



## Dancing at Two Weddings? The Ethics of Moonlighting

R' Mordechai Torczyner – torczyner@torontotorah.com

1. Edward Mendlowitz, CPA, *Art of Accounting: Staff Who Moonlight During Tax Season*, Accounting Today Jan '17  
When I had my own practice and then became partners with others I felt it was important for staff to be able to moonlight if they wanted to, but that they could not if I made them work more than two nights a week. I also felt the moonlighting made them better. For openers, they would make mistakes on their own time and had to figure out how to do a better job. They also would get confidence dealing with clients, develop marketing skills and be more diligent keeping up to date on tax law changes, become procedure oriented, organize their time better, make sure they completed what was assigned to them so they did not get "stuck" working longer hours and be late to a private appointment.

2. David Meyer, *City Bus and Train Drivers Busted Moonlighting for Uber and Lyft*, NY Post July '19  
More than a dozen MTA bus and train operators were busted driving for-hire vehicles like Ubers and Lyfts during mandated rest time between shifts, according to a series of 2018 investigations published by the agency's Inspector General on Wednesday...  
One moonlighting bus operator never once received the required eight hours in a stretch of three shifts in January 2018 — and sometimes had as little as two-and-a half hours rest, the IG found.

3. Jonathan Ziss, JD, *When Moonlighting Becomes Your Problem*, Pennsylvania CPA Journal, Spring '12  
The problem with a CPA moonlighting is that a practitioner is first and foremost thought of in his or her capacity as an employee of a firm. Should problems arise, forces adverse to the moonlighter will almost invariably look for a way to involve the firm, with its presumably greater financial strength backed up by insurance. Nearly any perceived connection can be enough to embroil the firm in a claim – whether as a party or as a nonparty participant in discovery. This can lead to unanticipated and unplanned-for exposure – exposure that might fall outside insurance coverage...  
Another pitfall could emerge on a professional liability insurance application. If all pertinent extracurricular activities are not disclosed, a misrepresentation could be perceived. Also, if there is any financial tether between the practice and the outside venture, such as a loan to the practitioner that could be perceived as an investment, the firm stands closer to the flames than it would have ever anticipated.

### An Industry Norm

4. Rabbi Joseph Caro (16<sup>th</sup> century Israel), Code of Jewish Law, Choshen Mishpat 331:1-2

השוכר את הפועלים ואמר להם להשכים ולהעריב, מקום שנהגו שלא להשכים ושלא להעריב אינו יכול לכופן, אפילו הוסיף על שכרן, כיון שלא התנה כן בשעה ששכרן.

מקום שנהגו לזון, יזון; לספק בגרוגרות או בתמרים וכיוצא בהם, יספק; הכל כמנהג המדינה.

In a place where the practice is not to rise early and stay late, one who hires employees and tells them to rise early and stay late, cannot coerce them, even based on higher wages. This is because he didn't stipulate it when hiring them.

Where the practice is to feed them, one must feed them. To provide dried figs, dates and the like, provide it. All is according to local practice.

### Question 1: Grounds for Termination?

5. CPA Ontario, *CPA Code of Professional Conduct* (2016), Preamble

Members and firms are expected to be straightforward, honest and fair dealing in all professional relationships. They are also expected to act diligently and in accordance with applicable technical and professional standards when providing professional services. Diligence includes the responsibility to act, in respect of any professional service, carefully, thoroughly, and on a timely basis.

6. Miriam Yosowich, *Can I be fired for having a second job?*, FindLaw Canada

Does your second job impact your work performance at your daytime job?

There is nothing specific in the law that forbids a person from working at two jobs. However, things become more problematic if a second job affects the job performance of a worker at their first job.

Employers have the right to terminate their employee if the employee's conduct and performance is not up to par. In other words, if the employee is frequently absent, late or the employee's productivity suffers then the employer has grounds for dismissal. Normally warnings will precede the termination, so that the employee has a chance to correct their behaviour.

Is your daytime job in the same industry as your second job?

This could be highly problematic in terms of your second job. If you work for a competitor in your second job, then it's likely there will be a conflict and your employer may terminate you.

7. Rabbi Moses Maimonides (12<sup>th</sup> century Egypt), Commentary to Avot 1:5

ויהיו עניים בני ביתך - יאמר, שראוי שיהיו משמשין הדלים והעניים...

"Paupers should be members of your household" – Your servants should come from the poor and indigent...

8. Deuteronomy 24:14-15

(יד) לא תעשק שכיר עני ואביון מאחיק או מגרף אשר בארץך בשעריך: (טו) ביומו תמן שקרו ולא תבוא עליו השמש כי עני הוא ואליו הוא נשא את נפשו ולא יקרא עליך אל ד' והיה בך חטא:

You shall not cheat the wages of a worker who is indigent from among your brethren or from your stranger in your land, at your gates. You shall pay him that day, and the sun shall not set on him, for he is indigent, and for this he risks his life. He shall not call to Gd regarding you, in which case the sin would be upon you.

