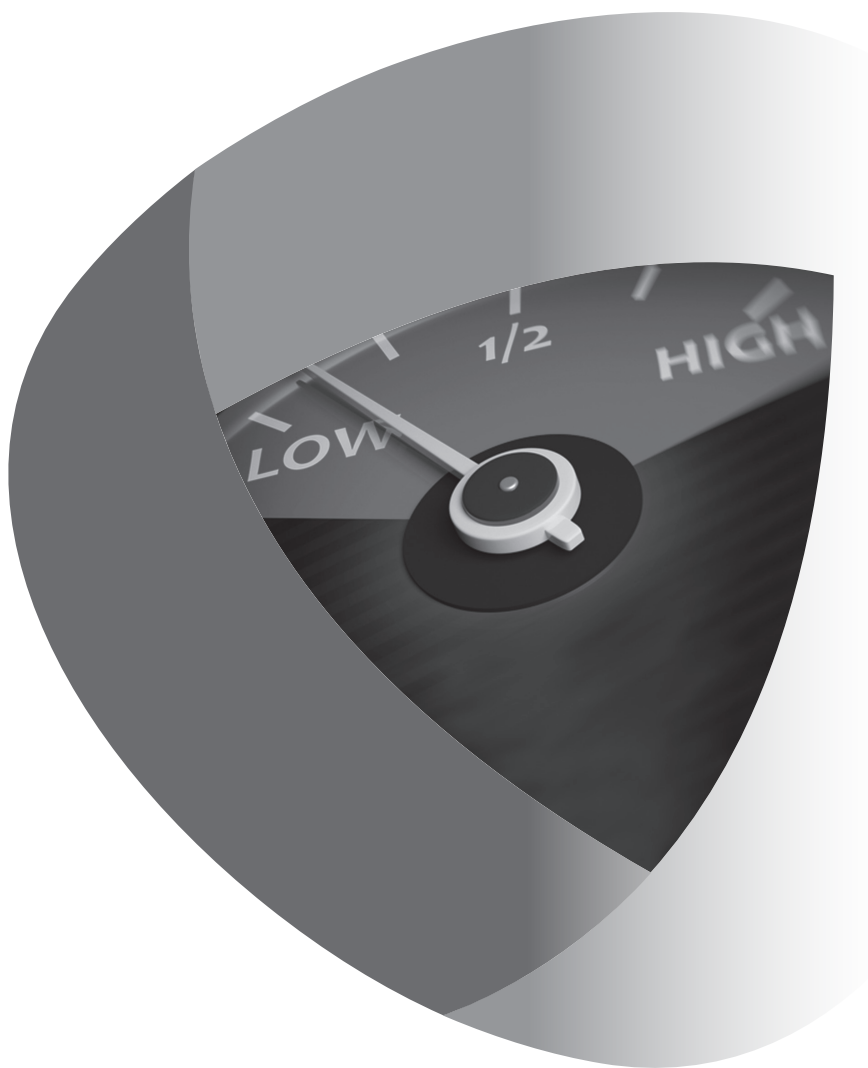


Tackling Partner Underperformance

2nd edition



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Introduction and Executive Summary

A great deal has happened to the legal services market since the first edition of this book was published in 2011. According to many commentators, the demand for legal services has remained flat – certainly in the USA and to some extent elsewhere – for the last ten years. The 2018 Report on the state of the legal market produced by The Center for the Study of the Legal Profession at the Georgetown University Law Center and Thomson Reuters Legal Executive Institute and Peer Monitor shows that demand in 2017 “continues a seven-year pattern (with the exception of a brief uptick in 2011 and a slight negative turn in 2013)”. Low demand for legal services has been compounded by an increase in the competitive forces both inside and outside the legal profession. Life has become even more difficult for partners, for whom performance demands have increased at the same time as the availability of work has tailed off.

The issue of underperformance at partner level therefore remains incredibly agonizing and sensitive in law firms. In preparation for this edition we have built on the contacts that were made for the first edition, connecting with a further selection of law firms of all sizes across the world by means of a specially designed and focused survey. Within the legal profession, the issues are so sensitive that most firms who have participated in the study have requested that their identities be kept entirely confidential. Underperformance is naturally not confined to just the legal profession, and this report also draws on leading academic research to identify best practice which can be applied to law firms. The extent of our research therefore makes this report arguably the most comprehensive study ever undertaken into partner underperformance in law firms.

What is immediately clear is that the issue of underperformance is not ‘done and dusted’ with and remains a live issue for the profession globally, a constant and thorny problem with which firms continue to grapple. Some 87% of firms surveyed by Ark confirm that they are likely to have to take action over the next two years in respect of this issue; this is in comparison with the 85% identified in the 2011 survey carried out

for the first edition of this book. In addition, according to Altman Weils 2017 survey *Law Firms in Transition*, 88% of law firm leaders believe they employ chronically underperforming lawyers. This is because underperformance continues to affect law firms in many ways, not least of which are diminished profitability, loss of opportunity, disaffection of high performers, challenges to the firm's values and falling morale. What is more, underperformance has to be seen not just in terms of productivity but also in terms of a more holistic approach to a firm's standards. My definition of underperformance therefore includes the consistent failure of a partner to meet the firm's reasonable expectations or standards for productivity, profitability, quality, technical proficiency, client service or interpersonal relationships.

