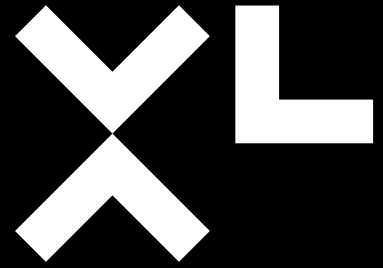


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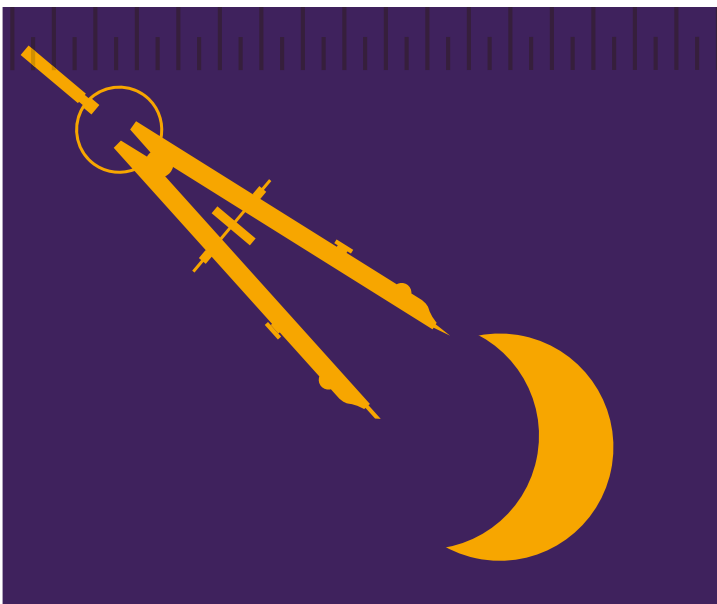
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Design Professional

The Dark Side of Employee Moonlighting

If your employees take on outside jobs, can your firm be held liable for their moonlighting? Maybe.



Engineers and architects may not like to admit it, but there's a lot of moonlighting going on out there. It's a touchy subject, and not a new one. Many seasoned design professionals supplemented their income along the way by doing a few jobs on the side.

They were taking a big chance. Perhaps unintentionally, they were exposing themselves to potential liability and putting their employers and jobs at risk.

Consider, for example, a recent claim involving a design firm that was sued because its employee moonlighted on a series of small residential remodeling projects. The employee's boyfriend, an unlicensed contractor, did the remodeling. Not surprisingly, a major problem arose on one of the projects and—of course—the contractor had no insurance. The homeowner sued the employer for "negligent supervision of its employee."

Why Moonlight?

Moonlighters usually take on the extra work for the money, but there are plenty of other reasons. Some want the chance to grow creatively. Others are looking for ways to gain broader experience or to do something more interesting than design window details. Some are hoping to build a portfolio or a client base with an eye toward starting a practice of their own. And many just want to help a family member, friend, neighbor or worthy organization. (See the sidebar, "Pro Bono Projects.")

Another recent claim involved an architect who volunteered to serve on a library committee, and agreed to help with the library's remodeling project on his own time. He didn't tell his employer, but used both company letterhead

and his architect's stamp, which also bore the company name. When problems arose on the remodel, a claim was brought against the architect's employer. The architecture firm ended up paying out its deductible for defense costs on a project it knew nothing about, and for which it received no compensation.

Understanding the Risks

A lot of moonlighters simply don't know or understand that they're playing with fire. They may tell themselves that they won't get into trouble if they're very careful. But they don't grasp what many other A/Es have learned the hard way: you don't have to make a mistake in order to get sued, and if there's a problem on a project, chances are everyone remotely involved will be brought into the lawsuit.

Moonlighters often fail to practice sound risk management, even though most projects that involve moonlighting have limited scopes and budgets and, therefore, a high probability of litigation. Moonlighters may not have the experience or resources to evaluate the risks of a potential client or project. Such jobs often dispense with written contracts, or may involve highly onerous ones. In addition, young moonlighters won't be working with the backup of their firms' usual oversight and professional supervision. They're on their own.

