Northwest Construction Consumer Council's Annual Conference

Integrated Project Delivery (IPD): Key Considerations and Possible Pitfalls

Presented by:
Sean C. Gay
Bart W. Reed
Stoel Rives LLP
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II. IPD as a concept
III. IPD in practice
IV. Conclusion
History

- Project inefficiencies
- Project disputes
- Increased productivity generally
- Construction industry is the exception to increased productivity
- Industry has historically tried to address these issues
- These efforts have had mixed results
• Project inefficiencies
• Project disputes
• Increased productivity generally
  • U.S. Dept. of Labor Report
Construction & Non-Farm Labor Productivity Index (1964-2003)

Constant $ of contracts / workhours of hourly workers

Sources: US Dept. of Commerce, Bureau of Labor Statistics
• Construction industry is the exception to increased productivity
• Information is lost because of hand-offs between phases.
• Total waste in construction industry estimated at 30%.
• Industry has historically tried to address these issues.
  • Differing site condition clauses
  • Partnering
  • Design build
  • Mediation
• All are examples of some form of collaboration
• Mixed results
IPD As a Concept

- Potential for seismic shift
- Emphasis on collaboration
- Goes further than past efforts with a contractual emphasis on "we" rather than "I"
- Industry has continued to embrace collaboration -- ENR Survey
- Differences in IPD Approach

<table>
<thead>
<tr>
<th>Project Factors</th>
<th>Traditional Project Delivery</th>
<th>Integrated Project Delivery</th>
</tr>
</thead>
<tbody>
<tr>
<td>Teams</td>
<td><strong>Fragmented</strong>, assembled on “just as needed” or “minimum necessary” basis, strongly hierarchical, controlled</td>
<td><strong>An integrated</strong> team entity comprising key project stakeholders, assembled early in the process, open, collaborative</td>
</tr>
<tr>
<td>Process</td>
<td><strong>Linear, distinct, segregated;</strong> knowledge gathered “just as needed,” information hoarded, silos of knowledge and experience</td>
<td><strong>Concurrent and multilevel,</strong> early contributions of knowledge and expertise, information openly shared, stakeholder trust and respect</td>
</tr>
<tr>
<td>Risk</td>
<td><strong>Individually managed,</strong> transferred to the greatest extent possible</td>
<td><strong>Collectively managed,</strong> appropriately shared</td>
</tr>
<tr>
<td>Compensation / Reward</td>
<td><strong>Individually pursued,</strong> minimum effort for maximum return (usually) first cost-based</td>
<td><strong>Team</strong> success tied to project success, value-based</td>
</tr>
<tr>
<td>Communications / Technology</td>
<td><strong>Paper-based,</strong> two-dimensional, analog</td>
<td><strong>Digitally based,</strong> virtual; <strong>Building Information Modeling</strong> (three-, four-and five-dimensional)</td>
</tr>
<tr>
<td>Agreements</td>
<td><strong>Encourage unilateral effort,</strong> allocate and transfer risk, no sharing</td>
<td><strong>Encourage, foster,</strong> promote and support multilateral open sharing and collaboration; risk sharing</td>
</tr>
</tbody>
</table>
• Industry-wide documents developed to implement IPD at a contract collaborative level
  • ConsensusDOCs 300
  • AIA A295 Transitional IPD Agreement
  • AIA C190-series documents (SPE)
  • Draft Digital Practice Documents -- AIA E203 (BIM and Digital Data Exhibit), G201 (Project Digital Data Protocol Form) and G202 (Project Building Information Modeling Protocol Form)
  • Manuscripted Forms
AIA and ConsensusDOCS Integrated Project Delivery

Side-by-Side Document Comparison

### AIA DO-215

- **AIA DO-215**
  - **Standard Contract for the Design and Construction of a Building or Other Work**
  - **AIA Task Force on Design-Build**
  - **AIA Contract for the Construction of a Building or Other Work**

### ConsensusDOCS XR

- **ConsensusDOCS XR**
  - **Integrated Project Delivery**
  - **AIA Task Force on Integrated Project Delivery**

### Differences

- **AIA DO-215**
  - Focuses on traditional design-bid-build contracts
  - Emphasizes the separation of design and construction phases
  - Assumes that the owner is responsible for the project delivery

