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A Proposal to Study the Effect of Optimism, Overconfidence, and the Planning Fallacy on Lawyers' Ability to Secure Favorable Results for Clients

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**A Proposal to Study the Effect of Optimism, Overconfidence, and the Planning Fallacy on
Lawyers' Ability to Secure Favorable Results for Clients**

I. Introduction

Lawyers are notoriously risk averse. The media and popular culture have an abundance of references to lawyers serving reality checks to overambitious clients, often labeling lawyers as “deal breakers” or “obstructionists.”¹ Risk aversion may come with pessimism or cautious decision-making. Lawyers may also be seen, by some, as professional pessimists.² Many traits that make a successful lawyer go hand-in-hand with a pessimistic worldview. Some argue that in order to represent clients effectively and achieve professional success, lawyers should be able to consider future dire consequences, examine consequences beyond the scope of the immediate issue, and ascertain blame.³ In fact, in positive psychology, law has been recognized as an occupation where pessimism serves as a helpful rather than maladaptive characteristic.⁴ In a study done on University of Virginia Law School students in 1987, pessimistic law students actually fared better than their optimistic peers in GPA and law journal success.⁵

While many lawyers exhibit risk aversion in decision-making and pessimism, do these traits actually lead to better results for clients? Results for a client often center on an attorney’s decision-making abilities, and the ability to convince a client that these decisions are correct.

¹ Martin E. P. Seligman et al., *Why Lawyers are Unhappy*, 23 CARDOZO L. REV. 33, 41 (2001-2002).

² Catherine Gage O’Grady, *Cognitive Optimism and Professional Pessimism in the Large-Firm Practice of Law: The Optimistic Associate*, 30 LAW & PSYCHOL. REV. 23 (2006).

³ *Id.* at 24.

⁴ *Id.*

⁵ Seligman, *supra* note 1 at 40-41.

Optimism, the overconfidence bias, and the planning fallacy are biases that impact attorneys' decision-making abilities. How do all of these psychological phenomena interact when a lawyer is representing his or her client, and how do various manifestations of optimism, overconfidence, and the planning fallacy impact client results?

Research has documented some of the pros and cons of optimism (and pessimism) in personal professional success in large law firms.⁶ Research has also documented how optimism and overconfidence impact other professionals, such as entrepreneurs.⁷ Because the law is known for being one of the more risk-averse professions, it is worth exploring how traits on the opposite end of the spectrum affect results for clients. Optimism can produce positive outcomes in health, stress, coping, persistence, and commitment.⁸ Confidence and positive outlook has been proven to have dual outcomes: optimism promotes action, resilience, and commitment, but excess confidence promotes decision-making shortcuts, frame blindness and an inability to adapt.⁹ With all of these effects noted in other settings, including ones personal life, it is worth exploring whether these confidence and positive outlook traits produce similar benefits for lawyers professionally. The focus of this paper will be on the interaction between optimism, overconfidence, and the planning fallacy with regard to professional success for lawyers and their clients, as opposed to satisfaction in the workplace.

⁶ See Seligman, *supra* note 1, at 40 (noting that law students whose attributional style defined them as “pessimistic” actually fared better than their optimistic peers) 40; O’Grady, *supra* note 2, at 55 (finding that “pessimism that helped [young lawyers] achieve success in law school does not always help in the law firm environment”).

⁷ Rose Trevelyan, *Optimism, overconfidence and entrepreneurial activity*, 46 MANAGEMENT DECISION 986, (2008) (noting that optimism and overconfidence are both beneficial when deciding to become an entrepreneur, but overconfidence is harmful when making decisions in response to setbacks).

⁸ *Id.* at 988.

⁹ *Id.* at 990.

