

DOJ Mishandled Privileged Documents in \$1B Fraud Probe: Court

Federal prosecutors in a \$1 billion nursing home fraud case shouldn't be able to use some 1,000 seized documents and other evidence because federal agents committed misconduct in the handling of privileged materials, a federal magistrate judge found.

Documents, messages, and recordings that might qualify for attorney-client privilege or work product protection were mishandled and inappropriately reviewed as part of the federal investigation into a South Florida nursing home operator Philip Esformes, the judge found in an Aug. 10 report.

Agents led by the Federal Bureau of Investigation failed to set aside all but a handful of privileged documents during a July 2016 search, and the Department of Justice lawyers continued to use protected materials to guide their investigation after warnings from defense attorneys. DOJ attorneys also tried to "obfuscate the record" in court by changing their story about the extent to which certain materials were considered privileged, according to the court's findings.

The "government engaged in improper conduct" in its investigation of Esformes and other participants in the alleged fraud, wrote Alicia M. Otazo-Reyes, magistrate judge in the U.S. District Court for the Southern District of Florida. Its "disregard for the attorney client and work product privileges has not been limited to a single instance or event."

Otazo-Reyes recommended suppressing certain evidence in the case because of the government's misconduct. This includes any documents "that are found by the Court to be privileged after Defendant's privilege log is litigated," as well as text messages between Esformes and one of his attorneys.

The court denied motions by Esformes to dismiss the indictment against him or disqualify the team of prosecutors.

Secret Recordings Barred Also excluded will be secret recordings of Esformes made by defendants in a separate fraud case — the brothers Gabriel and Guillermo Delgado — after they decided to cooperate with the government. The government wrongly directed those secret recordings, since the Delgados previously had a joint-defense agreement with Esformes, the court found.

The Delgados were allegedly business associates of Esformes. Among the 35 federal counts he faces, Esformes is charged with obstruction of justice for allegedly arranging to fly Guillermo Delgado out of the country to help him avoid arrest.

Attorneys for Esformes declined Bloomberg Law's request for comment.

The DOJ is reviewing the court's report and "evaluating next steps," spokeswoman Nicole Navas Oxman told Bloomberg Law.

'Inadequate' Document Review in FBI Raid The bulk of the evidence in question came from a federal search of the Eden Gardens Assisted Living Facility, one of a few dozen facilities that Esformes operated in Florida. He is accused of billing Medicare and Medicaid an estimated \$1 billion in fraudulent claims between 2002 and 2016 for services that weren't medically necessary and/or resulted from illegal kickback payments for patient referrals.

In a July 2016 search at Eden Gardens—on the day Esformes was arrested—federal agents led by the Federal Bureau of Investigation seized 70 boxes of documents. To avoid improperly encountering privileged documents, the agents set aside one "taint" box where they were instructed to place any documents from law firms or correspondence with lawyers.

But the "taint" protocol was "inadequate and ineffective," the magistrate judge found.

The "taint" box contained 10 sets of documents and six disks, versus 179,000 documents in the other boxes, according to the judge's report.

By contrast, an attorney for Esformes—Rossana Arteaga-Gomez of the Miami law firm Black Srebnick Kornspan & Stumpf—later prepared a list of more than 1,200 legal documents, about 800 of which she said should be protected for attorney client or work product privilege, the judge wrote.

Federal agents gave only a " cursory" review of which documents might be privileged and no review at all of electronic media that was seized, according to the judge's report.

An attorney for Esformes, Norman Ginsparg, had an office in the Eden Gardens building that was also searched. Federal prosecutors contended Ginsparg didn't qualify as Esformes' lawyer for purposes of attorney-client privilege—partly because he was licensed to practice law in Illinois but not Florida—but the judge disagreed and found their communications could be considered privileged. These included text messages related to Esformes' divorce, in which Ginsparg represented him.

Esformes is represented in the case by attorneys from the law firms Black Srebnick Kornspan & Stumpf and Tache, Bronis, Christianson and Descalzo, P.A., both in Miami.

The case is *United States v. Esformes*, S.D. Fla., No. 1:16-cr-20549, *judge report and recommendations* 8/10/18.

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The Aug. 10 judge's report is at <http://src.bna.com/A9f>

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