of record are responsible both for direct and cross-examining witnesses and for negotiating with prosecutors regarding potential plea offers, CDAs avoid the “untenable” position that arises when one defendant is offered “a reduced charge, immunity or even a dismissal, in exchange for testimony against the remaining defendants or other cooperation with the government.”<sup>227</sup>

Although the risks that Judge Forrest was intuitively concerned about<sup>228</sup> are not present here, it is useful to explore the possibility that CDAs’ discovery obligations to one defendant may “materially limit[]” their obligations to the other defendants.<sup>229</sup> Consider the following hypothetical: five defendants—Company A (A) and corporate officers Brad (B), Charlie (C), Drew (D), and Eden (E)—are charged with fraud for inflating expenses in their contracts with the government. The defendants’ lead attorneys ask the CDA to review the evidence, directing her to search for ESI that may be

223. Such conduct would veer dangerously into conflict-ridden territory. *See, e.g.*, Peter W. Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 GEO. L.J. 1075, 1078–80 (1979) (describing various conflicts that arise when one lawyer jointly represents two defendants in a criminal matter, including deciding which, if any, defendant should testify during trial and how to formulate a closing argument that benefits multiple defendants simultaneously).

224. The NYCBA has acknowledged that “not all joint representations involve conflicts of interest requiring ‘informed consent’ pursuant to Rule 1.7.” N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2017-7 (2017), [https://s3.amazonaws.com/documents.nycbar.org/files/2017299-2017-7-Joint\\_Client\\_Opinion\\_PROFETHICS\\_12.12.17.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/2017299-2017-7-Joint_Client_Opinion_PROFETHICS_12.12.17.pdf) [<https://perma.cc/AG5S-QQX5>] [hereinafter *Opinion 2017-7*]. Particularly in a transactional setting, “the positions and interests of the joint clients may be aligned so closely and/or the scope of the representation may be so limited that a lawyer’s representation of any one of them is unlikely to be adversely affected by the representation of the other(s).” *Id.*

225. *Cf. Parker v. Parratt*, 662 F.2d 479, 484 (8th Cir. 1981) (“A conflict of interest exists where the factual circumstances require counsel to offer evidence which assists one codefendant but adversely affects others.”); *Ross v. Heyne*, 638 F.2d 979, 983–84 (7th Cir. 1980); *United States v. Kranzthor*, 614 F.2d 981, 983 (5th Cir. 1980).

226. *Cf. Moore, supra* note 218, at 274 (“When a lawyer represents only one of several defendants, in closing arguments he may stress favorable comparisons between his client and the other defendants. When a single attorney represents all the defendants, however, he must approach comparisons among the defendants with the greatest caution.”).

227. *Id.* at 273–74 (quoting Y. KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 124 (5th ed. 1980)). When an attorney represents multiple defendants and one codefendant decides to cooperate and testify against the remaining defendant(s), an often-disqualifying conflict emerges. *See, e.g.*, *United States v. Sanders*, 688 F. Supp. 373, 374 (N.D. Ill. 1988) (disqualifying defendant Sanders’s attorney, Lassar, since he had previously represented a codefendant during the grand jury investigation who stated he might cooperate with the government and testify against Sanders).

228. *See supra* notes 130–40 and accompanying text.

229. MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(2) (AM. BAR ASS’N 2018).



helpful or hurtful to their clients' cases. While reviewing the discovery materials, the CDA comes across an email that ostensibly exculpates B and inculpates A, C, D, and E. The email is from C to D and has E copied on the email. It forwards a fraudulent expense report and reads, "When we discuss this contract, let's keep B out of the loop." Although the CDA will not decide how to use the evidence during trial, she must determine who should get the evidence. If she does not give the evidence to any of the defendants, or gives the evidence only to defendants A, C, D, and E, defendant B may feel betrayed; unless B's lead attorney locates this same email separately, B would presumably miss exculpatory information. On the other hand, if the CDA gives the email only to defendant B, defendants A, C, D, and E may feel neglected as they will be unable to determine how to minimize the email's significance. Similarly, defendants A, C, D, and E may deem the CDA disloyal if she gives the email to all five defendants since defendant B could then assert his innocence by pointing the finger at the rest.

