Tackling Underperformance

By Nick Jarrett-Kerr

Partner performance management systems attain their sharpest focus in how they cope with the issues of non-performance and under-performance.

There is hardly a law firm of any substance in the world which has not at some time had to deal with the issue of partner underperformance. As I have reviewed best practice in this area I have found many more examples of poor practice than best practice, although it is also becoming clear that some leading firms are learning to deal with these issues more sensibly. Examples of current and wholly avoidable bad practices include:

- Failure to set firm standards and manage the firm's expectations of partner performance generally.
- Criteria based on financial performance alone with all other contributions under-valued or ignored.
- Unacceptable partner behaviour and poor standards tolerated and indulged by the firm's leaders for long periods of time. This is often followed by sudden and precipitous over-reaction, with partners finding themselves suddenly out of a job without any warning.
- Underperformance issues not being confronted with any degree of openness and candour. Instead there is often a whispering campaign behind the back of the underperformer.
- Hasty and sudden departures without warning and without the underperformer being given an opportunity to address the underlying issues.
- Partners are over-promoted and should have never been made an equity partner in the first place.

Whilst some of these issues derive from poor management skills on the part of the firm's leaders, there are three essential infrastructure elements which will help firms address this difficult problem area. First, time must be spent on constructing and agreeing a comprehensive performance management system for partners. This should address how partners will be monitored and managed on a year to year basis, and how they will be expected to develop over time. Second, the firm must manage the expectation of partners by setting out both the constant standards and the baseline partner criteria which they expect partners to achieve. Third, the firm should give special consideration to the process by which they not only monitor and support struggling partners, but also, ultimately and in the event of failure, manage partners out.

Clearly there are many financial indicators which can be measured in law firms. One indicator which is not commonly measured is the true cost of underperformance. The problem is that, not unlike the assessment of the true cost of replacing a departing partner, some of the issues are hard to quantify.

Whilst it is possible, for example, to measure the cost of clients lost due to negligent or inefficient work, it is less easy to measure the cost of lost opportunities, or the effect on staff morale of an underperforming partner who is continually allowed to get away with blue murder. Equally, the presence of an underperforming partner may cause others to leave, or block promotion and recruitment opportunities. Here, a "back of the envelope" calculation can be as useful as a long-winded attempt at empirical analysis. But the true cost of underperformance of a single partner almost always can reach six figures and sometimes amount to several millions of pounds. We spoke to one firm where a partner had been identified as underperforming but the cost of severance was considered too high. Two years later, the underperforming partner was still there and the cost had, if anything, increased, whilst at the same time, the partner concerned had been paid a profit share far in excess of her contribution.

It is important to ensure that issues of underperformance form a part (but not the whole) of the performance management system. Firms do need to address those parts of the performance management system which manage aspects of behaviour and contribution that are not in keeping with the firm's objectives. This part of the overall performance management system must emphasise the importance of providing a positive supporting role. It would be detrimental to the partnership ethos of the firm if it were regarded as a disciplinary procedure and nothing else.

The framework needs to be responsive and flexible. The ability to operate the framework rapidly and without delay will be crucial to the firm's success and its ability as a whole to operate efficiently.

It must also avoid operating with any element of a 'blame culture', recognising that there may be partners trying hard to achieve the firm's standards and objectives but struggling to do so efficiently. However, there may be situations where the framework needs to allow approaches to be made to partners who have adopted a policy of quiet subversiveness and are therefore undermining the firm's efforts to achieve its strategic objectives or are in danger of losing trust and credibility within the firm.

The link with the firm's Governance and Partnership Compensation/Remuneration Scheme

It is important to draw a distinction between conduct and professional ethics on the one hand and partner performance on the other. Most partnership deeds will make provision for misconduct and will therefore deal with matters such as the contractual duties of partners and the provisions which relate to termination for breach. These provisions should provide a proper remedy with regard to partner misconduct issues. The focus of this book is, however, primarily upon performance issues, although it must be acknowledged that ultimately performance issues could form the subject of misconduct allegations within the scope of the misconduct provisions of the partnership deed. Many partnership deeds make no provision for expulsion for underperformance and, when revising their governance, many firms are seeking to address this issue. There is trend towards the firm being able to enforce compulsory retirement without cause upon attaining an overwhelming resolution (say 75%) of the equity partners to expel the underperforming partner. Some firms even have put in place more draconian provisions to allow the Board to expel a partner without taking the matter to the equity partners. In many cases, the provisions will call for more generous notice to be given to the underperforming partner than expulsion for misconduct.

