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Conceptual Legal Analysis of an IPD Revolution and the Advent of BIM Technology

Thursday, February 11, 2010

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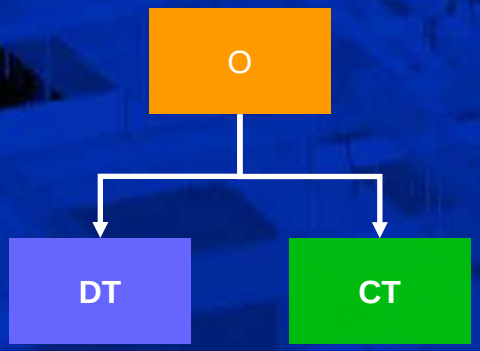

In the 20th Century, somewhere in North America, a construction project delivery system is put together.

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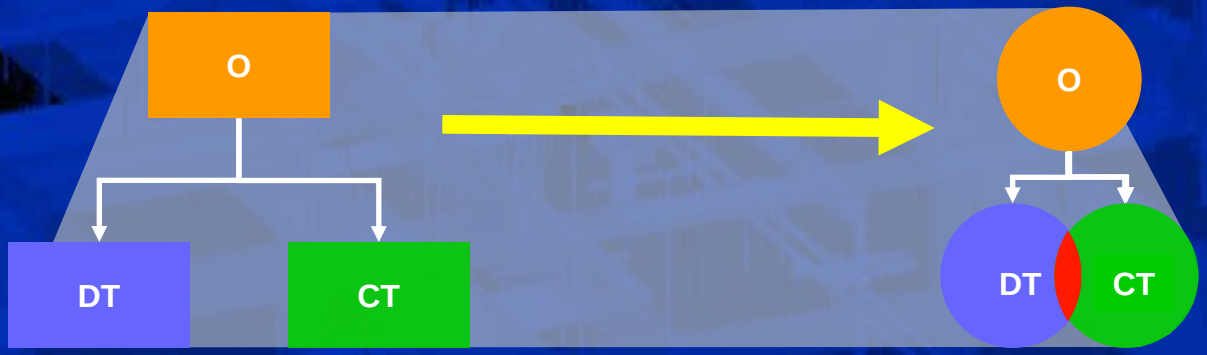

With the advent of BIM technology, there is an improvement in the design systems for construction projects.

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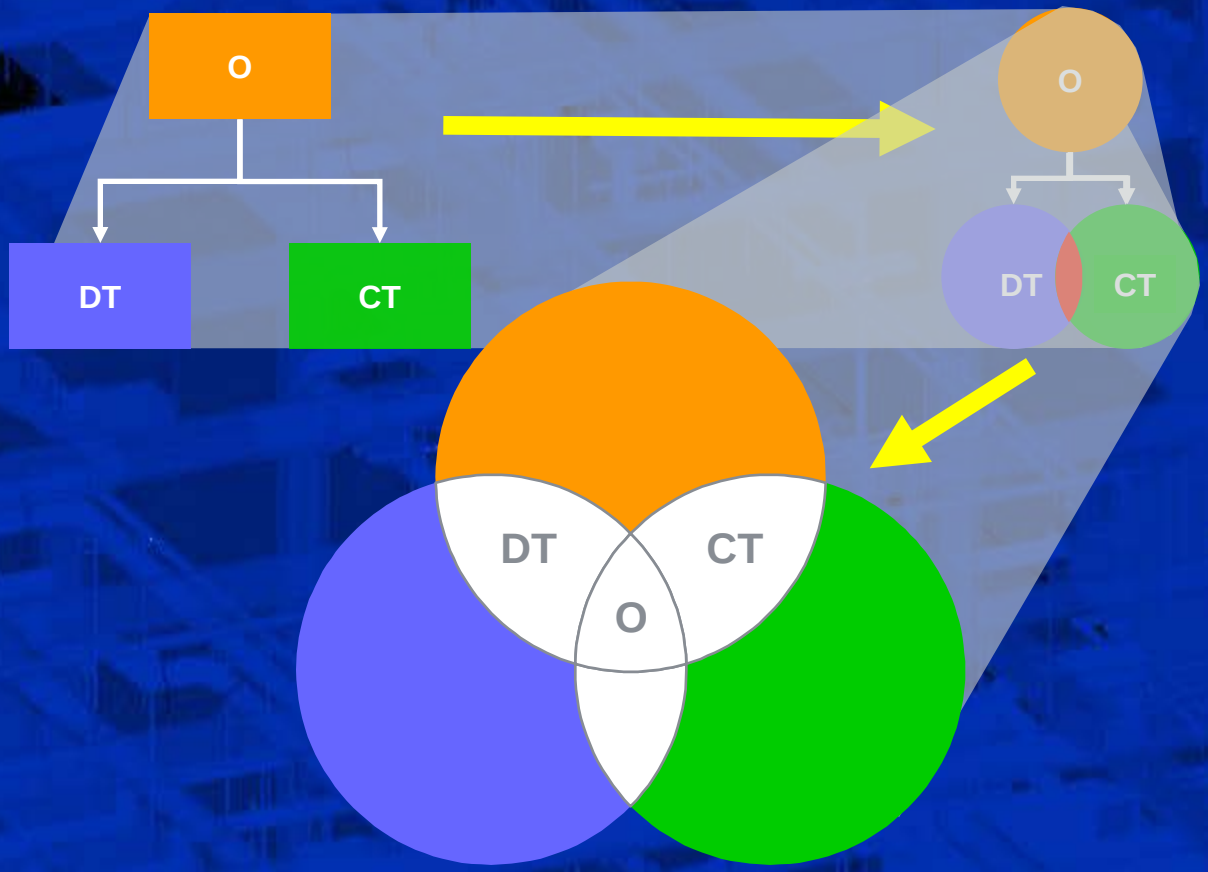

The premise of IPD is to bring more efficiencies to the design and construction process.

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IPD – Will it Ever Be Generally Applied?