The firm of one moonlighting employee paid out its deductible for defense costs on a project it knew nothing about, and for which it received no compensation.

Deep Pockets

Most times, the moonlighter does the job, gets paid (assuming he or she can collect) and no one is the wiser. That is, unless there's a problem. And if there is a problem, it's not unusual for a plaintiff's lawyer to include the moonlighter's employer in a lawsuit as a deep pocket.

Plaintiffs have used the argument that the employer derived some benefit from the employee's moonlighting, because otherwise the firm would not have been able to afford the employee. A damaged plaintiff might also claim that he or she thought the employer was involved in or at least condoned the moonlighting. If the plaintiff calls the employee at his or her regular job with questions, or receives some sketches on company letterhead, the plaintiff might assume the company is fully knowledgeable and a party to the project.

The Insurance Issue

Moonlighters often don't carry professional or general liability insurance coverage. Perhaps they can't afford it, can't get it or don't think they need it. Some believe that their employer's insurance will cover them if there's a claim.

They're mistaken. A firm's professional liability policy will typically not cover claims arising out of services that were not performed on behalf of the insured firm. What that means is that the uninsured moonlighting employee is personally, but maybe not solely, responsible for any costs or damages incurred.

Worse, if a claim expands to include your firm, coverage under the firm's professional liability policy may be questioned or denied. If the policy does provide coverage, the claim will surely affect your insurance rates and perhaps your future insurability...never mind the costs of the deductible and the stress of a claim.

A Matter of Loyalty

Even if there is no lawsuit, there is always the risk of deterioration in the quality and amount of work a moonlighting employee is able to perform during the regular workday. The result may be fatigue, stress and a greater probability of mistakes. As one young professional admitted, trying to work both jobs and hide her moonlighting projects from her employer was "crazy-making."

More serious is the issue of breach of professional ethics and conduct. If the employee accepts projects that should have gone to your firm, or if the employee—without your knowledge—hints to his or her client that the employee is really working under the sponsorship of your firm, well, you have bigger problems than a moonlighting staff member.

Some A/Es also complain that because many moonlighters charge less than the going rate, they're effectively undercutting their peers, their employers and, perhaps ultimately, themselves.

Don't Turn a Blind Eye

For all these reasons, most architectural and engineering firms prohibit moonlighting, and many make it a dismissible offense. As your risk management advisor and partner, that's the policy XL Group's Design Professional team recommends.

If, however, you choose not to forbid the practice, you'll have to accept and address the risks. Some firms prohibit moonlighting except with the written consent of senior staff, and only if such jobs are conducted entirely off firm premises.

Some firms encourage moonlighting, even passing jobs to staff that aren't right for the firm. But if those firms are serious about liability issues, they do what they can to separate the firm from responsibility.

However, other employers turn a blind eye to the practice. They may have a moonlighting rule tucked away in the employee manual, but fail to enforce it or, worse, tacitly condone moonlighting.

Put It in Writing

How should your firm handle the issue of moonlighting? Whatever you do, don't ignore the matter.

Decide on a rule and educate your staff. Regardless of how you choose to handle moonlighting, it's crucial that your employees understand exactly what is expected of them and why.

Make sure your firm's employee manual clearly addresses the issue. Some firms require their staff to sign a document indicating they understand the rule and that, with or without the firm's consent, the firm has no liability or responsibility for these services.

Make sure your employee manual clearly addresses moonlighting.

Pro Bono Projects

Pro bono projects carry the same risks and exposures to liability claims as those found in fee-based projects. Any pro bono services your employees wish to provide should first be cleared with senior staff and performed directly through your firm, with all your normal checking and quality control procedures in place. Be sure to verify that these projects are covered by your professional liability insurance by talking with your agent or professional liability insurance company. (For loss prevention suggestions and sample contract provisions, see the "Pro Bono Projects" chapter in *XL Group's Contract eGuide for Design Professionals*.)

If you permit moonlighting, even under strict controls, do what you can to protect your firm. For example, you might insist that the outside client acknowledge that the services are being provided by the individual and not in his or her capacity as a firm employee, and have the outside client agree to waive claims against the firm.

