COLLABORATIVE CORNER
By: Susan Hurst

It's Not a Communist Plot

In response to a recent television newsmagazine piece on Collaborative Practice, a colleague, friend and excellent litigator cried, "It's a communist plot!" The piece apparently listed all the positive aspects of Collaborative Practice, of which it claimed were many, and compared them against the downsides, of which there seemed to be none. An uninformed view might have concluded that Collaborative Practice could even cure warts.

Of course, such a skewed perspective leaves the public and skeptical lawyers, with the unbelievable perspective that Collaborative Practice works under all circumstance and in all cases better than litigation. But rather than recounting my list of cases that don't work well with Collaborative Practice, which tend to be very fact-specific, I believe it is much more valuable to discuss the circumstances and behavior which can foul the Collaborative process.

Many of these items are the same things that can screw up a successful presentation or outcome in a litigation case. For example, an unprepared client is as unsuccessful in collaborative negotiation as in depositions. A client who doesn't gather the information requested for the attorney for client preparation or for discovery production will stymie a resolution by any process. A client who acts unilaterally against the lawyer's advice or who does not follow through with interim agreements is just as much a "loose cannon" in Collaborative process and in litigation.

Not that it's always the client's fault; a client who is not coached properly by his lawyer on effective communication skills will break down any resolution process with confusing, ineffective or damaging communications. Worse, lawyers who themselves use inflammatory language and techniques in their pleadings, discovery or in dealings with other counsel will slow the resolution process in a litigation case and destroy the goodwill necessary to Collaborative processes. For this reason, Collaborative Practice lawyers receive special training in collaborative negotiation and resolution, and also form practice groups of like-minded practitioners to instill trust among all the professionals involved

In other words, since the collaborative process makes many of the same demands on its participants as does the litigation process, Collaborative Practice cases are usually unsuccessful for the same reason that a litigation case is "unsuccessful."

One difference, though, is that a litigation case will be concluded at point of a judge's order, without settlement, if the parties cannot reach one themselves, with the judge often using Solomon's solution to the Gordian Knot. Unfortunately, such a "conclusion" often sets the stage for further litigation in the form of endless contempt and modification actions. I'm sure that we've all seen cases where the litigation lasted longer, and was even more intimate, than was the marriage it intended to terminate.

Collaborative Practice, through the use of a Participation Agreement that commits the parties to a settlement of the issues, demands that the participants view the issues as being solvable through facilitated communication and honest, open disclosure. And since the disputants are required to believe that the conflict is solvable, they are often able to

solve their dilemmas, permanently, and without any need for an externally-imposed, mutually-dissatisfying slash of Solomon’s sword.