- Given the underlying principle in IPD that ultimately the Owner will bear the bulk of the risk for design and construction errors and problems, it is unlikely that IPD as presently understood will be widely adopted in the United States.
- However, some variation of IPD may evolve as an acceptable delivery system.

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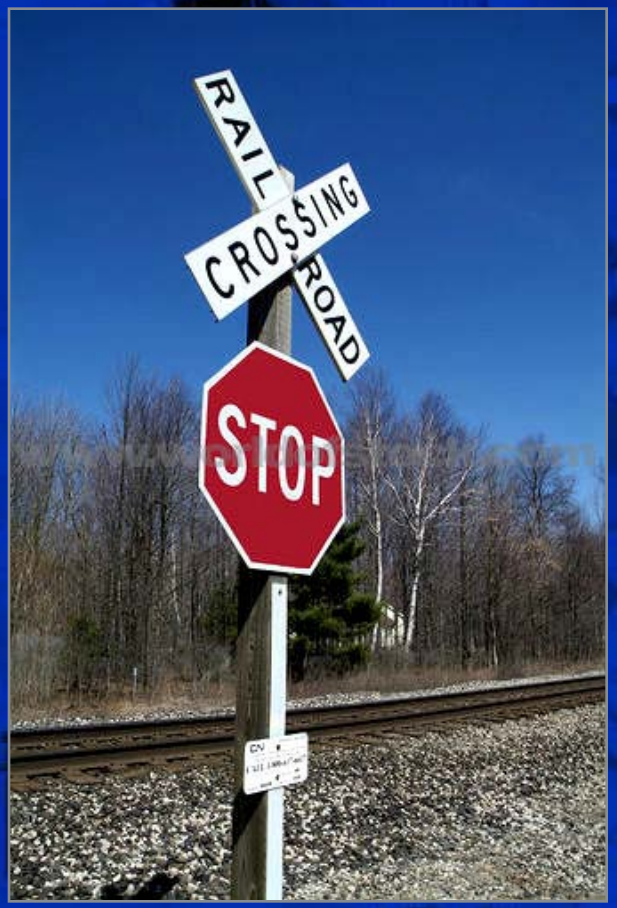

- BIM and IPD are Separate and Distinct Conceptual and Actual Constructs.
- BIM is A Design Delivery System. As Opposed to IPD which is a Project/Contractual Structure.
- BIM is Being Employed and is Likely to become the Dominant System for Delivery of Project Design.
- IPD is Not Widely Adopted and Faces Significant Legal and Practical Hurdles.

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Who Knows What Tomorrow Brings

- As with all new relationships, it may take years before the legal ramifications of the BIM design delivery system and the IPD project delivery system will be fully known.

- Over time, judges and juries will provide interpretations that may surprise not only the lawyers but also project participants.

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Historical Legal Framework

- Most states strictly adhere to a separation among Owner (“O”), Design Team (“DT”) and Construction Team (“CT”).
- Distinction based on concern that profit motive would trump safety.

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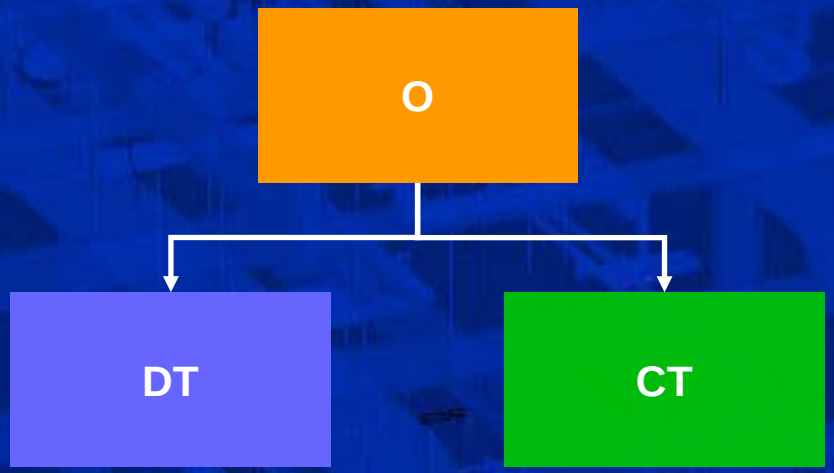
Risk/Reward Traditional Tripartite Structure



- Well-established, clearly understood allocation of risk/reward
- Huge body of law defining each party's obligations to the other.
  - These may vary state-by-state with respect to, e.g., privity and economic loss

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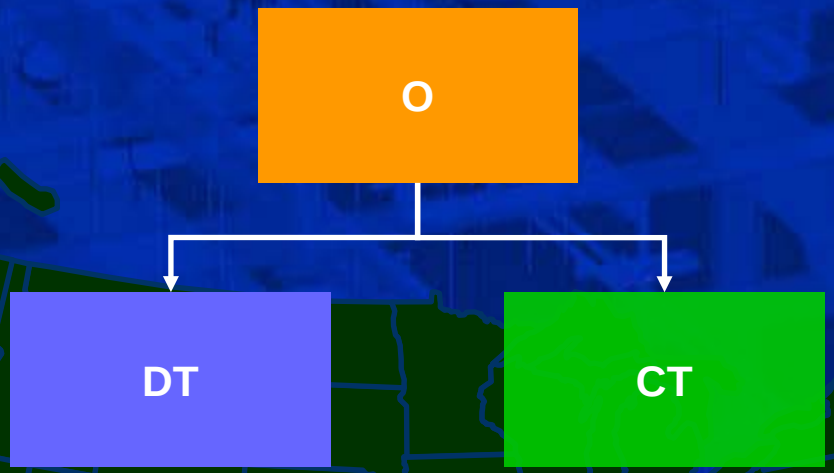
Risk/Reward Traditional Tripartite Structure



- The Owner is responsible for providing the Contractor with a set of drawings that is error-free and buildable (The Spearin Doctrine).
  - The Spearin Doctrine – Owner impliedly warrants to its contractors that the plans and specifications are complete, coordinated and free from error.
- The Design Team furnishes no warranty, and is governed by the relevant Standard of Care.