Firms seem iteratively to go through some or all of three phases in addressing issues of underperformance at partner level. The first phase – for a few firms long since concluded – has been to identify the shirkers and serially below average performers (sometimes referred to as C partners or, in the language of David Maister,¹ 'Losers' in the Dynamo-Cruiser-Loser Spectrum) and manage them out of the firm. A second and more recent phase has seen firms restructuring their partnerships and slimming down the number of equity partners. This phase has usually resulted in non-core partners finding themselves in the wrong place at the wrong time and being asked to leave. In the third phase, firms are considering how to tackle those partners who in relative terms are making a more modest contribution than the majority of their peers. Prior to phases one and two, these partners would have been solid performing B partners, ranked well away from the 'relegation zone'. As we point out later, the rigid distribution of bell-curve thinking forces firms to label a high performer as a mediocre one.

This edition is considerably expanded from the first, and includes five new chapters. Chapter One examines the background and trends, including how all firms have a performance curve resulting in the firm being segmented into high-performing A partners, B partners who form the engine room of the firm, and C partners who in relative terms perform less well than their peers. It establishes what motivates partners to perform and the importance of setting and communicating clear and measurable standards. It outlines a definition and the implications – financial and otherwise – of underperformance, and how firms can manage performance for success.

Chapter Two covers the steps which firms need to take to clarify what they expect of their partner, including agreeing the 'Critical Areas of Performance' or Balanced Scorecard in which partners need to

contribute. It explains how to define specific roles and responsibilities to play to strengths and (as a new section) how to link performance with the firm's values. The chapter also provides samples and templates for various roles and responsibilities and a sample competency framework and criteria, with suggested behavioural indicators.

Chapter Three covers the various reasons for underperformance, some of which may be capable of being remedied and some of which may become terminal. These include:

- Wrong choice of partner, including over-promotion
- Partners failing to keep up with the pace of change
- Partners finding themselves in non-core areas of law
- Internal politics and favouritism
- Trouble at home
- Stress and depression
- Burn-out and boredom
- Lifestyles and comfort zones
- Imbalanced personal scorecard – partners who may be strong in some things but weak below an acceptable standard in other areas
- Partners unable to cope with merger and extreme change.

Chapter Four continues to review methods of assessment and rating of partners, including possible metrics, performance and results indicators and critical success factors. It discusses data, evidence and measures and the extent to which firms should be measuring effort. It also includes rating methodologies as well as samples and examples of possible metrics.

In an entirely new chapter, Edwin Reeser considers the important difference between underperforming partners and underperforming firms. Chapter Five makes it clear that addressing the underperformance question fairly means measuring partner performance relative to the compensation assigned to them and highlights metrics that law firms should be using and yet are not. It also includes a sampling of six excellent tools that the rest of the business world is aware of and uses as a matter of course, and various methods of application in relation both to the firm's profitability and partner compensation.

Whatever the basis of the partner compensation system, Chapter Six discusses the important principles which need to be covered in creating

a balanced performance management system. This includes a review of trends in compensation systems, an examination of the links with Lockstep, Eat-What-You-Kill, Formula and Combination systems, and how to optimise the compensation system to align with partner performance. Three alignment principles are introduced: working towards a cohesive organisation; improving partner commitment; and supporting a homogeneous culture.

Most firms want to see partners given every chance to improve, and Chapter Seven covers the ways in which partners can be supported. This includes:

- How to help lawyers respond to change
- Supporting through collegiality
- Encouraging self-starters and self-help
- Coaching and mentoring
- Outplacement help
- Counselling and medical support
- Skills training
- Intensive care.

Chapter Eight is another entirely new chapter that examines the reason why lateral hires typically fail and how to redress this issue. The chapter covers the myth of inevitable success together with typical reasons for failure in lateral hiring (in addition to poor hiring), which includes the misfiring business plan, the cultural misfit, lack of integration and lack of support by the new firm. The chapter goes on to study how to cope with failure, setting out three main measures: treating partnership as just a short-term contract; using metrics to evaluate and then engaging the compensation system to regulate and make adjustments; and redoubling efforts to integrate and support.

Chapter Nine is another new chapter in which Angus Lyon examines the incidence and effect of stress and mental illness in the legal profession. Angus looks at the statistics that affect every part of the legal services sector and then considers the extent to which this is a “wicked problem” – a social or cultural problem that is difficult or impossible to solve. It considers a number of reports that have been produced on behalf of various branches of the profession in recent years which address lawyers’ wellbeing, highlighting common themes

and challenges. It explores stress from various perspectives – historical, engineering, stigma, and psychological – with the aim of clarifying a working definition of a misunderstood concept. Contrary to popular myth, ‘stress’ can be good for us.