Although this scenario presents a potential conflict, it is not clear that it triggers Rule 1.7's "significant risk" qualification.<sup>230</sup> Even if it does, however, the attorneys of record can overcome the risk by devising ground rules to govern the CDA's work and ask the defendants to consent. The ground rule should establish that the CDA will provide *all* the discovery materials to *all* the defendants, and then the defendants, with their individual counsel, can decide the utility of the evidence. This ground rule would enable the CDA to review and share the evidence without appearing disloyal to one or more defendants.

Such a ground rule is certainly consentable.<sup>231</sup> To establish proper consent in the context of a CDA's joint—yet limited-scope—representation, each codefendant must understand the ground rule's "possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved."<sup>232</sup> As independent, unconflicted counsel, the attorneys of record can address the implications of the ground rule before obtaining the defendants' informed consent.<sup>233</sup> Specifically, the attorneys can explain both the benefits of proceeding jointly with the CDA's help, including a more thorough and efficient review of the facts, and the potential risks, including

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230. Unlike the hypothetical lawyer described in Comment 8 to Rule 1.7, CDAs are not expected to "recommend or advocate all possible positions," or for that matter, advocate any position. *See id.* r. 1.7 cmt. 8; *see also supra* note 212 and accompanying text.

231. *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 31 ("The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.").

232. *Id.* r. 1.7 cmt. 18. "The more comprehensive the explanation of the . . . actual and reasonably foreseeable adverse consequences of th[e] representation[], the greater the likelihood that the client will have the requisite understanding." ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 05-436 (2005), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/formal\\_opinion\\_05\\_436.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_05_436.pdf) [<https://perma.cc/85DW-SYRW>].

233. *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 22.

feeling undermined when the CDA distributes evidence that damages one codefendant and benefits another.

After explaining the advantages and disadvantages and receiving the defendants' consent, the attorneys of record can represent to the court that the defendants understand the potential conflicts and voluntarily waive them.<sup>234</sup> Because each defendant has counsel independent from the CDA, a district court likely would validate the waivers.<sup>235</sup> Only when a client has given a waiver that is likely to undermine his own goal should a court overturn the waiver on competency grounds without undermining the client's autonomy.<sup>236</sup> It is doubtful that a CDA's supplementary assistance would ever undermine a defendant's goals.

Assuming that there is no conflict of interest among codefendants, the Model Rules still require a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" before obtaining the client's consent.<sup>237</sup> "Because the lawyer's duty of loyalty to each jointly represented client generally prohibits the lawyer from continuing the representation while withholding, as between the clients, information material to the representation,"<sup>238</sup> the attorneys of record must clarify how the group plans to handle discovery material and explain alternatives before getting consent.<sup>239</sup> Furthermore, even if there is no apparent conflict of interest at the outset of the litigation, the attorneys of record must vigilantly monitor conflicts throughout the representation.<sup>240</sup> If one of the defendants decides, for instance, that he does not want the CDA to share a piece of evidence that is uncovered, then the CDA may have to withdraw from representing that client.<sup>241</sup>

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234. Judge Forrest asserted that only a *Curcio* hearing could resolve whether a defendant made a knowing, voluntary, and intelligent waiver of conflicts. *See* *United States v. Hernandez*, No. 14 Cr. 499 (KBF), 2014 WL 4510266, at \*4 (S.D.N.Y. Sept. 12, 2014); *see also supra* note 130 and accompanying text. However, because the attorneys of record can separately advise each defendant on the dangers of the potential conflict and make impartial representations to the court, scheduling *Curcio* hearings and appointing independent counsel to advise each defendant would be both burdensome and unnecessary.

235. *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 22 ("[C]onsent is more likely to be effective . . . if, e.g., the client is independently represented by other counsel in giving consent . . .").

236. Kevin H. Michels, *What Conflicts Can Be Waived?: A Unified Understanding of Competence and Consent*, 65 RUTGERS L. REV. 109, 155–56 (2012).

237. MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (addressing communications between a lawyer and client).

238. *See* Opinion 2017-7, *supra* note 224.

239. MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(4).

240. *Id.* r. 1.7 cmt. 22 ("Even if a client has validly consented to waive further conflicts, however, the lawyer must reassess the propriety of the adverse concurrent representation under paragraph (b) when an actual conflict arises.").

241. *See* N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2019-4 (2019), [https://s3.amazonaws.com/documents.nycbar.org/files/2019529-Pool\\_Counsel\\_FINAL.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/2019529-Pool_Counsel_FINAL.pdf) [<https://perma.cc/D7AN-4T49>] [hereinafter Opinion 2019-4].

The CDAs' other proposed duties, including subjective coding, pressing the government for *Brady*<sup>242</sup> material, and legal research on discovery issues common to all defendants, will not engender other conflicts. A CDA can easily maintain neutrality due to the role's limited scope<sup>243</sup> and because the attorney will have nothing to gain by vindicating one defendant's interests over another.

### C. Confidentiality

Model Rule 1.6 establishes that an attorney may not, without informed consent, reveal any information relating to the client's representation.<sup>244</sup> Especially in the criminal defense context, this "rule of secrecy" is one of the most important ethical obligations; it incentivizes defendants to fully and frankly disclose information—whether favorable or damaging—trusting that counsel will use that information only to mount the best defense possible.<sup>245</sup> If a lawyer represents multiple clients, however, this duty to maintain each client's confidentiality "may conflict with the obligation of disclosure to each."<sup>246</sup>

Even when CDAs act with broad authority, they do not meet with defendants individually to discuss the indictment, hear their stories, or counsel them. At least directly, the defendants only will confide in their attorneys of record. Within their limited scope, however, CDAs will inevitably learn of confidential information about multiple defendants and have to balance their commitments to both confidentiality and communication. Responding to counsels' requests to find probative documents, for instance, requires insight into the defendants' secrets.<sup>247</sup>

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242. See *supra* note 32 and accompanying text.

243. N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2001-3 (2001), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2001-3-limiting-the-scope-of-an-attorneys-representation-to-avoid-client-conflicts> [<https://perma.cc/88T6-94BU>] (finding that a lawyer may limit the scope of representation to resolve a conflict of interest "[w]here the portion of the engagement to be carved out is discrete").

244. MODEL RULES OF PROF'L CONDUCT r. 1.6.

245. See, e.g., *United States v. Standard Oil Co.*, 136 F. Supp. 345, 355 (S.D.N.Y. 1955) ("The confidences communicated by a client to his attorney must remain inviolate for all time if the public is to have reverence for the law and confidence in its guardians."); see also ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-450 (2008) [hereinafter Opinion 08-450] ("Among a lawyer's foremost professional responsibilities are fidelity to a client and preservation of the client's confidence with respect to 'information related to the representation' . . . ." (quoting MODEL RULES OF PROF'L CONDUCT r. 1.6)).

246. Opinion 08-450, *supra* note 245. Model Rule 1.4 requires a lawyer to "keep the client reasonably informed about the status of the matter . . . to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." MODEL RULES OF PROF'L CONDUCT r. 1.4; see also *supra* note 237 and accompanying text.

247. Cf. *Gordon v. Kaleida Health*, No. 08-CV-3785(F), 2013 WL 2250506, at \*9 (W.D.N.Y. May 21, 2013) (finding that rules of presumed confidential communications between client and attorney do not apply to client-nonattorney e-discovery vendor relationships, where the vendor provides paper document scanning and objective coding services, neither of which requires the coder to review or evaluate the document's probative value).

Imagine a ten-defendant, gang-related murder case where the attorneys of record share their clients' stories and strategies for the case with the CDA to generate the most relevant search results during the review process. In doing so, the CDA learns from defendant X's counsel that X confessed to his involvement and indicated that the government likely possesses text messages inculcating him and defendants Y and Z in the events but exculpating the rest of the defendants. Presumably, the CDA would violate her duty of confidentiality to X if she discloses X's confession to the other counsel but violates her duty to keep Y, Z, and the rest of the defendants "reasonably informed about the status of the matter," if she conceals it from the rest.<sup>248</sup> Absent defendants' agreement, a lawyer in this position ordinarily must withdraw to eliminate the conflict.<sup>249</sup>

