

## Without 'Smoking Gun,' Feds Face Tough Menendez Retrial

By **Bill Wichert**

*Law360, Clifton, N.J. (January 22, 2018, 10:06 PM EST)* -- Prosecutors gearing up for the retrial of U.S. Sen. Bob Menendez and a Florida eye doctor face the difficult task of beating the defense that the two men were longtime friends and convincing a jury that they engaged in a bribery scheme without any "smoking gun" evidence, attorneys say.

After a deadlocked jury led to a mistrial last fall, those challenges lie ahead for the government in its second bid to prove beyond a reasonable doubt that Menendez, a New Jersey Democrat, accepted private jet rides, political donations and other bribes from Salomon Melgen in exchange for trying to influence executive branch officials on the doctor's behalf.

At the second trial, prosecutors will still be confronted with "the heavy burden of trying to establish the quid pro quo intent ... proving that Senator Menendez received a gift specifically with the intent and understanding that it was done in exchange for official action," according to Robert W. Ray, a partner with Thompson & Knight LLP.

"That's difficult to prove," said Ray, a former federal prosecutor.

Proving such criminal intent will mean grappling with the defendants' argument that they were acting out of a long-standing friendship, not a corrupt scheme.

Overcoming that friendship defense represents "the most significant challenge" facing the government at the retrial, said Rebecca Monck Ricigliano, a partner in the white collar and regulatory enforcement group at Crowell & Moring LLP.

At the first trial, which ended on Nov. 16 after more than two months, prosecutors countered that Menendez and Melgen were friends who committed bribery, telling jurors at one point that "friends can bribe each other."

Ricigliano, formerly the first assistant attorney general of New Jersey and a onetime federal prosecutor, said such an argument is "factually true, but the jury didn't buy it the first time."

Prosecutors will need to ensure that "their witnesses are clear and direct about what the conduct was that they are alleging constituted the bribery and that it was outside the scope of the friendship" and that the defendants' conduct was criminal in nature, Ricigliano said.

“They have to prove that,” she added. “How they go about doing that when ... they tried the first time and were not successful ... it's going to be a challenge, because it's a powerful defense.”

But Jim McGovern, a partner at Hogan Lovells, said prosecutors will be in a better position to combat the friendship defense after having seen that argument at the first trial.

With a better understanding of the defense theory of the case and the prosecution's vulnerabilities, the government will be better able to prepare its own witnesses to testify at the retrial, according to McGovern, a former federal prosecutor.

“Government witnesses get better, not worse, over time by and large,” McGovern said. “After a full preview of the defense case, time really helps the government supplement its case for the second time around — if it's winnable at all.”

Prosecutors have alleged that Menendez — who is up for re-election this year — received gifts from Melgen, including flights on his private jet, a first-class commercial flight, a flight on a charter jet and a three-night stay at a Paris hotel valued at nearly \$5,000. The doctor also is accused of providing \$660,000 in political donations benefiting Menendez as part of the scheme.

In exchange for such alleged bribes, prosecutors said, Menendez tried to influence visa applications for women associated with Melgen; an \$8.9 million Medicare overbilling dispute involving the doctor; a port security contract dispute between Melgen and the government of the Dominican Republic; and the U.S. government's purported donation of cargo-scanning equipment to the Dominican government.

The senator is accused of trying to conceal the bribery scheme by not disclosing reportable gifts from the doctor on financial disclosure forms covering 2006, 2007, 2008 and 2010.

At the first trial, defense counsel highlighted that there were no emails or other evidence showing that Menendez and Melgen had a quid pro quo arrangement. Prosecutors argued that the defendants were too sophisticated to spell out their bribery agreement in writing.

Barbara Van Gelder, senior counsel with Cozen O'Connor, said the lack of any “smoking gun” evidence would be a challenge for the government at the retrial.

“Jurors don't like to have to put the pieces together,” said Van Gelder, a former federal prosecutor. “They want the picture already there.”

The absence of such evidence is “part of the issue in overcoming the defense of friendship,” Ricigliano said. Without a definitive piece of evidence of a criminal agreement, “it's hard to ignore the long-standing friendship,” she said.

“Proving a criminal conspiracy or a bribery scheme beyond a reasonable doubt, sometimes you need that [evidence] to point to and the defense did a great job of noting the absence of that,” Ricigliano said.

Among the evidence introduced at the first trial, too much time was spent on “attention-grabbing aspects of the nature of the gifts,” such as the hotel rooms where Menendez stayed as part of the alleged bribery scheme, according to Ray.

That evidence does not provide much of a window onto the senator's intent, Ray said.

“In other words, too much effort spent trying to just dirty the thing up to make it look bad doesn't really get to the core question of the case, which is ... did he receive the gifts with the intent that and the understanding that they were being given in exchange for his official action,” Ray said.

At the retrial, Ray added, “more time ought to be spent on intent and less time should be spent on ... what hotel room he was in and what the place looked like.”

Prosecutors largely sought to establish Menendez's criminal intent at the first trial through the testimony of an FBI agent about the senator's financial disclosure forms.

Ray suggested that another witness should present such evidence at the second trial, saying the FBI agent appears like he has an interest in the outcome of the case.

“In the best-case scenario, you want to present a neutral and detached witness with regard to that issue to communicate to the jury the importance of accurate ... financial information on the financial disclosure form,” Ray said. “In other words, you want a credible, unbiased witness that would be persuasive to a jury.”

But Ray also noted that “every trial is a crapshoot.”

“Every trial is a moment in time, so you never know quite how it's going to come out,” he said.

The case is U.S. v. Menendez et al., case number 2:15-cr-00155, in the U.S. District Court for the District of New Jersey.

--Editing by Mark Lebetkin and Pamela Wilkinson.