Representing Clients Who Hold or Held Security Clearances in UAP Matters

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Key points

- The client's most important facts may be classified and the lawyer may not be cleared to hear them; take only unclassified descriptions until access is arranged.
- The Justice Department's position is that people holding classified information may not lawfully disclose it to uncleared counsel (Justice Manual 9-90.200).
- Washington Advisory Opinion 2134 permits counsel to accept a classified-information protective order if the client consents in writing after full disclosure of the limits.
- Clearance hearings (DOHA for contractors; agency procedures for federal employees) are where most cleared UAP clients win or lose; prepare under SEAD 4 Guidelines E, I and K.
- A lawyer who passes classified material outside authorized channels risks prosecution and disbarment (*In re Diaz*).

1. Summary

Lawyers representing UAP insiders face a structural problem: the client's most important facts may be classified, and the lawyer may not be cleared to hear them. Disclosure of classified information to an uncleared lawyer is not a protected disclosure and may itself be a crime. The lawyer must therefore structure the representation so that classified facts flow only through authorized channels, while still giving competent advice.

The practical solutions are: (1) take only unclassified descriptions from the client; (2) obtain a case-specific clearance or access through the agency, a court protective order, or an inspector general proceeding when classified facts are necessary; (3) use authorized disclosure channels (50 U.S.C. §3373b; IG; ICIG) for the substance; and (4) document the boundaries in the engagement letter.

2. Ethical framework

- **Competence and communication** (Model Rules 1.1, 1.4). The lawyer must understand the client's situation well enough to advise. Where classified facts are essential, competence may require obtaining access or associating cleared counsel.
- **Confidentiality** (Model Rule 1.6). Classified information the lawyer receives is subject to both Rule 1.6 and federal law. Federal law controls handling; Rule 1.6(b)(6) permits disclosure to comply with law or court order.
- **Counseling about illegal conduct** (Model Rule 1.2(d)). A lawyer may not assist a client in an unauthorized disclosure, but may explain lawful channels and the consequences of proposed conduct.
- **Possession of client materials.** A lawyer who receives documents that appear classified must not retain or copy them and should contact the agency security office or the Department of Justice Litigation Security Group for guidance. Retention by the lawyer can create exposure under 18 U.S.C. §793(e).
- **The Justice Department's position on uncleared counsel.** The Justice Manual states that "witnesses, subjects or targets of an investigation who have lawfully acquired classified information cannot lawfully disclose such information to their uncleared attorneys," and that those attorneys "should therefore either obtain a security clearance that would allow access to the classified information or seek to have the information declassified"; if counsel seeks declassification, the prosecutor must move for a protective order. Justice Manual 9-90.200 (updated Jan. 2020). Uncleared counsel should take that statement as the government's working rule: interview the client only about unclassified matters, and start the clearance or protective-order process early (Form C4-1).
- **Conflicts.** Representing multiple witnesses from the same program raises conflicts if their accounts or exposure diverge (Model Rule 1.7). Joint-defense or common-interest arrangements require care.
- **Discipline for disclosing classified information.** A lawyer who discloses classified information, even to vindicate others' legal rights, risks disbarment as well as prosecution. A Navy judge advocate at Guantánamo Bay who mailed a classified list of detainees to a lawyer seeking to file habeas petitions for them was convicted by court-martial and later disbarred. The Kansas Supreme Court held that the disclosure violated Rule 1.6(a) (confidentiality) and Rule 8.4(b) (criminal act reflecting on fitness), rejected the argument that a virtuous motive mitigated the misconduct, and noted the risk to the persons identified. *In re Diaz*, 295 Kan. 1071, 1075-76, 1079-83 (2012). A lawyer for a UAP whistleblower who receives classified material, or who is tempted to pass it to a committee or the press outside authorized channels, faces the same exposure.

Few bar ethics opinions address classified information in a client representation. One is directly on point, and several others apply by analogy:

- **Agreeing to a classified-information protective order.** Washington State Bar Advisory Opinion 2134 (2007) (RPC 1.4, 1.7(b), 8.4) considered a lawyer asked to sign the

memorandum of understanding and protective order entered in *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004), which bars counsel from sharing classified information with anyone, the client included, without a further court order. Obeying the order does not in itself violate the duty to keep the client informed, though the lawyer must tell the client about the restrictions. The lawyer's own exposure to sanctions creates a personal-interest conflict, which is consentable because the order can be modified on motion if vital information comes to light. The lawyer may sign "only if he intends to abide by it," and only if the client gives written consent after full disclosure of the limits. Counsel who accept a protective order or a nondisclosure agreement in a UAP matter (Form C4-1) should obtain the same written consent at the start of the engagement.