Establishing a "no secrets" ground rule—where information disclosed by X may be shared with the rest of the defendants—can overcome this ethical quandary.<sup>250</sup> So long as CDAs obtain each defendant's informed consent, this solution does not foreclose appointing CDAs in multidefendant criminal trials.<sup>251</sup> To obtain informed consent, the attorneys of record must explain the risks and benefits of a "no secrets" model, where private communications shared with the CDA may be disclosed to the other codefendants on the case.<sup>252</sup> In a sense, the CDA acts as an agent of a joint defense team, coordinating and managing an open discovery platform for the entire group. If defendants agree at the outset to share all information with each other, expressly waiving confidentiality, then defendant X in the example above will not feel wronged when the CDA reveals the confession or the text messages to the remaining defendants.<sup>253</sup>

248. See MODEL RULES OF PROF'L CONDUCT r. 1.4.

249. See, e.g., D.C. Bar Legal Ethics Comm., Ethics Op. 327 (2005), <https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion327.cfm> [<https://perma.cc/T2SY-YLTS>] [hereinafter Opinion 327].

250. See Opinion 08-450, *supra* note 245 ("Clarifying expectations at the onset of the representation is always preferable . . . and may affect the ability of the lawyer to continue representing one or the other client after difficulties arise."); see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 75 cmt. d (AM. LAW INST. 2000) ("Fairness and candor between the co-clients and with the lawyer generally preclude[] the lawyer from keeping information secret from any one of them . . .").

251. See MODEL RULES OF PROF'L CONDUCT r. 1.6(a); see also *id.* r. 1.0(e).

252. See N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 555 (1984), <https://www.nysba.org/CustomTemplates/Content.aspx?id=7471> [<https://perma.cc/7Q8U-UY3U>] [hereinafter Opinion 555] ("Lawyer may not disclose to one joint client confidential communications from other joint client relating to the subject matter of the representation, absent express or implied consent . . ."); see also Opinion 08-450, *supra* note 245 ("Absent an express agreement among the lawyer and the clients that satisfies the 'informed consent' standard of Rule 1.6(a) . . . the lawyer is prohibited by Rule 1.6 from revealing that information to any person . . .").

253. See, e.g., Opinion 327, *supra* note 249 ("Because the disclosing client previously has waived confidentiality, there is nothing to weigh against either the lawyer's duty of loyalty to the non-disclosing client or the lawyer's obligation to keep that client reasonably informed of anything bearing on the representation that might affect that client's interests."). As explained above in Part III.B, since the defendants have their own counsel to advise on any theoretical risks, a court likely will accept that each defendant who consents to the agreement is informed. See *supra* notes 233–35 and accompanying text.

After the defendants consent to the CDA's appointment under these terms, the attorneys of record must monitor the representation to ensure the agreement passes muster as the representation continues.<sup>254</sup> Imagine that defendant X consents to a "no secrets" rule when the CDA is first appointed.<sup>255</sup> Later, defendant X's attorney tells the CDA about X's confession, information that defendants Y and Z need to know, but X now insists that the information not be disclosed to Y and Z.<sup>256</sup> Here, the CDA "may have an unconsentable conflict that requires withdrawing from the representation of one or [many] clients."<sup>257</sup> The speculative risk that a CDA would have to withdraw from representing one defendant in a multidefendant criminal trial, however, should not prohibit or limit the role more generally.

Moreover, the common disadvantages associated with sharing information, usually in a joint defense arrangement, are not present here. Ordinarily, when confidences are unprotected, codefendants may not feel comfortable divulging their secrets.<sup>258</sup> Knowing that a fellow codefendant might withdraw from the group and cooperate as a government witness often creates a skeptical and guarded environment.<sup>259</sup> Moreover, defendants may remain quiet and avoid blaming the kingpin for fear of retaliation, embarrassment, or stricter punishment.<sup>260</sup> However, in this context, the attorneys of record can protect each defendant from revealing information that would frustrate their defense strategy. As a filter between the defendants and the CDA, the attorneys of record can ensure that confidences only be shared with the CDA if, in their reasoned opinion, such a disclosure would benefit their client. Because CDAs never counsel the defendants directly, defendants would never lose secrecy entirely.

