

Streamlining Salvages Dewey Case On Second Try

By **Daniel Siegal**

Law360, Los Angeles (May 8, 2017, 11:55 PM EDT) -- After their first try ended in a mistrial, prosecutors from the Manhattan district attorney's office trimmed the fat and the key defendant from their controversial retrial of the former leadership of Dewey & LeBoeuf LLP — and that decision netted a modest victory five years in the making Monday when jurors convicted the defunct firm's former chief financial officer on felony fraud charges.

After five full days of deliberations, a New York state jury **found former CFO Joel Sanders guilty** of two felony fraud charges and a misdemeanor count of conspiracy but acquitted former Executive Director Stephen DiCarmine of all charges.

DiCarmine and Sanders were put on trial for a second time by Manhattan District Attorney Cyrus Vance's office over allegations that they had masterminded a ploy to con banks and insurer-investors into backing the firm with more than \$250 million in financing. A prior, five-month jury trial that ended in a hung jury had **raised questions about whether the prosecution could end the sprawling case** with a win.

By narrowing the case in a number of ways in order to better focus on the alleged misconduct by the defendants, Vance's office was able to secure Monday's verdict, according to several former prosecutors.

Monday's verdict, however, has its roots in the decisions the prosecution made before the retrial, when it cut deferred prosecution deals with former Dewey Chairman Steven Davis — who was a defendant in the first trial — and indicted low-level employee Zachary Warren.

Jonathan Lenzner of The Lenzner Firm PC, who spent six years working for the Manhattan district attorney's office, told Law360 that cutting the number of defendants in the trial — and including significantly fewer counts in the operative indictment — was key.

"I think the prosecution was able to focus its presentation and more easily steer the jury toward its version of the facts," he said. "Anytime you have a more streamlined indictment with only a couple different legal theories to explain to a jury in a complicated case, you're going to have a better shot at getting a verdict."

The streamlining of the case also came about as a result of decisions outside the prosecution's control, as ahead of the retrial New York Supreme Court Judge Robert Stolz **dismissed 15 counts of grand larceny** apiece against DiCarmine and Sanders.

Once the second trial started earlier this year, however, prosecutors again took matters in hand, choosing to be more judicious about which witnesses they called and what testimony they elicited, according to Andrew Lankler of Baker Botts LLP, a former assistant district attorney in New York County.

"The prosecution abandoned some of the more extraneous workplace drama testimony in favor of more targeted and focused evidence," he said.

Bennett L. Gershman, a former prosecutor with the DA's office who is now a professor at Pace Law School, noted that there was plenty of fat to trim in the government's case during the first go-round.

The prosecution shortened the case considerably by focusing more narrowly on the crimes at issue and forgoing “boring financial background,” he said.

“I think they saw it in the first trial, that it didn't work, and the jury was bored,” Gershman said. “And if the jury is bored they tend to take it out against the government.”

John W. Moscow of BakerHostetler LLP, who spent 30 years working in the New York County district attorney's office, noted that retrials present their own challenges, and victory is far from a sure thing.

“Yes it is a major, major pain in the neck to retry a big case, you have to learn the whole thing, you have to learn every argument,” he said. “You lose a lot of spontaneity. It's difficult, it takes a lot of discipline and hard work to get the results.”

Despite this, Moscow said that “of course” he would have taken the case to trial again, adding that the evidence presented indicated it was an appropriate case to prosecute. Moscow noted that while the case ended with only one trial conviction, it came after seven other former Dewey employees pled guilty.

Still, the fact that after five years and two full jury trials, prosecutors were unable to get charges to stick to Dewey's most senior leadership or to have the firm itself held liable — that was a clear failure with respect to the prosecution's intentions, Gershman said.

The conviction was a “Pyrrhic victory” for Vance, given the “expenditure of tremendous resources, in terms of time, money, political capital” he made in bringing charges against Dewey, only to see the firm's most senior executives escape punishment, according to Gershman.

“You really can't say he came away with anything that he should be proud of,” he said. “Certainly the firm itself wasn't convicted of anything ... virtually every one of their key executives that were indicted or charged was dismissed or acquitted, except for Sanders.”

Gershman noted that Sanders was convicted of a pair of Class E felonies, the least serious variety in the state, and said that all told, the prosecution as a whole hadn't sent any sort of message to other potential fraudsters.

“If they had tried to make a point to show you can't get away with this kind of fraud, and if you're going to try it you're going to get caught and punished, he didn't sustain that message,” he said.

Lankler and Lenzner, on the other hand, both shared Moscow's sentiments that the district attorney likely wasn't weighing the decision to prosecute the case to the end through such a cost-benefit lens. The two men independently said that in the Manhattan district attorney's office the number one priority is doing “the right thing,” and that Vance wouldn't have taken the case to trial if he didn't think it worthwhile.

“So if asked if they had to do it all over again, I think the answer is yes,” Lankler said.

He added that while Sanders was convicted on class E felonies, that doesn't mean the prosecution is going to see its convicted defendant walk out the door.

“They are felony convictions that occurred after two trials and even low grade felonies can garner incarceratory sentences,” he said. “And I wouldn't rule out an incarceratory sentence in this case.”

– Additional reporting by Stewart Bishop and Brandon Lowrey. Editing by Pamela Wilkinson.