

## CLASSIFIED INFORMATION CASES ON THE GROUND: ALTERING THE ATTORNEY-CLIENT RELATIONSHIP

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For federal criminal defendants or their counsel first caught up in a case involving classified information, it is easy to find the text of the Classified Information Procedures Act (“CIPA” or “the Act”).<sup>1</sup> The Department of Justice makes available a synopsis of the Act, obviously from the perspective of the prosecution, but generously flavored with case law advancing that perspective.<sup>2</sup> Case law sustaining CIPA against constitutional attack, either facially or as applied, is easy enough to find.<sup>3</sup> Plenty of related case law likewise holds that CIPA’s procedures allow courts to reasonably balance the executive’s right to protect classified information against a criminal accused’s constitutional rights to know and use evidence material to his defense.<sup>4</sup>

There appears to be less attention paid to how CIPA affects the typical attorney-client relationship as defined by ethics rules (and good common sense), or the related questions CIPA may raise for defendants and counsel accustomed to that status quo.<sup>5</sup> This article will focus on this less discussed arena. Part I identifies ethical

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1. Classified Information Procedures Act (CIPA), 18 U.S.C. app. §§ 1–16 (2012).

2. See U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, CRIMINAL RESOURCE MANUAL § 2054 (1997), <https://www.justice.gov/usam/criminal-resource-manual-2054-synopsis-classified-information-procedures-act-cipa>.

3. See, e.g., United States v. Hashmi, 621 F. Supp. 2d 76, 81–82 (S.D.N.Y. 2008); United States v. Lee, 90 F. Supp. 2d 1324, 1326–29 (D.N.M. 2000).

4. See, e.g., United States v. Abu Ali, 528 F.3d 210, 247, 254 (4th Cir. 2008), *cert. denied*, 555 U.S. 1170 (2009); United States v. Salah, 462 F. Supp. 2d 915, 922 (N.D. Ill. 2006); United States v. Scarfo, 180 F. Supp. 2d 572, 582–83 (D.N.J. 2001).

5. *But see* David I. Greenberger, Note, *An Overview of the Ethical Implications of the Classified Information Procedures Act*, 12 GEO. J. LEGAL ETHICS 151 (1998).

and procedural rules which govern most criminal cases not involving classified information.<sup>6</sup> The article then describes several features of CIPA, which necessarily contradict those familiar rules and procedures in Part II. In Part III, the article concludes with an overview of some related proposed reforms of CIPA, reforms which would at least offer defense counsel more opportunity to argue for discovery of classified information, and the ability to use that information at trial, without offering a detailed accounting of their defense theories to the prosecution.

### I. FOUNDATIONAL ETHICAL RULES

It should be no surprise that the first ethical rule demands competence.<sup>7</sup> More specifically, “[a] lawyer shall provide competent representation to a client.”<sup>8</sup> The rule recognizes that competence “includes inquiry into and analysis of the factual and legal elements of the problem.”<sup>9</sup> Competence may be derived not merely through one’s own prior experience, but through association of experts or other lawyers of “established competence in the field.”<sup>10</sup>

Competence means nothing without effective communication with the client, which gets its own ethical rule as well.<sup>11</sup> The rule has three equally important parts: (1) “keep a client reasonably informed about the status of a matter,” complying with his reasonable requests for information;<sup>12</sup> (2) “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”;<sup>13</sup> and (3) “inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.”<sup>14</sup>

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6. This article will primarily refer to Virginia Disciplinary Rules. For present purposes, they are consistent with the ABA Model Rules, including rules governing competence and communication with clients. *See* VA. RULES OF PROF’L CONDUCT r. 1.1 cmt. (2016); VA. RULES OF PROF’L CONDUCT r. 1.4 cmt. (2009).

7. VA. RULES OF PROF’L CONDUCT r. 1.1 (2016).

8. *Id.*; accord MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2016).

9. VA. RULES OF PROF’L CONDUCT r. 1.1 cmt. 5 (2016).

10. *See id.* cmt. 1.

11. *Id.* r. 1.4.

12. *Id.* r. 1.4(a).

13. *Id.* r. 1.4(b).

14. *Id.* r. 1.4(c).

Two Virginia Legal Ethics Opinions (“LEO”) illustrate the breadth and importance of the rule mandating communication with the client.