Furthermore, defendants stand to gain significant advantages from sharing information, including a more exhaustive review of the evidence and lower costs.<sup>261</sup> Coordinating discovery efforts gives the defendants the best means to challenge the prosecution's resources and evidentiary advantage.<sup>262</sup> Of course, each defendant must understand the risk that certain disclosures may damage his case compared to the other codefendants. Nonetheless, CDAs' work will help defendants gain greater insight into the prosecution's strategy and build a stronger defense. This ground rule also protects CDAs from

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254. See Opinion 2019-4, *supra* note 241.

255. See *id.*

256. See *id.*

257. *Id.*

258. Bartel, *supra* note 53, at 877.

259. See, e.g., *id.*

260. Cf. Nahrstadt & Rogers, *supra* note 54, at 30–31 (describing that one significant drawback to joint defense agreements is that the major defendants tend to control the defense "to protect their large stake in the case," thereby disadvantaging the less involved defendants).

261. See *id.* at 30; see also Opinion 2019-4, *supra* note 241 ("An arrangement in which prospective clients give informed consent to the lawyer's use of confidential information, learned while representing them for the mutual benefit of all the pool clients, furthers one of the principal advantages to the clients of concurrent representation—that is, the lawyer's ability to draw on a greater depth of knowledge based on the aggregation of information from the multiple clients to the benefit of all the representations.").

262. Nahrstadt & Rogers, *supra* note 54, at 30.

breaking either their confidentiality or communication obligation and prevents the potential discomfort from maintaining codefendants' confidences.

Many bar associations have approved this "no secrets" scheme in other multiple-client settings.<sup>263</sup> In Ethics Opinion 555, the New York State Bar Association (NYSBA) considered whether a lawyer who is jointly representing clients A and B in their partnership affairs, and receives a confidential communication from A that he is actively breaching the partnership agreement with B, can disclose that communication to B.<sup>264</sup> While the NYSBA answered the question in the negative, it concluded that if partners A and B had knowingly consented to nonconfidentiality at the outset, the answer would be different: although "joint employment is not sufficient, without more, to justify implying such consent where disclosure of the communication to the other joint client would obviously be detrimental to the communicating client," the attorney can condition "joint representation upon the clients' agreement that all communications from one . . . may be disclosed to the other."<sup>265</sup>

Similarly, in Formal Opinion 2019-4, the NYCBA determined that one lawyer, often referred to as "pool counsel," may simultaneously represent multiple individuals as witnesses or potential witnesses in a governmental or corporate internal investigation.<sup>266</sup> Because "[t]he ordinary expectations regarding confidentiality in an individual representation cannot be maintained in a pool representation," the NYCBA outlined guidelines that pool counsel should use to address confidentiality issues among multiple clients. The opinion's recommendations align with this Note's proposal: each client must understand "the lawyer's obligations regarding confidential client information and must secure the prospective client's informed consent regarding how confidential information will be handled."<sup>267</sup> Specifically, the NYCBA stated that pool counsel must obtain informed consent not only to *use* information learned from every client to benefit all the representations

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263. *See, e.g.*, Opinion 327, *supra* note 249 ("Where one client has given consent to the disclosure of confidential information by the lawyer to another client," the lawyer must reveal the secret "if the information is relevant or material to the lawyer's representation of the other client."); Opinion 555, *supra* note 252; *cf.* Fla. Bar Prof'l Ethics Comm., Op. 95-4 (1997), <https://www.floridabar.org/etopinions/etopinion-95-4/> [<https://perma.cc/T94Q-K6BN>] (finding that lawyers should discuss ethical obligations with regard to confidentiality prior to joint representation of husband and wife in estate planning to avoid confidentiality and disclosure conflicts).

264. Opinion 555, *supra* note 252.

265. *Id.*

266. *See generally* Opinion 2019-4, *supra* note 241. Although pool counsels' responsibilities, including preparing clients for questioning by corporate or government counsel and negotiating the terms of each client's interview and/or testimony, are more comprehensive than CDAs' duties in multidefendant criminal trials, similar ethics issues apply. *See id.* The biggest difference between pool counsel and CDAs is that pool counsel typically represent multiple individuals concurrently but separately, whereas CDAs normally represent the discovery interests of "joint clients" who coordinate legal strategy." *See id.* (emphasis added).