II. Dispositional and Learned Optimism

a. Optimism Defined

Optimism may not be getting enough attention in the legal profession. With many studies suggesting that pessimism is a prevalent trait among successful lawyers, there has been little professional incentive for lawyers to exercise more optimism as they advise their clients. However, in general, optimists are typically content and successful personally and professionally.¹⁰ In theory, it makes sense that lawyers would also benefit from optimism in their professional lives. Not only is it more likely that lawyers will enjoy their careers and stay with their firms longer,¹¹ dispositional optimism may lead to more favorable results for clients. Optimism is colloquially viewed as a basic personality trait or a stable aspect of character that is not readily susceptible to change.¹² Optimism is a trait that generates a confidence that positive outcomes will occur.¹³ Optimists are more resilient and biased towards action.¹⁴ Traditionally, optimism has been thought to be a personality trait that is relatively stable over time and across situations.¹⁵ However, developments in positive psychology demonstrate that optimism can be learned and acquired.

A leader in positive psychology, Martin Seligman, coined the term “learned optimism.”¹⁶ While not everyone naturally exhibits dispositional optimism, learned optimism suggests that one can develop optimism through intentional, cognitive processes. Learned optimism requires the individual to use cognitive behavioral therapies to change one’s cognitions to try to make

¹⁰ O’Grady, *supra* note 2, at 23.

¹¹ *Id.* at 25.

¹² *Id.* at 29.

¹³ Trevelyan, *supra* note 7, at 990.

¹⁴ *Id.*

¹⁵ *Id.* at 990.

¹⁶ Seligman, *supra* note 1, at 35.

them more positive, thereby reducing distress.¹⁷ First, a person learns to be more aware of automatic, habitual pessimistic thoughts.¹⁸ The pessimistic thought can then be dealt with by using a variety of techniques that are designed to challenge the pessimistic thought and change it.¹⁹ In addition to learned optimism, a cognitive optimist consciously employs optimism when it would be useful and consciously rejects optimism when pessimism would be more appropriate.²⁰

b. How Could Optimism Impact Lawyering

Optimism may help lawyers secure favorable results for several reasons. First, optimism leads to resilience in the face of setbacks. An optimistic explanation style contributes to resilience by defending one's self image, which could also have benefits for clients.²¹ Optimists tend to be goal oriented and employ a "promotion focus," which allows them to focus on what course of action allows them to achieve their goals.²² This trait can prove beneficial to clients in several legal settings. In the context of litigation, lawyers employing an optimistic disposition may succeed in obtaining more favorable settlements by credibly threatening to continue with costly steps in the litigation process.²³ This result could also be found in other negotiation settings, including deal making. Optimistic lawyers may be more goal focused, which could lead to a more zealous pursuit of meeting their client's needs. Mediation may also be a context where optimism could help clients. A mediator more resilient in the face of setbacks may exercise more patience and utilize techniques that could work parties toward a mutually beneficial settlement.

¹⁷ O'Grady, *supra* note 2, at 35.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 29.

²¹ DANIEL KAHNEMAN, THINKING FAST AND SLOW 263 (Farrar, Straus and Giroux) (2011).

²² Trevelyan, *supra* note 7 at 988.

²³ Oren Bar-Gill, *The Evolution and Persistence of Optimism in Litigation*, 22 J.L. ECON. & ORG. 2, 3 (2006).

III. Overconfidence in Decision-Making

a. Overconfidence Defined

Many studies have demonstrated that people tend to be overconfident in their decision-making abilities.²⁴ Overconfidence is the tendency for people to exaggerate the extent to which they know that a decision is correct.²⁵ It is a systematic error of judgment made by individuals when they assess the correctness of their responses to questions relating to intellectual or perceptual problems.²⁶ In one of the pioneer studies on overconfidence, when presented with decisions of general-knowledge questions of moderate or extreme difficulty, subjects indicated a high, and often unjustified, degree of certainty that the answers selected were in fact correct.²⁷ There may be a number of phenomena that contribute to this bias. First, people may be insufficiently critical of their inference processes. They may fail to ask themselves important underlying questions such as, “What were my assumptions in getting to that inference?” Or, “How good am I at making such inferences?”²⁸

Next, people may be unaware of the reconstructive nature of memory and perception and cannot distinguish between assertions and inferences.²⁹ People often view memories as exact copies of their original experiences although they may have faded. If this is the case, people will not critically evaluate their inferred knowledge.³⁰ As Daniel Kahneman puts it, overconfidence is another manifestation of people’s tendency to focus on only the information available, a

²⁴ Baruch Fischhoff et al., *Knowing with Certainty: The Appropriateness of Extreme Confidence*, 3 JOURNAL OF EXPERIMENTAL PSYCHOLOGY: HUMAN PERCEPTION AND PERFORMANCE, 552 (1977).