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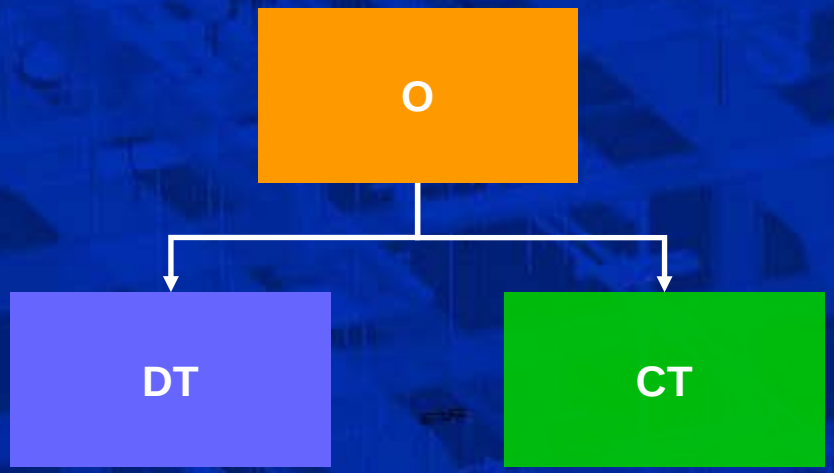
Risk/Reward Traditional Tripartite Structure



- Disconnect between Owner's liability to Contractor and Designer's Liability to Owner
- Also, absence of contractual privity between DT and CT meant CT typically could not sue DT directly for design errors/omissions

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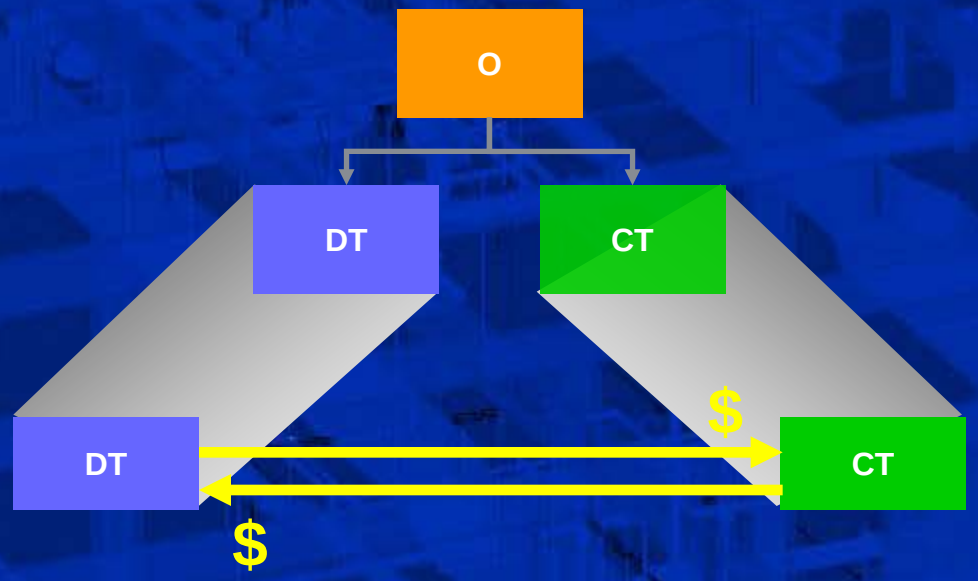
Profit Allocation:
The Traditional Tripartite Approach

Profitability



- DT receives fees for basic services and additional services
- CT receives general conditions plus overhead and profit
- Owner retains all profit
- Profitability of the DT and CT are generally unrelated, but can be adversely affected by one another's actions.

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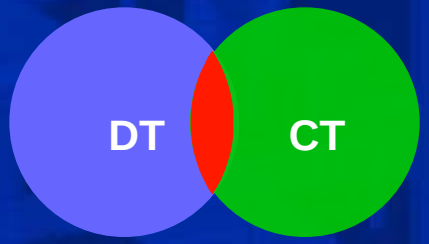
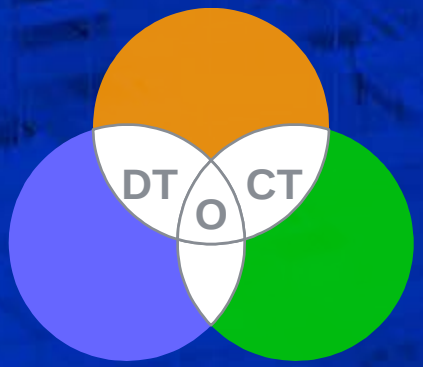
Risk/Reward in the World of BIM/IPD

- BIM begins to blur these well-understood allocations of responsibility (risk/reward).



- IPD promises (threatens?) to overturn traditional allocations of responsibility, risk and reward



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BIM's Family of Documents

- AIA E202-2008
- ConsensusDOCS 301

Both forms are designed as exhibits to O/DT Agreements.

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Contractual Approaches to BIM

Copyright and Ownership Questions

- Does CT own the copyright for its contribution?
- Does DT own the copyright for its portion of the design?
- Who owns the DT's standard details if they are incorporated in the Model?
- Who owns the final integrated design?

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Contractual Approaches to BIM

AIA Copyright and Ownership

- AIA E202-2008 is the AIA's first document specifically addressing BIM.
- E202 addresses model ownership as follows:

> "In contributing content to the Model, the Model Element Author does not convey any ownership right in the content provided or in the software used to generate the content. Unless otherwise granted in a separate license, any subsequent Model Element Author's and Model User's right to use, modify, or further transmit the Model is specifically limited to the design and construction of the Project, and nothing contained in this Exhibit conveys any other right to use the Model for another purpose."

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Contractual Approaches to BIM

AIA Copyright and Ownership

- From a design professional's perspective, this language does not sufficiently preserve its traditional copyright interest in its creative design services.
- On the contrary, it creates an intellectual property stew, with each entity that contributes to the model owning the individual ingredient it contributed to the mix.