In one, the Virginia State Bar considered a situation in which the prosecutor told the defense counsel the name of a cooperating witness and the witness’s anticipated testimony against the defendant, if the case were to go to trial.<sup>15</sup> The prosecutor offered a plea deal, but requested that defense counsel not share the witness’s name and testimony with the client.<sup>16</sup>

The Bar indicated that defense counsel’s compliance with the prosecutor’s request would be unethical: the identity and involvement of the witness is relevant and cannot be withheld.<sup>17</sup> It would even be unethical for the prosecutor to make such a plea offer, because it *solicited* unethical conduct by the defense counsel.<sup>18</sup> However, because the prosecutor is not obliged to offer a plea deal or provide all incriminating evidence or witness testimony to the defense, she could ethically offer a plea based on a nameless confidential informant.<sup>19</sup>

A second LEO addressed a more common situation involving limitations on discovery.<sup>20</sup> The question was the propriety of a prosecutor imposing, and defense counsel agreeing to, a rule that discovery may be *shown* to the defendant, but not *given* to him, and ultimately must be returned to the prosecutor.<sup>21</sup> That situation, the Bar opined, was ethical because “the lawyer is allowed and encouraged to share the information from the discovery materials with his client.”<sup>22</sup> The situation created no conflict with Rule 1.4, because the lawyer “can explain all pertinent facts to his client” while reviewing discovery with him.<sup>23</sup>

In general, then, reading these two LEOs together, the lawyer cannot withhold from the client information he receives that is relevant to a client’s decision. This includes information about discovery and other pertinent facts, even though the lawyer can

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15. Va. Legal Ethics Op. 1854 (2010).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Va. Legal Ethics Op. 1864 (2012) (revised 2014).

21. *Id.*

22. *Id.*

23. *Id.*

agree not to leave the physical representation of that information with his client, as long as the lawyer shares the substance of the information with his client.

As much as ethical rules emphasize sharing discovery and other relevant information with clients, they say little about communicating with prosecutors. In federal court, rules may require modest pretrial disclosure by defense counsel of witnesses, exhibits, and experts,<sup>24</sup> or advance disclosure of alibi,<sup>25</sup> mental health related defenses,<sup>26</sup> or affirmative defenses like public authority.<sup>27</sup> Likewise, prudence and tactics may dictate pretrial disclosure of some parts of a defense theory, such as via motions to suppress, to compel, or in limine to exclude evidence, motions that often require the prosecution to provide more information about its case. The same considerations may warrant some information sharing in the course of plea negotiations.

But ethical rules and judges do not generally require defense counsel to disclose their defense theory and evidence in advance of trial. CIPA plays havoc with both this status quo and the ethical default of disclosure to clients.

## II. THE CIPA LOOKING GLASS

CIPA by its terms applies to “any information or material that has been determined by . . . Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security,” with “[n]ational security” defined to mean “national defense and foreign relations of the United States.”<sup>28</sup>

CIPA requires the court on motion of any party or its own motion to hold a pretrial conference to establish the timing of requests for discovery and other matters addressed by the Act or involving classified information generally.<sup>29</sup> However, the Act offers no substantive rule or procedural vehicle for challenging the

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24. *See, e.g.*, FED. R. CRIM. P. 16(b).

25. FED. R. CRIM. P. 12.1.

26. *See* FED. R. CRIM. P. 12.2.

27. FED. R. CRIM. P. 12.3.

28. CIPA, 18 U.S.C. app. § 1 (2012).

29. *Id.* § 2.

executive's classification of information.<sup>30</sup> As courts have commented: "A defendant cannot challenge this classification. A court cannot question it."<sup>31</sup> Rather, CIPA provides pretrial procedures permitting the trial judge to rule in sealed proceedings on questions of admissibility involving classified information before such evidence is introduced in open court.<sup>32</sup>

Nor does CIPA describe how civilian prosecutors and law enforcement personnel determine whether classified information exists and is relevant to the prosecution or defense of a criminal case. Those determinations are based on prosecutorial judgments, discovery rules, and the constitutional obligations of the government to search for and provide potentially favorable evidence to defendants.<sup>33</sup> One court in an infamous case emphasized the importance of those obligations nearly twenty years ago:

Application of the *Brady* doctrine to this case is especially difficult because the scope of inquiry is so broad and the information gathering capability of all government agencies is so great. The lawyers appearing on behalf of the United States, speaking for the entire government, must inform themselves about everything that is known in all of the archives and all of the data banks of all of the agencies collecting information which could assist in the construction of alternative scenarios to that which they intend to prove at trial. That is their burden under *Brady*[, and it] . . . is not excused by any inconvenience, expense, annoyance or delay.<sup>34</sup>

At least two scholars question whether such exhortations are "borne out in executive protocol," however.<sup>35</sup> The relevant federal protocol makes clear that the "law enforcement community" ("LEC") and "intelligence community" ("IC") are different parties with different obligations.<sup>36</sup> The former term includes "all [f]ederal investigative and prosecutive agencies."<sup>37</sup> The "intelligence community" includes certain designated agencies, like the

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30. *See, e.g.*, *United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1984).

31. *Id.*

32. *Id.* (discussing legislative history).

33. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 421 (1995); *Giglio v. United States*, 405 U.S. 150, 154–55 (1972); *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963).

34. *United States v. McVeigh*, 954 F. Supp. 1441, 1450 (D. Colo. 1997).

35. Joshua A.T. Fairfield & Erik Luna, *Digital Innocence*, 99 CORNELL L. REV. 981, 1040 (2013).

36. To read the observations of a former federal prosecutor and CIA attorney on this point, see Afsheen John Radsan, *Remodeling the Classified Information Procedures Act (CIPA)*, 32 CARDOZO L. REV. 437, 437–41 (2010).

37. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-90.210(1), <https://www.justice.gov/usam/usam-9-9000-national-security#9-90.210>.

Central Intelligence Agency and National Security Agency, as well as “intelligence components” of the Department of State, Federal Bureau of Investigation, Department of Treasury, Department of Energy, and “respective military services.”<sup>38</sup>

Protocol forbids Department of Justice or federal prosecutors from even “[i]nitial contacts” with the IC, except on approval by the National Security Division’s Counterintelligence and Export Control Section (“CES”), of a written request for a search of IC files.<sup>39</sup> The CES also acts as the intermediary between the prosecution team and the IC.<sup>40</sup>

CIPA has provisions worded to suggest that “defendants” themselves have access to classified information and active roles in advocating for the right to use such information or declassified substitutes thereof for investigative and trial purposes.<sup>41</sup> That is misleading.

CIPA requires the court, on request of the government, to issue an order “to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case.”<sup>42</sup> In a case in which a defendant is charged with national security or terrorism related crimes, the defendant himself is likely to be ineligible for the security clearance to even have access to classified information.<sup>43</sup> His counsel may be able to obtain appropriate security clearances to access the information, but even then, they will likely be required not to disclose classified information to the uncleared defendant.<sup>44</sup>

CIPA in those situations directly conflicts with the general ethical rules of communicating with the client.<sup>45</sup> Instead of promoting communication between cleared counsel and uncleared defendants, CIPA prohibits it. Indeed, it goes further, because classified

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38. *Id.*

39. *Id.* § 9-90.210(2).

40. *Id.* § 9-90.210(2)–(4).

41. *See* CIPA, 18 U.S.C. app. §§ 4–5 (2012) (addressing discovery of classified information by defendants, and notice of defendant’s intention to disclose classified information).

42. *Id.* § 3.

43. EDWARD C. LIU & TODD GARVEY, CONG. RESEARCH SERV., R41742, PROTECTING CLASSIFIED INFORMATION AND THE RIGHTS OF CRIMINAL DEFENDANTS: THE CLASSIFIED INFORMATION PROCEDURES ACT 3–4 (2012) (noting practice and its approval by courts and commentators).

44. *Id.*

45. *See supra* Part I.

information which cannot be disclosed to uncleared persons may prove unusable even for purposes of *investigation*. That is, counsel not only cannot discuss classified discovery with the client, which by definition bares some relevance to the prosecution or defense of the case. They also cannot mention classified discovery when questioning a witness or consulting with an expert or other counsel versed in the kind of case.<sup>46</sup> In doing so, counsel may be limited in their ability to rely on others to attain competence in their representation of the client who doesn't even know what he doesn't know.<sup>47</sup>

