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DEALING WITH UNDERPERFORMING PARTNERS – AT THE TOP OF EVERY MANAGING PARTNER'S *"TO DO"* LIST

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In Smock Law Firm Consultants' year end state of the legal marketplace surveys for the last few years – and in our consulting assignments and continuing discussions with law firm managers – *"underproductive partners"* is listed and/or described as a major management issue or concern – either at the top of the list, or close to it. While many (perhaps all) firms have tried to address the issue, it continues to vex law firm managers and create strains on the partnerships in law firms of all sizes.

- This monograph, then, is intended to address the issue of underproductive partners (or **underperforming partners** – a term we prefer, as it is a more accurate one) by defining it, assessing its impact, and suggesting near and longer term ways to successfully address the issue.

- My focus is managerial – as in *"how can successfully addressing this issue improve firm performance and profitability in the near and longer term?"* Because of its ubiquitousness there has been much written on the topic of underperforming partners – some of it a good bit of psychobabble on how the unique nature of attorneys leads to a lack of self-actualization that typifies underperforming partners. I will not address the psychobabble, only the rational.

An early confession is in order. While I do discuss solutions and the importance of the timeliness of those solutions, I have also sinned in the past by not dealing clearly and quickly with underperformers. As the leader/manager of large and small consulting practices, I have recognized the problem, but more often than not I have taken too long to address it (hoping against hope that the issue would self-correct). And, my delay has clearly and negatively affected performance.

Defining Underperforming Partners

Use of the term *"underperforming or underproductive partners"* in law firm management circles often has as many meanings as the similarly overused term *"firm culture."* So, in prior monographs, we have defined *"chronic underperforming partners"* (the real problem cases) with both timing and characteristics.

- For a partner to be chronically underperforming, he/she must have displayed most or all of four key characteristics for a multi-year period.

- These four characteristics include (1) a lack of sufficient economic value added to his/her firm, expressed either in billable hours or, more appropriately, in collected revenue; (2) an unacceptably low work ethic; (3) a dislike, aversion, or resistance to meaningful business development efforts; and (4) a lack of participation in and support for essential firm building activities – most notably people development.

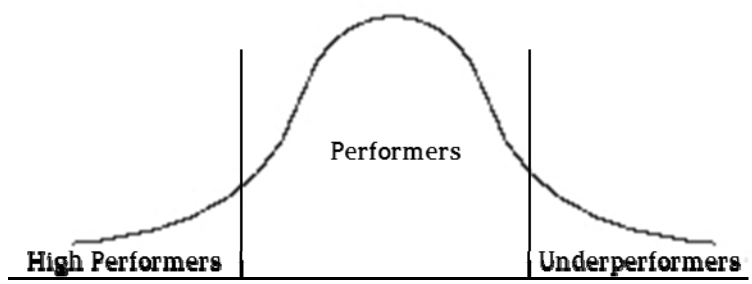
Please note that we do not consider many short-term fall-offs from expected performance to constitute *"chronic underperformance."* Cases can settle, clients are sold, partners (or their spouses or children) get sick, and demand can fall for a particular legal service (e.g. – M&A transactions, real estate, etc.). We view these as periods of temporary underperformance – but, over time, these partners do have to rejoin the ranks of the productive fully performing or have the term *"chronic"* prefixed to their underperformance.

Underperforming partners exist in every law firm – they are statistically unavoidable. Every group of partners has a median level of productivity – thus, 50% are below the median and 50% above.

- Managing partners and consultants often speak of a figure of 10% (of the total partnership) as chronically underperforming – our experience is that the actual percentage is below that 10% (but, probably above 5%). Some firms do have less (either because of the luck of the partner draw or positive actions by firm and practice management to minimize the incidence of chronic underperformance).

- So, for a business law firm of 200 attorneys and 100 partners, it is reasonable to assume that there are at least five to ten or more partners who are chronically underperformers.

- It is theoretically true that every Firm has three levels of performer in their partner ranks (high performers, performers; usually the great majority; and underperformers) – or, as David Maister labeled them – *"dynamos, cruisers, and losers."* As with most statistical distributions, they tend to fit the classic bell curve (although every firm's curve probably varies somewhat from every other firm's).



