



Defense Pushes For Prosecutor Testimony In \$1B Fraud Case

By **Nathan Hale**

Law360, Miami (June 27, 2017, 10:06 PM EDT) -- Federal prosecutors pursuing a \$1 billion Medicaid fraud case against a Florida businessman failed Tuesday to secure a quick escape from having to provide live testimony in connection with his bid to disqualify them after he raised concerns about sworn statements they offered as a potential substitute.

U.S. Magistrate Judge Alicia M. Otazo-Reyes recently had agreed to let more than a dozen federal prosecutors and investigators who worked the case file affidavits to help her gauge whether they will have to take the stand at a three-day evidentiary hearing next month in the record-setting case against Philip Esformes and two co-defendants.

But when Esformes' legal team claimed during a follow-up hearing Tuesday in Miami to have identified inconsistencies and omissions after comparing those statements with FBI reports and past statements — and said they still wanted to question all but one of the federal employees they had subpoenaed, while adding a new one to the list — the judge said she needed the government to lay out in writing its arguments for quashing their request, including a determination from the U.S. Department of Justice on whether it is formally denying or limiting those employees' testimony.

“I want some definitive position from the government,” Judge Otazo-Reyes said, adding, “Otherwise, I am jumping the gun, which I think is what you're all asking me to do.”

As a result, the judge denied the government's motion to quash the subpoenas with instructions for the prosecutors to renew their request by Friday. Esformes will have until July 7 to respond so Judge Otazo-Reyes can issue a ruling before the hearing scheduled for July 18-20.

The indictments against Esformes and two other Miami-area residents, alleging a complex scheme and featuring charges for payment of kickbacks, obstruction of justice, money laundering and wire fraud, represented the largest criminal health care fraud case the DOJ had brought against individuals, prosecutors said when they announced the charges last July.

Esformes has alleged that federal prosecutors and investigators violated attorney-client, work-product and joint-defense privileges through their improper collection of

documents and communications containing privileged information and their subsequent use of that information to form the charges against him.

At a June 19 hearing, the government argued that putting prosecutors on the stand is an extraordinary step and that Esformes' subpoenas were overly broad. Prosecutors proposed filing affidavits as a means of possibly satisfying or at least narrowing the defense's discovery request.

On Tuesday, Esformes counsel Howard M. Srebnick of Black Srebnick Kornspan & Stumpf PA said the “devil is in the details” and presented a notebook the defense team had compiled comparing 23 instances where they think the affidavits do not comport with the government's prior statements or even show they made affirmative use of the allegedly privileged information they seized during a search of an assisted living facility Esformes owned.

In one portion of his arguments, Srebnick pointed to the statements of two investigators who said they handled some of these materials but continued to work on the case and interviewed witnesses for several months before being dropped, saying this showed the government did not have proper procedures in place at the search to prevent the prosecution from being tainted by improperly collected materials.

“People who are exposed to attorney-client privileged materials are not supposed to be part of the investigation,” Srebnick said. “We are certain there was not a taint protocol of any satisfactory fashion.”

Prosecutor Daniel Bernstein expressed frustration in several interjections, saying there was nothing sinister in the government's actions.

“This is what we're dealing with — supposition upon supposition, conjecture upon conjecture,” he told the court.

He noted that Srebnick repeatedly said the government had “admitted” and “conceded” points.

“We're agreeing on the facts, just not the meanings of the facts,” he said, explaining that where the defense argues that the government improperly questioned witnesses about one of Esformes' work product, it holds it had legitimate reason to view certain notes as evidence of a possible ongoing crime or fraud. The affidavits also recounted numerous steps prosecutors took to avoid tainting the case, Bernstein said.

“We're quibbling over words,” Bernstein told Judge Otazo-Reyes, adding, “You have the facts

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The judge did not agree that she could rule on the spot; however, the parties did resolve several discovery issues raised in a motion to compel information on what documents the prosecution team had viewed.

The case targets Esformes, Odette Barcha and Arnaldo Carmouze. Esformes, who could face life imprisonment if convicted, was allegedly the ringleader, operating a network of 30 nursing homes and assisted-living centers where medically unnecessary services were allegedly routinely supplied.

The indictments claimed the alleged scheme resulted in \$1 billion in false billing and said that Medicare shelled out 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 in order to entice them to stay in facilities where they didn't belong, the DOJ claimed.

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 previously argued successfully that Esformes was a flight risk, and he is being held in custody pending his trial, which is scheduled for September. The judge did not agree that she could rule on the spot; however, the parties did resolve

The United States is represented by Daniel Bernstein, Elizabeth Young, Alison Whitney Lehr, Allan J. Medina, Anthony Erickson-Pogorzelski, Daren Grove and Drew Bradylyons of the U.S. Department of Justice.

Esformes is represented by Roy Black, Howard M. Srebnick, Jackie Perczek and G. Richard Strafer of Black Srebnick Kornspan & Stumpf PA, Michael Pasano of Carlton Fields, and Marissel Descalzo of Tache Bronis Christionson & Descalzo PA.

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