²⁵ *Id.*

²⁶ Gerry Pallier et al., *The Role of Individual Differences in the Accuracy of Confidence Judgments*, 129 JOURNAL OF GENERAL PSYCHOLOGY 257, 258 (2010).

²⁷ *Id.*; SARAH LICHTENSTEIN ET AL., CALIBRATION OF PROBABILITIES: THE STATE OF THE ART TO 1980 15, (In D. Kahneman & A. Tversky Eds., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES. (1982).

²⁸ Fischhoff, *supra* note 24, at 562.

²⁹ *Id.*

³⁰ *Id.* at 562-563.

phenomenon he calls “What You See Is All There Is.”³¹ When people estimate a quantity, they rely on information that comes to mind and construct a coherent story in which the estimate makes sense.³²

Finally, there are individual differences when it comes to the overconfidence bias.³³ For example, there is evidence suggesting that those who are able to perform well on tests are less likely to be overconfident.³⁴ Individual differences in overconfidence are likely due to the confidence trait. The confidence trait mediates the ability to evaluate the accuracy of responses.³⁵ This presence and impact of this trait is a major determinant of the accuracy of self-assessment in a wide variety of tasks.³⁶ This trait is a mix of one’s personality and intelligence.³⁷ There is a small relationship between cognitive ability, certain personality traits, and the accuracy of confidence judgments.³⁸

b. Overconfidence and Lawyering Ability

Studies have concluded that lawyers tend to be overconfident. In a study comparing rejected settlement offers to the actual verdicts, plaintiffs were wrong in thinking that they would do better at trial 61.2% of the time and defendants were wrong 24.3% of the time.³⁹ When the defendants were wrong, however, they were wrong by large margins.⁴⁰ Overconfidence can also

³¹ Kahneman, *supra* note 21, at 262.

³² *Id.*

³³ Pallier, *supra* note 26, at 260.

³⁴ *Id.* at 273.

³⁵ *Id.* at 293.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 295.

³⁹ Teresa F. Frisbie, *Decision-making in negotiating settlements: the overconfidence bias*, 161 CHICAGO DAILY LAW BULLETIN (2015).

⁴⁰ *Id.*

inhibit negotiated settlements because if parties are overoptimistic about their ability to secure favorable litigated outcomes, they may set extreme settlement numbers, which could harm clients.⁴¹ Despite these risks, is there a degree of overconfidence that is useful for securing favorable client results? Overconfidence seems to be standard for experts and professional advisors. In fact, clients encourage expert overconfidence.⁴² For example, clients read hesitant behavior by clinicians as a weakness and a sign of vulnerability.⁴³ Confidence is valued over uncertainty, and experts are often implicitly discouraged from disclosing uncertainty to clients.⁴⁴ Thus, acting on pretended knowledge and expertise is often the preferred solution.⁴⁵

Overconfidence tends to be most extreme with tasks of extreme difficulty.⁴⁶ Often, lawyers have to make extremely difficult decisions on behalf of their clients. Thus, lawyers' representation of their clients is ripe for demonstrating overconfidence in decision-making. Overconfidence predicts an escalation of commitment to a losing course of action. As a result, overconfidence in decision-making leads to likeliness to stick to an original course of action even if the environment one was operating in had changed. Overconfident experts do not fully or accurately assess risks.⁴⁷ While the negative impacts of overconfidence are well documented, it is worth exploring whether there are any possible benefits to clients in lawyers expressing overconfidence in their decision-making. The impact of overconfidence is situation specific.⁴⁸ Is

⁴¹ Richard Birke and Craig Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV 1, 15 (1999).

⁴² Kahneman, *supra* note 21, at 262.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Lichtenstein, *supra* note 27, at 16.