267. *See id.*

but also to *disclose* pool clients' confidential communications.<sup>268</sup> As the "presumptive understanding in a joint representation," the NYCBA offered the "no secrets" approach as one way to handle confidential communications.<sup>269</sup> Under this framework, the opinion maintains, the clients can all agree that "confidential information disclosed to the lawyer may be disclosed to all other concurrently represented clients at the lawyer's discretion, unless and until the disclosing client revokes this authorization."<sup>270</sup>

If confidentiality dilemmas can be overcome in other joint representation contexts, such as corporate and estate planning matters, CDAs should similarly be able to jointly represent codefendants if ground rules are set at the start.

#### D. Competence

Pursuant to Model Rule 1.1, lawyers have a nondelegable duty to act competently.<sup>271</sup> This rule requires lawyers to act with "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>272</sup> In response to the rapid impact technology has had on the practice of law, the ABA amended this rule in 2012, adding that a competent lawyer should "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."<sup>273</sup> In this digital age, an attorney's technological incompetence can lead to serious consequences for the client, as well as disciplinary sanctions against the lawyer.<sup>274</sup>

In *Hernandez*, Judge Forrest worried that the attorneys of record would rely on the CDA's technical expertise and inevitably inhibit their own fluency

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268. *See id.*

269. *Id.*; *see also* N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2016-2 (2016), [https://www.nycbar.org/pdf/report/uploads/20073141-2016-2\\_Representing\\_Witness\\_Solely\\_for\\_Deposition\\_7\\_7\\_16.pdf](https://www.nycbar.org/pdf/report/uploads/20073141-2016-2_Representing_Witness_Solely_for_Deposition_7_7_16.pdf) [<https://perma.cc/E66K-FTKU>] ("Among joint clients, there is a presumption that confidential information that is material to the joint representation will be shared among the joint clients, unless some exception applies.").

270. Opinion 2019-4, *supra* note 241.

271. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2018).

272. *Id.* r. 1.1 cmt. 8.

273. *Id.* The ABA Commission on Ethics 20/20's chief reporter claimed that the ABA wrote this comment in a purposefully vague manner, leaving room for new technologies bound to arise in the future. *See* Andrew Perlman, The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence, *PROF. LAW.*, Oct. 2014, at 24, 25 ("[T]he specific skills lawyers will need in the decades ahead are difficult to imagine."); *see also* Jamie J. Baker, *Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society*, 69 *S.C. L. REV.* 557, 560 (2018).

274. *See, e.g.*, *HM Elecs., Inc. v. R.F. Techs., Inc.*, No. 12cv2884-BAS-MDD, 2015 WL 4714908, at \*21 (S.D. Cal. Aug. 7, 2015) (sanctioning a civil practitioner for his failure to issue a litigation hold, learn about the structure of his client's ESI, advise his client on the proper methodology for searching ESI and monitoring compliance, and, finally, for failing to supervise the attorneys to whom data preservation and litigation hold duties were delegated), *vacated in part*, 2016 WL 1267385 (S.D. Cal. Mar. 15, 2016).

with legal technology.<sup>275</sup> Managing complex discovery, Judge Forrest warned, should not become “an unduly specialized task” that only few lawyers can handle.<sup>276</sup> The court surmised that if CDAs were routinely appointed in multidefendant CJA cases, defense counsel would lose the technological competence that the Model Rules require.<sup>277</sup> These concerns are overstated.

First, the Model Rules recognize that lawyers can retain or contract with other lawyers to provide or assist in the provision of legal services to the client.<sup>278</sup> So long as the lawyer obtains informed consent from the client and reasonably believes that the other lawyers’ services will contribute to the competent and ethical representation of the client, then delegating discovery tasks to another lawyer is acceptable.<sup>279</sup> In Formal Opinion 08-451, the ABA specifically authorized lawyers to outsource discovery tasks to other lawyers, either in the United States or abroad.<sup>280</sup> Outsourcing can range from photocopying for document productions to developing legal strategies and preparing motion papers.<sup>281</sup> Provided that the outsourcing lawyer’s services to the client and delegated tasks are performed competently, then “[t]here is nothing unethical about” outsourcing.<sup>282</sup> Delegating discovery tasks to CDAs in multidefendant criminal cases is analogous to the outsourcing scenarios described in Formal Opinion 08-451, including hiring a document management company to create and oversee a discovery database for complex litigation.<sup>283</sup> Outsourcing and delegating discovery tasks to CDAs share similar goals, such as reducing costs and increasing the quality of legal assistance.<sup>284</sup> Similar to a small firm that may be unable to regularly employ the lawyers and legal assistants required to handle a large, discovery-intensive litigation, court-appointed defense lawyers, often single practitioners, lack the infrastructural support to review evidence thoroughly and cost-effectively.<sup>285</sup>