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Contractual Approaches to BIM

ConsensusDOCS Copyright and Ownership

- The ConsensusDOCS form contains similar operative language:
- "In the absence of any express language to the contrary in the Governing contract or in this Addendum, nothing in this Addendum . . . shall be deemed or construed to deprive or dispossess a Contributor of copyrights or license rights held by that Contributor in its respective underlying contribution to any Model."
- As under the AIA addendum, the design professional does not keep any of the primary rights to the design "as a whole."

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Contractual Approaches to BIM

Information Management and Control Questions

- Who determines the management framework?
- Who controls the model?
- Who has authority to direct modifications or delegate responsibilities for the progression of the model?
- Who bears the costs of model management?

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Contractual Approaches to BIM

AIA Coordination Issues

- E202 Approach to Information Management ("IM")
  - Project architect undertakes IM from the inception of the Project (Section 2.4.1).
  - The information management responsibilities may be assigned to other parties at other project phases (Section 2.4.1).

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Contractual Approaches to BIM

ConsensusDOCS Coordination Issues

- CD301 Section 3.1
  - Information Management is coordinated by an Owner's appointed "Information Manager" (check box for: Architect/Contractor/Other)
  - Independent costs associated with management are borne by Owner.
  - IM can be replaced at ANY TIME by the Owner at its discretion.

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Accuracy of Data

AIA Approach

- AIA E202-2008, section 4.1.2:
- "…Model Users and subsequent Model Element Authors may rely on the accuracy and completeness of a Model Element consistent only with the content required for the LOD [level of development] identified in Section 4.3."

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Accuracy of Data

ConsensusDOCS Approach

- **C-DOCS BIM Addendum sec. 4.3.11: Participants' Dimensional Accuracy Representation:**
- **[ ] Each Contributor represents that the dimensions in its Contribution to a Model are accurate and take precedence over the dimensions called out in the Drawings or inferred from the Drawings…**
- **[ ] Each Contributor represents that the dimensions in its Contribution to a Model are accurate to the extent that the BIM Execution Plan specifies dimensions to be accurate…**
- **[ ] Contributors make no representation with respect to the dimensional accuracy of the Contributor's Contribution to a Model. A Model can be used for reference only and all dimensions must be retrieved from the Drawings."**

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Risk of Software Defects and Failures

AIA E202-2008

- No language on software defects.

C-DOCS BIM Addendum

- "A defect in the software used in the creation, modification, federation or other use of a Model, including the Project Model, shall entitle a Party to a time or other excuse from performance, but only to the extent that the Party could not have avoided any delay or loss by the exercise of reasonable care…" (Section 5.8)

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Legal and other Issues in BIM

- How will risk be assigned if a contributor cannot be determined?
- Risk of deviations in submittals
- Disputes concerning coordination responsibilities
- Licensing Issues – in states that do not allow constructors to be involved in the design
- Is the governmental entity in charge of approving the construction plans equipped to evaluate a BIM model?

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With Great Power Comes Great Responsibility

- How will the growing use and functionality of Building Information Modeling affect the design professional's standard of care?
- Will the growing use and functionality of Building Information Modeling lead courts to impose a heightened standard of care on design professionals more akin to a warranty obligation than traditional notions of negligence?

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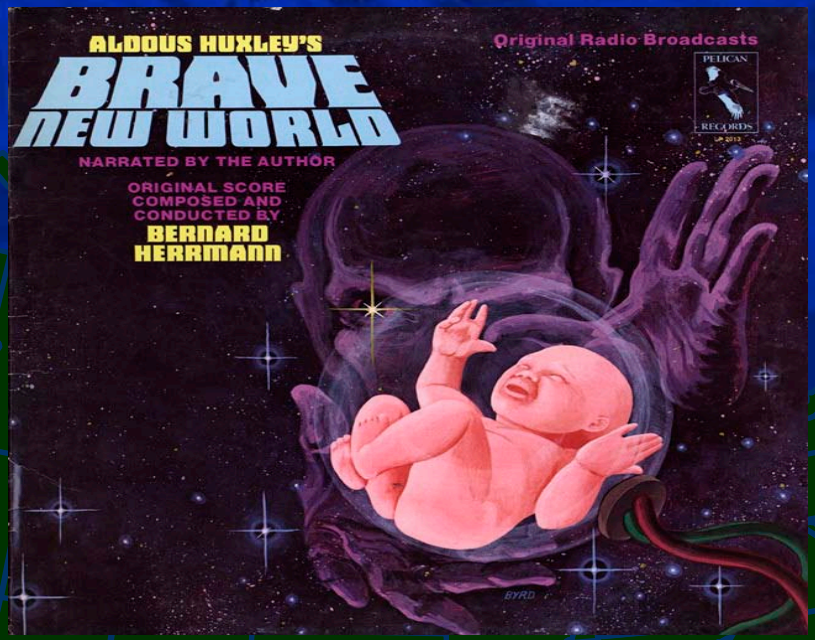
The IPD (r)Evolution



THE BRAVE NEW WORLD OF IPD:

REVOLUTION, OR EVOLUTION OF AN IDEA?

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IPD Structure – Current Thinking

- Basic Project Structure Similar to Traditional PDS
- Major shift in compensation scheme and allocation of risk/reward

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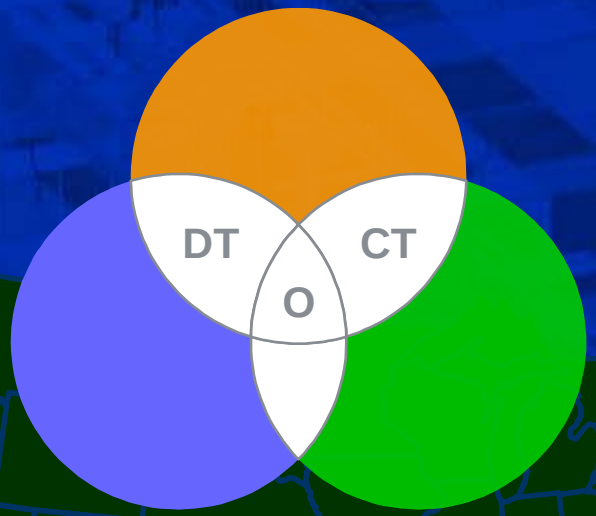

Owner's Risk/Reward

- Owner assumes the risk of non-intentional design and construction errors, omissions and defects
- Owner hopes to secure the benefit of a more efficient collaboration that leads to greater profit.

