

## Attorney-Client Privileged Communications - Organizational Clients



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When attorneys are engaged to advise an organizational client, and not only an individual, the entity itself is the client. But, this simple answer blurs the fact that this issue is rather nuanced. The U.S. Supreme Court recognizes that in order to carry out the business of the organization and for an attorney to adequately represent an organizational client, the attorney may have to speak with lower-ranking employees (and not just executive staff). The organization's privilege therefore extends to communications between its attorneys and the employees that the attorneys communicate with if the attorneys (for the purpose of providing legal advice) contact employees who have necessary information falling within their scope of duties and the contact is made at the direction of superiors. The California Supreme Court similarly holds that "client" communications for an organizational client's privilege include those between the attorney and the logical person(s) required to speak on behalf of the entity based on the facts of the particular situation.

A recent U.S. District Court of California decision, *U.S. v. Holmes*, 2021 WL 2309980 (N.D. Cal. June 3, 2021), highlights the complexity of the attorney-client privilege in organizational client scenarios. Elizabeth Holmes, founder of Theranos, asked the District Court to keep her communications with Theranos' outside counsel confidential in her current federal criminal jury trial alleging fraudulent operation of Theranos on the basis that the communications were protected by the attorney-client privilege. Her claim for attorney-client privilege was based on her understanding that Theranos' outside counsel jointly represented Theranos and herself as an individual, not as a representative of the company. However, the District Court, following Ninth Circuit legal precedent in *U.S. v. Graf*, 610 F.3d 1148, 1161 (9th Cir. 2010), found the communications with the company's outside counsel to be subject to corporate privilege only, which Theranos waived, as Holmes failed to establish: (1) she made clear to counsel that she was seeking legal advice in her individual capacity, (2) the communications were confidential, and (3) the communications did not concern matters within or related to the general business affairs of Theranos. The impact of allowing disclosure of these

communications remains to be seen in Ms. Holmes' case, however, as cases may hinge on certain communications being produced or withheld, it is critical for attorneys to ensure their organizational clients and employees are aware of the subtleties of the attorney-client privilege.

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