Reaching an agreement at the round table

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Settling a dispute through the collaborative process may begin with the shape of the negotiating table.

The common image of a divorce positions the clients with their attorneys sitting on opposite sides of a rectangular table. Often, it is an adversarial situation where the lawyers do most of the talking.

Conversely, the collaborative law process might involve a change as simple as seating the parties at a round table. The attorneys might sit next to the clients they are not representing and talk to the clients directly. Other professionals from the mental health and financial services fields might also be part of the conversation.

Family law attorneys who practice collaborative law say the discussions at the round table yield substantially better results than those across the rectangular table.

“\[quote\]I think the clients come away feeling better about the whole experience if they have an active part in it,\[/quote\] said John Brandt, family law attorney at Beckman Lawson LLP in Fort Wayne. “They’re part of the team solution.”

Collaborative law dates back to 1990, and while it is widely practiced in other states and countries, it is slowly gaining acceptance in Indiana. Although it is akin to mediation, the collaborative method is distinctive in that the clients both have attorneys instead of a single lawyer acting as a neutral facilitator. Parties usually meet a couple of times rather than working out an agreement in a single session.

One obstacle to its growth in the Hoosier state is the relatively small pool of professionals trained in collaborative practice techniques. Another obstacle may be skepticism that arises from the absence of rules promulgated by either the courts or the Legislature regarding the method.

However, the obstacles will likely be overpowered by the advocates of collaborative law. Attorneys who employ the method in their practices talk about being convinced of the merits from the first time they encountered the technique.

Melanie Reichert, attorney at Broyles Kight Ricafort P.C. in Indianapolis, was first trained in collaborative law in 2005 and was among the small group of lawyers who formed the first board for the Central Indiana Association of Collaborative Practitioners in 2011. Currently, she is president of the association.

Based on her experience, Reichert said just about every kind of family law case could be handled
through collaboration. Even situations that involve allegations of child abuse or substance abuse and cases that revolve around the hot-button issues, such as one spouse moving out-of-state and high-asset or low-asset divorces, can all be settled at the round table.

“It’s working because people are sitting down in a room and talking about the issues rather than hiding behind their lawyers,” Reichert said.

**Hard work for a better ending**

A 2010 survey by the International Academy of Collaborative Practice examined 933 cases that were handled with the collaborative model. The study found that 86 percent of the cases ended with a settlement agreement and another 2 percent of divorcing couples reconciled.

Although collaborative law has had success, it is not an easy process. The issues that need to be addressed can be very difficult to discuss, bringing up anger and despair. Yet, the clients are required to be respectful of each other, communicate in a mature manner and listen to the opinions and advice of everyone involved in the session.

All the hard work needed to reach a collaborative settlement, attorneys say, is worth it.

“One of the surprises for me was just how significant the difference is between the experience the clients have and the way the clients feel at the end of the collaborative process compared with the way the clients feel at the end of the traditional divorce process,” said Amy Stewart, attorney at Mallor Grodner LLP in Indianapolis.

Traditional divorce often makes the relationship and the communication between the husband and wife worse. The process can entail the parties showing their opposing spouses in the harshest light possible and maneuvering to get their fair share as well as part of the other’s share.

Once the battle is done, many couples have to figure out on their own how to work together to parent their children.

While watching that scenario play out over and over again in her more than 20 years as a family law attorney, Deetta Steinmetz thought there had to be a better way for couples to divorce. She found that better way in collaborative law and is now expanding her mediation practice at the Neighborhood Christian Legal Clinic to include it.

Within the collaborative setting, the clients identify their common interests and focus on finding ways to meet those interests.

Through the collaborative process, Steinmetz said, a couple has the opportunity to establish a new family dynamic.

**Governing rules**

Unlike mediation, which is governed by the rules of alternative dispute resolution, collaborative law has no formal rules or guidelines. The IACP does have practice and ethics standards for collaborative law attorneys.

Also, the National Conference of Commissioners on Uniform State Laws, also know as the Uniform Law Commission, crafted the Uniform Collaborative Law Rules/Act as model legislation for states to
adopt. However, in 2011, the American Bar Association House of Delegates voted against approving it.

Collaborative law practitioners support the institution of rules over the technique whether established by the Indiana Supreme Court or the Indiana General Assembly. Rules would give more legitimacy to the practice and provide lawyers with clear guidelines, Reichert said.

A hallmark of collaborative law is the agreement worked out by the parties and their attorneys before the process begins. Often these contracts include many ADR principles, but the documents cannot cover every issue or situation that could arise during the process. Having set rules or guidelines, Reichert said, would help attorneys handle the unexpected.

Legitimacy could also foster acceptance. The divorce agreements that result from the collaborative process can be creative and put forth terms that are, for example, different than those outlined in the state’s parenting time guidelines.

Consequently, courts may take a closer look at the final divorce decree. Some judges, Reichert said, are concerned about agreements that do not follow the parenting time rules. However, she continued, caselaw not only encourages settlement of disputes, it also supports the decision of the parties to agree to terms not normally in an order.

In addition, the contracts signed at the beginning of the collaborative process have caused concern.

A key component of those contracts is the stipulation to focus on the negotiations and not go to court or threaten to go to court. If the couple does decide to proceed with litigation, the attorneys must withdraw and not provide any representation.

The Colorado Bar Association issued an opinion in 2007 that held the pre-session collaborative agreements violated the state’s rules of professional conduct. In part, the bar association was worried the terms of the contract would impair a lawyer’s ability to recommend all the legal alternatives.

A short time later, the ABA’s Standing Committee on Ethics and Professional Responsibility rejected that reasoning. The committee concluded the legal representation is not hindered if the clients are well informed and have consented to the attorneys’ limited duties.

“I think collaborative law will gain support in Indiana. I think it will become one of the first options people look to when they have a family law issue,” Reichert said. “Collaborative law is not right for every case and every person. It’s one more tool in the toolbox.”