But, how do 5% to 10% of the *"best and brightest"* end up in the chronic underperforming category? Within a firm, we believe there are a number of causes – both external and internal to the underperforming partner.

- Those causes **external to the underperforming partner** include (1) a partner selection process that admitted or still admits men and women to the partnership who have not demonstrated and do not possess the qualities needed to be successful in their present (or any) law firm; (2) a lack of defined and stated expectations of performance, not communicating them if they do exist, and/or not enforcing them (it always amazes me how much of a *"wuss"* a very tough litigator can be in a firm/practice management role); and (3) a lack of visible commitment by firm/practice management to the consistent long and short term actions necessary to minimize the incidence of chronic underperformance, and (4) a lack of a decentralized management structure (specifically, practice teams) to ensure, as much as possible, an acceptable level of performance from individuals. There are probably others, but generally they are variations of the above.

- There are also **underperforming partner induced causes** for the chronic underperforming state including (1) an inability to recognize that there is a problem or that they are part of the problem; (2) a *"victimhood"* expressed in terms of *"they do not give me enough work,"* so it must be *"their"* fault; (3) often, a lack of skills necessary to solve the problem; or (4) the will to put the time and effort into resolving the problem.

- More often than not, the chronic underperforming partner is well paid (certainly considerably more than he/she deserves – as many firms hesitate to make cuts in compensation that match the fall-off in performance), and coupled with a lack of will on the part of the Firm, the most rewarding approach to such a partner is merely to keep one's head down and not make waves.

We should note that the population of *"chronic underperforming partners"* is fluid – some are temporarily rescued by large projects (*"he/she is still a good lawyer"*) and become productive for a while. Some reform, do what needs to be done, and claw their way back to productivity and contribution to the Firm and the partnership. But, we believe (based on our experience) that the percentage of that happening after the issue is confronted is somewhere less than 25% of those who either recognize the problem or have it formally presented to them (and that may be optimistic).

The Impact of Underperforming Partners

There are a wide range of impacts on a law firm caused by underperforming partners (as defined in the prior section).

- First, let us face facts – underproductive and underperforming partners cost a law firm considerable cash. These partners generally are paid considerably more than they deserve and that takes money away from the higher performing partners and investments for the future. But more importantly, they represent a distinct sub-optimization of productive capacity that generally consumes overhead and support resources, but does not produce an expected return.

- We believe underproductive partners who are not performing as true partners in the firm put the firm at risk – both professionally and financially. The excuse we often hear is that *"x or y is really a good lawyer, it is just that they are not busy enough."* We believe that assertion is wishful thinking – because if they are really, really good lawyers they would, over a longer period of time, be both productive and in demand by the marketplace. So, in many ways, they are *"professional weak links"* in the resources the firm presents to the market.

- Dealing with underperforming partners takes an enormous amount of management time and become emotional (as opposed to intellectual) issues. Managing partners, practice leaders, and governing bodies (Management Committees, Executive Committees, Boards, etc.) fret about underperforming partners, talk continually about them, and wring their hands – all emotional exercises.

  - This takes away from focusing on productive partners, building the business, and better serving clients.

  - I am reminded of the client a number of years ago whose Executive Committee fretted endlessly about a single underperforming partner in a one person office who was billing approximately 1,000 hours per year – I suggested that they either get rid of that person and close the office or quit worrying about it. There were considerably more important strategic fish to fry.

  - This reminds me of Peter Drucker's assertion that ineffective management tends to *"feed problems and starve opportunities"* – in other words, they spend their time and focus on the wrong things.

- Underperforming partners take up space, not just physically, but also within the organization (as a good client of ours described it – *"taking up limited bandwidth"*). Perhaps most importantly, they take up space in the partnership that could be filled by more committed and productive lawyers and they consume support services and support that is better focused on productive people and practices.

- Perhaps the greatest impact of underperforming partners is their effect on younger partners (in essence, the future of a law firm). In this age of information transparency, these younger partners know who the underperforming partners are and can easily calculate their financial impact. Many of the consulting assignment interviews we have held with younger partners demonstrate how upset they are/can be – (knowing that our conversations are confidential, they seethe with anger at the issue. And, on occasion they leave the firm pushed by the issue and firm management's inability to deal with it.