⁴⁷ Trevelyan, *supra* note 7 at 989.

⁴⁸ *Id.* at 990.

it possible that there are situations lawyers may encounter where overconfidence in judgments will prove to be a competitive advantage over their peers?

IV. The Planning Fallacy – Optimistic Bias in Time Prediction

a. What is the Planning Fallacy?

The planning fallacy is a term used to describe people's tendency to "underestimate the time required to complete a project, even when they have considerable experience of past failures to live up to planned schedules."⁴⁹ The signature of the planning fallacy is not that people are optimistic in their planning, but that they maintain their optimism about the current project even with historical evidence to the contrary.⁵⁰ For example, when working on a textbook, Daniel Kahneman and his colleagues vastly underestimated the time it would take to complete the project, despite having information of the time it has taken others to complete similar projects.⁵¹ In these types of predictions, people do not forget history, but they confidently make predictions that go against the history that they know and remember.⁵² Underlying the planning fallacy are two different, but related findings. First, predictions of current task completion times must be more optimistic than beliefs about the distribution of past completion times for similar projects. Second, predictions of current task completion times must be more optimistic than actual outcomes.⁵³

To explain the planning fallacy, Kahneman and Amos Tversky introduced a metaphor using the inside view versus the outside view to distinguish between two approaches to time

⁴⁹ Roger Buehler et al., *Chapter One – The Planning Fallacy: Cognitive, Motivational, and Social Origins*, 43 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 1, 2 (2010).

⁵⁰ *Id.* at 3.

⁵¹ Kahneman, *supra* note 21, at 245-247.

⁵² Buehler, *supra* note 49, at 4.

⁵³ *Id.*

prediction. When taking an inside view, people focus narrowly on case/individual specific features of the task at hand and construct a plan of how it will unfold.⁵⁴ On the other hand, those taking the outside view consider factors apart from the target task itself. They view the task through a broader lens, which includes relevant past experiences, the experiences of others, and other background events that may impact progress.⁵⁵ Both mundane everyday projects (such as estimating how long it will take to complete one's holiday shopping) and strategically vital projects are subject to optimistic biases in planning.⁵⁶ Unlike overconfidence and optimism, the planning fallacy is not moderated by individual differences in dispositional optimism or procrastination.⁵⁷

b. How the Planning Fallacy Could Affect Lawyers

Lawyers are constantly creating deadlines and being held to deadlines by their clients. Time management is an important aspect of successful cases or deals. Therefore, the planning fallacy could prove to be costly for both lawyers and their clients, especially since lawyers charge by the hour.⁵⁸ Another factor impacting the prevalence of the planning fallacy in law firms could come from potential incentives for early task completion. Incentives for early task completion prompt increased attention to future plans and reduced attention to relevant past experiences, which fuels the planning fallacy.⁵⁹ One can imagine that lawyers may feel pressure from their clients to complete tasks early.

⁵⁴ Roger Buehler et al., *Collaborative planning and prediction: Does group discussion affect optimistic biases in time estimation?* 97 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 47, 48 (2005).

⁵⁵ *Id.*

⁵⁶ *Id.* at 47.

⁵⁷ Roger Buehler and Dale Griffin, *Planning, personality, and prediction: The role of future focus in optimistic time predictions*, 92 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 80, 88 (2003).

⁵⁸ Buehler, *supra* note 54, at 48.

⁵⁹ Buehler, *supra* note 54, at 48.

In organizations, judgmental forecasting is often performed collaboratively. Even when someone in an organization makes this decision alone, he or she likely consults others along the way.⁶⁰ The overconfidence that people exhibit during the planning fallacy is often heightened by group discussion.⁶¹ Predictions based on group discussion were more optimistic than individual predictions.⁶² Also, the group accentuation effect could impact those prone to optimism bias in decision-making. If some bias, error, or tendency predisposes individual to process information in a particular way, then groups tend to exaggerate this tendency.⁶³ Group discussions can exacerbate the tendency toward unrealistic predictions through an even greater tendency to plan for success.⁶⁴

It is unclear whether lawyers tend to suffer from the planning fallacy and whether it impacts their clients. The obvious way the planning fallacy could impact clients is in how much clients pay for work. If lawyers are overly optimistic in their estimations of how long it will take to complete a project, clients will be disappointed, frustrated, and feel like they are being overcharged as a result of relying on the attorney's estimate. However, there are other possible implications for other aspects of a client's relationship with a lawyer. For example, on the deal side, a deal could fall through because a lawyer incorrectly estimated the time it would take to get all of the requisite ducks in a row. A lawyer's optimistic bias in time prediction could have serious ramifications for clients.

