

WHITE-COLLAR CRIME

When Does Company Counsel Also Represent a Company Founder?

The rise and fall of Theranos and its founder, Elizabeth Holmes, was a gripping corporate drama. The resulting prosecution of Holmes and a co-defendant is now generating issues of interest for white-collar practitioners, as we discussed not long ago. See Elkan Abramowitz and Jonathan S. Sack, *The Importance of ‘Particulars’ in Criminal Fraud Cases*, N.Y.L.J. (March 3, 2020).

In this article, we address a dispute between the government and Holmes which concerns the admissibility of communications between Holmes and outside company counsel, Boies, Schiller Flexner (Boies). The government seeks to admit 16 documents to which Holmes has objected on the grounds of attorney-client privilege. The government has argued that Boies had an attorney-client relationship with the company, not with Holmes. Holmes has argued that Boies represented her personally, and consequently she retains a



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privilege that she will not waive.

This question—when does company counsel also represent a company executive—often comes up in white-collar issue investigations. The present dispute in the *Holmes* prosecution is an occasion to revisit first principles, particularly in the

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Background

Elizabeth Holmes was the chief executive officer of Theranos Inc., which

claimed to have developed revolutionary blood-testing technology. Theranos once reached a private valuation of \$10 billion. In 2015, multiple observers, including an investigative reporter for *The Wall Street Journal*, began questioning Theranos’ claims. Evidence came to light which indicated that Theranos and Holmes had misrepresented the efficacy of Theranos’ technology. In March 2018, the SEC filed suit alleging securities fraud against Theranos and Holmes—a matter that was concluded by consent decree.

In June 2018, a grand jury in the Northern District of California returned an 11-count indictment against Holmes and former company President and Chief Operating Officer, Ramesh Balwani, on wire fraud and conspiracy charges. The indictment alleged a massive fraud on private investors in Theranos and doctors and patients using Theranos technology. Theranos collapsed soon thereafter, and pursuant to an assignment for the benefit of creditors under California law, the company assigned all of its rights to an assignee (the Theranos Assignee), who is liquidating and distributing the company’s remaining assets.

In or about 2011, well before its problems became public, Theranos retained Boies to do various legal work for the company. In two cases, Boies represented both Theranos and Holmes: a suit

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filed in 2011 by Holmes and Theranos to challenge a rival company's alleged misuse of confidential information; and a putative class action suit filed in 2016 on behalf of former Theranos and Walgreens patients which alleged fraud, battery, and conspiracy.

Holmes argues that, through 2016, Boies advised her personally on "regulatory matters, and media strategy and related issues," as well as a potential defamation suit against *The Wall Street Journal*. Holmes claims that Boies "advised [her] in connection with" SEC and DOJ subpoenas and the related investigations from the fall of 2015 into 2016, when she obtained separate legal counsel. In Holmes's affidavit in support of her opposition, she stated that she "do[es] not recall Boies ... informing me ... that they were acting solely as attorneys for Theranos."

In June 2020, the government provided Holmes with its exhibit list for trial, now scheduled for July 2021. Holmes objected to 16 documents, claiming that those documents were privileged communications with attorneys at Boies. According to the government, these documents concerned attorney billing arrangements, investor contacts, regulatory requirements, and claims by journalists. While Holmes sent or received some of the documents, one of the documents was not sent or received by Holmes at all, and on others she was just copied. The Theranos Assignee informed the government that it would waive privilege over the documents.

The Government's Motion

The government moved for an order allowing the documents to be introduced at trial because Holmes had not established a privileged relationship with Boies. The government's position rested on the bedrock proposition that if an individual communicates with

company counsel in her capacity as a company officer, the privilege belongs to the corporation, and the company officer has the heavy burden of proving a distinct individual attorney-client relationship with company counsel.

To prove such a relationship, an individual must establish that both she and the counsel were clear that the representation extended to the individual separate and apart from her company position. The applicable test in the Ninth Circuit was set forth in *United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010), which adopted the standard set out in the Third Circuit's widely cited decision in *In re Beville, Bresler & Schulman Asset Management*, 805 F.2d 120 (3d Cir. 1986):

First, [the individuals] must show

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they approached counsel for the purpose of seeking legal advice. Second, they must demonstrate that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacity. Third, they must demonstrate that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with counsel were confidential. And fifth, they must show that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company.

Graf, 610 F.3d at 1160. The Third

Circuit test has been adopted by other circuits, including the Second Circuit in *United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210 (2d Cir. 1997).

The government argued that Holmes failed to meet her burden of showing that she sought legal advice from Boies in her personal, rather than corporate, capacity. The government explained that the documents Holmes claimed were privileged "related to corporate matters," i.e., they were documents for which it "would have been strange" for Holmes to have expressly asked for personal representation.