- Unfortunately, even very good law firm managements usually do not deal well with underproductive partners. The primary impact is that some very good managers lose their credibility with their partners and hard earned political capital by ignoring the issue, downplaying it, or kicking the can further down the road.

- Ignoring the issue or kicking the can down the road usually creates more of a problem, than dealing with it early and effectively. If underperforming partners see no consequences for their lack of performance, then there is no motivation to get them to perform better and most do not. And, in classic passive aggressive fashion, they defend their inactivity and promote their victimhood (because they know it works).

- Underperforming partners create real holes in the complement of attorneys that a firm takes to the marketplace. They weaken the practices they are in and serve as an obstacle to practice improvement and growth. This is a greater problem/risk in smaller and medium sized firms, because generally the larger firms have either effectively dealt with the issue and/or have the breadth/depth and financial strength to compensate for their underperforming partners.

- Also, we have seen underproductive partners, acting in concert, serve as a real block to firm development. In some cases, they block strategic moves (e.g. – addition of qualified productive laterals, acquisition of strong practices, or mergers combinations, etc.) because they can due to impossible to achieve super-majority vote requirements in the partnership. Often, whether consciously or subconsciously, they seem to be more focused on protecting their position (and compensation) than taking positive steps to grow and improve the firm competitively.

What Should You Do to Address This Issue

This section of our monograph discusses what firms (regardless of size) need to do to address the underperforming/underproductive partner issue. First, we discuss the fallacy of using compensation as a method to resolve the issue; then, short term suggestions; and, finally, longer term ones.

The Fallacy of Compensation Adjustments as the Answer to Underperforming Partners

While we believe law firm management is becoming much more aware of what works and what does not in addressing chronically underperforming partners, we still see a majority of firms that address the issue through compensation adjustments (as either the only or the primary step to address the issue). Simply put, they believe that if an underperforming partner's compensation is adjusted downward, they will miraculously see the light, change their ways, and rejoin the ranks of the performing.

- It really does not work that way. If an underperforming partner is overpaid, downgrading his/her compensation (often in insignificant amounts) does not come close to balancing the ledger.

- Further, we have seen very few cases where a downward adjustment in compensation is followed by an upward effort in performance and productivity. That downward adjustment in compensation, as one of our clients said, *"only makes an underperforming partner a ticked off underperforming partner."*

- While many firms do explain to the partner why they are decreasing their income, they do not explain what that partner needs to do to get an income increase (back to his/her original level). There is often the assumption that merely reducing the partner in question's income ensures that, because he/she understands the system, he/she will get it.

We do believe that underproductive/underperforming partner as defined earlier in this document, should have their income reduced and probably more significantly than most firms would do or even consider doing. But, the reason is **fairness** – not to the partner in question, but, importantly, to the other partners in the firm. There are a number of bad investments made in professional services, but nothing that generally produces less of a return then paying an underperforming partner more than he/she is worth (relative to both the near and longer terms). As we have said in prior monographs, *"one dollar paid to an underperforming partner is a dollar less than what would be to a fully performing partner."* Why would a rational manager do that?

Short Term Suggestions

In reading the legal management literature, there are a number of suggestions made to address things to do about underperforming partners but most of these are longer term in nature. We believe longer term solutions (such as only promoting those people who can fully function as partners) are important, but that does not solve the near term issues that already exist – today – in firms.

- First, a clearly underperforming partner has to be confronted by either practice management or firm management or, preferably, both. **There has to be an intervention**.

  - He/she needs to be informed that they are not meeting expectations, have not met expectations, and need to make a radical adjustment in behavior.

  - As part of these discussions, near term expectations need to be stated and the underperforming partners should be given a chance to develop and execute a program for improvement. These expectations are more than just billable hours – they need to include marketing efforts, people development, client relationships, and other important factors.

  - Not only should this program have objectives and milestones, clear consequences have to be communicated for lack of achievement including reduction in status (e.g. – to a non-equity role), outplacement, and separation from the firm.

