Practice

Moonlighting Dark Side

By Barry B. LePatner, Esq., Timothy F. Hegarty, Esq., and Roy R. Pachecano, AIA

In many firms, staff architects execute their own projects on company time. Should principals tolerate competitors in their own offices?

Generations of architects have accepted moonlighting as a fact of their professional lives. The reasons are simple: Working on projects outside the office supplements the meager wages paid by most firms. Moonlighting also allows novices to gain design experience that would otherwise take years to attain.

But although most freelance projects are typically limited in scope and duration, design services performed outside the supervision of the office create moral, ethical, and legal dilemmas for principals and employees alike.

From a business as well as a legal perspective, moonlighting should be banned from every office. Firms that sanction "shadow" practices risk exposing the firm's liability insurance and personal assets to major claims by parties who aren't even actual clients. If a firm cannot pay employees fair wages for their undivided loyalty, its principals hardly deserve respect for their business savvy. Nor can principals afford to ignore the ethical dilemma posed by the use of their offices, equipment, and the inference of their firm's imprimatur when the moonlighter's client stops by the office after hours.

Liability Pitfalls

Principals who tolerate moonlighting are, first of all, allowing employees to compete against them for work. Moonlighting should be distinguished from an employee helping a family member design an addition to a house or a conversion of a garage into a bedroom. When the freelance project involves work on the same scope or magnitude as that which the moonlighter's firm pursues, the employees practice is not only in direct competition with the employer, but ethically dubious.

To compound the problem, firms can be held liable for problems that occur with an employee's outside projects. If an employee's moonlighting projects are similar to work he or she performs for the firm, employers may be liable for problems — whether or not they know the work is under way. The work may be construed by the client — and the client's attorney — as having the firm's approval, thus exposing the firm to liability by association for any of the moonlighting employee's negligent acts. Because these unauthorized projects cannot be monitored, they cry out for company policies banning the practice entirely.

Worse yet, moonlighting employees often use firm resources such as CAD equipment, postage, and stationery, as well as advice from office peers. A firm's tacit approval of the use of such resources suggests that the firm benefits from — and condones — the activity. With annual liability claims running as high as 30 claims per 100 architects, principals should think twice before allowing any employee to use supplies and equipment.

Many states now have laws that prevent an employer from dictating what employees can do during off-

hours. However, these laws do not exempt an employee from following their professional code of ethics. Employees considering outside projects should comply with local laws and company rules to prevent conflicts of interest. They should also be aware that their employer will be liable for moonlighting work that feeds off the firm.

But even if architects take into account these risks and liabilities, the practice of moonlighting is likely to continue. Firms should therefore be careful to establish comprehensive formal guidelines as part of the company policy familiar to every employee.

Setting policies

Proactive policies regarding moonlighting shield firms from the responsibility for the acts of their employees. Establishing billable office accounts for employees to pay for photocopies and postage, for example, holds moonlighters more accountable for their time while using company equipment. Practices should also prepare employee contracts that hold the firm harmless from claims against moonlighters.

In addition, firms should recognize moonlighting as a marketing opportunity for the firm. Allowing the moonlighter to speak for and represent the firm may lead to new work.

With the trend toward more flexible hours and telecommuting, the time spent moonlighting will become more difficult to discern, creating an even more complex scenario.

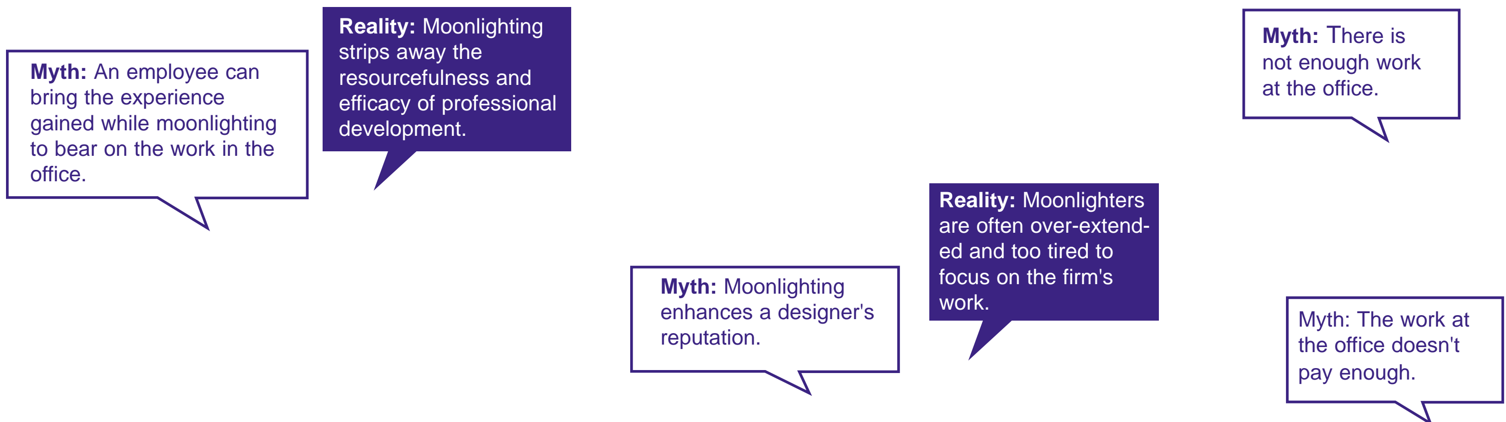
Nevertheless, raising these issues among all staff will help lay the groundwork to establishing flexible moonlighting policies, offering opportunities for employees to build knowledge, experience, and independent decision-making skills. Such policies also raise the incentive for employees to seek a long-term future with their firms while protecting those firms from liability that moonlighting can create.