Chapter Ten covers systems for partner performance management. It suggests both a methodology for introducing a codified performance management system and also some important principles for firms that want to remain flexible.

Chapter Eleven builds on the previous chapter by studying a system of performance management in use in a medium-sized progressive law firm in the United Kingdom. This chapter first appeared as one of the case studies in the first edition, but has now been expanded into a standalone chapter.

Chapter Twelve sets out a methodology and timetable for managing underperformance, including linking with the firm’s governance and partner compensation scheme. It details the setting of underperformance criteria and standards and how to deal with difficult partners with a performance procedure. This includes identifying areas for improvement, intensive care and monitoring, redeployment or de-equitization and expulsion.

Getting partners to leave is not the only option, and Chapter Thirteen examines the main choices which firms can consider. These could be reinvigorating moderate performers, or introducing incremental performance improvement across teams and the entire firm. Firms can also address weak areas using by development, training and re-training; by rehabilitating temporary strugglers; or by facilitating partner moves and voluntary and negotiated departure.

Chapter Fourteen is another entirely new chapter, in which renowned author Patrick McKenna looks at lost causes and other thorny issues. The chapter is based on comments Patrick McKenna contributed during an international webinar concerning the issues of partner performance. The chapter considers how one might define and subsequently measure lawyer performance and establishes ten different performance measures, including profitability measures, client originations, personal marketing and client related initiatives as well as mentoring, teamwork and internal firm management. Patrick considers common reasons for underperformance, temporary and permanent, and also covers the reasons why intelligent and capable leaders often avoid taking action when they first detect a problem. The chapter lists ineffective ways of dealing with underperformance and morale issues and ends by suggesting five steps

that leaders can use to deal with thorny issues and the difficult problem of lost causes.

Chapter Fifteen is a new chapter which considers how a firm can avoid a culture in which stringent performance management is in danger of creating unhappiness and discontent. The chapter particularly focuses on building a collaborative business where partners are accountable to each other and suggests ten long-term steps that the leadership team can take towards a happier firm with engaged and motivated partners. These steps will never cut out entirely incidences of underperformance, but instead help to provide a collaborative culture and organisation in which incidences of underperformance become less frequent.

Chapter Sixteen explains why it is vital to understand the sensitivities involved in changing governance to deal with underperformers. It covers the essential elements for setting performance rules and disciplines and establishing accountability along with:

- The leadership challenge
- Partnership/membership voting rights
- Amending the partnership/membership agreement.

Communications in law firms is key, and nowhere is this truer than in connection with underperformers. The final chapter of the report details how best to communicate with underperformers – for example, maintaining honesty and openness on a one-to-one basis by listening and asking questions and leveraging past accomplishments to link to necessary changes. It provides ten practical suggestions for internal communications and also addresses coping with client succession issues, as well as seven ways to verbalize and tackle common obstacles to internal projects. The chapter ends with the seven key features of an external communications strategy.

Reference

1. Maister DH (1997) True Professionalism – Free Press, Chapter 4

About the author

Nick Jarrett-Kerr is a specialist advisor to law firms and professional services firms worldwide on issues of strategy, governance and leadership development. Nick is a member of Edge International, a leading global consultancy to law firms, and in the last twelve years has established himself as one of the leading UK and international advisors. Prior to becoming a consultant, Nick was the Chief Executive Partner of Bevan Ashford, a leading regional firm in Great Britain, for eight years. Nick is the author of two published books on partner underperformance and law firm strategy, and is currently Visiting Professor at Nottingham Trent University where he leads the strategy modules for the Nottingham Law School MBA.

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Angus Lyon works as a psychodynamic counsellor and coach. He is a registered member of the British Association for Counselling and Psychotherapy (BACP) and a director and co-founder of Catalyst Counselling CIC, a social enterprise providing counselling and therapy training. In 2015, he wrote *A Lawyer's Guide to Wellbeing and Managing Stress* in collaboration with LawCare. Before becoming a counsellor, Angus practised as a litigation solicitor for over 30 years and was a partner at UK firm Mears Hobbs & Durrant, and has regularly been recommended in the Legal 500. Angus has also served as a Professional Deputy.

Patrick J. McKenna is an internationally recognized author, lecturer, strategist, and seasoned advisor to the leaders of premier professional service firms. His published articles have appeared in over 50 leading professional journals and his most notable book, *First Among Equals* (2002), topped bestseller lists in the US, Canada and Australia and has been translated into nine languages. He was recently voted by the readers of *Legal Business World* as one of only seven international Thought Leaders (2017).

Edwin B. Reeser is a business lawyer specializing in structuring, negotiating and documenting complex real estate and business transactions. He also counsels law firms and lawyers on partnership agreements, partner compensation, lateral movement, professional ethics, capitalization and operations. He is the director of Edwin B. Reeser, a professional law corporation, the author of over 100 published articles, and is a former managing partner of firm Sonnenschein Nath & Rosenthal.