You might consider asking your employees to agree to indemnify and defend you against claims arising from moonlighting services. While employees are unlikely to have the resources to defend anyone (much less themselves), such a document might help underscore how seriously your firm takes the liability issue. Discuss these options with your attorney.

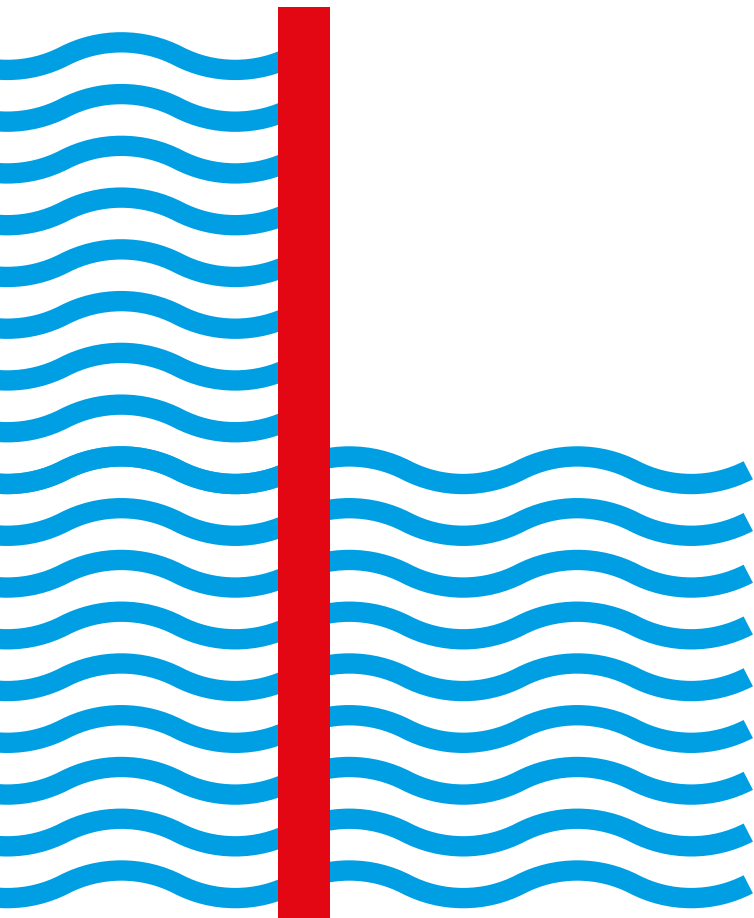
You could also require that moonlighting employees purchase insurance policies—professional and general liability—in their own names. Insist, too, that they never give an outside client any impression that they are working on behalf of or are being supervised by your firm. No services should ever be performed at your firm's offices; that means no emails, phone calls, faxing, copying or design services. It also means no advice from co-workers, and no use of stationery or stamps with the firm's name or logo.

Finally, talk with your insurance agent or broker to make sure you have the right type of coverage to protect your firm from potential claims from moonlighting.

Your employees need to understand what's at stake. If they realize that they put not only themselves but also their jobs and their employer in jeopardy by accepting outside work, they may be less tempted to agree to design that summer cabin for their neighbor.

Claim Trend: Water Intrusion

Preventing a water intrusion claim takes more than technical expertise—it also takes a commitment to solid practice management techniques.



“Water, water every where” goes the classic line of poetry, and it could just as easily describe the sentiment at XL Group’s Design Professional team, where we’re seeing an uptick in the number of water intrusion claims. Whether it’s related to the growing awareness of the dangers of mold, the determination of more and more owners to build projects in places previously considered ill-fit for construction, or some other, more elusive reason, we’re not sure. It must be something in the water!

Water is a mighty force that resists control and, given the right conditions, can wreak havoc. Unfortunately, it often falls to architects and engineers to design structures that protect against water intrusion—structures such as parking garages, hospitals, schools, warehouses and, of course, houses and other residences.

Among recent claims, one involved a new high school. School staff found that water was infiltrating the building’s roofing system, leading to leaks and concerns about mold.