Even the litigation the client's cleared counsel pursues to use classified information is done without the client's knowledge. That is because it typically occurs in sealed proceedings, to which the client is generally not privy, to avoid unwanted disclosure of classified material. The client's ignorance of the classified discovery itself, is matched by the potential for his counsel to be ignorant of part of it, in that CIPA authorizes ex parte applications to the court to "delete specified items of classified information from documents to be made available to the defendant"—really, his counsel—to start with, or to "substitute a statement admitting relevant facts that the classified information would tend to prove."<sup>48</sup>

The uncleared client also generally remains ignorant of the thinking process about what classified information his own coun-

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46. The mechanical implications of CIPA are imposing as well. Classified information can only be transmitted through counsel or staff with security clearances, and must be maintained in a secured area. All notes and pleadings relating to classified information must be stored there, as well. Counsel used to sending discovery or pleadings electronically to other team members, themselves (for work at home), or even the court, cannot do so; a Department of Justice security officer provides dedicated computers for use in the secure room, and any secured team member who wants to see the work product it contains must peruse it in the same room. CIPA is not for the claustrophobic.

47. See *supra* note 11 and accompanying text.

48. CIPA, 18 U.S.C. app. § 4 (2012); see also, e.g., Arjun Chandran, Note, *The Classified Information Procedures Act in the Age of Terrorism: Remodeling CIPA in an Offense-Specific Manner*, 64 DUKE L.J. 1411, 1444 (2015) (criticizing ex parte nature of section 4); Joshua L. Dratel, *Section 4 of the Classified Information Procedures Act: The Growing Threat to the Adversary Process*, 53 WAYNE L. REV. 1041, 1058 (2007) ("Unfettered reliance on the ex parte opportunities § 4 offers thus has genuine public policy implications, as it shields questionable government conduct from public view, evaluation, and, ultimately, correction.").

As Chandran observes, the prosecution may provide classified information on its own through use of a secure transmission of discovery to cleared defense counsel, or may ask the court in advance to permit substitutions, admissions, or summaries of the classified information. Chandran, *supra* note 48, at 1417–20.

sel wants to use. That thinking process which *cannot* be shared with the uncleared *client*, however, must be disclosed by defense counsel to the *prosecution*. That is because CIPA requires the defendant to give notice to the court and prosecution of any classified information reasonably expected to be disclosed “in any manner in connection with any trial or pretrial proceeding” in the criminal prosecution.<sup>49</sup>

The United States has the right under CIPA to a hearing to make determinations concerning the “use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding.”<sup>50</sup> The non-cleared defendant also does not participate in such hearings, because most are conducted in camera.<sup>51</sup> Even if arguably necessary to allow the government to litigate and the court to determine the necessity of such disclosures, the procedure is so contrary to the general rules of criminal defense.

### III. RESPONDING TO QUESTIONS ABOUT CLASSIFIED DISCOVERY

Predictably, many defendants subject to prosecution in cases involving classified discovery may view the United States in general, and its justice system in particular, with some cynicism. Those familiar with the general rules of that system may prove the most cynical of all. Defendants, and lawyers unaccustomed to dealing with CIPA, may justifiably have several incredulous questions, which are regrettably easy to answer:

- So, the executive alone decides what is classified; CIPA does not allow a challenge to the classification itself; and CIPA even encourages *ex parte* application to the court to delete classified information from otherwise discoverable documents, or to substitute a summary or stipulation of facts for classified documents or information? Answer: yes.

- Who in the intelligence committee—not just in the abstract, but in the sense of a named person responsible to the court—is responsible for seeking discoverable classified information, and

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49. CIPA, 18 U.S.C. app. § 5.

50. *Id.* § 6(a).

51. *Id.* More specifically, any hearing held pursuant to this section “shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information.” *Id.*



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can be held responsible if such information is never, or not timely, disclosed? Answer: not always clear.<sup>52</sup>

- From the client perspective: Are you saying I am not allowed to view the classified discovery, or obtain information about it from my own counsel? Answer: yes.

- My own counsel cannot even discuss classified information with me, or ask questions of me based on the information, without telling the prosecutor and the court what he wants to discuss or disclose, and for what purpose? Answer: yes.

- When do I get to see and hear this information my lawyers have? Answer: you do not, unless and until the information is declassified, or its disclosure is authorized in some other form.

- More important, when do I get to tell you the information is true or false, or explain to you why *I* think it matters?<sup>53</sup> Answer: see question and answer immediately above.

