

thought leadership

Working with Brand Ambassadors: Why Brands Should Endorse Morals Clause

Introduction

Generally, endorsement deals, whereby an advertiser engages a recognizable performer or online influencer to promote the advertiser's products or services, have proven to be a win-win for advertisers and talent alike. Engaging a celebrity performer or influencer (collectively referred to hereinafter as "talent") to promote a product or service allows an advertiser to tap into the talent's following and benefit from the talent's influence. For talent, endorsement deals offer a very lucrative stream of income. The success of any endorsement campaign hinges on the reputation of the talent. Assuming talent maintains his or her reputation throughout the engagement, both parties stand to benefit from the amount of exposure and profit that can be realized from a successful campaign. While the foregoing win-win scenario is common, endorsement deals involve real people susceptible to making mistakes, some of which can quickly result in a tarnished reputation for both talent and the brand—especially given today's 24/7 news culture, where social media is king and information is shared at the speed of light.

So, what happens when a talent's reputation tanks and poses a risk to the reputation of the brand? That's where the morals clause comes in. A morals clause (also sometimes referred to as a morality clause) allows an advertiser to quickly disassociate from the talent in the event the talent commits an act or becomes involved in a scenario that is viewed by the public as morally unacceptable.

A Brief History

The morals clause traces its roots as far back as the 1920s, as a reaction to the Roscoe "Fatty" Arbuckle scandal. In 1921, Arbuckle, a famous silent film



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actor, was arrested and tried for the rape and murder of actress Virginia Rappe. The trials were highly publicized, and although Arbuckle was eventually acquitted, his reputation never recovered. In response to the scandal, attorneys for the Universal Film Company announced that the company would begin integrating a morality clause into its contracts, allowing the company to terminate agreements with, and discontinue payments to, actors and actresses who “forfeit the respect of the public.” Fast forward to the 21st century, the morals clause has become a standard provision in talent agreements. In recent years, these clauses have received new attention due to social movements, like the #MeToo movement, which highlighted the bad acts of several influential public figures, including Harvey Weinstein, Kevin Spacey, and Bill Cosby, and public outcries against racist remarks made by household names like Kanye West and Roseanne Barr.

Given its origin, the morals clause has historically been drafted as a one-sided clause, protecting advertisers against unruly talent whose transgressions could impact the value of a campaign. However, in today’s socially conscious world, advertisers too can find themselves at the center of a public scandal. More now than ever, consumers are holding advertisers accountable for their business practices. As a result, some talent will ask for reciprocal terms—commonly known as a “reverse morals clause”—discussed in more detail below.

Construction of the Morals Clause

An effective morals clause addresses three critical questions, with the aim to protect an advertiser’s investment and goodwill:

(1) What type of conduct triggers the clause?

Simply put, the morals clause addresses conduct of the talent that is likely to frustrate the purpose of the agreement. For endorsement deals, this means conduct that is likely to hinder the success of the campaign. Thus, it is imperative that any morals clause clearly define the conduct that will trigger the clause.

Most morals clauses are drafted broadly to capture any type of conduct that is likely to (i) bring talent into disrepute—i.e., public hatred, scorn, or ridicule; or (ii) injure the success of the campaign or the reputation of the advertiser. During negotiations, talent will often contest the scope of applicable conduct as being overly broad. Talent may propose certain qualifiers to narrow the scope of conduct that will trigger the clause. Examples of commonly proposed edits include limiting the conduct to that which (i) was reported by a reputable news source (e.g., The New York Times), to protect against termination due to sensational, unsubstantiated rumors and tabloid stories; and (ii) is considered a felony—so that only the commission of a serious criminal act (and in some cases, the actual conviction of a crime) would give an advertiser the right to trigger the morals clause. Additionally, talent may ask to define the “public” (e.g., “a reasonable person in a major urban U.S. city”), since conduct that is considered acceptable in large coastal cities may be controversial in more conservative parts of the country.