Second, time-honored case law has recognized that “the complexities of modern existence prevent attorneys from effectively handling clients’ affairs without the help of others.”<sup>286</sup> In *United States v. Kovel*,<sup>287</sup> a lawyer representing a client accused of federal income tax violations hired an

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275. *See* *United States v. Hernandez*, No. 14 Cr. 499 (KBF), 2014 WL 4510266, at \*7 (S.D.N.Y. Sept. 12, 2014).

276. *Id.*

277. *See id.*

278. *See* MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 6 (AM. BAR ASS’N 2018).

279. *See id.*

280. ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-451 (2008), <https://www.americanbar.org/content/dam/aba/migrated/ethics2020/pdfs/ethicsopinion08451.authcheckdam.pdf> [<https://perma.cc/4VRJ-6VGF>].

281. *Id.*

282. *Id.*

283. *See id.*

284. *See id.*; *see also* Letter from Russell M. Aoki to Hon. Kathleen Cardone, *supra* note 13, at 3–4.

285. *See* Garrie & Gelb, *supra* note 8, at 402.

286. *See, e.g.,* *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961).

287. 296 F.2d 918 (2d Cir. 1961).



accountant to listen to the client's story and then help the lawyer analyze the complex accounting and tax issues.<sup>288</sup> In rendering its decision that the attorney-client privilege extended to the nonlawyer accountant, the Second Circuit acknowledged that law is highly specialized and lawyers cannot be expected to understand every concept relevant to a client's case.<sup>289</sup> To provide competent representation to their clients, lawyers who lack a specialty in a particular field should seek assistance from experts, both lawyers and nonlawyers.<sup>290</sup>

Third, while discovery is a concept that all lawyers must understand to be competent—unlike accounting, which understandably may be “a foreign language to some lawyers”<sup>291</sup>—keeping abreast of technological changes does not restrict lawyers from seeking outside assistance during the discovery process.<sup>292</sup> Legal practitioners understand that “[l]awyers who lack their own competence in e-discovery may associate with other lawyers with the necessary expertise.”<sup>293</sup> Unlike Judge Forrest, who speculated that associating with CDAs would cause the other defense lawyers to “‘lose the thread’ of how to handle and manage electronic discovery,”<sup>294</sup> most judges encourage such association.<sup>295</sup> In a Title VII action involving voluminous and complex ESI, Judge Andrew J. Peck, a magistrate judge for the Southern District of New York, wrote: “[e]ven where . . . counsel is very familiar with ESI issues, it is very helpful to have the parties’ ediscovery vendors (or in-house IT personnel or in-house ediscovery counsel) present at court conferences where ESI issues are being discussed.”<sup>296</sup>

Fourth, CDA assistance does not stymie defense counsel's required comprehension, since CDAs are empowered to train defense attorneys on the technological complexities of managing voluminous ESI.<sup>297</sup> As a result, attorneys of record gain, rather than lose, new technological skills and techniques to manage ESI moving forward.<sup>298</sup> Even assuming CDAs fail to impart their knowledge, the attorneys of record presumably work on other single-defendant or civil cases where e-discovery tasks are just as important. Since managing ESI is not unique to multidefendant criminal cases, CDAs

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288. *See id.* at 919.

289. *Id.*

290. *See id.*

291. *Id.* at 922.

292. *See* Monica McCarroll, *Discovery and the Duty of Competence*, 26 REGENT U. L. REV. 81, 107 (2014) (“While competent practitioners must stay abreast of these changes, they also must recognize the need to rely on experts in these areas not only to understand the technology but to ensure that their adversary and the court understand and accept it as well.”); Ettari & Hertz-Bunzl, *supra* note 30.

