Introduction

In 1995, I was asked to assume a project that had been languishing for some time: editing a compilation of articles about divorce settlement negotiations for a book. With the assistance of a number of fine family law attorneys, I was able to complete the project, and the result was The Joy of Settlement, published in 1997 by the ABA Family Law Section (FLS). The Joy of Settlement sold a respectable number of copies, but, a few years later, the ABA FLS published a book on litigating divorce cases. It outsold The Joy of Settlement several times over.

Over the years, I have had the privilege to speak about various aspects of divorce settlement negotiations before a number of bar associations, including the Kentucky Bar Association, the Alaska Bar Association, and the Association of Family and Conciliation Courts, to name a few. On each occasion, I have asked for a show of hands to determine the percentage of cases settled, rather than litigated, by the lawyers in attendance. I start with 75 percent, and every single hand in the room is up. In fact, hands don’t even start going down until I get to 85 percent. Most

hands are still up at 90 percent, a fair number at 95 percent, and even some at 100 percent. Although unscientific to be sure, this survey reflects what I’ve always believed: most lawyers prefer to resolve—rather than litigate—cases.

The problem is that most legal education, both in writing and through lectures, teaches what lawyers engage in the small minority of the time: litigation. The fault is not with the publishers or legal education providers; rather, the fault lies with lawyers, who think that they need training for litigation but not for settlement. The irony of this belief is starkly highlighted in visits to bookstores, which contain large numbers of books on negotiations, and in perusals of college business school course listings. In business settings other than law, there is a widespread understanding of the importance of learning how to negotiate. The Harvard Business School course on negotiation is sold out far in advance, for example. Still, lawyers seem to believe that settlement is intuitive and therefore does not require the same training as litigation.

To be sure, to an extent, negotiation strategy can be intuitive. But not all negotiation strategy is instinctive. Therefore, family law attorneys should use the substantial amount of literature and courses teaching the strategy and concepts to become better negotiators.

The importance of becoming better negotiators cannot be understated. What we do affects not only the lives of our clients but also the lives of their children and their extended family. Although it’s important to get to “yes” so that our clients can avoid the financial and emotional destructive nature of litigation, if we can get to “yes” with less acrimony and bitterness, we have done a great service for our clients. My late partner, Leonard Loeb, used to say that the goal of a family law attorney should be to resolve a case without creating or adding to the degree of animosity that would prevent parents from walking down the aisle together at their child’s marriage. Importantly, that methodology is not inconsistent with also achieving superior financial results for our clients. In fact, it is quite consistent.

Consider the typical case of an income provider who is going to pay support. Many wage earners have a certain amount of discretion regarding the creation of income. In extreme cases, some simply quit their jobs, running the risk of being sanctioned for contempt. More commonly, they have options regarding how hard to work and how much to earn. If the wage earner has any control over his business, there are numerous methodologies (some of them quite legal) to minimize his
income for the purpose of support while taking benefits in other forms (sometimes not quite so legal). Working voluntary overtime or second jobs or even changing jobs are other ways of creating extra income—or not. A good relationship between the parties can lead to a higher incentive to work and create wealth, from which all will benefit.

There are many schools of thought about negotiations, including some lawyers who believe that litigation is as acceptable as settlement. Litigation allows some lawyers to pass the blame for less-than-optimal results, which are endemic in settlement because settlement requires compromise. Others believe that courts can do as good a job in making any compromises as the parties can themselves. Still others believe that settlement is not part of being a lawyer, i.e., that lawyers, in the words of the now-repealed Model Code of Professional Responsibility, “zealously” advocate for their clients. This book is not for those lawyers unless those lawyers want to explore changing their minds. Rather, it is written under the belief that by recommending compromise to clients and taking full responsibility for recommending what trade offs should be made, lawyers are doing exactly what they should be doing: helping clients end one part of their lives and have an opportunity for a better future. Zealously advocating for a client does not accomplish any of the foregoing and is therefore, in my opinion, completely inconsistent with an attorney’s responsibilities.

This book is not designed for the novice family law attorney, nor is it a PhD course in settlement negotiations. Although it’s designed for those lawyers who have done enough negotiating to recognize room for improvement, it is not intended to replace—or even summarize—the vast collection of resources for learning the science of negotiating. Instead, it is designed to collate, using one voice, many of the various concepts of divorce settlement negotiations that are discussed in The Joy of Settlement, for which I owe the authors a deep debt of gratitude. Hopefully, having waded into the water with these concepts, lawyers will go the next step and dive in the deep end for further information and to improve their skills.

It will be noted that in the course of writing this book, I frequently use pronouns assuming that the female member of the couple will be the primary child custodian and the male, the primary financial provider. I well recognize that such assumptions are inconsistent with

many couples in today’s world, but attempting to use neutral or mixed terms (e.g., *his/her*) does not seem to read well, so the common, but certainly not universal, gender role assignments are assumed for the most part.

There is an old joke that 80 percent of lawyers give the other 20 percent a bad name. This is a joke because the truth is that the vast majority of lawyers are highly professional. Like all professionals, their goal is not to line their own pockets but to provide services to promote the best interests of their clients. Far more than 80 percent of lawyers deeply understand that settlement promotes those interests. I hope that this book is of some assistance to them.