

Maintaining Privilege for Corporate Executives' Communications With Company Counsel: Lessons Learned From Elizabeth Holmes' Trial

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A recent court decision serves as an important reminder that attorney-client privilege may not apply to communications between an executive and a company's counsel during the course of an investigation unless individual privilege is clearly established. The Northern District of California recently addressed this issue in the pending prosecution of Elizabeth Holmes, former CEO of Theranos.¹ The government asked the court to admit 13 of Theranos' corporate documents in the criminal trial against Holmes. Holmes opposed the request, arguing that the documents were communications between her and the Theranos' counsel, Boies Schiller Flexner LLP, and thus were subject to her *individual* attorney-client privilege as opposed to corporate privilege, which, critically, had been waived and therefore would not prevent the documents from being admitted.²

Holmes argued that the court should apply a "subjective belief" test, under which courts will find that an attorney-client relationship exists if the client's belief that such a relationship existed was subjectively reasonable. The court disagreed and instead applied the test articulated in *United States v. Graf*,³ which imposes a higher burden on defendants trying to assert the attorney-client privilege. Under the *Graf* standard, Holmes must demonstrate that:

1. She approached counsel for the purpose of seeking legal advice.
2. When she approached counsel, she made it clear that she was seeking legal advice in her individual rather than in her representative capacity.
3. Counsel saw fit to communicate with her in her individual capacity, knowing that a possible conflict could arise.
4. Her conversations with counsel were confidential.

5. The substance of her conversations with counsel did not concern matters within the company or the general affairs of the company.

The court found that Holmes failed to satisfy the second, fourth, and fifth elements of the *Graf* test. For the second element, Holmes was unable to produce any documents evincing the alleged joint representation. Indeed, Holmes admitted that "there was no engagement letter relating to Mr. Boies' or his firm's representation of Ms. Holmes and/or Theranos," nor could she point to any financial record showing that she paid Boies from her own accounts rather than from Theranos' corporate accounts. For the fourth element, Holmes failed to show that the contested documents were confidential conversations exclusively between her and Boies or his firm. Finally, for the fifth element, none of the contested documents discussed Holmes' individual legal interest but, instead, discussed topics relating to either her official duties or the general affairs of the company. As a result, the court held that individual privilege did not apply to the 13 documents at issue, and with the corporate privilege already waived, the documents were admissible.

To avoid loss of privilege during an investigation, corporate executives and company counsel should err on the side of following the *Graf* standard and clearly establish the scope of executives' legal representation. That includes making it clear that legal advice is being sought in the executive's individual capacity, documenting the confidential nature of the communication, and limiting the scope of the communication to legal issues specific to the executive rather than matters related to the company.

¹ *USA v. Elizabeth A. Holmes*, No. 18-CR-00258-EJD-1 (NC), 2021 WL 2309980, at *1 (N.D. Cal. June 3, 2021).

² The admissibility of the documents hinged on the waiver of Theranos' corporate privilege. So, had Theranos not waived the privilege, then the corporate documents could not be used in the government's case against Holmes. Since Theranos had already waived the privilege, the documents were admissible.

³ 610 F.3d 1148 (9th Cir. 2010).

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