

Ask Vic!

Q: I live in an area where new subdivisions are starting construction. I'm worried that some of the licensed land surveyors on staff may perform services "on the side." What, if anything, should I be concerned about? Can I be held liable for the services my staff may provide to others outside of their employment?

A: There are few instances where an employer is held liable for the actions of a surveyor practicing outside of regular employment. Still, it makes sense for surveying firms to address the issue from both practice management and professional liability perspectives. While a firm's simple statement prohibiting moonlighting is usually sufficient, firm management may want to look at what moonlighting would do to an employee's status within the firm. For example, will moonlighting affect an employee's ability to perform their primary function for the firm? The firm may also want to state that legal action will be pursued if the employee's moonlighting deprives the firm of a business opportunity or results in a claim against the firm.

It is important for surveying firms to have clear policies regarding the professional activities of its employees outside the firm. A firm's exposure to the possibility of loss is decreased if clients of moonlighting employees—whether the surveying services are being provided for a fee or otherwise—acknowledge that the services are being performed solely by the individual, not by the firm, and that the firm assumes no responsibility for the actions of the individual providing such services. A firm is also at risk if it does not clarify the use of company equipment or premises for outside employment activities. And, an absolute prohibition of moonlighting services is not unreasonable.

Surveying firms can help protect themselves and assist employees in understanding their responsibilities by having policies that address the two significant types of moonlighting.

OUTSIDE SERVICES FOR A FEE

Many firms simply prohibit this activity. The activity may not stop, but the firm has stated its policy. If the firm becomes aware of such activity, it needs to go on record that the firm does not support or condone the activity in any manner. However, some firms actually encourage moonlighting as a way for a professional, particularly younger staff members, to gain experience. While some firms condone outside surveying projects, they however limit the use of company facilities for such projects.

Firms that condone moonlighting often state that the employee must obtain a signed statement from any outside client that recognizes that the services are being provided by the surveyor as an individual and not as an employee or agent of the firm. In addition, the client agrees that no claims will be made against the firm. These firms usually prohibit any contact with the outside client or any work on the outside project during normal working hours.

Firms that look at outside projects as a source of professional or personal gain usually require the individual to identify the project to firm management to determine whether there is a conflict of interest or interference with a business opportunity for the firm. At times, the firm will offer to provide a peer review or staff mentor for the design. These firms recognize that they could be held legally liable for the negligence of the employee, but usually find this risk tolerable.

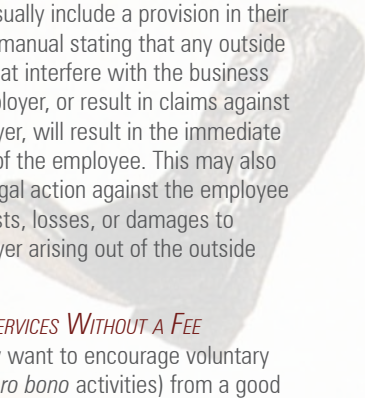
Firms that prohibit outside surveying projects usually include a provision in their employee manual stating that any outside projects that interfere with the business of the employer, or result in claims against the employer, will result in the immediate dismissal of the employee. This may also result in legal action against the employee for any costs, losses, or damages to the employer arising out of the outside project.

OUTSIDE SERVICES WITHOUT A FEE

A firm may want to encourage voluntary projects (*pro bono* activities) from a good



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34th ACSM/CaGIS Map Design Competition

Winners

Best of Show

Chesapeake Bay, by Allen Carroll, National Geographic Society/National Geographic Maps

Professional

◇ Best Reference

Chesapeake Bay, by Allen Carroll, National Geographic Society/National Geographic Maps

Honorable Mention

Sierra Nevada, California/Nevada, USA, by David Imus, Imus Geographics

◇ Best Thematic Map

The People's Republic of China Power Plants, by Erin LeFevre, Platts, McGraw Hill

◇ Best Recreation/Travel Map

Maine's Ice Age Trail Down East, by Michael Hermann, University of Maine

Honorable Mention

Absaroka Beartooth Wilderness, by Will Robertson, Beartooth Publishing

◇ Best Interactive/Digital Map

Campus Lakeshore Preserve, by Mark Harrower, University of Wisconsin [URL: [lakeshorepreserve.wisc.edu]]

Honorable Mention

University of Wisconsin—Madison Interactive Campus Map, by Mark Harrower, University of Wisconsin [URL: map.wisc.edu]

◇ Best Book/Atlas

National Geographic Collegiate Atlas of the World, by Sally Summerall, National Geographic Society/National Geographic Maps

Honorable Mentions

GIS for the Urban Environment, by Juliana Maantay, City University of New York, Lehmann College

The Second Battle of New Orleans, by Cartographic Services, World Book Publishing

Winners, p.54, col.1

will perspective, and to allow employees, including professional surveyors, to gain experience in providing services directly to a client. A firm could develop a special provision for such authorized services. The firm's professional liability insurance would cover such services, regardless of whether or not they were provided for a fee and whether they were provided by the firm or the firm's employees with the recognition and permission of the firm. However, claims from such projects may jeopardize professional liability coverage or rates, just as any other adverse experience might, because a high frequency of claims may make a firm undesirable for an insurance company.

INSURANCE ISSUES

Firms that condone moonlighting and try to protect themselves through indemnification obligations from their moonlighting employees usually are realistic about the limitations of that indemnity. As for an indemnification provision that would provide adequate protection, the firm probably would not benefit in any meaningful way. Most individuals providing any services outside the scope of their full-time employment have few assets from which to indemnify their lawful employer.

The insurance coverage of any claim follows the employee-employer relationship. A firm's employees are covered for all activities performed within their scope of employment. If a problem occurs on a project for which employees are providing services, but such project does not result in a fee for the employer, any determination of coverage would be based on whether the firm or an employee of the firm, acting within the scope of employment, provided the services.

It is possible that an insurer may argue that moonlighting is outside the scope of services and that such services are not covered. The law is more likely to attach liability if there is any nexus between the firm and the moonlighting employee's activities. The possibility exists that the firm could be held liable for the actions of its employee even though the firm did not know specifically of such actions or have any factual authorization of those actions. Thus, the firm could have liability for the

professional negligence of the employee working outside the scope of employment, but without insurance coverage, for the harm the employee caused.

From a risk management perspective, it is clear that if the firm's name was not apparent on the outside project's documents, the likelihood of the initial claim being brought against the individual rather than the firm is much higher. This does not mean that the firm would not be subsequently involved. The firm, however, could still be brought into the action. In most states, such risk to the firm exists even if the employee is providing services for no fee, as long as the firm authorized or condoned such services. The central question is *whether the action of the employee can be attributed to the firm*. The specifics in determining that attribution are based on state rulings within the general framework of agency law.

Key Factors to Remember

- o Have clear policies regarding moonlighting in the employee manual.
- o Make it clear to employees that if legal action is brought against the firm for the professional negligence of the employee working outside the scope of employment, the employee will be responsible for any related costs.
- o For firms that promote moonlighting, obtain evidence that the outside client knows and understands that the services being provided are the responsibility of the individual and not the firm.
- o For firms that encourage *pro bono* activities, establish procedures to authorize such activities.



Do you have a question regarding an insurance or practice management issue? Email your question to AskVic@Schinnerer.com and look for your answer in a future issue of ACSM's Bulletin. Victor O. Schinnerer & Company, Inc., is the underwriting manager for the CNA professional liability program. Schinnerer and CNA have been the commended program of the American Congress on Surveying and Mapping since 1965.