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Chapter 59

Negotiations

by Julian Solotorovsky and Matthew C. Luzadder

II. THE ART OF NEGOTIATING

§ 59:2 Negotiation theories

Add footnote 0.50 at end of second sentence of first paragraph:

[0.50]See Joshua N. Weiss, The Book of Real-World Negotiations: Successful Strategies from Business, Government, and Daily Life (Wiley, 1st ed. 2020) for discussion of negotiations in everyday life.

§ 59:3 Negotiation theories—Practical application of in litigation

Add footnote 14.30 at end of first sentence of sixth paragraph:

[14.30]See Barry Nalebuff, Split the Pie: A Radical New Way to Negotiate (Harper Business, 2022) for discussion of how focusing on the desired overall outcome benefits both parties.

Add paragraph, including footnotes, after sixth paragraph:

Interest-based negotiation's reliance on objective standards is problematic. Indeed, "many types of criteria relied upon by the interest-based framework to ensure objectivity and fairness are themselves animated by norms that are prejudiced and, in fact, unfair."[14.50] "[N]egotiators must therefore identify embedded norms and, when necessary, re-negotiate them."[14.70]

[14.50]Ariel Eckblad, In Pursuit of Fairness: Re-Negotiating Embedded Norms & Re-Imagining Interest-Based Negotiation, 26 Harv. Negot. L. Rev. 1, 3 (2020).

[14.70]Eckblad, 26 Harv. Negot. L. Rev. at 20.

Add footnote 15.50 at end of second sentence of ninth paragraph:

[15.50]See Deepak Malhotra, Negotiating the Impossible: How to Break Deadlocks and Resolve Ugly Conflicts (without Money or Muscle) (Berrett-Koehler Publishers, 2016) for discussion of resolving conflict in negotiations.

Add text, including footnotes, after sixth sentence of tenth paragraph:

The loss aversion cognitive bias is especially relevant to consider in negotiations.[16.50] Loss aversion "refers to the asymmetry in the evaluation of positive and negative outcomes, in which losses loom larger than the corresponding gains."[16.70]

[16.50]Se Yair Livneh, Overcoming the Loss Aversion Obstacle in Negotiation, 25 Harv. Negot. L. Rev. 187, 191 (2020).

[16.70]See Livneh, 25 Harv. Negot. L. Rev. at 189 (quoting Daniel Kahneman & Amos Tversky, Conflict Resolution: A Cognitive Perspective, in Barriers to Conflict Resolution 45 (Kenneth J. Arrow et al., eds., 1995)).

IX. ETHICAL CONSIDERATIONS IN NEGOTIATIONS

§ 59:43 Ethical duties—To opposing parties—Representations and omissions

Add text, including footnote 0.50, at end of first sentence of first paragraph:

More specifically, the Annotation to Model Rule 4.1 states: "A lawyer who makes a false statement in the course of negotiating may be subject to discipline under Rule 4.1(a)."[0.50]

[0.50]Neil B. Posner, Candor, Truthfulness, and Conflicts of Interest: Ethics in Negotiations, 57 Tort Trial & Ins. Prac. L.J. 121, 137 (2021) (quoting Annot. Model Rules of Pro. Conduct 443, 448 (9th ed. 2019)).

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