



## Alerts

### Constituent or Client? Inside Embattled Ex-Theranos CEO Elizabeth Holmes' Attempt to Keep Documents in Criminal Case Under Wraps

July 1, 2021

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*United States v. Holmes*, No. 5:18-cr-00258-EJD-1, 2021 U.S. Dist. LEXIS 98060 (N.D. Cal. May 21, 2021)

#### Brief Summary

Elizabeth Holmes—founder of the now-defunct startup Theranos—is on trial for a host of fraud-related allegations. According to the charges brought by the federal government, Holmes and the co-accused Sunny Balwani knowingly defrauded investors and customers by falsely claiming to have developed technology that could run a wide range of tests on a single drop of blood.

Holmes, who is standing trial separate from Balwani, recently opposed the admission of certain Theranos corporate documents in the criminal case against her. She asserted that the documents are protected by the individual attorney-client privilege between her and Theranos' former counsel, Boies Schiller Flexner LLP (BSF).

#### Complete Summary

Model Rule 1.13 governs lawyers employed or retained by an organization to represent the organization acting through its duly authorized constituents. Comment 2 to Rule 1.13 states that "when one of the constituents of an organization communicates with the organization's lawyer in that person's organizational capacity," the communication is protected by attorney-client privilege. Comment 2 specifies, however, that this does not mean that constituents of an organizational client are the clients of the lawyer.

BSF was originally retained to represent Holmes and Theranos in an intellectual property dispute. BSF continued to provide legal services after this initial case, though an engagement letter outlining the scope of the representation was never drafted or signed. Holmes claimed that BSF jointly represented both Theranos and her as an individual during this time. The government argued that no joint representation existed and that the documents at issue were subject only to corporate privilege.

#### Attorneys

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#### Service Areas

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The court applied the *Graf* test to determine whether BSF jointly represented Theranos and Holmes individually. The *Graf* test established that communications about "individual legal matters" with corporate counsel are controlled by the individual's privilege. *U.S. v. Graf*, 610 F.3d 1148, 1161 (9th Cir. 2010). It requires a person seeking to assert individual privilege to satisfy five requirements. Specifically, the person must prove that:

1. he or she approached counsel for the purpose of seeking legal advice;
2. he or she made clear when approaching counsel that he or she was seeking advice in his or her individual capacity, rather than as a representative;
3. counsel was willing to communicate with him or her in his or her individual capacity, knowing a possible conflict could arise;
4. the conversations with counsel were confidential; and
5. communications with counsel did not concern the general affairs or matters of the company.

The court found that Holmes could not satisfy the second, fourth, and fifth elements of the *Graf* test. First, Holmes could not show that she made clear when approaching BSF that she sought legal advice in her individual capacity. Also, there is no engagement letter or records showing Holmes paid BSF from her own accounts. Next, the communications between Holmes and BSF were not confidential, as Theranos employees and attorneys were present. Finally, Holmes failed to show that the communications concerned her individual legal matters, her "official duties," or the "general affairs" of the company.

Based on this, the court found that joint representation did not exist and that the holder of the attorney-client privilege over the protected documents was Theranos' assignee. The assignee waived this privilege, and the documents were thus deemed admissible by the court.

## Significance of Opinion

This decision illustrates the importance of establishing an attorney-client relationship and the potential consequences of failing to draft an engagement letter. According to Holmes, the fact that she was a client of BSF was irrefutable based on the firm's appearance as counsel of record on her behalf in multiple proceedings. However, the lack of an engagement agreement outlining the scope of representation and the absence of a clear indication that an attorney-client relationship had formed between BSF and Holmes outweighed this so-called "irrefutable" evidence.