- **ConsensusDOCS XR**
  - Emphasizes collaborative and integrated project delivery
  - Involves the entire team from the start of the project
  - Assumes that the project delivery team is responsible for the project delivery

### Benefits

- **AIA DO-215**
  - Clear separation of roles and responsibilities
  - Traditional risk allocation
  - Standardized contract terms

- **ConsensusDOCS XR**
  - More flexible risk allocation
  - Collaborative decision-making
  - Customizable contract terms

### Implementation

- **AIA DO-215**
  - Requires formal contract documents
  - Standard form of AIA contract documents

- **ConsensusDOCS XR**
  - Offers a range of contract documents
  - Tailored to specific project needs

### Conclusion

- **AIA DO-215**
  - Suitable for traditional project delivery models

- **ConsensusDOCS XR**
  - Suitable for integrated project delivery models

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### Additional Resources

- **AIA DO-215**
  - AIA Contract Document Series
  - AIA Documentation Policy

- **ConsensusDOCS XR**
  - ConsensusDOCS XR Library
  - ConsensusDOCS XR Training

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**Note:** This comparison highlights the key differences between AIA DO-215 and ConsensusDOCS XR in the context of project delivery models. Each model offers unique benefits and is suited for different project types and client preferences.
• Examples of collaboration
  • Early assembly of Project Team
  • Building Information Modeling (on a shared basis)
• Co-Location of Project Participants
• Team Meetings
• Shared Risk-Reward
AIA and ConsensusDOCS Integrated Project Delivery

Side-by-Side Document Comparison

AIA A201-2014  AIA C106-2016 ConsensusDOCS X6

Contractual Relationship

- Add AIA A201 Agreement Between Owner and Contractor
- AIA C106 Agreement Between Design Firm and Contractor
- Be sure to align the text with the AIA Contract Document.
- Ensure the text is clear and concise for easy understanding.
- Add AIA A201 Agreement Between Owner and Contractor
- AIA C106 Agreement Between Design Firm and Contractor
- Be sure to align the text with the AIA Contract Document.
- Ensure the text is clear and concise for easy understanding.
- Add AIA A201 Agreement Between Owner and Contractor
- AIA C106 Agreement Between Design Firm and Contractor
- Be sure to align the text with the AIA Contract Document.
- Ensure the text is clear and concise for easy understanding.

Scope of Work

- The project scope of work shall be determined by the owner.
- The project scope of work shall be determined by the owner.
- The project scope of work shall be determined by the owner.
- The project scope of work shall be determined by the owner.

Scope of Services

- The services of the architect shall be limited to the design and supervision of the construction.
- The services of the architect shall be limited to the design and supervision of the construction.
- The services of the architect shall be limited to the design and supervision of the construction.
- The services of the architect shall be limited to the design and supervision of the construction.

Contractor Selection

- The contractor shall be selected by the owner.
- The contractor shall be selected by the owner.
- The contractor shall be selected by the owner.
- The contractor shall be selected by the owner.

Construction Documents

- The construction documents shall be prepared by the architect.
- The construction documents shall be prepared by the architect.
- The construction documents shall be prepared by the architect.
- The construction documents shall be prepared by the architect.

Construction Administration

- The construction administration shall be performed by the owner.
- The construction administration shall be performed by the owner.
- The construction administration shall be performed by the owner.
- The construction administration shall be performed by the owner.

Contractor's Liabilities

- The contractor shall be liable for any damages caused by the contractor.
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- The contractor shall be liable for any damages caused by the contractor.

Penalties

- The penalties for non-compliance shall be determined by the owner.
- The penalties for non-compliance shall be determined by the owner.
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- The penalties for non-compliance shall be determined by the owner.

Dispute Resolution

- Dispute resolution shall be determined by the owner.
- Dispute resolution shall be determined by the owner.
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- Dispute resolution shall be determined by the owner.

Endnotes

- Endnotes shall be included to provide additional information.
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Sample Language

- Sample language shall be included to provide examples.
- Sample language shall be included to provide examples.
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Legal Considerations

- Legal considerations shall be included to provide guidance.
- Legal considerations shall be included to provide guidance.
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- Legal considerations shall be included to provide guidance.