Partner performance also is extremely relevant in the context of the firm's scheme for partner remuneration or compensation. I have, however, noticed that some partner remuneration schemes avoid focus on negative aspects of Partners performance; there is a widespread but mistaken feeling in these firms that to do so could jeopardise the effectiveness and validity of the remuneration scheme.

However, in setting criteria for admission, promotion and the evaluation of partners, it is important that the firm enunciates some standards which the leaders of the firm are prepared to enforce. Clearly therefore, the firm needs some recognised means of managing situations of underperformance against the firm's standards and criteria.

Setting Criteria and constant standards

To confront a partner with an accusation of underperformance often evokes the response, "what is your evidence?", or "against what standards am I being judged?". It helps here to agree performance criteria -- in the financial context for chargeable hours, the targets, credit control, and work in progress control -- both for the partnership as a whole, but also, and perhaps more importantly, for each individual partner as part of his or her business plan. If a partner has agreed his or her proper level of performance, then issues of underperformance become easier to monitor. Financial criteria are easier both to agree and to monitor than other key skills and behaviours. Selfishness, rudeness, staff intimidation, intolerance and disruptive behaviour all fall within a more difficult area to police.

We observe that some firms draw up specific underperformance criteria whilst others prefer to rely on the criteria for incoming equity partners as a guide to the minimum baseline indicators of acceptable performance. Where specific 'elimination criteria' are preferred, great care must be taken to draw them up across all the Critical Areas of Performance and – as with all performance metrics- to ensure that they are measurable or assessable in a fair and open manner. Thus, elimination criteria in the area of Financial and Business performance might appear as follows:

- Consistently records less than the chargeable hours per annum expected at his level of the partnership.
- Fails to manage engagements to the firm's standards for engagement profitability.
- Fails consistently to adhere to firm's financial disciplines.
- Fails to manage projects, time or priorities adequately or cost effectively.
- Fails to leverage work to an agreed level (technology as well as people).

Sample 'elimination criteria' are set out in

Part 2 of the Annexe.

The performance procedure for underperformers

Whilst there should be no room for the consistent underperformer in any law firm which prides itself on its quality and standards, nevertheless, the underperformer should be given the opportunity to improve and develop, and should be offered every possible assistance in training, coaching and support. Indeed, I have found that in most firms there is an extreme reluctance to vote for an expulsion (even in extreme cases), unless partners can be satisfied that every opportunity has been given for improvement to take place. What is vital is for a programme and timetable to be agreed for and with the underperforming individual, both so that the underperformer can feel safe from attack for the period of the timetable, and so that he/she is fully aware of what needs to be done to improve. The key is for somebody to take personal responsibility for the performance of the underperformer - as has often been said, the best way of managing performance is on a one-to-one basis.

A sympathetic firm will also want to investigate the reasons for underperformance which might give rise to curative measures other than action plans to improve straightforward underperformance. Some of these issues may need counselling or other help. Such issues often include:

- Trouble at home or other personal problems (divorce, alcoholism, depression, etc).
- The individual is "burnt out" and no longer finds the work interesting or challenging.
- The individual is, in fact, no longer competent.
- Fear of failure in trying something new and reaching for career progress.
- The individual is making a quality of life choice and does not wish to contribute any more energy or time to the business.
- Externally driven reasons such as the loss of a recent client or downturn in their sector.
- The individual has not kept up in his field and is less in demand.
- The individual is struggling because of poor time management or other inefficiencies.
- The individual does not know what he should be doing in order to succeed.
- The individual is isolated from the flow of better work or is not receiving an appropriate share of work coming into the team.
- The individual is poorly monitored/managed or has not been persuaded to agree to the "rules of the club".
- The individual is insecure due to issues like merger discussions or Partner Remuneration programs, and has withdrawn into his shell, pending resolution of such issues.

Assuming that areas for performance improvement are reasonably clear to the Managing Partner, it is suggested that the underperformance procedure should follow a number of Phases, which should all be clearly outlined in the Performance Management System so that all partners are fully aware of the process and methodology from the very beginning of their career as an Equity Partner.

