The prosecution of Elizabeth Holmes, founder of the infamous healthcare and life sciences company, Theranos, Inc., has sparked media attention around the country. With just a few months before trial is slated to begin, Holmes recently lost her pretrial battle over whether the attorney-client privilege precludes the introduction of certain emails with counsel. While the emails at issue remain sealed from public view, related filings and hearings indicate Holmes and lawyers at Boies Schiller Flexner LLP (“BSF”) attempted to prevent the Wall Street Journal from exposing the startup’s impending collapse.

According to Holmes, BSF jointly represented both her and Theranos, beginning in 2011. She contended the joint representation continued for half a decade and covered a wide variety of topics, including her interactions with the media. As a result, Holmes argued the emails are subject to her individual attorney-client
privilege. On the other hand, the government took the position there was no joint representation at all, such that the emails are subject only to corporate privilege—which has already been waived.

Magistrate Judge Nathaneal M. Cousins agreed with the government, finding that Holmes failed to establish a joint representation. The court applied the Graf test, a common test used to determine whether a corporate attorney was representing an executive in their personal capacity, as opposed to representing the corporation itself. Notably, the Graf test put the burden on Holmes to show she had established in the communications that she was seeking legal advice personally, rather than as a Theranos executive. Among the factors the court considered, was that Holmes could not point to any financial records showing payments to BSF from her personal accounts. Further, Holmes was unable to show that the communications with lawyers at BSF were strictly confidential, as other senior Theranos employees and in-house attorneys were copied on the email chains. It seems, moreover, that the fatal flaw for Holmes was the absence of an engagement letter relating to BSF’s alleged representation of the ex-CEO in her personal capacity.

This outcome serves as an important reminder of how privilege lines may become blurred when business disputes involving corporate executives arise. In order to avoid these blurred lines and similar issues for you or your business, we recommend clear, well-drafted engagement letters being a top priority when retaining counsel. Likewise, firms can—and should—provide clients with distinct engagement letters to the extent representation extends to multiple, unrelated matters. As Holmes has likely learned, spelling out exactly who the client is and the scope of representation upfront can prevent major pitfalls later down the line.

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