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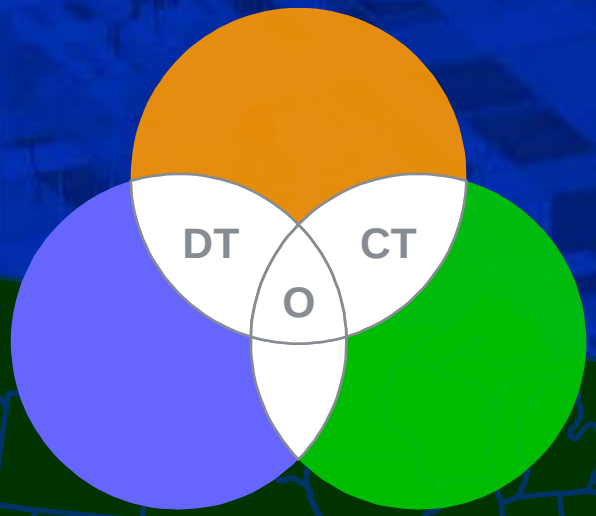

Design Team's Risk/Reward

- Design Team assumes risk of lost profits.
- Design team is absolved of liability to Owner and Contractor for non-intentional errors, omissions and defects.

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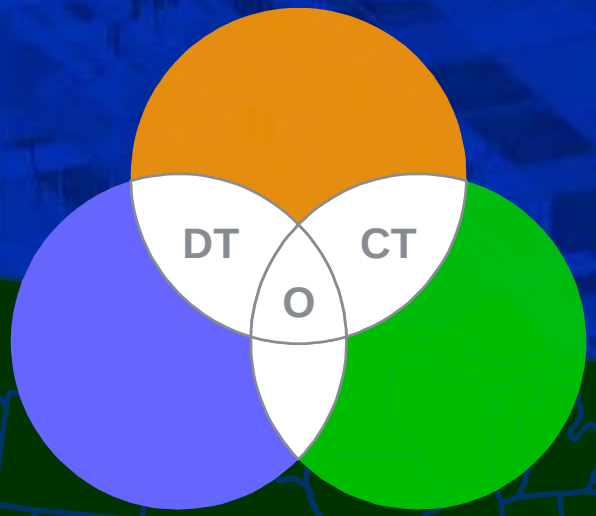

CT's Risk/Reward

- Contractor risks loss of profit and waives claims for poor design documents, including delay claims.
- Contractor gains waiver of its own liability for non-intentional planning, coordination, scheduling and construction deficiencies.

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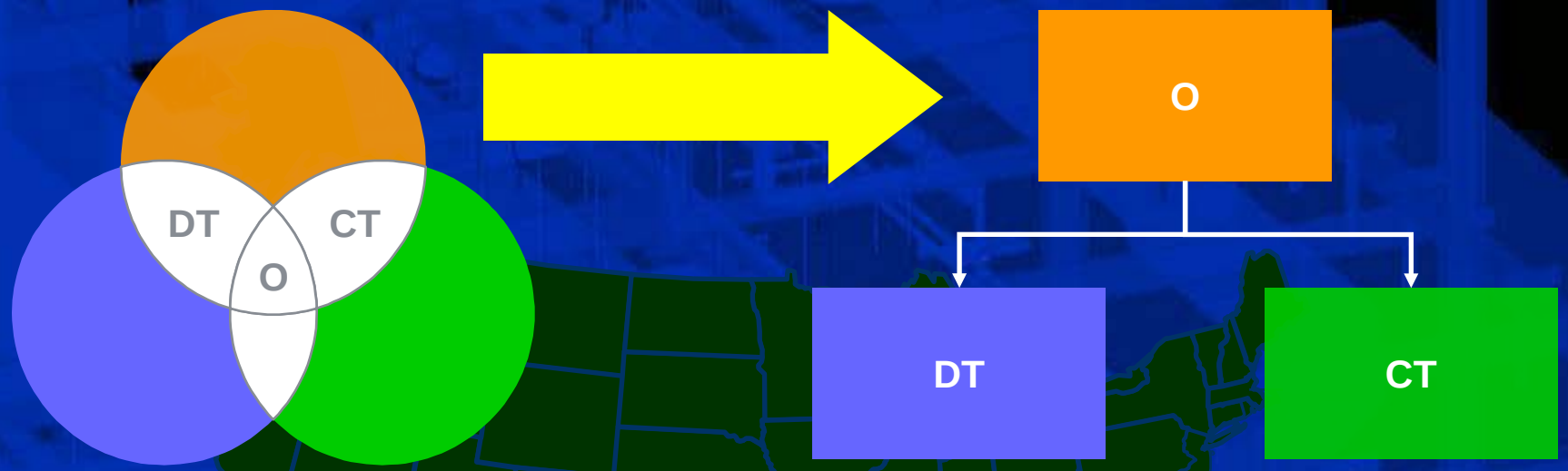

- Waiver of damages among the O, DT and CT is not applicable to claims by third parties (perhaps including subcontractors).
- To the extent there are cross indemnifications to cover claims, these provisions act to convert the IPD agreement into a traditional Tripartite structure.

