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Morals clauses: the corporate ejection seat

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Star power: a captivating, irresistible, and undeniable force wielded by athletes, executives and media and entertainment icons at the top of their game. This power is derived from their achievements and abilities mixed with their visibility, recognition and emotional connection to audiences. At its core, star power is a magnetic attraction between human beings. From a fan's perspective: 'I know you, I respect you and I want to be just like you.'

Those fortunate enough to develop star power status are often capable of generating revenue from it because organisations are willing to pay top dollar to align their products and services with celebrities, and multi-year endorsement contracts can easily move north of the eight-figure range. In the corporate world, organisations are willing to pay lots of money for highly skilled, experienced professionals to run their companies.

In professional sports, tennis professional Roger Federer earned $60m in 2016. Just behind him that year was NBA star LeBron James who earned $54m and PGA professional golfer Phil Mickelson who earned $50m. Those athletes paycheques as professionals may, in themselves, be massive; but the real money is in the endorsement deals.

In endorsement deals, a basic principal of economics applies, what will the market bear? There is only one Roger Federer. If a company wants him to endorse its product, the company needs to pay what the market will bear. That is exactly what Nike, Wilson, Rolex, Credit Suisse, and Mercedes-Benz decided to do. They all believed their relationship with Federer would create an emotional connection with the buying public, driving demand, and ultimately increasing sales. This is a classic win-win proposition. In this situation, all Federer has to do is continue to perform at the top of his game and project an image that complements the organisations he endorses.

The problems arise where one begins to mix basic economics with basic physics. The higher one rises, the harder one falls. This is as true of wild-eyed children on a trampoline as it is of celebrities and executives. With some of the outrageous things people say and do, this seems a fitting parallel. What do Paula Deen uttering racial slurs, Tiger Woods driving under the influence, Lance Armstrong using performance-enhancing drugs and, most recently, Matt Lauer acting inappropriately with women all

have in common? All these actions came at a price equal to the loss of a lucrative contract.

So how do organisations protect their reputations and images when the celebrity with whom they have partnered goes off the rails? By having an escape clause (also known as a 'morals clause') in their contracts that allows the organisation to immediately terminate the formal, contractual relationship and put distance between themselves and the media frenzy surrounding the individual offender. It's like pulling the eject lever in a fighter plane and being blasted up and away from the crashing aircraft (the disgraced celebrity) and safely parachuting down to earth.

Prior to the last few years, even prior to the last few months, one rarely heard either much about the morals clause, or of so many allegations being launched against so many people in such a short period of time. Most high-profile individuals' nefarious behaviour was handled discretely and efficiently by savvy PR firms and HR departments, with the issues mysteriously disappearing from the radar. With modern technology and the power and reach of social media outlets, though, the world is more connected than ever and allegations are harder to keep quiet. Today, it seems that no person, no matter how large their persona, is above the law for immoral actions. In the case of Matt Lauer, whose relationship with NBC was recently terminated after a swirl of allegations of inappropriate sexual conduct, NBC quickly hit the eject button and distanced itself from Lauer as his career went into tailspin amid the controversy. The news then turned to whether or not Lauer would be 'paid out' the balance due under his contract or, conversely, whether his 'morals clause' was sufficiently triggered for NBC to jettison Lauer without further obligation to him.

Lauer is one of the latest casualties in a wave of morality breaches among well-known celebrities but these cases all have a common thread: they involve high-profile individuals with an image and reputation tied to a major organisation. There is big money at stake. As their behaviour falls under the microscope in the court of public opinion, the sources of that money scramble to do damage control, pull the plug on future opportunities and keep their reputations intact and untarnished. This is understandable given that, if a respected organisation that has spent years developing its image, enters into a contract with a known celebrity to endorse its product or service, or hires an executive because of their star power as a business leader, it is paying for an image and skill set that aligns with its own. If that image or skill set begins to change because that person begins to act in a questionable manner or makes poor 'moral' decisions, everyone stands to lose. What began as a mutually beneficial relationship has now become a win-lose situation. In the eyes of many an organisation, it's time to activate the ejection seat.

