



## Moonlighting for Design Professionals: A Primer

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### WHAT IS 'MOONLIGHTING'?

Some professional employees supplement their income by doing a few jobs on the side, especially in difficult economy. This practice is called 'Moonlighting'. Professionals who moonlight may be looking for extra work, broader experience, or have a desire to contribute time to friends or charitable causes. Motivations aside, moonlighting does not always conflict with a professional's employment.

The California Labor Code (Sections 96(k) and 98.6) does not allow employers to bar employees from lawful conduct occurring during nonworking hours away from the employer's premises but the code does allow for exceptions. If a moonlighting employee's activities are in direct conflict with the essential enterprise and related interests of the employer and would result in a material and substantial disruption of the employer's operation, moonlighting activities may be restricted, especially if there is a written agreement which prohibits such activities.

### UNDERSTANDING THE RISKS

Design firms have a legitimate interest in restricting professional employees' activities outside the workplace although some employees may feel that a policy against moonlighting unreasonably restricts their freedom. Unfortunately such an attitude does not consider the complex business and liability risks of their employer. Consider the following:

- ▶ Design firms can be the subject of uninsured professional liability claims if a moonlighting employee utilizes company resources such as computers, software licenses, plotters, phones, offices, and reference materials. Even advice from company peers can create a connection between the firm and the services being provided for the moonlighting project.
- ▶ Fatigue resulting from moonlighting activities can impact the employee's work resulting in error and omissions on their employer's projects.

### DEVELOPING A POLICY

Employment counsel encourages firms to have a clear policy in employment manuals which prohibits professional employees from moonlighting in the same business of the firm unless approved by the firm's owner or Chief Executive Officer. Employment contracts should include provisions which specifically address this issue drafted by an attorney who specializes in employment law. Colleen Palmer, Head of Professions Risk Management of Beazley Insurance Company, a major professional liability insurer of design professionals, recommends that firms consider having professional employees sign a moonlighting document which evidences the employee understands and consents to the firm's policy as a condition of employment. Some specific elements she recommends for inclusion are:

- ▶ Employee shall perform services only for firm clients pursuant to agreements between the firm and their clients and shall not independently perform services for firm clients outside firm sanctioned agreements;

- ▶ Employee shall not perform services for any entity or person that is not a firm client without written permission of the firm whether those services are (1) conducted on or off firm premises or (2) paid or unpaid;
- ▶ Employee acknowledges if moonlighting services are performed, with or without the firm's consent, the firm has no liability or responsibility for such services; and
- ▶ Employee shall defend and indemnify the firm from any and all claims, losses, damages, and injuries arising from the employee's moonlighting services.

Even with an effective moonlighting policy plaintiff lawyers representing a damaged or injured party can allege culpability based on erroneous circumstances resulting in costly and time-consuming litigation. However, this should not be a deterrent to having a policy as part of a firm's risk management strategy.

### EDUCATION AND OPPORTUNITIES

An open dialogue about the risks of moonlighting can serve to educate employees about the business and risk ingredients in any practice. Professional agreements, scope of services, taxes, insurance, risk assessment, and fee development are among the many facets which must be considered in a project pursuit.

If an employee presents a moonlighting project, an opening is created for execution of sound risk management or perhaps there is an opportunity for a creative response where the firm could take on the project and reward the employee's entrepreneurship. Properly presented pro bono projects can present a scenario where the firm and employee can work together to donate time and experience while avoiding liability pitfalls.

In a mutually respectful environment, professional employees will understand the need to have a policy covering moonlighting and employers will sensibly respond to employee's moonlighting opportunities.

### ABOUT DEALEY, RENTON & ASSOCIATES

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