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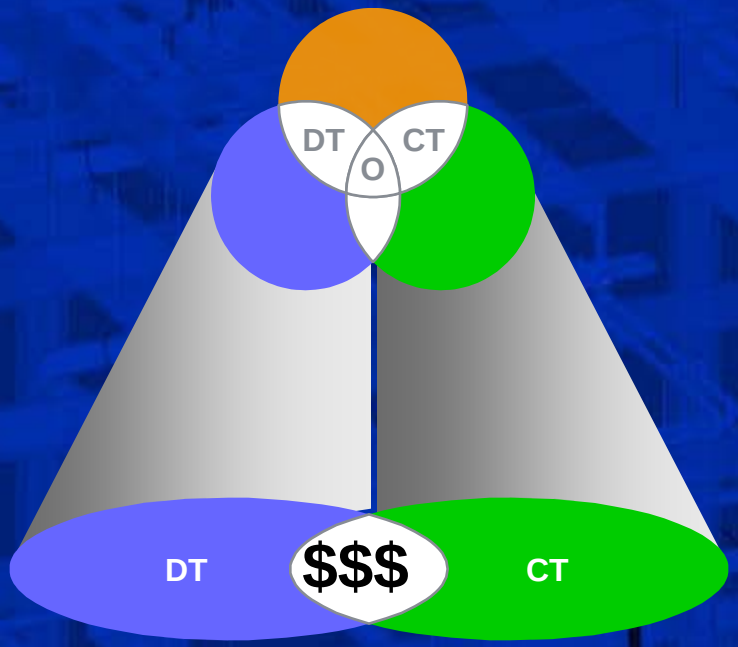
Profit Allocation in the IPD World

Profitability



- Under the IPD approach, profitability is an interrelated and shared risk reward between the DT and CT.
- The concept is to create a scenario where neither the DT nor the CT can benefit due to the failure of the other to perform.

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AIA's Family of IPD Documents

- Transitional IPD:
  - B195-2008 – Standard Form of Agreement between Owner and Architect for IPD
  - A195-2008 – Standard Form of Agreement between Owner and Contractor for IPD
  - A295-2008 – General Conditions of the Contract for IPD
- AIA C195-2008 – Standard Form Single Purpose Entity Agreement for IPD
- AIA C191-2009 – Standard Form Multi-Party Agreement for Integrated Project Delivery

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Transitional Project Delivery System ("PDS")

- **Structure Similar to Traditional PDS**
- **Shift in Terminology and Conceptual Approach to Phases**

- Traditional Phases (O/DT)
  1) Schematic Design
  2) Design Development
  3) Construction Documents
  4) Construction Administration

- IPD Phases (O/DT/CT)
  1) Conceptualization
  2) Critical Design
  3) Detailed Design
  4) Implementation of Documents
  5) Construction
  6) Closeout

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Single Entity PDS

- O/DT/CT form jointly-owned LLC
- LLC enters into separate agreements with each of O, CT and DT
- Numerous concerns have been raised about this structure, including questionable legality in states that do not allow non-professionals to own an interest in professional design firms

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AIA's Latest Offering

- AIA C191-2009 – Standard Form Multi-Party Agreement for Integrated Project Delivery
- Seeks to improve on perceived problems with AIA's single purpose entity offering
- Seeks to create a comprehensive structure for collaborative project delivery
- Will it be adopted? Will it work if it is adopted?

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Keys to the AIA C191-2009

- Creates contractual obligation to collaborate, but the collaborative language is essentially aspirational:

  "The Parties intend that the Project shall be delivered in a collaborative environment and shall endeavor to align individual interests with those of the Project."

- Creates contractual structure for collaboration, comprised of a Project Executive Team and Project Management Team

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IPD

Project Executive Team C191-2009

- One representative from each of Owner, Architect and Contractor and any Additional Parties they want to include
  - Function is to "make decisions as well as plan and manage the Project."
  - Similar to a corporate board of directors.

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Project Executive Team C191-2009

- Decisions must be unanimous.
- If the PET cannot reach unanimous decisions:
  - Owner may issue directives "within the general scope of the Contract with regard to the matter."
    - What if parties do not agree that directive is within the "general scope"?
  - Matters referred to "the dispute resolution process set forth in Article 9."
    - AIA's "solution" to every matter on which the Parties cannot agree.
    - It is a cash cow for the Designated Neutral that could place control of the Project in the hands of a AAA arbitrator.

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Project Management Team C191-2009

- One representative from each of Owner, Architect and Contractor and any Additional Parties they want to include
  - Responsible "for the day-to-day management of the Project."
  - Assigned functions mimic Construction Manager responsibilities.
    - Does Architect now become responsible for means and methods? Site safety issues?

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IPD

Project Management Team C191-2009

- Decisions must be unanimous
  - If the parties' representatives fail to reach unanimous decisions, the matter is referred to the Project Executive Team.
    - Unclear how the same Parties would reach unanimous agreement at the "Executive Team" level if they do not agree at the "Management Team" level
    - Unresolved matters involving project management may end up being decided under "the dispute resolution process set forth in Article 9."

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Plus Ça Change Plus C'est La Même Chose

- The new C191-2009 does not alter the basic description of the Parties' respective obligations:
  - Owner's basic obligation is to pay
    - Even if Actual Cost exceeds Target Cost
    - Unless, of course, the Owner gets a better deal
  - Architect's performs "the Architect's Services"
  - Contractor performs '"the Contractor's Work"

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Copyright Ownership in IPD

- C191-2009 license provisions
  - Each party retains copyright in their respective contributions
  - Grants license to Owner to construct, use, maintain, alter and add onto the project
  - The license is conditioned on Owner's compliance with the contract including payment of all sums when due
- Termination by Architect
  - If Architect "rightfully" terminates Owner, license to Owner terminates

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Innovation in Compensation Schemes

- IPD is based on a conceptual "shared risk/shared benefit" approach
  - Basic Compensation is "Cost Only"
  - Additional payment for achieving agreed upon "Project Goals"
  - Shared savings if total Project cost is less than agreed upon "Target Cost"
    - Failure to achieve any given "Project Goal" reduces "Target Cost", resulting in double indemnity to DT and CT
    - Requirement of Recovery Plans during Project if any Party believes Project is on track to exceed Target Cost
      - Must be developed without regard to fault.