Sample Documents

- Sample documents shall be included to provide examples.
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References

- References shall be included to provide sources.
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- References shall be included to provide sources.
• Contract Collaboration Provisions
  • Shared risk/reward
  • Multi-party agreements
  • Project specific entities
  • Safe harbor provisions
  • Project insurance
  • Transparent cost accounting
  • Structured dispute resolution
  • Project Neutral
IPD As a Concept
- Potential for seismic shift
- Emphasis on collaboration
- Goes further than past efforts with a contractual emphasis on "we" rather than "I"

IPD In Practice
- Early reports sparse at best
- Glowing reports of projects with reduction in RFLs, change orders and other disputes

Significant Legal Issues of IPD
- Clauses and Contracts Not Tested
- Newfound Risk Exposure
- Design and Financial Risk
- Ownership of the BIM Model and Data
- Licensing and Professional Design Responsibility
- Collective Waiver of Claims

Examples of collaboration
- Early assembly of Project Team
- Building Information Modeling (on a shared basis)
- Co-Location of Project Participants
- Team Meetings
- Shared Risk-Reward

AIA and ConsensusDOCS Integrated Project Delivery

Only time will tell whether IPD is the answer to the challenges the industry has faced, a partial solution that is a stop along the way to a yet-to-be determined and even better approach to construction delivery, or whether the multiple parties will revert to their historically territorial and cross purposes approach to construction projects.
IPD In Practice

- Early reports sparse at best
- Glowing reports of projects with reduction in RFIs, change orders and other disputes
A cautionary note

- Negotiated relationship contracts v. low competitive bid contracts
- Teams with old relationships v. teams with newer relationships
Significant Legal Issues of IPD

- Clauses and Contracts Not Tested
- Newfound Risk Exposure
- Design and Financial Risk

- Erosion of Spearin Doctrine
- Sharing in Means and Methods
- Economic Loss Doctrine/Independent Duty Doctrine

- Ill-Defined Aspirational Language
- Third-Party Design Liability
- Elevated or Altered Standard of Care

- Ownership of the BIM Model and Data
- Licensing and Professional Design Responsibility
- Collective Waiver of Claims

- Impact on Indemnity Clauses
- Business Entity
- Insufficient Insurance Products
- Clauses and Contracts
- Not Tested
- Newfound Risk Exposure
- Design and Financial Risk
Significant Legal Issues of

- Erosion of Spearin Doctrine
- Sharing in Means and Methods
- Economic Loss Doctrine/Independent Duty Doctrine
- Ill-Defined Aspirational Language
- Third-Party Design Liability
- Elevated or Altered Standard of Care
• Ownership of the BIM Model and Data
• Licensing and Professional Design Responsibility
• Collective Waiver of Claims
• Impact on Indemnity Clauses
• Business Entity
• Insufficient Insurance Products
Conclusion

- Any new industry approach to a problem must satisfy three criteria to be successful
  - Industry awareness of the problem
  - Industry initiatives to address the problem
  - Mandate from owners to implement a solution to the problem
Only time will tell whether IPD is the answer to the challenges the industry has faced, a partial solution that is a stop along the way to a yet-to-be determined and even better approach to construction delivery, or whether the multiple parties will revert to their historically territorial and cross purposes approach to construction projects.
IPD is most likely a point in the continuum of collaboration

Questions?
Sean Gay is a partner practicing in the Real Estate and Construction group. Sean has substantial experience litigating disputes and drafting and negotiating construction and design contracts. In addition, he has extensive public contracting experience, having litigated bid protests and contract disputes. He has also drafted solicitation documents, such as requests for proposals and invitations to bid, and has negotiated and drafted several construction and design contracts for public agencies.

Before joining Stoel Rives, Sean worked in the construction industry in Alaska, Hawaii and Washington. As a construction project manager, project engineer and field engineer, Sean was intimately involved in the technical and financial aspects of his construction projects. Now Sean applies that real-world experience to his clients’ legal issues. His knowledge about how complex construction projects get managed and built, and occasionally result in disputes, has proved an invaluable resource in his legal career.

