Beware the moonlighting employee: What you don’t know may hurt you.

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As we collectively continue to cope with a struggling economy, some design professionals may seek supplemental income by independently pursuing employment opportunities outside the official relationship they enjoy with their employer. This practice, commonly known as “moonlighting,” may have dire consequences to both the individual professional and the firm that employs the professional. This article highlights some of the more pertinent considerations architecture and engineering (“A&E”) firms should keep in mind with regard to moonlighting activities.

It is not uncommon for A&E firms to prohibit their professional staff from moonlighting due to the potential exposure firms face in the event of a claim arising from moonlighting services. One option to ensure each employee is aware of the firm’s stance on moonlighting is to include language in the employee handbook detailing the restrictions on pursuing employment beyond the design professional’s capacity as a firm employee.

The "Moonlighting Document" – valuable but not impenetrable:

We recommend A&E firms require their professional staff to sign a document (hereinafter referred to as "Moonlighting Document") as evidence that each employee understands and consents to the firm policy prohibiting moonlighting as a condition of employment at the firm. The Moonlighting Document should explicitly require employee acknowledgment that while employed by the firm, the employee shall perform services exclusively for the A&E firm and:

- shall perform services only for firm clients pursuant to agreements between the A&E firm and the A&E firm’s clients and shall not independently perform services for firm clients outside firm-sanctioned agreements;
- shall not perform services for any entity or person that is not a firm client without the written permission of the A&E firm, whether those services are 1) conducted on or off firm premises; or 2) paid or unpaid;
- acknowledges if the employee performs moonlighting services, with or without the A&E firm’s consent, the A&E firm has no liability or responsibility for such services; and
- shall defend and indemnify the A&E firm from any and all claims, losses, damages, and injuries arising from the employee’s moonlighting services.

While this type of Moonlighting Document may delineate restrictions regarding moonlighting activities, A&E firms should not consider this document bullet-proof against professional liability exposure for several reasons.

The indemnity may not protect the A&E firm:

First, in the event of a claim, the Moonlighting Document may not provide the A&E firm with significant protection. The firm should consider whether the employee would have the resources to provide the necessary defense and indemnity protection should a claim arise triggering the indemnity obligation. An indemnity agreement is only as good as the funds behind the obligation. Defending a claim, even a specious one, can be an expensive undertaking. Unless the employee has its own funds or a separate professional liability insurance policy that responds to the claim, and most will have neither, the indemnity language will not provide the necessary protection. Even if the employee does assume the defense and indemnity, a claim may burden the A&E firm’s non-financial resources, including time devoted to monitoring the claim and potential impact on the A&E firm’s reputation depending on how much media attention the claim receives.

The A&E firm may still be liable for the employee’s actions:

Second, even with the disclaimer that the firm is not associated with or liable for the employee’s moonlighting services, a plaintiff would likely argue that the A&E firm is still liable in the event of a claim situation. A plaintiff may assert that the firm is vicariously liable for the employee’s services and try to link the employee’s moonlighting activities to the A&E firm. There is certainly potential exposure to the A&E firm if any of the moonlighting work is done in the A&E firm’s office or using firm resources. Even something as simple as the employee sending a fax on the A&E firm’s letterhead could be enough to implicate the firm in the moonlighting activities.

The A&E firm can still be sued:

Third, while the A&E firm may disclaim liability for moonlighting activities, the Moonlighting Document is not binding on the entity for which the employee is moonlighting and, therefore, does not prevent that entity from bringing a claim against the A&E firm. Although the A&E firm could try to obtain the entity’s agreement (in writing) to waive any claims against the A&E firm arising out of the employee’s moonlighting services, it is unlikely to happen. Further, this risk management scenario presumes the A&E firm has
knowledge of the employee’s moonlighting in the first place, which may be unlikely given the nature of moonlighting and assuming the employee signed the Moonlighting Document acknowledging the prohibitions! In addition, even if the entity for which the employee was moonlighting did agree to provide a release and indemnity, there is nothing to preclude a third party from bringing a claim against the A&E firm. Although not the focus of this article, there may be ethical issues associated with violating a Moonlighting Document and employees may want to seek guidance from applicable state licensing boards.

More independence and less experience may result in claims:

Claims are potentially more likely if an employee moonlights, both on projects where the employee is moonlighting and projects where the employee provides services pursuant to its capacity as an A&E firm employee. A moonlighting employee may not engage in the appropriate level of risk management analysis before independently taking on a project.

For example, the employee may not sufficiently weigh the potential risks of working with a particular client or on a particular project and may agree to a professional services agreement with onerous terms and conditions, or not negotiate a written agreement at all. A moonlighting employee is probably operating more independently than he/she would if performing services on a firm-sanctioned project and without the same level of quality assurance and quality control. With less supervision and collaboration by the design team, there is an increased potential for professional errors or omissions and disappointed client expectations. An inexperienced employee may not have the necessary skill set to effectively address the client’s concerns and keep the project on the right track.

Moonlighting may also affect the success of firm-sanctioned projects. A moonlighting employee may devote more of its energy to the moonlighting project in an effort to make a good impression on its client and may rely upon the strength of the A&E firm design team to assume some of the employee’s responsibilities on firm-sanctioned projects. Since the employee may be juggling moonlighting and firm-sanctioned projects, there is arguably more potential for the employee to breach the standard of care on firm-sanctioned projects due to conflicting demands on the employee’s time and energy.

Insurance coverage concerns:
For the employee:
If a claim is made against the employee based on the employee’s moonlighting activities, the employee will be exposed to liability beyond the A&E firm’s professional liability insurance policy. The current Beazley policy form addresses “employees” and defines “Insured” as “an employee or Temporary Employee of the Named Insured, but only for work done while acting within the scope of his or her employment and related to the conduct of the Named Insured’s business.”

Remember, one of the primary goals of the Moonlighting Document is for the A&E firm to disclaim liability for the employee’s activities by establishing that the employee is acting independently of the firm and firm-sanctioned projects. As a moonlighting employee, the employee is not acting within the scope of his/her employment with the A&E firm, and would not be included in the definition of “Insured.”

For the A&E firm:
Of course, the A&E firm’s primary concern is that the A&E firm has coverage in the event a claim is made arising out of a moonlighting employee’s actions. The coverage outlook for the A&E firm is grim. The firm may have a defense, subject to a reservation of rights letter issued by the insurance company, since a claimant may allege negligence against the firm, which could trigger the professional liability insurance policy. However, if it is subsequently proven that the moonlighting employee was not acting within the scope of employment, there would not be coverage for the firm.

Conclusion:

Moonlighting is inherently dangerous. The first step in avoiding the potential problems is to have an open dialogue between the A&E firm and its professional staff regarding the A&E firm’s expectations and potential exposures. Hopefully, mutual respect between employees and the A&E firm will prevent moonlighting, particularly when employees understand some of the risks involved both to themselves and their employers.

1 All claims are distinct and require a coverage determination based upon the specific factual scenario and subject to the language in the applicable professional liability insurance policy.

2 As the name suggests, a reservations of rights letter is issued by an insurance company to its policyholder in the event of a claim to reserve the insurer’s right to formally confirm or deny coverage as facts are obtained to conduct the necessary coverage analysis of the claim.