While certain qualifiers may be reasonable, so the parties have a clearer picture as to the specific type of situation that will trigger the clause, limiting the scope to felonies and felony convictions is extremely narrow and, from the perspective of an advertiser, defeats the purpose of the clause. An immeasurable number of actions or situations that do not qualify as a felony under the law could nevertheless garner public scrutiny and elicit public scorn. Furthermore, there is no guarantee that allegations of a felony crime would lead to a conviction. Consider that Kevin Spacey has never been convicted of criminal charges, notwithstanding the bevy of allegations against him. Moreover, any limitation requiring a conviction makes little sense from a timing perspective. Convictions in felony criminal cases can take years. An endorsement agreement is likely to expire long before a talent's fate is determined in a court of law. As an example, the charges that resulted in Bill Cosby's incarceration were filed in 2015, but Cosby was not convicted until 2018.

(2) When must the conduct have occurred?

It is often in the best interest of an advertiser to ensure that the morals clause applies to past and future conduct—i.e., conduct that talent has previously committed or commits during the course of the endorsement deal. This way, both past acts that resurface during the term of the agreement as well as acts that are committed by talent during the term of the agreement trigger the clause. By now, it's common knowledge that what goes on the internet, stays on the internet. For example, in 2021, Chrissy Teigen found herself in the middle of a public scandal after abusive and bullying tweets she made ten years prior against model Courtney Stodden resurfaced. This scenario would not be subject to the morals clause of any agreement entered into in 2021 if the clause only applied to acts committed during the term. Accordingly, talent will often attempt to limit the morals clause to apply only to future conduct occurring during the term of the agreement, arguing that advertisers have the opportunity to conduct diligence on the talent prior to making an offer and should know at the time of contracting if there were any controversial acts in the talent's past.

While advertisers do typically conduct pre-contract diligence on talent (e.g., negative news searches), it's next to impossible to uncover every post, tweet, or action ever made by talent. Further, standard due diligence may not uncover past acts that were not previously publicized (e.g., accusations of prior acts of sexual assault that are first made against talent during the term).

A fair compromise on which talent and advertisers often align is limiting the conduct to that which is either committed during the term or first comes to light during the term. This way, talent is assured that the morals clause will not be triggered by past public scandals or actions that the advertiser could have easily uncovered prior to execution of the agreement, while the advertiser is assured that it can terminate if past acts come to light that may have been previously unreported or not widely publicized. Such compromise language may also reference allegations that become materially more prominent in the public consciousness during the term of the agreement, to address situations where allegations may have previously been made but not taken seriously (such as the case of Bill Cosby, where allegations had been made for decades before they were taken seriously).

(3) What are the parties' rights and remedies in the event a morals breach occurs?

While the nature and timing of triggering conduct is often highly negotiated, advertisers and talent tend to agree on the rights and remedies available once the morals clause is implicated—namely, (i) the advertiser's right to terminate the agreement (though talent sometimes seek a cure period); (ii) the advertiser's right to retain or be refunded a pro-rata portion of the fee, based on advertiser's loss of usage rights and any unperformed talent services (though, the precise calculation of this amount will often be negotiated); and (iii) that the advertiser's rights to use the talent's name and likeness end (subject to any post-term, non-removal rights).

In some cases, talent will attempt to limit the advertiser's ability to invoke the morals clause by imposing a "trigger period," meaning the advertiser has a limited window of time after learning of a morals breach to trigger the clause and terminate the agreement. If the advertiser does not terminate within the trigger period, it waives its right to subsequently terminate the agreement for the particular conduct that triggered the clause. This allows talent to protect against a scenario where the advertiser learns of a morals clause violation but continues working with talent, business as usual, and subsequently decides to trigger the clause at a later date, long after the offensive conduct occurred. While it is understandable that talent would like to have certainty and avoid an unexpected termination arising well after a breach occurred, advertisers rarely agree to trigger periods. Following a morals clause violation by talent, internal policies and the need to involve several key stakeholders can cause delays in the advertiser's decision-making process, and advertisers typically will not agree to an automatic waiver of rights if it takes several weeks or longer to determine whether and how to take action.

