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INSIGHTS

Part 2 – Classified Information in Federal Criminal Litigation and the Need to Know With Sid Kamaraju

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On the second episode in this two-part series, Bracewell Sidebar hosts ***Matthew Nielsen*** and ***Seth DuCharme*** are joined by Sid Kamaraju, a former national security prosecutor in the Southern District of New York, to discuss the process by which classified information is handled in federal court and the balancing of equities and interests that allow proceedings to go forward while maintaining national security.

Could you talk a little bit about a Classified Information Procedures Act (CIPA) Section 4 filing?

Basically it is a motion to the court asking for permission to either withhold the classified information entirely or to produce the evidence in classified discovery in some kind of summarized or substituted format that will protect the national security interests. The standard governing a Section 4 filing is a little bit different in different circuits. There's some specific requirements in the Second Circuit, for example, which don't apply in other circuits. But generally speaking, what the government has to show is that while the information may be relevant to the case, it's not helpful to the defendant.

Is the judge reviewing this information?

Typically what you do in a CIPA filing is you describe it. Depending on what circuits you're in, you may submit supporting affidavits or documentation to show the national security harm. But judges certainly have the authority to request of you anything in particular. I've had cases where judges have done that. It causes a lot of consternation for the owner of the classified information, but they're allowed to do it. We talked earlier about security clearance holders. Judges, and I think the president, do not require security clearances. They're allowed to see classified information in whatever form, so judges will often review it, if not prosecutors, typically in a CIPA filing. These are often so people have scale. These are often a 100-page or more than 100-page motions that are being filed. So, there's usually a pretty robust discussion of classified information in them, but judges will review them and they will make a decision as to whether the government's allowed to withhold it or whether the government has to produce it, and in which form they have to do that.

If you're a defense attorney now and you get this submission, are you going to run straight to the judge and say, "make the government declassify it all," or what do you do once you get that submission?

If there is classified information that a defendant wants to use in furtherance of their defense, CIPA's got an answer; it's Section 5, since we're walking through the statute. Section 5 requires the defendant to provide notice to the government and the court as to what classified information they intend to use at any hearing or at trial.

It's a particularly thorny thing for defendants for a couple of reasons. One, it applies not only to documents, but also to testimony. So you have to think ahead, for example, to whether you are going to be putting on a witness or whether you are going to be eliciting classified information from a witness which anybody who has done a criminal trial on the defense side knows that some of your best stuff comes when you get the 3,500 material a few weeks or a few days even before trial. And two, once you identify the classified information that you intend to use, the government has an opportunity to say, they shouldn't be allowed to use it. Now you are litigating with the government as to the relevance and the admissibility of the classified information that you're using; now you're not just talking about your defense theory with the judge at your own ex-parte conference, now you're fronting it.

Have questions about this podcast? Email ***Matthew Nielsen*** or ***Seth DuCharme***.

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