



# Bid To DQ Prosecution Spurs Fiery Row In Health Fraud Case

By Nathan Hale

Law360, Miami (November 8, 2018, 11:26 PM EST) -- A federal judge heard impassioned arguments during a daylong hearing Thursday in Miami over a magistrate's recommendation that suggested suppressing certain evidence in a \$1 billion health fraud case due to prosecutorial misconduct, but also noted that the defendant's requests to disqualify the prosecutors or dismiss the case are not warranted.

While the magistrate's report and recommendation before U.S. District Judge Robert N. Scola Jr. came down mostly against the requests of defendant Philip Esformes, who is accused of running a network of 30 nursing homes and assisted-living facilities where medically unnecessary services were routinely supplied, the bulk of Thursday's hearing focused on the government's rebuttal of findings that prosecutors repeatedly disregarded attorney-client and work product privileges and that "the government's attempt to obfuscate the evidentiary record [was] deplorable."

"There has been no intent to conceal anything," Assistant U.S. Attorney John Shipley objected to the court. "The government acted in good faith, and the defense has not shown otherwise."

But defense counsel for Esformes, who has been imprisoned since his arrest in July 2016, hammered prosecutors' "brazen disregard for the law" and argued the recommendations from U.S. Magistrate Judge Alicia Otazo-Reyes did not go far enough, given her findings of a pattern of misconduct and concealment.

Attorney Howard Srebnick urged the court to order dismissal without prejudice, which he

argued would allow for the case to be reset with a new prosecution team, proper evidence and an even playing field.

“Our thesis is that we should wind the clock back before the misconduct occurred ... a do-over for Mr. Esformes, so he can have a fair trial,” Srebnick said.

After a series of evidentiary hearings that began last October on Esformes’ motion, Judge Otazo-Reyes issued a 117-page report in August recommending against disqualifying the prosecution. But she concluded that prosecutors had engaged in improper conduct on several fronts: in connection with a July 2016 raid of Esformes’ Eden Gardens Assisted Living Facility, where attorney Norman Ginsparg, who worked for Esformes, maintained an office; their direction of secret recordings of Esformes by alleged co-conspirators Guillermo and Gabriel Delgado; and inconsistent explanations for their continued use of documents asserted to be privileged.

She recommended suppression of any documents from the Eden Gardens search determined to be privileged; text messages between Esformes and Ginsparg regarding Esformes’ divorce; and recordings made by the Delgado brothers, as well as any testimony by them regarding the contents of those recordings.

Shiple on Thursday acknowledged the government made mistakes, most notably having an insufficient “taint protocol” for keeping the prosecution team from receiving privileged documents after the Eden Gardens raid. And he said the government has never contested that it cannot use evidence that is ultimately found to be privileged.

But Shiple said Judge Otazo-Reyes erred by reaching findings of government misconduct and prejudice — which carry serious career implications for the prosecutors — without evidence of extreme outrageous conduct or bad faith as required under Eleventh Circuit and U.S. Supreme Court case law.

The parties sparred in particular over the report's findings that trial attorney Elizabeth Young of the DOJ Criminal Division's Fraud Section used materials obtained during the Eden Gardens raid in witness interviews despite attorneys' assertions of privilege and then attempted to change her explanation during the proceedings before the magistrate.

Shiple argued that contradictory testimony by other individuals did not disprove Young's

testimony of what she understood at the time, and he said the government has been consistent in its position.

“Everything matches up that this was a misunderstanding. There was no bad faith,” he said.

Judge Scola also heard arguments from attorneys representing Young and fellow prosecutors Daniel Bernstein and Drew Bradylyons individually.

Roberto Martinez of Colson Hicks Eidson, who is representing Young, expressed concern that Judge Otazo-Reyes violated his client's due process rights by making her leave the courtroom during testimony on the allegations against her.

Srebnick said the exclusion was done at the agreement of the parties so the witness could testify about privileged materials and that a designated taint prosecutor was present for the government, but Shipley said the government had lodged an objection to the procedure.

The hearing got heated at one point when Shipley suggested the personal attacks on the prosecutors were part of a defense strategy to delay a January trial date.

"It has nothing to do with the trial date. I think this is a highly personal attack that is below [the government counsel]," Esformes counsel Roy Black quickly responded, pointing animatedly at Shipley.

Judge Scola voiced agreement with the government that given the report and recommendation's more than 100 pages of facts, it provided little in terms of legal explanation of how Judge Otazo-Reyes reached her legal findings. He also described the nine days of testimony she allowed on Esformes' motion as “way more than any judge should've done.”

But he also pressed Shipley that the government needed to present him with “something articulable” if it wants him to overturn the credibility findings and he questioned whether the prosecution team exacerbated issues by taking a myopic view that Ginsparg was a co-conspirator and not an attorney in possession of potentially privileged documents before the Eden Gardens raid.

The indictment, which also charges two other Miami-area residents, claims that the alleged

scheme resulted in \$1 billion in false billing and that Medicare and Medicaid spent at least \$464 million in improper reimbursement.

Among the thousands of people cycled through the allegedly fraudulent network were drug addicts who were prescribed opioids to entice them to stay in facilities where they did not belong, according to prosecutors.

The alleged misconduct included paying kickbacks to attract patient referrals and receiving kickbacks in exchange for steering patients to other health care providers. The kickbacks were sometimes disguised as charitable donations, payments to female escorts and payments to a basketball coach for Esformes' son, according to the indictment.

The government is represented by Daniel Bernstein, Elizabeth Young, Alison Whitney Lehr, Allan J. Medina, Anthony Erickson-Pogorzelski, Daren Grove, Drew Bradylyons, John Charlton Shipley Jr., Jeremy R. Sanders and Catherine Wagner of the U.S. Department of Justice.

Esformes is represented by Roy Black, Howard M. Srebnick, Jackie Perczek and Rossana Arteaga-Gomez of Black Srebnick Kornspan & Stumpf PA and Marissel Descalzo of Tache Bronis Christianson & Descalzo PA.

The case is U.S. v. Esformes et al., case number 1:16-cr-20549, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Carolina Bolado. Editing by Michael Watanabe.