Only as good as your last trick

Under-performing partners are being targeted as law firms look to improve profitability. Anne Parkinson and Ronnie Fox explain the dangers and benefits of performance assessment

Herbert Smith's senior partner, David Gold, is reported to be taking a tough stance on under-performing partners, with the aim of improving profitability. This is becoming a popular mantra among senior partners. Why?

Simple mathematics dictate that the departure of those partners who generate least profits will increase profits per partner. The challenge lies in easing out under-performing partners without excessive damage to the firm's morale or reputation. This is not simply a question of legal rights. It is a question of pride and dignity, for both the firm and the individual. Partnership is an emotional relationship and partners who feel unfairly treated will denigrate a firm for the rest of their lives.

In the past, firms often used retirement as a way of forcing out under-performing older partners and also as a way of controlling the number of partners holding an equity stake. Retiring a partner on the grounds of his or her age is now potentially discriminatory and unlawful. Firms are beginning to accept that they must tackle performance issues head-on.

Many still argue that retirement is a dignified way of dealing with the problem of under-performing older partners who have in the past contributed a great deal to their firm, but this is not the case. If a firm's prime objective is to increase profitability, it needs a proper mechanism for identifying sub-standard performance. That means dealing with the under-performance of both older and younger partners.

To even the most self-assured partner, this is unsettling. Partners tell us they feel scared or under attack when their firm introduces intensified monitoring, performance targets, formal appraisals and sanctions for failure to meet specified objectives. If insensitively introduced, proactive performance management can create more problems that it solves.

Best practice is to consult with partners when setting targets and designing appraisal systems. That encourages buy-in. It helps if partners agree the criteria against which performance will be assessed. Sharing key performance indicators and explaining the economic dynamics of a firm helps partners to understand how they are performing. That is the first step towards improving performance.

Performance assessment should be objective and transparent. This is not as easy as it sounds. Time recording and billing can be monitored and measured in a relatively objective and transparent way. These are the performance indicators most commonly taken into account by law firms. But to what extent does this actually help achieve the firm's business objectives? As most of us are aware, there is a great deal more involved in running a successful law firm than carrying out legal work and billing for it. We are seeing firms trying harder to recognise and reward success in non-fee-earning activities, such as business development and management functions.

The results of such activities are harder to measure objectively. Partners often do not agree on the relative importance of the respective activities. Wide consultation is usually the key to gaining general acceptance for subjectively assessed elements of performance assessment.

'Transparency' is a buzz-word that we now hear often in law firms. In this context, it means making it clear to partners exactly what the assessment criteria are, how and by whom they are being monitored and assessed, and, importantly, how their performance compares with peers within the firm.

This final aspect is one that seems to be controversial. Some firms simply will not countenance the dissemination of information required to allow partners to see how their own performance compares with that of their peers. This can cause problems. It makes it more difficult for partners to understand that they are under-performing. It is usually those partners who do not accept that they have performance issues who react badly when the problem is identified by the firm. Those partners often run straight into the arms of a litigation lawyer. They search for other reasons for what has happened to them.

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Sometimes they believe they have been unlawfully discriminated against. These are consequences that might be avoided if the leaders of a firm are willing to disseminate more information – and at an earlier stage before matters escalate.

Partners whom we advise often view issues differently from our law firm clients. Partners whose performance is below par often blame their firm's management. They speak of a lack of support, a refusal to supply resources, intense internal competition and unacceptable client-hugging.

The best firms ask why a partner is having performance difficulties. Is he or she suffering from a disability? If so, the firm may have a legal duty to make reasonable adjustments. Is it fair to judge in the same way a partner who has discharged a heavy management burden as a partner who has devoted his career to building a practice? Failure to handle the situation sensitively damages morale (other partners, no doubt, will be watching closely) and mars the firm's external image.

Even if management concludes that a partner must leave, there are ways to minimise reputational damage for both the firm and the individual concerned. It is usually in the interests of a firm to maintain good relations with the outgoing partner. We see some firms volunteer introductions to their own retained head-hunters, and others which always contribute to the legal fees of a partner who has been asked to leave. This helps smooth the path to an amicable parting of ways.

Rigorous performance management is here to stay in successful firms. Inevitably it will be greeted with suspicion and hostility by some. However, if firms invest the time and energy to get performance management right, then this should herald a new era in which we see fairer competition based on performance (which should increase diversity) and higher standards of excellence in our profession. This can only be a good thing.

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