Phase One – Formal or Informal Identification of an area for improvement

The Managing Partner or Head of Practice Group should clearly be responsible for monitoring partner performance generally and should of his/her own initiative or at the request of the Management Committee or Board discuss with a partner specific areas of a partner's performance that need to be clarified and possibly addressed.

In some instances the discussion may result in the Managing Partner and the partner agreeing that there is nothing further to be done and that having gained a better understanding of the partner's position the Managing Partner is in a position to report back to the Board with a clear and detailed explanation of the actual position thereby addressing and satisfying the concerns that have been highlighted.

Where the identified concerns need some action, the Managing Partner should agree with the underperforming partner what specific action is needed to address the shortcomings. The action points should focus on objectives that should be specific, measurable, achievable, and realistic and time bound. The underperforming partner must be given ample access to support by way of training, coaching, counselling and consultation.

The partner will then usually be expected to progress the action points and to keep the Managing Partner appraised of progress towards achieving the objectives in accordance with the agreed timetable which should (unless agreed otherwise) be no longer than one year. In the ordinary course of events the Managing Partner and the underperforming partner will meet once the action plan has run its course with a view to agreeing the outcome and in the majority of instances concluding the review process.

Phase Two – Intensive Care

The failure of informal attempts to improve performance should usually move the procedure onto the second phase of the scheme for a period of formal remedial action. It is, of course, possible that the failure at Phase 1 may be as a consequence of wrongly focused SMARTE objectives. More seriously, problems could result from the underperforming partner's unwillingness to support and undertake the agreed objectives. Nevertheless, this failure should lead to a period of what might be called 'intensive care'. This period should start with the Managing Partner agreeing with the underperforming partner why the previous action points had not been achieved and should agree a more drastic and final action plan and review process. It should be abundantly clear by now to the underperforming partner that he or she is 'drinking in the last chance saloon'.

Once the timetable contemplated by the second Action Plan has run its course (which again should be no more than one year) then there should be a review meeting and an agreement reached between the Managing Partner and the underperforming partner as to the outcome of the Phase Two Action Plan during the period of intensive care. This will hopefully lead to agreement that the area of concern

Analyse and review files to find examples of:-

- Waiting time between steps
- Incidences of delay
- Iterations and unnecessary work
- Poor matter strategy
- Use of the wrong level of lawyer
- Poor/inadequate delegation
- Inefficient use of secretaries
- Poor client reporting
- Failure to use standard forms and precedents

has now been addressed with the help of coaching, counselling and training. Equally, it may be clear by now that there are aspects of the partner's contribution or behaviour that are still not acceptable to the firm.

Phase Three – Redeployment or De-equitisation

In some cases it is clear that the underperformance is due to factors outside the partner's concern. The most common reason is where the area of law in which the partner has traditionally practiced is not sufficiently busy to keep him or her fully productive. In such cases, it may be possible to consider redeployment of the underperforming partner to another area of the firm. Redeployment of a partner whose only problem is under productivity can be an attractive option for firms because it is both humane (in comparison to firing partners or demotion on the lockstep ladder) and in many cases has a good chance of success. But it does need a partner who is willing to retrain and an area of practice where there is a sustained need.

De-equitisation or reduction in equity share has also proved to be a favoured route for firms where equity partners are underperforming. It has to be recognised that most de-equitisations usually result in the partner ultimately leaving the firm. It rarely seems to work as a permanent solution.

In the case of both redeployment and de-equitisation, one issue is the loss of credibility which the partner suffers in the firm.

Phase Four - Expulsion

Once the first three phases have been concluded without significant success, it is probable that the underperforming partner is going to be asked to leave the partnership. At this stage, the morale of other partners should be considered. We were told recently about a partner expulsion in one firm where all partners accepted that the right decision had been made but felt that the way the expulsion was dealt with was savage and unsettling.

We believe that at the expulsion stage the firm should be prepared to be generous, as it is easy to destabilise the other partners if the leadership is seen as excessively ruthless. We have witnessed in many firms the demotivating effect that an ungenerous or badly handled expulsion has had on the remaining partners. At the other extreme, firms which ignore or fail to grasp issues of underperformance in a timely and sensible manner, also run the risk of demotivating the partners who are performing well.

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