9. Rabbi Hershel Schachter (21<sup>st</sup> century USA), Eretz haTzvi 29

וס"ל דאינה התחייבות מדעת, אלא חיוב ממון שהטילה התורה עליה דבעה"ב לשלם שיווי הפעולה לפועליו, ואפילו לא הסכים לזה הבעה"ב ולא התחייב את עצמו כלל.

These authorities contend that [the duty to pay an employee] is not a function of a personal, voluntary undertaking, but a financial duty placed upon the employer by the Torah, to pay a worker fair value for the work done. This applies even if the employer does not agree, and never obligates himself to do it.

10. Talmud, Bava Metzia 93a-b

ההוא רעיא דהוה קא רעי חיותא אגודא דנהר פפא, שריג חדא מינייהו ונפלת למיא, אתא לקמיה דרבה ופטריה. אמר, "מאי הוה ליה למיעבד? הא נטר כדנטרי אינשי!" אמר ליה אביי: אלא מעתה, על למתא בעידנא דעיילי אינשי הכי נמי דפטור? אמר ליה: אין. גנא פורתא בעידנא דגנו אינשי, הכי נמי דפטור? אמר ליה: אין... איתביה, "עד מתי שומר שכר חייב לשמור? עד כדי הייתי ביום אכלני חרב וקרח בלילה!" אמר ליה, התם נמי בחזני מתא. אמר ליה, אטו יעקב אבינו חזן מתא הוה? דאמר ליה ללבן, "נטרי לך נטירותא יתירתא כחזני מתא."

A shepherd was herding animals on the bridge of the Pappa River; one slipped and fell into the water. He came before Rabbah, who said he was exempt from liability, saying, "What should he have done? He guarded as people normally do!"

Abbaye replied: Then had he gone into the city at a time when people normally do, would he have been exempt?

He said: Yes.

Had he slept a bit, at a time when people sleep, would he also have been exempt?

He said: Yes...

[Abbaye] challenged from a text, "How far must a paid guardian go in guarding? To the point of [Jacob's declaration], 'I was consumed by withering heat during the day, and frost at night!'"

He said: That is a case of a municipal guard.

[Abbaye] said, "Was our ancestor Jacob a municipal guard?"

He told Lavan, "I will guard for you at a higher level, as municipal guards do."

11. Rabbi Moses Maimonides (12<sup>th</sup> century Egypt), Mishneh Torah, Hilchot Sechirut 13:7

כדרך שמוזהר בעה"ב שלא יגזול שכר עני ולא יעכבנו, כך העני מוזהר שלא יגזול מלאכת בעה"ב ויבטל מעט בכאן ומעט בכאן ומציא כל היום במרמה. אלא חייב לדקדק על עצמו בזמן, שהרי הקפידו על ברכה רביעית של ברכת המזון שלא יברך אותה. וכן חייב לעבוד בכל כחו שהרי יעקב הצדיק אמר "כי בכל כחי עבדתי את אביכן." לפיכך נטל שכר זאת אף בעולם הזה שנאמר "ויפרץ האיש מאד מאד."

Just as an employer is warned not to steal the pay of a pauper and not to delay it, so the pauper is warned not to steal the work of the employer, wasting a little here and a little there and so spending the entire day cleverly. Rather, he must

be precise with his time, for the Sages were even careful not to recite the fourth blessing of the blessing after meals [on an employer's time]. He must also work with all of his energy, for the righteous Jacob said, "I worked for your father with all of my energy." Therefore [Jacob] was rewarded even in this world, as it says, "And the man became very, very great."

12. Midrash Tannaim to Deuteronomy 24:15

"ואליו הוא נשא את נפשו" הרי זו אזהרה לפועל שיעשה בכל כוחו:

"For this he risks his life" – This warns an employee to work with all of his strength.

13. Rabbi Joseph Caro (16<sup>th</sup> century Israel), Code of Jewish Law, Choshen Mishpat 176:10

המשתתף עם חבירו בסתם, לא ישנה ממנהג המדינה באותה סחורה, ולא ילך למקום אחר, ולא ישתתף בה עם אחרים, ולא יתעסק בסחורה אחרת

One who partners with another without specifying otherwise should not deviate from local practice for that business. He should not go elsewhere, and should not add partners in it, and he should not involve himself in other business.

14. Rabbi Joseph Caro (16<sup>th</sup> century Israel), Code of Jewish Law, Yoreh Deah 177:29

המושיב חבירו בחנות להתעסק ויחלקו הריוח, לא יהיה לוקח ומוכר דברים אחרים ממותיו, ואם עשה כן, חצי הריוח לבעל החנות.