Pro bono positives

Not all moonlighting exposes a firm to liability. There are numerous outlets to fulfill an architect's old-fashioned sense of professional responsibility. Serving the public through political activity, community action groups, local professional chapters, churches, synagogues, or pro bono work are all opportunities for design professionals to gain hands-on design and construction experience and acquire new management skills.

For example, one eager young professional in the office of a prominent New York architecture firm had to decide between notifying her supervisors of a possible pro bono project for the firm, or taking on the project herself without her employer's knowledge. She initially chose to keep quiet. As the scope of the project grew, and its nature became more visible, the employee decided to tell the principals and seek approval for her

Moonlighting: Myths vs. Reality



moonlighting work. To her surprise, the firm not only granted approval but also allowed her to use its equipment, supplies, and computer time — on the condition that the work would be done after office hours, and no version of the firm's name would appear on the finished product.

The principals concluded that the opportunity could help develop their young staff and draw on the mentorship of the more seasoned professionals. They invited the employee to form a team and treat the project in such a way as to maximize the learning potential of this project. Mentors coached the younger staff and assigned them more senior roles than they otherwise would have performed during the day. The project, a Habitat for Humanity house, was the first such project in West Harlem. In this instance, moonlighting not only benefitted the firm's interns, but it also gave the principals a chance to establish a positive working relationship with their employees. □

Firms that allow Moonlighting...

1 Should establish billable office accounts to enable moonlighting employees to pay for photocopies, postage, reproducibles, etc.

2 Should prepare employment contracts that indemnify and hold the firm harmless from any claims arising from the moonlighting work.

3 Should turn the employee's contacts with moonlighting clients into a marketing opportunity for the firm by allowing the moonlighter to speak for and represent the firm — and by compensating individuals if they bring new work into the office.

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Reality: The firm should not employ any more architects than it needs to work on projects on a full time basis.

Reality: The longstanding practice of design firms paying minimal wages that are often less than required by law should not be used as an excuse to create another set of wrongful practices.

Myth: Clients save money and streamline costs.

Reality: Moonlighters may be illegally avoiding taxes and Social Security payments, practices that can backfire on the firm if knowledge of these actions can be imputed to the firm.

Myth: Moonlighting leads to new projects.

Reality: If an employee has the ability to bring in new clients, the firm should either recognize and promote the individual or risk having the employee leave the firm with the new clients.

About The Authors

Barry B. LePatner, Esq. *Principal*

Mr. LePatner is the founder of Barry B. LePatner and Associates LLP, attorneys at law. He has been a prominent figure in organizing, promoting, and moderating numerous symposia and events addressing the business and legal issues for the design, real estate, and construction industries. Among these are: ABA Convention Section of Litigation, 1987; AIA Convention 1988 - Business and Legal Issues of Ownership Transition; New Partnering Strategies Conference, PSMJ, 1994; Marketing for Architects & Design Professionals, Harvard GSD Summer Program, with Eugene Kohn, et.al., 1990-97. Mr. LePatner has written extensively on the subjects of construction law. A few listed here are: *Structural & Foundation Failures: A Casebook for A/Es & Lawyers*, McGraw Hill, 1981; Construction Arbitration: Uprooting the Myths, *Legal Times*, 1986; Limiting your Liability, *Architecture*, April 1996. He is the editor of the LePatner Report, a quarterly newsletter on the business and legal issues for its design, real estate, and construction clients, published since 1980. He has served on numerous advisory committees including: National Academy of Sciences, 1984-85; Board of Advisors, Legal Briefs for the Construction Industry 1981-89; American Institute of Architects Advisory Committee, 1984; Advisory Board, Society for Marketing Professional Services, 1990-93. He is a member of The Association of the Bar of the City of New York, New York State Bar Association and American Bar Association. He is head of the law firm that has grown to become widely recognized as the leading advisor for design professionals, corporate and institutional clients, and real estate owners.

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Mr. Hegarty's studied Civil Engineering and earned his B.S.C.E. in 1986 from Rutgers College of Engineering. His interest in construction law led him to pursue legal study at Rutgers School of Law which culminated in his earning a Juris Doctorate in 1993. He served as a Law Clerk for Hon. Edward R. Schwartz in the New Jersey Superior Court, Civil Division. He is a member of The Association of the Bar of the City of New York and the Essex County Bar Association. He is a Certified Mediator and co-author of numerous articles on construction, design, and corporation law. His practice areas include: Construction and Contract Law; Architectural and Engineering Law; Surety Law; Corporation and Partnership Law; and General Civil Litigation.

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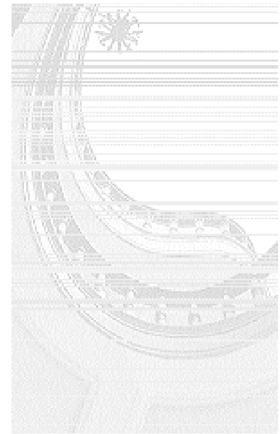
Mr. Pachecano earned his Master of Architecture, with high honors as a National Hispanic Scholar, at Columbia University in 1993. He began his architectural education at Texas A & M University, where he earned his Bachelor of Environmental Design in 1988. He has worked with construction, architectural, and engineering firms in Europe, Japan and the United States prior to joining the firm as a Design Consultant. He is a member of the American Institute of Architects, and NCARB Certified. He is a licensed architect in the State of New York and the State of Texas. Mr. Pachecano has written and co-authored numerous articles on architectural practice, building construction, marketing, and graphic design.



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