**Representative Work**

**Construction Claims Litigation**

- Represented subcontractor in large litigation matter involving delay and defective work claims (Washington)
- Represented developers/owners in multiple contracts and litigation matters (multistate)
- Represented local developer in large dispute involving delay and defective work claims asserted by national homebuilder (Oregon)
- Represented major technology company defending and pursuing claims related to manufacturing facility construction and design (Oregon).

**Construction Defects Litigation**

- Represent large school district owner in multimillion-dollar litigation matter involving construction defects in a recently constructed school building (Oregon)
- Represented owner in multimillion-dollar litigation matter involving defects in a mixed-use condominium project (Oregon)
- Represented developer/owner in multiple defect litigation matters for western states hospitality developer (California, Oregon and Washington)

**Construction Lien Disputes and Litigation**

- Represented large national lender in lien foreclosure litigation matter (Oregon)
Sean C. Gay

- Represented design-build subcontractor in lien foreclosure matter (Oregon)
- Represented contractors in multiple construction lien matters (Oregon and Washington)

Public Contracting
- Represent public owner on construction and design procurement and CMGC contracting issues related to large bridge project in Portland (Oregon)
- Represented public owner on construction of large middle school (Oregon)
- Represented water district in emergency procurements (Oregon)

Public Contracting Disputes and Litigation
- Represented school district in dispute involving performance issues related to a recently constructed high-performance school building (Oregon)
- Represented large public utility in litigation regarding a contractor's bid protest (Oregon)

Professional Honors and Activities
- Member, Associated General Contractors, Oregon Columbia Chapter
- Member, Construction Management Association of America (CMAA), Oregon Chapter
- Member, American Society of Professional Estimators, Columbia-Pacific Chapter
- Member, Design-Build Institute of America (DBIA)

Presentations
- “Construction Default Rights and Remedies,” Program Chair, The Seminar Group, June 3, 2015
- “Launching Into the Future with Design-Build and Integrated Project Delivery,” AGC Summer Convention, Aug. 9, 2014
- “Construction Defects: Legal Strategies, Tactics and Practical Concerns,” Program Chair, The Seminar Group, May 16, 2014
- “Tricks, Traps and Ploys Used in Construction Scheduling in Oregon,” Lorman Education Services, Apr. 30, 2014
- “2013 Oregon Legislative Update,” DBIA NW Oregon Chapter 54, June 11, 2013
Sean C. Gay

• “Avoiding Construction Defects: Before, During and After the Project,” Stoel Rives LLP, Feb. 28, 2011
• “Understanding the Construction Process from the Developer Perspective in Oregon,” Lorman Education Services, Nov. 1, 2006

Publications

Treatises

• Fifty State Construction Lien and Bond Law (coauthor), Supp. 2006-2012
• “Client Strategies for Working with Construction Firms,” Thomson/Aspatore, 2008

Continuing Legal Education Materials

• “Federal Procurements” (coauthor), Oregon Construction Law, 2011

Trade Publications

Sean C. Gay

  - “Provisions Providing for Early Accrual of Statute of Limitations Held Inapplicable,” published by the ABA in Construction Litigation: American Bar Association Section of Litigation, July 16, 2014
  - “Contractor Not Entitled to Setoff Costs of Repairing Subcontractor’s Defective Work,” published by the ABA in Construction Litigation: American Bar Association Section of Litigation, January 17, 2014
  - “Declaratory Relief and Sovereign Immunity in Oregon: Can Someone Tell Me If I Turned Square Corners?” Willamette Law Review, 2004

Civic Activities
- Member and Secretary, Board of Directors, Architecture Foundation of Oregon
- Former Member, Board of Directors, March of Dimes, Greater Oregon Chapter
- Stoel Rives LLP Pro Bono Night Clinic
Experience
Bart W. Reed is Of Counsel in the Seattle office and practices with the firm’s Real Estate and Construction group. With extensive experience in complex commercial and construction law, multistate litigation and ADR (representing clients in 28 states), Bart focuses his practice on construction and design issues and disputes, representing owners, developers, contractors, subcontractors, design professionals and sureties, in diverse matters on both public and private projects. His experience covers a wide range of issues affecting design and construction clients, including contract drafting/negotiation, non-payment and surety claims, construction liens and payment bond claims, design disputes, construction defects, and scheduling issues in the defense and prosecution of delay/impact claims.