Part of the problem was that moisture mixed with the organic roof insulation’s facer sheets, a combination that insects couldn’t resist eating. This development not only reduced the insulation’s effectiveness, but also created a home for insects under the school’s roof. Remediation costs to replace the roof surpassed \$1 million and the owner filed a claim against the architect, the contractor and subcontractors.

In another case, a decorative water wall in a plaza leaked water into a nearby underground parking garage for an upscale apartment building. Not only did the concrete parking garage suffer damage, but the tenants’ cars, many of them very expensive, also suffered damage from concrete chips, stones and other material landing on the roofs. The tenants and the building owner claimed more than \$3 million in damages.

Ann Kreidler, Executive Claim Consultant for XL Group’s Design Professional team in Bloomfield, New Jersey, says water infiltration problems are always costly to investigate. “It’s often hard to pinpoint the source of the problem without performing a lot of destructive testing,” she says. “For instance, investigating a roof leak will require retaining an expert to get onto the roof and make several deep cuts into the roof system to determine how the water’s getting in.”

Kreidler says these claims point up a few practices every designer should apply to all types of projects.

“In the case of the school roof,” she says, “the contractor had used that particular organic roofing material in several other school projects without having experienced any problems. But if the architect had gone the extra mile, looked beyond the spec sheets and contacted additional users, he would have found that, indeed, several schools using the material had experienced similar problems which exposed the buildings to water damage.”

Kreidler recommends that before using unfamiliar material, or familiar material in a new application, a designer should investigate its suitability for the project and present the owner with a cost benefit analysis to help the owner make a decision. "The designer should also document his or her efforts in investigating the material and the owner's final decision," she says.

Some materials, such as the type of windows a designer might think of recommending for use, should also be researched in terms of the type of project and geographic location. One window may be suitable 200 miles inland, for example, while it may not be nearly sufficient to handle the winds and lake-effect storms common to many large bodies of water. This sounds like common sense, but we've seen claims of water intrusion due to the inappropriate choice of windows for the project location. We've also seen the inappropriate specification in the original construction documents, and the substitution to an even lesser quality window during a value engineering exercise.

Kreidler says A/E's should also follow XL Group's advice and strive to include construction observation services in every contract. "Although some designers believe they're asking for trouble by getting involved in the construction phase," she says, "you should weigh any potential risks against your inability to see for yourself that construction is proceeding as it should." (Just as important as providing construction observation services is documenting and storing those observations so they can be readily retrieved.)

In the case of the leaking water wall, had the designing architect provided construction observation services, there's no guarantee she would have visited the site while the ripped liner was visible. But that's no argument against construction observation; after all, she could have observed other problems and helped resolve them before they developed into disputes.

Finally, yet another water intrusion claim illustrates just how critical good communication practices are to the success of every project. After the owners of a new multi-million-dollar home moved in, the roof began to leak right above their bedroom...and gym...and great room. It turned out that the roofing contractor had installed the roof shingles upside

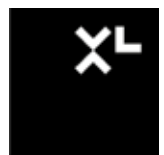
"It's often hard to pinpoint the source of [water intrusion] without performing a lot of destructive testing."

down, rendering the material practically defenseless against the pounding rain.

An investigation revealed that the architect, who did provide construction observation services as part of his contract, had noticed the error and notified the general contractor in writing. Apparently, the architect should have widened his circle of communication, because the general contractor never had the roofers redo their work.

"While the architect did the right thing by notifying the GC in writing," Kreidler says, "he should have let the owners know of the problem and followed up with the GC to make sure the problem was resolved. If it had not been, then he should have notified the owners and advised them to stop the work." The architect, responsible for approving contractor payment applications, also should have questioned that submission as incomplete. As it turned out, the failure to follow up with the GC and, in turn, notify the owners, cost the architect's firm northward of \$70,000.

Every design professional should be in the habit of practicing good communication, providing construction observation, and documenting the investigation of new products and materials. Combining those with your design expertise will no doubt help you prevent costly water intrusion claims from cutting into your revenue stream.



Design Professional

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