⁶⁰ *Id.*

⁶¹ *Id. at 49.*

⁶² *Id. at 59.*

⁶³ *Id. at 60.*

⁶⁴ *Id. at 61.*

V. Research Proposal

Studies have shown that pessimistic lawyers have traditionally been more professionally successful than their optimistic peers. However, as discussed above, there are opportunities for various levels of optimism and confidence biases to impact lawyering, possibly in ways that favor clients. When lawyers with a variety of bias levels interact with each other in litigation and settlement settings, some bias levels will prove to be more successful than others.⁶⁵ Therefore, it is worth studying which optimism and confidence biases are best for lawyers in various settings.

The following research proposal will aim to address the below research questions:

1. How does optimism as a personality trait impact lawyers' ability to get favorable results for their clients?
 - a. Is there a difference in client results between naturally optimistic lawyers v. those who practice learned or cognitive optimism?

Hypothesis 1: Moderately optimistic lawyers will yield more successful results for their clients than their pessimistic peers. Lawyers who engage in learned or cognitive optimism will be just as successful over time as those that are naturally optimistic.

2. How does overconfidence in decision-making impact lawyers' ability to get favorable results for their clients?
 - a. Can overconfidence be beneficial?
 - b. If so, in what contexts or settings?
 - c. In what contexts or settings is overconfidence particularly harmful?

⁶⁵ Bar-Gill, *supra* note 23, at 3.

Hypothesis 2: Low levels of overconfidence will be more beneficial than no overconfidence in certain settings. These settings may include, negotiations, mediations, and preparation, including early stages in the litigation process. High levels of overconfidence may be particularly harmful in negotiations and later stages in the litigation process.

3. How susceptible are lawyers to the planning fallacy? How does the planning fallacy impact lawyers' ability to get favorable results for their clients?

Hypothesis 3: Lawyers fall victim to the planning fallacy as often as other professionals frequently working in groups. The planning fallacy may lead to negative results for clients, such as missed deadlines.

4. Does optimism as a personality trait impact/mitigate/exacerbate the negative effects of the overconfidence bias and the planning fallacy?

Hypothesis 4: While optimism on its own may lead to more favorable results for clients, it may exacerbate the negative effects of the overconfidence bias and the planning fallacy.

VI. Design of Study

In order to properly assess the implications of optimism, overconfidence, and the planning fallacy their impact on attorney professional success, we would need to do a prolonged study focusing on subjects in various practice areas at various phases of their career. Participants could first be introduced to the study as 3L law students. These subjects would continue to be monitored throughout their early years as a lawyer, in both public and private practice. This research should also study mid-level associates, in their third and fourth years. More experienced

attorneys will not be ideal subjects for this study because they are more likely to have habits or behaviors inconsistent with the aim of this study. Participants will be recruited from top law schools and large law firms, mid size law firms, small law firms, and public practice. Subjects will be prompted to respond to various questionnaires throughout their career (two years at minimum) to generate the presence and impact of optimism, overconfidence, and the planning fallacy on the results they're able to secure for their clients.

The first step of the study will be to measure current levels of optimism for the participants, both the law students about to begin their careers and the mid level associates. The Attributional Style Questionnaire, designed by Martin Seligman, is a questionnaire used to measure explanatory style, which is one's tendency to select certain causal explanations for good and bad events.⁶⁶ The results of this questionnaire will be used to divide subjects into optimists and pessimists. Half of the pessimist pool will be used as a control, and half will be selected to engage in learned or cognitive optimism.