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Innovation in Compensation Schemes

- Although the theory underlying this approach is that the parties will set aside their respective economic self-interest, the system can be "gamed"
  - "Target Cost" and the bonus for each "Project Goal" must be negotiated.
    - Each party has incentive to negotiate higher or lower amounts for each in order to secure a larger piece of the pie.
- Architect is in the weakest position in terms of ability to control achievement of Project Goals or cost savings.

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Limitation of Liability Under AIA C191

- C191-2009 Article 8 (Risk-Sharing)
- General waiver of claims among Parties, of consequential damages and of subrogation
- Exceptions:
  - Willful misconduct (i.e., no liability for negligence)
  - Express warranties (i.e., no liability for implied warranties)
  - Claims against Owner for payment
  - Claims for failure to procure required insurance
  - Indemnity obligations for third-party claims

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Limitation of Liability Under AIA C191 - Third Party Claims

- Waiver of claims does not apply to third party liens or similar claims against the property or to express indemnification obligations.
- Indemnity for personal injury and property damage claims by third-parties, such as subcontractors, generally limited to available insurance.
- No limitation for indemnity with respect to claims where the indemnified party has been held or is claimed to be vicariously liable or where the claim arises from the indemnifying party's alleged failure to perform its contractual obligations.

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IPD

Dispute Resolution Under AIA C191

- AIA C191-2009 seeks to create greater efficiency in resolving disputes by formalizing a process for resolving issues as they arise, rather than waiting for Project end before the Parties pursue claims against each other.
- Parties are required continue performance pending resolution of disputes
  - **Key Exception**: Services may be suspended or terminated if Owner fails to pay

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IPD

Dispute Resolution Under AIA C191

- Project Management Team and Project Executive Team
- Section 9.4 adds a "Dispute Resolution Committee"
  - High level representatives of O, A and C, plus "Project Neutral"
    - Project Neutral is basically a AAA mediator
- Dispute Resolution Committee basically functions as an expedited mediation forum
  - Must commence within 15 days, but no time limit to complete

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Dispute Resolution Under AIA C191

- 3 Options if mediation fails:
  - Arbitrate before the Project Neutral
    - This is the default method if the parties do not choose
  - Arbitrate under AAA's Construction Industry Arbitration Rules
  - Other (Litigation)

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IPD

Dispute Resolution Under AIA C191

- Every issue on which the Project Management Team and/or Project Executive Team cannot agree on unanimously must be resolved under Article 9 procedure.
- Article 9 is a cash cow for AAA and professional mediators/arbitrators.
- Do you want your Project run by an Arbitrator?

"Well, do ya…..?"

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Contractual Approaches to IPD

ConsensusDOCS Overview

- Contractor generated documents that seek to create a comprehensive framework for Project Delivery.
- Operative Project Delivery System is substantially similar to the structure set forth in the AIA C191.
- Owner has greater control and rights than under AIA C191.

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Contractual Approaches to IPD

ConsensusDOCS Collaboration without the BIM?

- Unlike the AIA documents, which presume the use of BIM for IPD, BIM is not required under the CD 300 Collaborative Agreement.
- CD 300 allows parties to elect the use of BIM and refers to CD 301 BIM Addendum for the "parameters, standards and technological requirements."

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Contractual Approaches to IPD

ConsensusDOCS Copyright and Ownership

- Owner has "all title, ownership, and copyright privileges", subject to its full payment for all design services to the DT.
- Limited usage rights/licenses are granted to DT and CT.
  - DT is permitted to reuse portions of its design (not just standard details) but may not reuse the complete design.
  - CT's use is permitted for the "sole purpose" of carrying out the duties under the Project.
- A party's limited license can be terminated for misuse.
- Indemnification provision allows for recovery for any violation or infringement.

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Contractual Approaches to IPD

ConsensusDOCS Limitation of Liability

- Requires the parties to choose between:
  - The traditional framework, under which the DT is liable for negligent errors and omissions
    - Total liability for damages limited to the greater of :
      (1) available insurance, or
      (2) an agreed upon sum;

OR

  - A safe harbor election, which allows the DT to avoid any liability for acts and decisions made in good faith.

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Contractual Approaches to IPD

ConsensusDOCS Allocation of Profits

- Similar to traditional project delivery systems
  - DT's compensation for Basic Services is a "cost plus" fee.
  - DT receives additional compensation for Additional Services.
- CD300 provides incentive compensation determined by Project Target Cost Estimate ("PTCE").
- Savings are shared based on an agreed upon formula or percentages.
- Losses are either: (a) borne by Owner, or (b) shared among the parties.

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Contractual Approaches to IPD

ConsensusDOCS Dispute Resolution

- CD300 obligates CT and DT to continue work during pendency of a dispute
  - There is no exception in the contract language for disputes concerning nonpayment for fees.
  - However, CD 300 provide "the Owner shall continue to make payments in accordance with this Agreement."

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Contractual Approaches to IPD

ConsensusDOCS Dispute Resolution

- Creates a 4 step Process for Dispute Resolution:
  - (1) Direct Discussions,
  - (2) Mitigation (which is optional),
  - (3) Mediation,
  - (4) Arbitration or Litigation.
- CD 300 does not mandate the same level of involvement by the Project Neutral during the Project, as does the AIA C191.

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Common Legal Issues in BIM and IPD

- Legal Issues Raised by Shift in Terminology and Conceptual Approach to Design Phases.
- Uncertainty as meaning of new terms.
- Unclear legal relationships among the parties and ultimate responsibilities to third parties for damages
  - Liability for DT's own errors/omissions and those committed by others
  - Standard of care
    - C191-2009 adopts traditional definition
    - Unclear how this will be applied where DT is required to collaborate in construction and ownership issues.

