Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

'Our Heads Were Spinning': Trial Atty Explains Rare Strategy

By **Cara Salvatore**

Elizabeth Prewitt

Law360 (April 22, 2022, 2:42 PM EDT) -- Two recent high-profile trials included an unusual move by defense counsel to save their opening argument for after the prosecution's case, a bold tactic one of the attorneys told Law360 can catch the government off guard and provide a midtrial chance to speak persuasively to jurors.

Latham & Watkins LLP's Elizabeth Prewitt, a former U.S. Department of Justice Antitrust Division assistant chief in New York, decided to reserve her opening argument for chicken wholesale executive Tim Mulrenin in a price-fixing case in February. Prewitt dramatically announced the move in a Denver federal courtroom after being called to the lectern amid a chain of nine other executives' openings, then walked back to her seat.

The charges against Mulrenin and four others have now been dropped following two mistrials, but the DOJ plans to try the other five defendants a third time.

The same tactic was used in another Denver antitrust trial this month, when kidney dialysis giant DaVita gave its opening at the outset of an employee-poaching case while a lawyer for former CEO Kent Thiry, Tom Melsheimer of Winston & Strawn LLP, addressed jurors after the prosecution rested. The jury came back with an across-the-board acquittal for both defendants.

A reserved opening goes against the conventional trial lawyer wisdom but can carry great benefits in the right situation, Prewitt told Law360 in an interview exploring what goes into this uncommon decision. This interview has been edited for length and clarity.

How many times in your career on the defense side have you chosen to reserve your opening arguments?

It's the first time.

And how many times when you were a prosecutor did you see that happen?

One time.

So it's pretty rare.

It's very rare. There's a tremendous amount of jury research out there that indicates that jurors make up their mind very early in the case as to guilt or innocence or just the fundamental facts at issue, so it's an unusual choice to make. In fact, when you talk to experienced criminal defense lawyers, many of them have never seen it done in their whole career.

I would imagine that if you're even thinking about doing it, it might be under some very unique circumstances. What would those be?

I'll tell you about the circumstance I confronted when I was a prosecutor for the Antitrust Division, because I think that's the prototypical example — and that's what you also saw in the DaVita case.

That circumstance is where you have a very aligned company and individual. Essentially, the liability is imputed from the individual to the company, so the arguments and the themes should be more or less fully integrated. When those defense themes, arguments and positions are aligned, then it can be a smart strategic option to split up the openings, because the defendants have confidence that the side of the defense is fully articulated early on, when the jury is in the process of forming a view.

The example I confronted when I was a prosecutor was in the food brokers bid-rigging prosecutions brought by the Antitrust Division. It was a case I prosecuted along with others out of the New York office over bid-rigging by suppliers of frozen and fresh food to the New York City schools, the food that was put on the plates of the 1.1 million New York City schoolchildren, which was subjected to rigged bids and cartelized prices for a number of years.

In that case, all told, there were 22 individuals who were convicted and 13 companies. It was a very successful prosecution and recovered $20 million in restitution for the New York City Board of Education.

And so there was one trial against a company and its owner, and that led to a conviction. The company and its senior executive chose to split the openings up. I think it was the company that reserved and did its opening at the close of the government's case.

It didn't work in that case. But at the time, as a prosecutor, I mean, our heads were spinning. We didn't expect it, and it kind of knocks you back on your heels a little bit. But you can see why it made a lot of sense. And that's what they did in the DaVita trial too.

It's one of the few ways that the defense can really surprise the other side.

Exactly. I almost reserved my opening in the first chicken trial. It was very close. It comes down to a game-time call, right? It requires an alignment in terms of your client's view; you all have to believe in the strategy. But I didn't do it in the first trial. And then looking at how the second trial was going to develop, I decided to do it. And when I stood up and reserved my opening, I do believe that I caught the DOJ by surprise.

It gives the defense attorney the opportunity to stand up right after the government closes its case and give a forward-looking view of what we expect the defense case would be — and to offer that forward-looking view having an understanding of what has come in in the government's case already. So the opening that I ended up giving in this trial was different from the opening I would have given had I not

sat through the government's case.

Can you talk more about what went into the decision to switch it up?

I think having seen and gone through the trial once before for seven weeks, I could visualize how reserving my opening would play to another jury.

I had a sense that the government's case would focus more on witnesses. That would give me an opportunity to get up and amplify my themes in cross-examination of those witnesses.

I also knew from the first trial that a lot of proof that my client had no means or motive came through very strongly through the witnesses we put on in our defense. And so I felt it would be very impactful to be able to speak to that right before we called them to the stand.

When you say it was a game-time decision, is that minutes before, hours before? When did you actually lock it in?

I think it was the night before. I was more than 90% confident that I'd reserve. Because of the number of openings, they straddled two days. It's a decision that you need to make considering everything that has taken place and you expect will take place. Knowing that you're going to be one of 10 is a factor, in terms of having a moment when the jury's really focused on what you will say.

You're also asking yourself a brutally honest question about, at this moment in time, am I really offering something new? Is it really something that distinguishes my client and his defense?

And then also asking yourself, do you think your story is going to come through sufficiently through the opening statements of others? Is it something that you are going to be able to do as a defense attorney while challenging the government's case in chief?

For me, I had a belief that the themes that would demonstrate my client's innocence were going to come out through the openings of others. The flaws in the government's case, they were common amongst a number of defendants. But then also, I knew I was going to be standing up and cross-examining the government's main cooperator, who's a former Tyson employee. I felt that I would quickly be able to get up and introduce the government to my client and to the defense through the cross of the government's witnesses.

And so that's how I structured our defense case. In terms of cross-examination, I didn't get up for every witness. I tried to be tactical about where I stood up, at what point I would stand up. And it was really to make the points that were consistent with our defense themes and then sit down as soon as possible. With 10 defendants, there's just this opportunity for it just to go on and on.

And I really wanted to be able to hear the case as it came in and then be able to speak to the jury. I had the opportunity to say, 'Hey, we are going to show you' and then right away put up a witness, which is what I did.

You mentioned jury research showing that jurors make up their minds very quickly on first impressions. Is there any research you're aware of showing that when a reserved opening is used, it's effective?

Honestly, the decision to reserve, I researched it and I found very, very little. If you look, you'll see the same thing. It's just not done that often. When you're thinking about doing it, you have to call a lot of folks to get some intelligence in terms of different ways in which you can approach a reserved opening.

The Antitrust Division is really unusual in that way, prosecuting corporations alongside individuals. That's something that the Antitrust Division probably does more than any other litigating component of the DOJ, so that's why I think there's more occasion in antitrust cases to have the opportunity and sort of the circumstance where a reserved opening makes sense. But there's just not a lot of guidance out there, because it's just not done very often.

Are there any other notable aspects of prosecuting an individual and a company together or defending an individual and a company together?

Because the liability of the individuals is imputed to the company in almost all cases, they can undermine each other's defenses or they can support each other's defenses. Typically they're extremely well integrated and aligned. It's almost like there's a trust element that supports that decision for someone to kind of hold their fire in the face of all that research indicating the jurors make their mind up early on in the case. There has to be a lot of trust that it makes sense and both the company and the individual will be well served by the reserved opening.

--Editing by Brian Baresch.
