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Dewey, Sex, Lies and Videotape

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Do you really want to be a partner in a law firm?

As we all daily sit transfixed staring at the horrific train wreck of Dewey & LeBoeuf, a firm with glorious legacies, many have already begun to undertake the post mortem to try to determine what went so horribly wrong as to bring the

demise of one of the twenty largest law firms in the nation. The most comprehensive piece that has appeared to date comes from the brilliant and articulate Bruce MacEwen, writing as Adam Smith, Esq., in which Bruce dissects what is now obvious to most informed observers. Some claim that some of the partners were simply too greedy and that the firm's leadership was too eager to accommodate that greed, providing those partners with guaranteed incomes, regardless of productivity or law firm profitability. The fault, according to some, is base criminality and greed at the hands of the firm's leadership. Still others point to the firm's unsustainable leverage: Well over $700,000,000 in bank, institutional, legacy and similar liabilities (not taking into account current liabilities for rent, wages, and vendors), an amount that simply cannot be sustained under any circumstances on the backs of 300 partners, bringing in $900,000,000 in gross revenues. There are those suggesting sexual peccadilloes by the firm's senior leadership. Still others point to ongoing deception by current firm leadership, which one day encouraged partners to seek alternative employment in rather plain language and the next day, in the tradition of Lewis Carol, said that the epistle didn't mean what it said. In other instances of unfortunate lack of candor, the firm's leadership said that help was on its way in the form of a major law firm merger partner which was being discussed with "a number" of firms, only to fail to mention that all of those preliminary inquiries were politely previously declined. Or one day promoting a bankruptcy strategy, while eschewing bankruptcy as an option a day or so later, no matter that the initially promoted bankruptcy strategy had no likelihood of succeeding.

All of the facts will emerge as the long slog of litigation and bankruptcy proceedings take their inevitable course, Presumably, some depositions of key players will be videotaped for the benefit of interested parties, courts and perhaps the movie that (documentary or fictionalized) that seems to be likely.

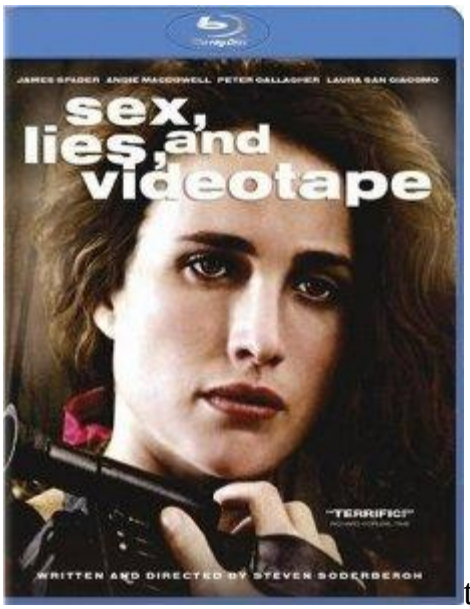
Instead of dawdling too long over all of the foregoing (too much ink and space on the Internet has already been taken), I turn to the repeated lament of Steve Harper of Northwestern University School of Law, retired Kirkland & Ellis

partner, noted author and keen observer of the legal profession. Harper recently returned to a theme he has repeatedly previously eloquently addressed, namely, the devolution of the concept of law firm equity partner, particularly in the face of Dewey & LeBoeuf's utter deconstruction.

The fact is that in Dewey World, a good number of the firm's most highly compensated partners were not in fact equity partners, although they proudly bore and boasted of having that moniker.

The hornbook definition of a partnership is two or more people engaged in a business who agree to share the profits and losses of that business. The Dewey highly compensated partners did not share profits. Rather, they were apparently bestowed with contracts which provided them with fixed premium incomes, regardless of their own production or the firm's profitability. I guess we all now know that this business model doesn't work. Actually, we learned this lesson in 1987, with the demise of Finley, Kumble , then the world's second largest law firm, but as Santayana said, those who have failed to learn the lessons of history are destined to repeat them.

The point is why did all of these very smart, accomplished and talented lawyers take on the visage of "equity partners," when that was simply not the case? There



doesn't seem to be any rational explanation. These soon to be former highly compensated Dewey equity partners are soon to have some of the torments of Dante's financial inferno visited upon them, as, among other things, they will be subject to clawbacks, loss of capital, adverse tax consequences and clawforwards.

A noted bankruptcy lawyer, who himself suffered through these torments as his firm went bankrupt thirty years ago said that he would never be a partner in a law firm again. His observation was that partners can do things to you even spouses can't do, without your express consent: They can make you liable for substantial debt, they can encumber your assets and otherwise wreak very real financial and professional havoc. This lawyer continued to practice for many years quite successfully and with a substantial client following at several very large successful law firms. Yet, he always was simply "of counsel" or "counsel" to the firms. His income never suffered and he says he never missed out on an engagement because he didn't possess the adornment of partner. Given his success and standing at the bar, he had a voice in all significant law firm decisions. He was never inclined to take less money than he was worth only to have what he described as a meaningless ego gratifying title on his business card.

So, let's see what happens to those who took on the honorific of being an equity partner in a world where partners are free agents and where partners are employees at will: These ex Dewey partners will probably face years of legal proceedings as well as serious adverse financial consequences. They will likely

have to repay substantial sums. Had they been salaried employees dubbed as counsel or of counsel and subject to simple written employment agreements (which in many senses, they actually were), they would be creditors of the bankrupt estate, entitled to priority treatment with regard to payments to which they claim an entitlement. The estate would be sending them checks, not the reverse.

Surely, ego is likely to prevent accomplished lawyers from taking what is ostensibly a step down, but that bruise to the ego should be assuaged by simple financial and other real world vagaries.

The interesting irony is that some of these highly compensated partners may well take the position in ensuing litigation that in fact they were not partners at all but merely highly compensated salaried employees and should be treated accordingly in the bankruptcy process. I can't predict how the courts will react, but I would note that for the last thirty years, the lower levels of the law firm partnership have frequently claimed that they, too, were not actually partners; they were nothing more than salaried employees working for wages only. They had no role in management, and at best, were "mushroom partners:" kept in the dark and fed muck. The argument, while repeatedly made, has never gained real favor, except that mushroom partners (a term of art in law firm liquidations) typically wind up writing smaller checks than those at the summit.

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