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Common Legal Issues in BIM and IPD

- Licensing issues re. sharing design responsibility with non-licensed contractors
- Ownership of intellectual property
- Issues regarding insurability
- Control and management of information
- Software/Technical Interoperability and Related Issues

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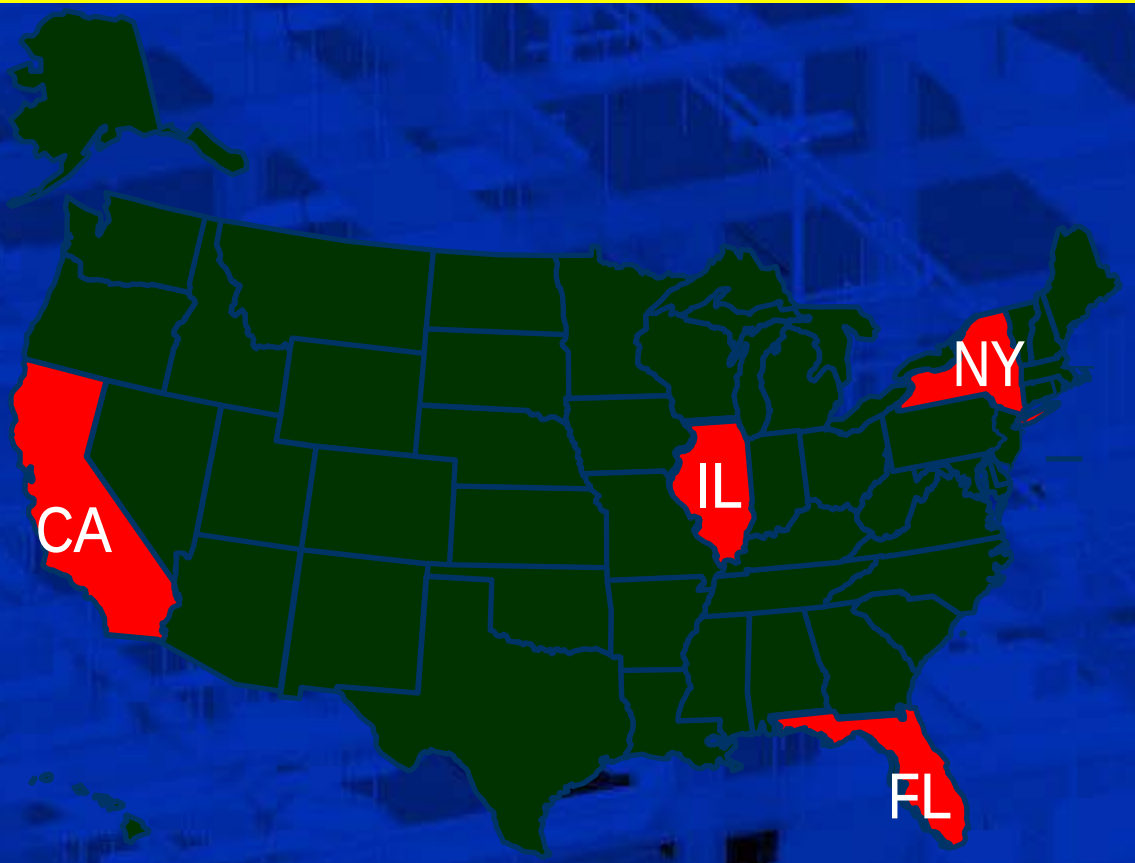
Licensing Issues Arising from Collaborative Design Input Among O, DT & CT

Many States Have Outright Prohibitions on Any Entities, Other Than Licensed Professionals Determining the Technical Design

-



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Legal Issues Arising from Collaborative Design Input Among O, DT & CT: California

- Section 5582.1(a) of the Cal. Bus. & Prof. Code

  Prohibits a licensed architect from "affix(ing) his or her signature to plans, drawings, specifications, or other instruments of service which have not been prepared by him or her, or under his or her responsible control.

- Section 5535.1 of the Cal. Bus. & Prof. Code

  Defines responsible control as "that amount of control over the content of technical submissions during their preparation that is ordinarily exercised by architects applying the required professional standard of care.

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Legal Issues Arising from Collaborative Design Input Among O, DT & CT: Florida

- Sections 481.225 and 481.227 of the Florida Statutes:

  An architect is subject to discipline for, among other things, "Delegating or contracting for the performance of professional responsibilities by a person when the licensee delegating or contracting for performance of such responsibilities knows, or has reason to know, such person is not qualified by training, experience, and authorization when required to perform them."

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Legal Issues Arising from Collaborative Design Input Among O, DT & CT: Illinois

- Section 225 ILCS 305/14:

  "An architect licensed under the laws of this jurisdiction shall not sign and seal technical submissions that were not prepared by or under the responsible control of the architect…"

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Legal Issues Arising from Collaborative Design Input Among O, DT & CT: New York

- Section 7302 of the NYS Education Law

  Only a person licensed or otherwise authorized to practice under this article shall practice architecture or use the title "architect".

- Section 6509 of the NYS Education Law

  Each of the following is professional misconduct, and any licensee found guilty of such misconduct . . . shall be subject to the penalties prescribed in section sixty-five hundred eleven: . . . (7) Permitting, aiding or abetting an unlicensed person to perform activities requiring a license,

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Insurability Issues in IPD

- From a legal point of view, the issue is to make sure that the IPD approach is covered under the PL policies of the DTs.

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Insurability Issues in IPD

- The general advice in this regard is straightforward. You must have your lawyers and brokers carefully review your IPD agreements to determine whether there is language or whether relationships are created which will adversely affect your insurance.

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Insurability Issues in BIM & IPD

- Potential issues for DTs
  - You might have assumed liability for contractors' work (shop drawings) which may fall outside the scope of your insurance.
  - You might have engaged in non-professional services which are outside the scope of your insurance.
  - In states that don't allow the DT to share design responsibility with non-licensed professionals, participation in the collaborative design could be deemed an illegal act, which might render your PL insurance null and void.

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Conclusion

- Is this a case of “all that jazz” resulting in no fundamental shifts in the central construct of the design and construction relationships, but rather a change in design document delivery systems; or

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Conclusion

- Is this a case of cataclysmic change under the banner of efficiency; or

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Conclusion

- Will we progress to the point where we have a highly efficient and harmonious functioning of the design team and construction team for the ultimate benefit of the project and the client.

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Q & A

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