Prior to joining Stoel Rives, Bart was a Partner and Shareholder at Hendrick Phillips Salzman & Flatt, PC, 2003–2012; an Associate at Moore Ingram Johnson & Steele, LLP, 2000-2003; a Summer Associate for the Litigation Department of Moore Ingram Johnson & Steel, LLP, 1999; and a Summer Associate for the Corporate/Tax Department of Moore Ingram Johnson & Steele, LLP, 1998.

Representative Work
Design and Construction Contract Drafting
- Assisted owners, developers, design professionals, contractors, subcontractors and suppliers in the review, formation and negotiation of contract documents, with specific emphasis on risk mitigation and allocation, for various private projects, including condominiums, apartments, low-income housing developments, and commercial and industrial facilities.

Private Construction Litigation
- Successfully defended large regional civil engineering firm and favorably resolved multimillion-dollar design defect dispute regarding civil and infiltration design issues on industrial facility in Everett, Washington.
- Assisted general contractor in defense of multiple condominium defect claims and facilitated settlement and resolution of multimillion-dollar construction and design-related disputes between homeowners associations and project developers.
- Aided owner of industrial facility in achieving favorable settlement of additional compensation claims for delay and extra and changed work asserted by mechanical contractor, emanating from emergency work performed on owner’s canola-processing plant in Minnesota.

Education
- Mercer University Walter F. George School of Law, J.D., 2000
- University of Georgia, B.A., 1996, with honors
- Presidential Scholar
- Oxford University, Jesus College, 1994, with honors

Admissions
- Georgia
- Washington
- U.S. District Court for the Northern District of Georgia
Bart W. Reed

• Successfully defended major national engineering firm as primary outside counsel in protracted multiparty case in Tennessee involving $24 million dispute arising from sinkhole activity on construction site of Fortune 500 pharmaceutical corporation’s consolidated network distribution center. Case involved complex civil, structural and geotechnical engineering issues. Prevailed on motion to compel production of important post-construction and pre-litigation remediation geotechnical report from owner and, after hard-fought discovery and motion practice, achieved extremely favorable settlement (less than 4% of total hard-cost claim).

• Successfully defended real estate developer in Cobb County, Georgia in multimillion-dollar construction defect and professional negligence case where plaintiffs alleged injuries arising from significant water infiltration and mold infestation.

• Prosecuted and defended multiple large-dollar claims on behalf of large Chicago-based general contractor relative to major infrastructure projects in the Southeast, including recent summary judgment award and settlement achieved (for disposition of multimillion-dollar claims from trade subcontractor on Alabama project) during appeal by subcontractor arising from successful state licensing and registration defense.

• Represented national architectural firm in case regarding multiple design and payment disputes and other contractual matters emanating from school projects in Atlanta, Georgia and achieved favorable disposition and monetary settlement of case during discovery phase of litigation.

• Facilitated resolution of numerous wage and hour claims arising from multiple projects for a large Washington general contractor and a Washington real estate developer.

Public Construction Litigation and Procurement Law

• Named Special Deputy Prosecuting Attorney for King County, Washington and negotiated favorable settlement of various design, payment and public retainage claims between County and general contractor on Brightwater Conveyance Project.

• Prevailed in obtaining an award for full recovery of damages for developer client in Contract Disputes Act claim against U.S. Postal Service arising from multiple ground leases relating to properties in Tukwila, Washington.

• Represented and defended major design services firm against design claims between public owner and general contractor on a water/wastewater treatment facility in King County, Washington.

• Defended national engineering firm and achieved favorable settlement of claims asserted by local Washington municipality concerning project administration and management services rendered on a roadway improvement project.

• Defended and prosecuted claims on behalf of multinational Canadian-based general contractor in connection with local county/state prison project. Successful mediation presentation resulted in favorable defense against county owner’s assertion of liquidated damages and claims for withheld retainage and back-charges associated with alleged defects in facility’s various commercial flooring systems. Obtained large monetary settlement amount from owner through third-party actions against multiple flooring subcontractors.