293. Ettari & Hertz-Bunzl, *supra* note 30.

294. *United States v. Hernandez*, No. 14 Cr. 499 (KBF), 2014 WL 4510266, at \*7 (S.D.N.Y. Sept. 12, 2014).

295. *See, e.g.*, *Moore v. Publicis Groupe*, 287 F.R.D. 182, 193 (S.D.N.Y. 2012), *adopted* No. 11 Civ. 1279 (ALC) (AJP), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).

296. *Id.*

297. *See* Letter from Russell M. Aoki to Hon. Kathleen Cardone, *supra* note 13, at 3.

298. Motion for Reconsideration, *supra* note 145, at 7–8; *see also* Declaration, *supra* note 146, at 3.

do not breed incompetence. In fact, because CDAs' duties allow defense attorneys to concentrate on the facts and legal issues of the case rather than the duplicative and often tedious tasks involved in discovery, CDAs boost defense counsels' competence.<sup>299</sup>

#### CONCLUSION

Over the past few decades, legal representations have become increasingly complex. To provide effective and competent representation, lawyers are now required to understand far beyond the trial basics. In the context of ESI and discovery, lawyers are presumed to bear the expense of either self-educating or hiring someone, like a third-party vendor, to perform technical parts of the representation beyond arguing in court. In cases with voluminous ESI, lawyers may pool their resources and coordinate efforts to ensure an expedient resolution. One example of such coordination is court-appointed CDAs.

As demonstrated by the continued motions to appoint CDAs in criminal cases and NLST's decision to hire two more CDAs in 2018, defense lawyers have perceived CDAs as a helpful resource in managing multidefendant criminal cases with complex ESI. Because CDAs are lawyers, rather than nonattorney vendors, CDAs' assistance on multidefendant criminal trials implicates the professional conduct rules. One district court's concerns about CDAs' ethical consequences, however, should not restrict this role's potential reach.

This Note concludes that CDAs can be lawyers for multiple defendants within the limited scope of discovery. In addition to their administrative tasks, CDAs should be able to engage in substantive coding, press the prosecution for *Brady* material, help defense counsel locate key documents to bolster their trial strategy, and conduct legal research related to discovery that is relevant to all defendants.

Courts, and the legal market more generally, have already welcomed the unbundling of legal work from "cases" to "tasks" through limited-scope representations. As long as defendants understand and consent to the limited scope of the CDA's work, CDAs fit this unbundling model and can act ethically for the defense group's benefit. Furthermore, at the outset of the representation, defendants can agree that the CDA will share evidence among the codefendants equally to avoid prejudicing one defendant over another. Defendants also can agree to a "no secrets" ground rule, such that the CDA can disclose one defendant's confidential information to another defendant if the information bears on the latter defendant's representation. Because each defendant has his or her own counsel to advise on the risks and benefits of the CDA's limited scope, the potential conflicts of interest, and confidentiality issues, defendants can provide informed consent before a CDA is appointed. The attorneys of record must monitor a CDA's representation to ensure no conflicts arise, and a CDA must withdraw from

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299. See generally Aoki Declaration, *supra* note 93.

one or more representations if a nonconsentable conflict surfaces. Judicial appointment and proper oversight will ensure that both consent and conflict waivers are effective and that a CDA's assistance is consistent with due process throughout.

Under this Note's robust scheme, CDAs bring clear benefits to multidefendant federal criminal trials. As Judge Weinstein anticipated, CDAs help protect defendants' rights, enhance productivity, expedite the proceedings, and lower costs for the court. Achieving efficiencies in criminal trials through limited-scope lawyering is no less important now than it was in 1993. Similar to the appointment of lead and liaison counsel in class actions or MDL, CDAs streamline multidefendant criminal cases "without jeopardizing fairness to the parties."<sup>300</sup> With proper safeguards, CDAs with broad authority not only can conform to the Model Rules' norms but they can improve representation of codefendants in multidefendant federal criminal cases.

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300. See MANUAL FOR COMPLEX LITIGATION, *supra* note 5, § 10.221.