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Recognizing the Role of Optimism Bias in Case Evaluation

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In the immortal words of the Broadway lyricist Johnny Mercer, many people tend to accentuate the positive and eliminate the negative. And we sure don't want to mess with Mr. in-between. Several questions emerge: Is this optimism ingrained in us? And does it sometimes do more harm than good? The answers are yes and yes. Research has recently confirmed that most human beings have an innate optimism bias. But at the same time, that bias can distort our thinking when important decisions have to be made. For litigators, the challenge is how to control our optimism bias when trying to accurately evaluate a case.

Although she didn't necessarily originate the term "optimism bias," Tali Sharot, a cognitive neuroscientist at King's College in London and Israel, has spent much of her career studying the inherent tendency of people to make assessments that too often are overly optimistic. Supporting her conclusions, she has written "The Optimism Bias: A Tour of the Irrationally Positive Brain." And she has given a very popular TED Talk, which has been viewed by more than 1.7 million people. As Sharot explains, the optimism bias is what causes people to believe that things will be better than the facts warrant. So, despite all the statistics, facts, and empirical data, people think they can avoid being one of the 40 percent of married couples who get divorced, that they can smoke without developing cancer, that they can text while driving, or that they can produce children who are well above average. In her book, she argues "that humans do not hold a positivity bias on account of having read too many self-help books. Rather, optimism may be so essential to our survival that it is hard-wired into our most complex organ, the brain. ... Optimism biases human and nonhuman thought. It takes rational reasoning hostage, directing our expectations toward a better outcome without sufficient evidence to support such a conclusion." Similarly, David Hirshleifer, a finance professor at the University of California, Irvine, when commenting on how many individual investors inaccurately think they can outperform the stock market, has been quoted as saying, "We are evolutionarily programmed to believe that things will work out."

This tendency to be optimistic, Sharot explains, has a psychological function: It keeps us moving forward. It allows us to imagine a different, better future, and to act purposefully to move toward it. (After all, there is some truth to the saying, "If you think you can or you think you can't, you're probably right.") According to research, optimists work longer hours, save more money, take better care of themselves, and in general, live longer, lower-stressed lives. Hope, it seems, has a biological and evolutionary purpose. Yet, as useful as this bias is, it is also fundamentally irrational. It's called a "bias" for a reason. In the end, it's a trick the mind plays on itself, a deliberate distortion of the rational in the service of a more abstract, long-term good.

For litigators, particularly in large commercial cases, this can mean trouble. A great deal is at stake, and exercising poor judgment can be catastrophic. Yet research has shown that when discussing cases with clients, particularly the likelihood of succeeding in litigation, attorneys frequently:

- Underestimate the cost of prosecuting a case, and the time and resources needed to prevail in battle.

- Overestimate their chances of prevailing at trial.
- Overestimate their ability to sway or influence a judge, jury, or arbitration panel.

In addition to these strategic, big-picture effects, the optimism bias also typically causes litigators to make day-to-day mistakes at the tactical level, such as:

- Thinking witnesses who are impressive in a conference room will deliver in court.
- Assuming one witness can testify about a topic that another witness knew better, but that witness has left the client's company.
- Believing that the rules of evidence will not be strictly applied to exclude highly favorable facts.
- Believing that the sheer quantity of a party's own evidence can triumph over the other side's higher-quality evidence.

The most obvious place this bias has an impact is in negotiating settlements. Settlement, as every litigator knows, is a lot like poker. Having an accurate idea of what's in the other player's hand is vital, as is knowing your own hand. If you don't, or can't, adequately understand the risks of litigation, you may end up pushing your client into litigating a case she would have been much better off settling, or using mediation, arbitration, or some other kind of dispute resolution.

And over time—and maybe not that much time—errors of optimism can also have serious consequences on a lawyer's reputation and career. An attorney, after all, who is consistently wrong about the eventual outcome of cases will not have clients for long. Along with success, clients also highly value predictability and accurate, realistic assessment of the possible outcome of litigation. This is even true for plaintiffs' counsel who are operating on a contingent fee arrangement—if they're wrong about the outcome of a case, they generally end up having worked for free.

So is there anything you can do to deal with this? Fortunately, yes. As a practicing litigator, here are steps you can take to manage the optimism bias.

First of all, be aware of the problem. The critical first step is understanding and acknowledging that everyone has a tendency to fall prey to the optimism bias, and it's essential to address it. Or, to put it a little more cavalierly, if you think you aren't subject to the optimism bias, you just proved you are. After all, as Sharot says, “the optimism bias is so powerful precisely because, like many other illusions, it is not fully accessible to conscious deliberation.”

Second, do not believe your own malarkey. Human beings tend to construct self-images that are equal parts fantasy, unconscious desire, stereotypes, and gut reactions. While this is very human, and ubiquitous, it also leads to misdirected thinking, and beliefs that aren't supported by data or logic. Watch out for these. If you think about it, you will easily be able to remember a time that, at trial or in life, your gut told you that something was absolutely true, when events proved otherwise. Guts have limited uses; while developing good gut reactions is what we all strive for, there is more to making a complicated decision, and developing some healthy skepticism about your own initial reactions is a good start. (Lawyers shouldn't think they're the only ones who have to confront the limits of their own abilities. A recent ESPN Magazine article about the NFL draft gave some advice that should give pause to many a general manager: “The best way to make one good draft pick is to start with two draft picks.”)

Third, before you make your decision, listen to that soft voice of doubt. That is the voice of your instinct, and instincts exist for a reason, usually involving self-preservation—in this case, your preservation. If that voice is telling you something is a bad idea, take it seriously. Listen to it. Test it. Think it through. Do not shrug it off.

Fourth, recognize that, indeed, the pressure can get to you. We all know that a lawyer's job is to evaluate both the good and bad, and we've all been cautioned to control expectations to avoid surprises. Yet, you are operating in an environment that is constantly pushing you toward assuming a positive outcome. You may have focused on the positives of a case during the dog

and pony show that led your client to hire you in the first place. Even in a long-term relationship, you always want to make your client happy, and a positive status report is a quick way to achieve that, at least temporarily. You want your bills to be paid; indeed, you want to believe that the massive amounts of money that your client is incurring in legal fees is entirely justified. You want to succeed within your firm. You want to be known as a good lawyer and a great litigator. The bigger the case, the greater the pressure, and that pressure is constantly nudging you toward irrational optimism. So too can the zealous advocacy you're obligated to demonstrate.

Fifth, check your assumptions with a diverse group of your colleagues. This applies even to more experienced lawyers. Believe it or not, there is research suggesting that older lawyers are no better at avoiding the ill effects of optimism bias than their less-experienced colleagues. Other research indicates that female attorneys engage in less overconfidence than their male counterparts. But the good news is that research bolsters the notion that wisdom is found in the counsel of many. On the whole, lawyers make better decisions, and more accurate estimates arise, when a case is sanity-checked with people from a variety of perspectives. And overall, third-party case feedback (a mediator's perspective; the mock jury's feedback; the cabbie's advice) is invaluable in accurately evaluating litigation. In reducing overconfidence predictions, the act of speaking with just one other person has been found to be about a third as beneficial as obtaining feedback from a group. Even that is no panacea, because experienced lawyers have been shown to be more likely than novices to disregard third-party assessments if those assessments do not fit with their own preferred outcomes. To counter that tendency, you can improve your chances by giving the other person's judgment more weight than you might initially be inclined to do, and, better still, by continuing to assess the case with that someone else until you come to an agreement on the value.

All of this leads to the conclusion that litigators ignore the innate optimism bias at their peril, and that results improve when we take steps to counter that influence.

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