- If a partner develops an improvement program to get back to a happy state of productivity, his/her performance against that program must be measured, evaluated, and communicated. In other words, if a partner is going to *"do x by y time to produce z results"* that must be monitored, measured, and communicated.

- While we cannot prove it other than anecdotally, it has been our belief that consistent underperforming partners, when asked to develop and implement a program of improvement, have a probability of less than 25% to succeed. While that number is probably a little larger than reality, it certainly justifies making an honest attempt and should fit with most law firm cultures. But, the obvious needs to be said – the 75% who do not make it must be dealt with.

- We mentioned the use of practice teams/groups in the attempt to salvage an underperforming partner. We believe strongly in that approach, because professional peer pressure is one of the most positive elements in a law firm's culture and also one that can actually get partners to take action. But, practice teams and their members must have clear assigned responsibility for the team's performance for it to work.

- In some cases, it is helpful to enlist the aid of a management psychologist or coach in the improvement process. We have seen it work and I used this approach selectively as a manager in a prior firm with excellent results. But it should not be considered an entitlement for underperforming partners.

<u>Longer Term Suggestions</u>

We suggest that the following solutions be considered for the longer term.

- In many firms the partner expulsion process needs to be considerably streamlined and better defined. Too often law firms have an irrational super-majority for expulsion, resulting in essentially a legislative protection for underperforming partners. In fact, our view has been that a partner being asked to leave should not face a vote – it should be quietly and effectively handled short of that plebiscite.

- The partner selection process probably either needs to be adjusted or enforced to ensure that attorneys not be selected for equity status unless there is a firm and agreed upon belief that the partners in the firm feel he/she will perform as a productive equity partner. Although there are a wide variety of selection processes that can and do work, I liked the simplicity of the process in a prior firm where I was a partner. Candidates for partners (we did not have two tiers) had to demonstrate the capacity to operate as an equity partner in five areas – (1) professional skill (that is, be a competent attorney), (2) client handling ability (client communications and maintenance and expansion of the relationship), (3) practice development skills (yes, the ability to bring in sufficient work), (4) people development skills, and (5) business acumen (knowing how to make a profit from the work that is done). If a candidate for partner was not seen as potentially highly competent in all of those five areas, they could not be a partner.

- It is important to clearly state and publicize the expectations for a partner in a firm – where failure to meet these expectations generates consequences. And those expectations have to be more than a minimum level of billable hours. Law firm clients have asked me what should be expected of partners and I have usually responded as follows.

  - Be both productive as a practicing attorney and new business development oriented to a level in which each partner takes care of himself/herself (that is to an expected level of productivity and profitability) and **at the very least** – ½ of another professional.

  - Clearly and consistently participate as an owner in the affairs of the firm performing, as a partner of mine at Arthur Young described, *"random acts of service to the partnership."*

  - And, directly participate in the people development process.

- Most firms view professional development merely in the context of associate development – but if a person remains at a firm for his/her whole career, they have only a few years as an associate and many, many years as a partner. We maintain that partner development is at least as important as associate development and, in reality, much more so. Law firms should develop tailored programs for the professional development of each of their partners – an investment that has a much higher probability of success than continuing to pay underperforming partners year in and year out far more than they are worth.

- Practice teams should engage in full business planning, which includes setting expectations and objectives for everyone in the team. Each partner should have a clearly defined role within the practice team and the firm.

This completes our discussion of the underproductive/underperforming partner issue. It is important to recognize that each case is different – partners are underproductive for varying reasons and the solutions vary by partner. But, it is an issue that must be directly addressed, controlled, and minimized.

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Smock Law Firm Consultants serves a wide range of law firm clients on a national basis in seven key areas of practice – strategic planning, strategy execution, practice group management, firm mergers and combinations, high level economic counsel, operational excellence, and resolving vexing strategic management issues. Our four partners – John Smock, Peter Giuliani, Gary Fiebert, and Joe Walker are clearly the most experienced *"first string"* serving the legal marketplace – each of us has greater than forty years of relevant professional service experience.

If your firm has been wrestling with the issue of underperforming partners and you are not satisfied with the results, give us a call. We would be pleased to assist you in sorting out your options to address this difficult management issue.