- **Clearance practice across state lines.** Maryland State Bar Association Ethics Docket 2016-05 allowed a lawyer admitted in D.C. and Illinois, but not Maryland, to handle federal security-clearance appeals from a Maryland home office, because federal law authorizes the appearance (Rule 5.5(d)), provided the practice is limited to those federal matters and every communication states where the lawyer is admitted and that the practice is so limited.
- **Former government lawyers.** ABA Formal Opinion 509 (Feb. 28, 2024) construes Model Rule 1.11(c), which bars a lawyer who knows "confidential government information" about a person, acquired in government service, from representing a private client adverse to that person where the information could be used to that person's material disadvantage. The term covers information obtained under governmental authority that the government is prohibited by law from disclosing or privileged not to disclose and that is not otherwise public, so classified information about a contractor or an individual falls within it. The opinion reads paragraph (c) to reach current as well as former government lawyers and treats the prohibition as not waivable by consent; the firm may proceed only if the lawyer is timely screened and takes no part of the fee. California's rule 1.11(c) is to the same effect but is written for a lawyer "who was a public official or employee." A former DoD, AARO, or contractor-side government lawyer who now represents a whistleblower against a program contractor should run this check before taking the matter.
- **Documents from an unauthorized source.** ABA Formal Opinion 06-440 (May 13, 2006) concludes that Model Rule 4.4(b) does not govern materials a lawyer receives deliberately from someone not authorized to provide them; the consequences are left to other law. D.C. Legal Ethics Opinion 318 (Dec. 2002) is stricter: where a document is privileged on its face, the lawyer knows it came from someone not authorized to disclose it, and there is no reasonable basis to find a waiver, the lawyer should refrain from reviewing or using it and should return it or ask the owner's counsel about its status (D.C. Rules 1.15(b) and 8.4(c)). Virginia Legal Ethics Opinion 1786 (Dec. 10, 2004) addresses the whistleblower case directly: a client who brings the lawyer documents taken from an employer. The lawyer may not conceal the documents to keep them from an opposing party (Rule 3.4(a)) or use them in a way that violates the employer's legal rights (Rule 4.4), and may not tell the client to gather evidence by means the lawyer could not use (Rule 8.4(a)). Whether the lawyer must give notice or return the documents depends on whether they are originals or copies, how they were obtained, and whether a statute such as the False Claims Act imposes a sealing period. The opinion leaves criminal questions to the courts, citing *In re Ryder* on a lawyer's custody

of stolen property. None of these opinions addresses classified material. For classified documents the "other law" is the controlling point: retaining them can violate 18 U.S.C. §793(e), so the handling rule under "Possession of client materials" in this section (no review beyond what identifies the material, no copying, prompt contact with the security office or the Litigation Security Group) applies whatever the bar's rule on privileged documents.

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3. Gaining access

- **Agency-sponsored access.** Agencies sometimes grant counsel case-specific access to classified information to permit representation in administrative proceedings (security clearance appeals, IG reprisal investigations). Access depends on a clearance and a need-to-know determination by the agency.
- **Court-ordered procedures.** In litigation, protective orders and cleared-counsel arrangements are available (Issue A1; Form A1-1). *Stillman v. CIA*, 319 F.3d 546 (D.C. Cir. 2003), held in a prepublication case that a court should first decide whether material is classified, and reach the question of counsel access only if necessary (district court abused its discretion by first deciding whether the First Amendment gave the author's attorney a right of access to the manuscript before determining whether it could decide the classification question without counsel's aid).
- **How *Stillman* is applied.** District courts in the D.C. Circuit treat *Stillman* as a two-stage sequence and almost never reach the second stage. In *Shaffer v. Defense Intelligence Agency*, 102 F. Supp. 3d 1, 14-15 & n.16 (D.D.C. 2015), the court decided the classification challenge on ex parte, in camera submissions, so counsel access was "not necessary"; it also noted that counsel's clearances granted for other clients' matters did not extend to this one. In *Lawless v. Department of Defense*, No. 21-2859, 2024 WL 4263851, at *5 n.3 (D.D.C. Sept. 23, 2024), the author asked for an in camera classified discussion, a special master, or access for his counsel; the court held those procedures would be appropriate only if in camera review could not resolve the dispute, and it could. The one opinion that ordered access for cleared counsel,* Horn v. Huddle*, 647 F. Supp. 2d 55, 60-66 (D.D.C. 2009) (holding that once the court has done the first* Stillman* step, it may decide that cleared counsel have a need to know in litigation), was vacated on March 30, 2010 as part of a settlement, and it carries only the weight of its reasoning. Counsel seeking access should therefore build a record that in camera review cannot resolve the dispute without them: identify specific facts or sources the court cannot evaluate alone, and offer a classified declaration from the client through the agency's own channels.
- **Retaliation against counsel.** In 2025 a presidential memorandum directed agencies to revoke the clearance of national security attorney Mark Zaid, who had represented whistleblowers. In *Zaid v. Executive Office of the President*, 815 F. Supp. 3d 113 (D.D.C. Dec. 23, 2025) (Ali, J.), the court held that the political question doctrine did not bar procedural challenges to the summary revocation; found Zaid likely to succeed on First Amendment retaliation, procedural due process, and his clients' Fifth Amendment right to counsel of