If one sets up another person in a store to manage the business, such that they will split the profit, [the manager] should not buy and sell other items with his own money. If he does so, half of the proceeds go to the store owner.

15. Rabbi Joseph Caro (16<sup>th</sup> century Israel), Code of Jewish Law, Choshen Mishpat 337:19

אין הפועל רשאי לעשות מלאכה בלילה ולהשכיר עצמו ביום. ולא ירעב ויסגף עצמו ויאכיל מזונותיו לבניו, מפני ביטול מלאכתו של בעל הבית, שהרי מחליש כחו שלא יוכל לעשות מלאכת בעל הבית בכח.

An employee may not perform work at night and hire himself out by day. And he may not starve himself or make himself suffer, or give his own food to his children, for this will keep him from doing the employer's work. He weakens himself, and so he cannot do the employer's work with energy.

16. Rabbi Moshe Isserles (16<sup>th</sup> century Poland), Code of Jewish Law, Choshen Mishpat 333:5

ואסור לעשות מלאכתו עם הלמוד, או לנער בלילה יותר מדאי, או להרבות במאכל, וכל המשנה ידו על התחתונה ומעברין ליה.

One may not engage in his own work while teaching, or stay up too late at night, or increase his diet. Anyone who deviates has the lower hand, and is removed.

17. Tosefta, Bava Metzia 4:12

המושיב את חבירו בחנות למחצי שכר אם היה אומן לא יעסוק באומנותו לפי שאין ענינו על החנות בשעה שעוסק באומנותו. ואם היה עושה עמו בחנות מותר.

If one sets up another person in a store to manage the business, such that they will split the profit, if [the manager] has a trade, he may not ply his trade, for then he won't watch the store while engaged in the trade. If he can do it in the store, it is permitted.

18. Rabbi Yaakov Yeshayah Blau (20<sup>th</sup> century Israel), Pitchei Choshen IV 7 (31)

ונראה שפועל ממש פשיטא שאסור להניח מלאכתו ולעסוק במלאכה אחרת...

ומכאן יש ללמוד שכ"ש שיש להזהר כשיש ניגוד בין מלאכת בעה"ב לבין מלאכתו, כגון שד"ר עבור מוסד אחד, שלא יעסוק עבור מוסד אחר, או לצורך עצמו, וכל כיוצא בזה...

It appears that an actual employee certainly may not abandon his work and engage in other work...

And from here one may learn that one certainly must be careful when there is a conflict between the employer's work and his own work, like for a doctor of one institution to work for another institution or for himself, and the like...

19. Rabbi Yaakov Yeshayah Blau (20<sup>th</sup> century Israel), Pitchei Choshen IV 7 (24)

ומשמע מדבריו שאם מתעצל העובד במלאכתו אין זה כמתבטל, וכ"ש שאינו יכול לנכות משכרו.

From his words, it seems that a worker who is lazy in his work is not like one who doesn't work at all; certainly, one may not reduce his pay.

### Hiring a Moonlighter?

20. Talmud, Kiddushin 59a

רב גידל הוה מהפידך בההיא ארעא, אזל רבי אבא זבנה, אזל רב גידל קבליה לרבי זירא, אזל רבי זירא וקבליה לרב יצחק נפחא... אשכחיה, אמר ליה: עני מהפך בחררה ובא אחר ונטלה הימנו, מאי? אמר ליה: נקרא רשע...

Rav Gidel was trying to acquire a certain plot of land, but Rabbi Abba purchased it first. Rav Gidel complained to Rabbi Zeira, who complained to Rav Yitzchak Nafcha... Rav Yitzchak Nafcha asked [Rabbi Abba]: Where a pauper is pursuing a cake, and another takes it from him, what is the law? Rabbi Abba replied: He is called wicked...

21. Mishnah Gittin 5:8 (Talmud, Gittin 59b)

עני המנקף בראש הזית - מה שתחתיו גזל, מפני דרכי שלום. ר' יוסי אומר: גזל גמור.

If a pauper is striking atop an olive tree, [taking] that which is beneath him is theft, due to the ways of peace. Rabbi Yosi said: It is fully theft.

### Protecting the Firm

22. Jonathan Ziss, JD, *When Moonlighting Becomes Your Problem*, Pennsylvania CPA Journal, Spring '12

The problem is not moonlighting per se. It is a healthy, and certainly inevitable, part of life in the CPA community. The focus from the standpoint of professional risk is that the lines must not be blurred between one's day job and one's outside ventures. To keep those lines straight and clear, firms should make and enforce rules about the use of firm property in connection with outside ventures. Also, firms should require that a communication in writing be on file with the outside venture describing the firm's relationship (or lack thereof) for the sake of clarity and managing expectations. Something brief and to the point, an anti-engagement letter, should suffice – provided that it is backed up by compliance with the firm's guidelines for outside ventures.