Although this seems to be a new trend, the business of protecting corporate interests by adding morals clauses to contracts dates back almost a century. The first morals clause in Hollywood came about when silent film star, Roscoe 'Fatty' Arbuckle, was charged with the rape and manslaughter of Virginia Rappe. Arbuckle was tried three times between 1921 and 1922, with the first two trials ending in mistrials and the third in his acquittal. Due to the media outcry surrounding this case and the trials, Universal Studios decided to then add a morals clause to all of its talent contracts.[1] Additionally, one of the earliest documented cases of a professional athlete having a morals clause added to their contract was Babe Ruth, Hall of Fame baseball player with the New York Yankees. In 1921, Jake Ruppert, owner of the Yankees, attempted to curtail Ruth's notorious drinking and womanising by adding an addendum to his contract calling for Ruth to abstain entirely from intoxicating liquors and to not stay up past 0100 during the training and regular seasons.[2]

Thus, although this may not have been a topic of mainstream conversation until now, it has been an ongoing concern for businesses seeking to partner with talented individuals as either celebrity endorsers or as executive leaders, while still protecting their standing with the public. Now we see that entertainers and executives are losing their livelihoods due to immoral behaviour with increasing frequency. The general public may not think beyond whatever 'bad' thing the individual did to bring himself into disrepute and 'lose the gig'. However, at issue in all these relationship terminations is the contractual clause that permits one party to terminate the contract, without any further obligation under it, due to the 'immoral' behaviour of the other party: the morals clause. Morals clauses are common in both the entertainment industry (for performers of all levels, beginner and veteran alike), as well as in executive employment in all industries. While in the entertainment industry, the clause that gives one party the right to terminate 'for cause' (ie, without any consequence), which is typically known as the 'morals clause," in executive employment contracts in other industries, the clause is typically just a part of the termination section and has no particular name associated with it.

Regardless of the industry, from a philosophical perspective it is difficult to argue with the principal's proposition: 'if you do something that brings me into disrepute, then I can terminate with no consequence to me'. However, the contractual clauses that provide for this proposition come in all shapes and sizes and can arise in a variety of circumstances, including both employment and independent contractor situations, as well as in business-to-business contracts for the provision of goods and/or services, and from the perspective of either the person subject to them or his/her lawyer, the language should be closely scrutinised. This is because some morals clauses allow the principal wide discretion to determine whether certain behaviour is sufficient to give rise to the right to terminate, while other morals clauses have specific and objectively determinable triggers.

An example of a morals clause that is broad and vague (and allows the principal wide discretion to determine whether certain behaviour is sufficient to give rise to the right to terminate without further obligation to the terminated party) is:

> Principal will have the right to terminate for cause if you engage in conduct that brings you or principal into public disrepute, contempt, scandal or ridicule, or which insults or offends the community or any employee, agent or affiliate of principal or which otherwise injures your reputation in the sole judgment of principal, or otherwise diminishes the value of the Services to the public or principal.

On the other hand, an example of a morals clause that has specific, and objectively determinable triggers is:

> Principal will have the right to terminate for cause if: (a) you have committed a dishonest act to the material detriment of the principal or any act of fraud against the principal;
>
> (b) you are convicted or plead guilty or no contest to either a felony or a misdemeanor that involves moral turpitude;
>
> (c) you have habitually and unlawfully used (including being under the influence of) or possessed illegal drugs;
>
> (d) you lose, for any reason, any license or professional registration necessary to the performance of your duties, which loss continues without reinstatement for a period in excess of 30 days without the principal's written consent;
>
> (e) you materially and repeatedly violate the principal's reasonable, lawful and published policies and procedures, which violations continue for a period in excess of 30 days without the principal's written consent; or
>
> (f) you flagrantly disregard your duties under this Agreement.

On first review, it might appear that the second of the foregoing sample clauses is more favourable to the employer because it is 'longer'. However, note that the first of the foregoing examples is vague and ambiguous and gives principal far greater discretion as to whether a termination is appropriate. In the second sample clause, though, while there are more words and optically a greater number of different grounds to terminate, each grounds is specific and can be more objectively determined. There is no 'right' or 'wrong' way to draft these clauses but it is important that both parties understand the implications and the expectations that are outlined.

In today's world, reasonable people can disagree as to whether any given relationship should have been terminated for the 'immoral' conduct of one of the parties. However, both the smart organisation and the smart entertainer or executive is wise to pay attention to the morals clause at the outset, to later have a better chance of receiving the benefit of his/her bargain, should the principal decide, after the contract is signed, that it does not 'like' the celebrity's or executive's behaviour.

[1] Timothy Cedrne and Fernando Pinguelo 'Morals? Who Cares About Morals? An Examination Of Morals Clauses In Talent Contracts And What Talent Needs To Know.' (2009) Seton Hall Journal of Sports and Entertainment Law. Seton Hall School of Law

[2] Jane Leavy, 'Being Babe Ruth's Daughter' (2011) Grantland, accessed March 1, 2018.

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