On the surface, there seems little momentum for lawmakers to amend CIPA's presumptions favoring limited disclosure of classified material, but unlimited disclosure of defense strategy, and nondisclosure of classified discovery to the person most affected by it—the defendant. Consider the comments of Senator Benjamin Cardin (D-Md.) in announcing his introduction of the Classified Information Procedures Reform and Improvement Act of 2010.<sup>54</sup> The senator spoke of the need for “reforms and improvements,” to an Act which has gone unchanged for thirty years, not simply to protect classified information, but “to ensure that a de-

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52. The author's experience in one case involved a disclosure the weekend before trial in 2015, of some small, ultimately declassified, portion of the hours of videotapes of the defendant's cohorts in the 2009 Taliban approved attack that was the subject of prosecution. A government witness at trial testified that he had first learned that anyone was looking for the videos in the last thirty days, and acknowledged that he could have recovered much more had he been asked much earlier.

Several courts have expressed frustration with CIPA proceedings in which representations of prosecutors are not questioned, but it is later discovered that the prosecutors have relied on representations of intelligence officer which turn out to be false. *See Dratel, supra* note 48, at 1058, 1058 n.88.

53. This question is simple enough to answer: never, unless the lawyers persuade the court to let us share the information or a declassified substitute for it. *See CIPA*, 18 U.S.C. app. § 6(c) (2012) (noting that where a court authorizes disclosure of specified classified information, the court must order substitution through summary of same or statement admitting relevant facts instead, upon finding the substitutions will “provide the defendant with substantially the same ability to make his defense”).

54. 156 CONG. REC. S10816 (daily ed. Dec. 20, 2010) (statement of Sen. Cardin).

defendant's due process and fair trial rights are not violated."<sup>55</sup> But it appears that the only significant change the bill would have wrought to further a defendant's interests is to expressly allow the trial court to have *ex parte* conferences with *defendants* alone in pretrial conferences to consider matters relating to classified information.<sup>56</sup>

That bill does at least match the primary concerns of others who view CIPA's weaknesses as its focus on *ex parte* communications by the government, the inability of defendants to do the same, and the non-reciprocal mandate for defendants to describe in detail for what they want the use of classified information and why.<sup>57</sup> One expansive proposal would amend CIPA section 4 to allow cleared counsel to object to government requests for substitutions and deletions, and thereby argue for discoverability in the first instance.<sup>58</sup> It would also amend section 5 to require declassification of the defendant's own communications, written or electronic (e.g., emails, cell phone texts), notwithstanding their seizure by the government.<sup>59</sup> Significantly, it would also amend section 6 to encourage the use of a series of *ex parte* conferences with *defense counsel*, who could make their case for the use of classified information, matched by the court's separate conferences solely with the prosecution, allowing the government to make separate contrary arguments without a full disclosure by defense counsel of all arguments for use or ability to disclose.<sup>60</sup> This would be a huge leap forward for defendants, without limiting the government's ability to make its own arguments against use. "As many defendants have argued, [section 6] effectively requires the defense to hand the government a roadmap of its case by explaining counsel's theories on the use and relevance of defense evidence."<sup>61</sup> At least one court has on its own initiative adopted such a procedure,<sup>62</sup> but amending section 6 to specifically call for it would no undoubtedly expand its use dramatically.

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55. *Id.*

56. *Id.*

57. See Chandran, *supra* note 48, at 1443–45; Dratel, *supra* note 48, at 1058.

58. Chandran, *supra* note 48, at 1443–45.

59. *Id.* at 1445–46.

60. *Id.* at 1448.

61. *Id.*

62. *Id.* at 1449 (citing *United States v. Bin Laden*, No. S(7) 98 CR. 1023 LBS, 2001 U.S. Dist. LEXIS 4, at \*6 (S.D.N.Y. Jan. 25, 2001)).

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Until such legislative reforms, defense counsel dealing with CIPA—and their clients—must cope with CIPA’s burdens on a case-by-case basis. Counsel may be relieved of their communication duties with clients to the extent required to comply with rules of court which CIPA imposes.<sup>63</sup> But the ramifications of CIPA do alter the attorney-client relationship and add a layer of complexity to the litigation of a class of cases which is typically complex to begin with.

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63. See VA. RULES OF PROF'L CONDUCT r. 1.4 cmt. 7 (Va. State Bar Ass'n 2009) (“Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(d) directs compliance with such rules or orders.”).