• Successfully handled multiple breach of contract, delay, labor inefficiency, impact, change order and payment claims for Division 17 finish-trade contractors (specializing in electronic security systems and related components) in connection with various state and county prison, courthouse and other public institution projects throughout the country, including California, Georgia, Kentucky, Maryland and Texas.
Bart W. Reed

• Assisted multiple general contractor and subcontractor clients in their respective protests of competitive bids, as well as RFPs and RFQs, on projects throughout the nation, with most recent achievement involving local civil site-work and underground utility contractor obtaining multimillion-dollar project in connection with high-profile Atlanta Beltline Project.

• Prepared, submitted and prosecuted claims and cases before various Boards of Contract Appeal and prevailed on direct and indirect cost claims, including impact, delay, labor inefficiency and change order claims, for large national electrical trade contractor.

Surety Law

• Prevailed on numerous Miller Act and "Little Miller Act" claims throughout the country, along with defense and prosecution of performance and bad-faith claims against and on behalf of large construction sureties issuing payment and performance bonds for state and federal projects.

• Defended and prosecuted for and on behalf of major national surety on performance bond claims relating to project completion and post-termination issues of contractor/principal arising from high-profile construction projects.

Appellate Practice

• Dalton Paving & Constr., Inc. v. S. Green Constr. of Ga., Inc., 643 S.E.2d 754 (Ga. Ct. App. 2007) - Received favorable dispositive ruling for commercial developer and builder, affirming and reversing decision of trial court, on cases before the Georgia Court of Appeals involving appeal of arbitration award by subcontractor in dispute with general contractor and other related entities.

• ESI Cos v. Ray Bell Constr. Co., No. 2008-CA-001756-MR, 2009 WL 4060478 (Ky. Ct. App. Nov. 25, 2009) - Overturned Tennessee Court of Appeals opinion by arguing before the Kentucky Court of Appeals, after transfer of case to Kentucky, and prevailed on collateral estoppel issues emanating from large delay claim of Memphis, Tennessee-based security electronics contractor on prison project.


Professional Honors and Activities

• Listed among Rising Stars (Construction Litigation), Washington Super Lawyers®, 2013-2014

• Member of one of only 12 firms nationwide ranked Tier 1 for Construction Law by U.S. News - Best Lawyers® "Best Law Firms" since the survey's inception

• U.S. Green Building Council/Green Building Certification Institute
  o Accredited as a Leadership in Energy and Environmental Design Accredited Professional (LEED AP)
  o LEED AP Subspecialty: Building Design and Construction

• Associated Builders and Contractors, Georgia Chapter, 2005-2012

• Association of General Contractors, Georgia Chapter, Young Leaders Program, 2005-2012
Bart W. Reed

- American Bar Association, Construction Law Forum
- Washington State Bar Association Construction Law Section Council Member

Presentations
- "It's Not Easy Being GREEN: Issues and Risks to Consider When Participating on LEED or Other Green Construction Projects," Lunch and Learn — in house presentations at Hendrick Phillips Salzman & Flatt, PC, Atlanta, Georgia, September/October 2010
- "Brave New World of Public Contracting: Going Where the Money Is (or May Be) — and How to Find It!!" Associated Builders & Contractors of Georgia, Inc., Atlanta, Georgia, 2009

Publications
- "Is Your Contractual Arbitration Clause 'Unconscionable' and Thus Unenforceable?" Stoel Rives "Ahead of Schedule" Blog, May 2013
- "LEED-igation: Fact or Fiction?" Daily Journal of Commerce, February 2013
• “LEED-igation 101: Understanding and Mitigating the Legal Risks Unique to Green Construction Projects,” Professional Roofing, June 2010


Civic Activities
• Contributing Volunteer for numerous Habitat for Humanity projects
• Pro-Bono Volunteer for the Bainbridge Island Museum of Art
• Actively involved in Bainbridge Island Little League
• Member and Supporter, Washington Trails Association and The Mountaineers Club
• Vice President of North Springs Homeowners Association Executive Committee, North Springs Neighborhood, Sandy Springs, Georgia (2011-2012)
• Member and Pro-Bono Volunteer, Cobb County Justice Foundation (2000-2003)