

Feds Likely To Give Menendez Trial Another Shot, Attys Say

By **Bill Wichert**

Law360, Newark (November 16, 2017, 10:22 PM EST) -- The government will likely pursue a second bribery trial of Sen. Bob Menendez, D-N.J., and a Florida ophthalmologist in the wake of Thursday's mistrial, with prosecutors and defense lawyers expected to pore over the first trial's record to prepare for the battle ahead, attorneys say.

While jurors could not reach a unanimous decision on any charges against the senator and Salomon Melgen, prosecutors will probably regroup and ultimately try to convince another jury that the senator accepted bribes from the physician in exchange for trying to influence executive branch officials on the doctor's behalf, attorneys say.

"Absent a material change in the evidence, which doesn't seem to have occurred in this case, generally we can expect the government to retry the case," said Robert A. Mintz, a partner with McCarter & English LLP.

Carrie H. Cohen, a partner with Morrison & Foerster LLP, said she expected that prosecutors would ask for a new trial date in the near future.

"There's nothing about a hung jury that would make the prosecutors ... question their initial decision that they had proof beyond a reasonable doubt that those individuals committed the charged crimes," Cohen said.

In deciding whether to pursue a second trial, the government must consider the resources needed for a retrial and the message that would be sent to the public and other defendants by not retrying Menendez and Melgen, according to Lisa Krigsten, a partner in Dentons' white collar and government investigations practice.

Not retrying the two men could embolden others who learn that they're under investigation, Krigsten said. Such individuals could feel encouraged to not plead guilty or not cooperate with an investigation, said Krigsten, a former federal prosecutor.

"This could be the issue that helps tip the balance in favor of a retrial," said Krigsten, referring to the concern over sending such a wrong message.

Krigsten said prosecutors need to make a decision on a retrial before the end of the year.

“In the court of public opinion, the longer they wait to make this decision, the more it's going to send a signal to the public that the government's not confident in their case,” she added. “If they're going to retry it, they need to come out very soon and express very strongly that they think they have a good case and that they are gearing up for the retrial.”

Following the mistrial on Thursday, the U.S. Department of Justice indicated in a statement that the agency would be weighing its options.

“The Department of Justice appreciates the jury’s service in this lengthy trial. The department will carefully consider next steps in this important matter and report to the court at the appropriate time,” the agency said.

In addressing reporters outside the Newark courthouse Thursday, Menendez did not touch on the prospect of a retrial, but he blasted how the government has pursued the case.

"The way this case started was wrong. The way it was investigated was wrong. The way it was prosecuted was wrong, and the way it was tried was wrong as well. Certain elements of the FBI and of our state cannot understand, or even worse, accept that the Latino kid from Union City and Hudson County can grow up to be a United States senator and be honest," said Menendez, referring to his hometown where he once served as mayor.

After dozens of witnesses and arguments over the more than 10-week trial, the government and the defense would likely use the trial record as an educational tool to prepare for their next matchup, attorneys say.

Mintz, a former federal prosecutor and head of McCarter & English's white collar and internal investigations practice, said both sides “will go to school on how the case played out ... and try to do a better job the second time around.”

Prosecutors would likely engage in a self-critical analysis and determine how they could present a more streamlined and compelling case at the second trial, Mintz said. Now, the defense has the benefit of “a detailed road map from the government as to their case and all of their witness testimony,” he said.

“You would think that the advantage the second time around goes to the defense, because ... they have the benefit of all the prior testimony ... but experience shows that it's not unusual for prosecutors to get a conviction ... the second time around,” Mintz said.

But given the pretrial discovery that prosecutors must turn over, Cohen said the defense typically has a blueprint of the government's case before a first trial.

Going into a second trial, however, prosecutors have insight they typically don't have, such as the main themes of the defense and what cross-examination of government witnesses looks like, allowing the government to revise its approach in direct examinations, according to Cohen, a former federal prosecutor.

“They can put on other witnesses to rebut whatever the defense witnesses will claim,” Cohen said.

With the defense having presented a case, “the prosecution can look at that case and see which parts of

it may have been most effective for the jury and decide how to streamline the presentation of their evidence or how to highlight certain pieces of evidence in a way to preemptively rebut what ... the second jury may hear from the defense,” Krigsten said.

However, a second trial could also pose challenges for prosecutors.

For example, defense lawyers could confront government witnesses with their prior trial testimony in the event that they testify differently than they did at the first trial, according to Krigsten.

“The appearance at least of shifting testimony is what makes it difficult for prosecutors on retrial,” she said.

--Editing by Martin Bricketto and Pamela Wilkinson.