Learned optimism uses cognitive behavioral therapies to change pessimistic cognitions by making them more positive.⁶⁷ A person first learns to be more aware of automatic, habitual pessimistic thoughts.⁶⁸ Once the pessimistic thought is isolated, it can be dealt with by using a variety of techniques that are designed to challenge the pessimistic thought and change it.⁶⁹ Those exposed to learned optimism will be asked to practice learned optimism in professional situations, including their decision-making on a client's behalf.

⁶⁶ Seligman, *supra* note 1, at 40. Note: the Attributional Style Questionnaire is available for purchase.

⁶⁷ O'Grady, *supra* note 2, at 35.

⁶⁸ *Id.*

⁶⁹ *Id.*

Over the duration of the study (perhaps once per quarter), all subjects will be asked to fill out various, periodic surveys. When measuring the effect of optimism, the questionnaires will ask questions to gauge if and how optimism has impacted the results they've been able to generate for their clients. These questions may include questions from the ASQ to determine whether they're actually engaging in pessimistic or optimistic tendencies, regardless of the condition they were assigned to. Then, questions would ask about for details about the results they have secured for their clients (note, for young associates, clients also includes supervising attorneys). The questionnaire would also ask whether they attribute any of their success or failures to their level of optimism, and to explain the reasoning for each answer. This survey will be sent to the participants at intervals throughout the study.

To measure overconfidence, participants will be asked to record the confidence in their decision-making when they have decisions to make for their clients, both major and minor. While junior associates may not face as many decisions that directly affect their clients, they may be asked about their confidence in whether the research they presented to a supervising attorney is correct. Subjects will be asked to independently record a decision they have to make and how confident they were in the decision they made, preferably before they receive feedback. Like in the original study on overconfidence done by Fischhoff, participants will be asked to rate the probability that their answer was correct on a scale of 1-10.⁷⁰ Later, once they receive feedback on the decision, the subjects will also record the actual results of that decision. Participants will have access to the questionnaire and can input responses when they have a decision they want to record. Participants should keep track of and input results for at least five decisions per quarter.

⁷⁰ Fischhoff, *supra* note 24, at 553.

To measure the impact of the planning fallacy, subjects will be asked about the accuracy of their time predictions, both individual and group. The subject will first record the deadlines into the online mechanism for recording answers for this study. After the objective has been met, the subject will be asked about the actual date of completion. The subject will also be asked whether he used historical background information to determine whether the subject accounted for the “outside view” in setting the deadline. If, based on the subjects answers, there is a situation where the planning fallacy did occur, the subject will be asked whether or not the optimism bias in planning affected the client, and if so, how. This portion of the study may be repeated less than the other portions of the study because the questionnaire may be too obvious and alert the subjects about what is being studied.

The level of optimism of each subject will be compared to the results generated in the overconfidence and planning fallacy surveys to determine whether there is a relationship between optimism/pessimism, overconfidence, and the planning fallacy. Subjects will initially be informed that the study is only about optimism in order to limit their awareness about what other aspects of their decision-making is also being studied to hopefully secure more natural responses.

VII. Conclusion

The proposed study could enable lawyers to better understand the productive uses of optimism and confidence in their professional decision-making. However, there are some limitations with this study. Because it relies on self-reporting, there is the risk that the lawyers may not make accurate assessments regarding the tested variables. For example, lawyers may not be able to accurately assess the proper impact that optimism had in the favorable results to their clients or accurately assess the extent they considered historical data when assessing the planning

fallacy. Another potential issue with the study is that the subjects will become wise to what is being tested, and manipulate their answers accordingly. However, because this study aims to have a large sample size, researchers will be able to determine how accurate they perceive the subject's assessments to be. In summary, the proposed study offers a unique opportunity to determine what are the best situations for optimism and confidence in lawyering because it aims to study attorneys in various practice areas in different phases of their careers. Optimism and overconfidence are typically seen as maladaptive in the legal setting. This study has the possibility to both secure more favorable results for clients, but also to infuse the legal profession with more professional optimism and confidence.