choice; held the APA, vagueness, and bill of attainder claims adequately pleaded; and granted a preliminary injunction in part. An appeal was filed in the D.C. Circuit on January 13, 2026, and argued on May 14, 2026. *Zaid* distinguishes procedural challenges to a summary revocation from the substantive clearance judgments that *Egan* and *Lee v. Garland* place beyond review, a line practitioners can use (Issue C1).

3.1 How private counsel actually gets access

- **Criminal cases.** Defense counsel apply through the Department of Justice Litigation Security Group, which runs the background investigation for defense teams under the CIPA protective order; the court can order processing, and interim access is sometimes granted for urgent work.
- **Civil cases.** Access depends on the agency's sponsorship and a need-to-know determination, which the court may ask the agency to make (Form A1-1, ¶3). Courts in the D.C. Circuit rarely order access over agency objection (§3, *Stillman* line).
- **Administrative matters.** Agencies sometimes sponsor case-specific access for counsel in inspector general or clearance proceedings, but there is no general right to it.
- **Logistics.** Classified work happens in a SCIF on government systems. Counsel should budget for travel to a government facility, for the time needed to have notes reviewed before they leave, and for the fact that privileged communications in a government facility must be arranged with the security officer.

3.2 Clearance hearings

Clearance revocation is the sanction most UAP insiders fear, and the hearing is where it is decided. Issue C5 covers clearance practice in full, with a sample answer to a Statement of Reasons (Form C5-1).

- **Contractor employees.** Under DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, the employee receives a Statement of Reasons, may answer in writing and request a hearing before a Defense Office of Hearings and Appeals administrative judge, and may appeal to the DOHA Appeal Board. The standard is whether access is "clearly consistent with the national interest," and doubts are resolved against the applicant (*Egan*).
- **Federal employees** receive notice and a chance to respond under their agency's procedures implementing EO 12968 §5.2, with a personal appearance in many agencies.
- **The guidelines that matter in UAP cases** are in SEAD 4, App. A: Guideline E (personal conduct, including candor), Guideline I (psychological conditions, which bars a negative inference "solely on the basis of mental health counseling," ¶27), and Guideline K (handling protected information, the guideline an unauthorized disclosure would be charged under).
- **Experiencer clients.** The SF-86 asks about mental health in Section 21. A client who has reported unusual experiences should answer truthfully and should understand that SEAD 4

forbids treating counseling alone as disqualifying; counsel should prepare evidence of stability and judgment before any interview.

- **The client's own file.** Before a hearing, request the investigative file under the Privacy Act and FOIA from the Defense Counterintelligence and Security Agency (or the investigating agency), so the client sees what the adjudicator sees.
- **Reprisal.** If the clearance action follows a protected UAP disclosure, raise reprisal expressly and preserve it for the §3341(j) process (Issue C1).

4. Structuring the representation

1. **Intake.** Tell the client at the first meeting, before substance, not to disclose classified information. Take a written acknowledgment.
2. **Unclassified framing.** Work from unclassified descriptions ("a program involving recovered material at a contractor facility") and from official acknowledgments.
3. **Channels.** Route classified substance to AARO (Form C1-1), the IG, the ICIG, or the committees. Counsel may accompany the client for the unclassified portions and may be present in classified sessions only if cleared and authorized.
4. **Records.** Keep counsel's file unclassified. If counsel creates notes that may contain classified information, stop and seek a classification review.
5. **Communications.** Use secure, encrypted channels for unclassified but sensitive communications. Do not use secure-messaging apps for classified information; nothing outside approved systems is authorized for classified material.
6. **Prepublication.** Counsel's own public statements about the client's matter must not convey classified information; consider review.
7. **Engagement letter.** Set out these limits (Form C4-1), including fees and expenses for SCIF-based work and the client's written consent to any protective-order limits on what counsel may tell the client (WSBA Op. 2134).
8. **Malpractice coverage.** Confirm that the firm's policy covers national security representation and does not exclude matters involving classified information.