Because Holmes failed to inform Boies that she wanted representation in a personal capacity, the government argued that it is necessarily the case that corporate counsel "could not have chosen to represent her individually in the context of the challenged communications." Consistent with that view, Boies has taken the position that it represented Theranos only, and not Holmes personally.

With respect to whether Holmes made it clear that she was seeking personal representation, the Ninth Circuit instructs courts to consider what the relevant retainer agreements said—e.g., were they signed on behalf of the company and/or individual—and whether the corporate officer paid for any of the legal representation. The government pointed to the lack of an engagement letter executed by Holmes and a lack of any payment for legal services by Holmes. Indeed, Holmes acknowledged that, to her knowledge, "there was no engagement letter relating to [Boies'] representation" of Holmes and Theranos, "much less one limiting or delineating any of the areas on which" Boies advised Holmes and Theranos.

Finally, the government contended that Holmes failed to show that the disputed documents related to Holmes

personally and not corporate affairs. The government asked Holmes to provide specific information to show the disputed documents were privileged. Instead, Holmes proffered a privilege log which, the government contended, did not contain the information needed to assess Holmes's privilege claim. In any event, the privilege log indicated that all documents, including the exhibits at issue, concerned matters within the scope of the corporate representation.

Holmes' Opposition

In opposition, Holmes argued that the government's reliance on the *Graf* five-factor test was misplaced and not appropriate to determine whether Holmes had an attorney-client relationship with Boies. The *Graf* test, Holmes claimed, controls whether an implied attorney-client privilege relationship arises when an officer seeks personal legal advice from company counsel—that is, when a reasonable person would understand that an attorney was representing the client in the absence of an executed engagement letter, not whether an attorney-client privilege exists in the context of joint representation of two clients in the same matter(s).

Holmes argued that Boies represented both Theranos and Holmes in the same matter(s), and that the joint representation continued “organically” past the end of the specific matters. In these circumstances, Holmes claimed, the district court should follow the Third Circuit's test in *In re Teleglobe Communications*, 493 F.3d 345 (3d Cir. 2007), under which, when a joint representation has begun (for instance, when counsel makes a joint appearance in court), the joint representation continues until a client discharges the lawyer, the lawyer withdraws, or the clients' legal interests have diverged.

To demonstrate that Boies jointly represented Theranos and Holmes, Holmes claimed several putative Boies representations of her in her personal capacity between 2011 and 2016, including (1) a patent suit brought by Theranos and Holmes, in which Boies entered an appearance for both, which spanned from 2011 to 2014; (2) responses to inquiries from the Securities and Exchange Commission that were directed toward Holmes; and (3) advice on a possible defamation suit, and a putative class action in Arizona. Holmes claimed that these representations by Boies gave her a “reasonable belief” that Boies was continuously representing her in her personal capacity—a belief that was purportedly bolstered by the “many times” the firm advised Holmes “on matters implicating her personal interests in addition to those of Theranos.”

Holmes acknowledged that neither Theranos nor she signed an engagement letter with Boies, instead asserting that Boies's “role at Theranos evolved organically.” Ultimately, despite the absence of specific engagement letters, Holmes claimed she was a client of Boies alongside Theranos and thus had the right to block admission of the 16 disputed documents at trial.

In reply, the government rejected Holmes' attempt to cabin *Graf* to “implied” attorney engagements only, as neither *Graf* nor *Bevill, Bresler* established a distinction between an “implied” representation without an engagement letter and a joint representation with an engagement letter. In the government's view, the *Graf* test applies irrespective of whether the putative engagement was implied or not.

The government further argued that Holmes's proffered facts failed to overcome the presumption that an attorney retained to represent a company represents the entity, not individual

company officers, because she did not demonstrate that she was seeking advice for herself separate and apart from her duties as a Theranos officer. According to the government, Holmes erred by claiming “the existence of an amorphous personal attorney-client relationship with Boies” which existed without an engagement letter and, conveniently, covered the entire period of the disputed communications. To meet her burden, Holmes would have to show that a given communication was covered by privilege because it concerned her personal rights and responsibilities, separate and apart from advice to Theranos; and, in that respect, the government, argued, Holmes failed.

Conclusion

The dispute over privilege in the *Holmes* case demonstrates the importance of documenting the nature and scope of a client representation at the outset of an engagement and over time. This practice is particularly important in the case of a small company led by one founder or a small group of founders. In these circumstances, as a practical matter, the lawyers are doing work for, and advising, the key individuals as well as the corporate entity. But that does not necessarily mean, as the *Bevill, Bresler* test makes clear, that the individuals have an attorney-client relationship with the company's lawyers, or that the individuals have a privilege to assert over information shared as part of the relationship. The district court has yet to decide the government's motion, but the decision will likely add clarity to this important issue.