Factors in Negotiation

As discussed, morals clauses are often highly negotiated. There is no one-size-fits-all provision, and the terms upon which the parties end up aligning will depend on several factors and practical considerations, including:

- **Length of engagement.** The longer the term, the greater the risk of a party breaching the morals clause, and the more complexity to the termination process. For agreements with a shorter term or content flight contemplated by the campaign, the parties may be more willing to concede on certain points (like the types of acts that are subject to the clause or the inclusion of a trigger period) as the practical risk of an incident occurring during such a brief window may be less likely.
- **Reputation of the parties.** Advertisers and talent often choose to work together based on alignment of their morals, beliefs, and values. Edgier brands, whose target audience might not be offended by a talent's drugs, sex, and rock and roll past, may be comfortable with certain behaviors or actions in talent's past (or even present), which are consistent with the talent's persona, not triggering a morals clause. Examples of such "persona exception" frequently come up for comedians (e.g., Sarah Silverman; Dave Chapelle; Kathy Griffin), whose jokes may offend a certain population, or

social activists (e.g., Jane Fonda; Alyssa Milano; Susan Sarandon) whose political views may alienate consumers in support of opposing parties. In such instances, advertisers may be willing to include language clarifying that certain offensive jokes or politically charged tweets will not be grounds for termination of the agreement pursuant to the morals clause.

- **Stature of the parties.** A-list celebrities and other talent with significant clout are likely to have more negotiating power. Advertisers eager to lock down such prized talent may find themselves making certain concessions in order to get the deal done. However, this can be a double-edged sword, as engagement of A-list talent may mean the stakes are higher all around—more eyes on the campaign, and more dollars spent as whole (including on production and media placement). In such a case, more stands to be lost if talent engages in conduct considered to be morally reprehensible. Advertisers should avoid being too wooed by a megastar pushing for unreasonably narrow terms and should carefully think through the potential repercussions of any concessions.

The Reverse Morals Clause

As noted above, consumers today are vigilant about corporate wrongdoing and do not hesitate to publicly call out companies and corporate leaders to be held accountable for their actions. Talent, ever mindful of their own personal brand, may seek to protect their own reputation by asking for a morals clause to be reciprocal or mutual. Like trigger periods, advertisers frequently do not agree to reverse morals clauses. To the extent an advertiser is amenable to some form of reverse morals clause, the terms are typically very limited. Commonly, advertisers will aim to ensure that any corporate conduct is tied to the specific product that is the subject of the applicable campaign (e.g., in the event of a recall of the product featured in the campaign) and limit any personal conduct only to the advertiser's public facing C-Suite executives (e.g., in the event Company X's CEO falls into disrepute). While some concessions may be acceptable, it is not reasonable for an advertiser to agree to fully mirror the morals clause terms that apply to talent, as (i) advertisers face greater risk in the event of a breach, given the advertiser's overall investment in the subject campaign; (ii) the parties are not similarly situated, because talent is being paid for the value of their association and not vice versa; and (iii) general references to a company's conduct are overly broad and may inappropriately apply to hundreds or thousands of rank and file employees.

Additional Protective Measures

While the morals clause is mission critical in endorsement deals, it's not the only measure that advertisers can take to ensure they are protected against a talent's bad acts. Representations, warranties, and additional obligations, including the following, can be leveraged as additional contractual safeguards:

- A non-disparagement obligation as to the advertiser, the product, and any competitors of the advertiser

- Industry-specific obligations (e.g., no DUIs in the past ten years where the advertiser is an automotive manufacturing company or an alcohol brand)
- An obligation to maintain professional decorum and to carry out the services in a professional manner.

Final Thoughts

Advertisers can reap substantial rewards by associating themselves with celebrity talent and influencers, achieving greater credibility among consumers and reaching new audiences for their content. But that association can quickly turn south when the talent does something to embarrass or jeopardize a brand, and advertisers need the right to respond appropriately. In 2023, morals clauses are an absolute necessity whenever a brand engages talent, and marketers—and their attorneys—need to have a keen understanding of the brand, the talent, and the social and media environment when drafting and negotiating morals clauses.

For more information about morals clauses and additional considerations when contracting with celebrity talent and influencers, check out the authors' [Key Issues for Negotiating Talent and Influencer Agreements](#) program, available from PLI Programs On Demand.

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