

Off-screen Behavior Matters: Morals Clauses for Performers

by

Sally Helppie, Esq. – Vincent Serafino Geary Waddell Jenevein, P.C., Dallas, TX

Amy E. Mitchell, Esq. – Amy E. Mitchell, PLLC, Austin, TX

SXSW CLE
Thursday, March 15, 2018
11:00 to 12:00

I. Purposes of Morals Clauses

In the entertainment and sports worlds, morals clauses are a way to control “off-duty” behavior. Sometimes an employer has a need (or a reason) to limit certain conduct of its employees in order to protect its public image. These contractual provisions arose in the entertainment industry in the 1920s and, over the years, have grown more prevalent and more specific.

II. Historical Origins

A. *Fatty Arbuckle and the Studio System*

Roscoe “Fatty” Arbuckle was a beloved comedian and silent film star in the early days of Hollywood. In 1921, after a night of heavy partying, he was arrested and charged with murder in the death of Virginia Rappe at the St. Francis Hotel in San Francisco. At the time, Rappe was a 25-year-old actor with a few parts under her belt and Arbuckle was a well-paid star under contract with Paramount Pictures. Press coverage of Rappe’s death and Arbuckle’s arrest was intense and constant. Studio honchos justifiably were concerned about the effect of this scandal on their box office profits. Consequently, even though the charges against Arbuckle were reduced and he ultimately was found guilty only of drinking bootleg alcohol, the studios began inserting “morality” clauses into their standard contracts.

B. *The First Morality Clauses*

Following the Arbuckle scandal, Universal Studios was the first to require morality clauses in its actor contracts. The standard language in 1921 provided:

The actor (actress) agrees to conduct himself (herself) with due regard to public conventions and morals and agrees that he (she) will not do or commit anything tending to degrade him (her) in society or bring him (her) into public hatred, contempt, scorn or ridicule, or tending to shock, insult or offend the community or outrage public morals or decency, or tending to the prejudice of the Universal Film Manufacturing Company or the motion picture industry. In the event that the actor (actress) violates any term or provision of this paragraph, then the Universal Film Manufacturing Company has the right to cancel and annul this contract by giving five (5) days' notice to the actor (actress) of its intention to do so.

The other studios followed suit. As is obvious, these early clauses were broad and rather vague. Nonetheless, some of the early language carries over into current morals clauses in the entertainment industry.

The sports world was not immune to misbehavior of its stars. For example, baseball player Babe Ruth was known for his heavy drinking. In 1922, when it came time to renew his player contract, the following addendum was included, which is believed to be the first morals clause for a professional athlete:

It is understood and agreed by and between the parties hereto that the regulation above set forth, numbered '2' shall be construed to mean among other things, that the player shall at all times during the term of this contract and throughout the years 1922, 1923 and 1924, and the years 1925 and 1926 if this contract is renewed for such years, refrain and abstain entirely from the use of intoxicating liquors and that he shall not during the training and playing season in each year stay up later than 1 o'clock A.M. on any day without the permission and consent of the Club's manager, and it is understood and agreed that if at any time during the period of this contract, whether in the playing season or not, the player shall indulge in intoxicating liquors or be guilty of any action or misbehavior which may render him unfit to perform the services to be performed by him hereunder, the Club may cancel and terminate this contract and retain as the property of the Club, any sums of money withheld from the player's salary as above provided.

Ruth's morality clause is instructive. The Yankees tailored the contractual provision to address Ruth's specific proclivities. Thus, it would be easier to determine a breach and to apply the remedies allowed.

C. *Morality and the Hollywood 10*

Studios implemented and relied on their morality clauses to try to keep their contract players in line. Perhaps the most pivotal applications arose in the late 1940s and 1950s when the Congressional House Un-American Activities Committee ("*HUAC*") began exploring links between Hollywood and communism. Multiple writers, directors and producers were subpoenaed by the HUAC, asked about their communist leanings and pressured to "name names" of communist sympathizers.

The "Hollywood 10," a group of eight writers, a producer and a director, agreed among themselves not to answer HUAC's questions based on their First (not Fifth) Amendment rights. They argued that everyone has the right to *not* speak. All 10 were held in contempt of Congress and the U.S. Supreme Court ultimately refused to review their appeals.

The country was caught up in fear of communism and studios were concerned about their bottom lines. They reacted by terminating the contracts of the Hollywood 10. After a private meeting at the Waldorf-Astoria Hotel in New York, the studio heads issued the following joint statement:

We will forthwith discharge or suspend without compensation those in our employ and we will not re-employ any of the ten until such time as he is acquitted or has purged himself of contempt and declares under oath that he is not a Communist.

On the broader issue of alleged subversive and disloyal elements in Hollywood our members are likewise prepared to take positive action.

We will not knowingly employ a Communist or a member of any party or group which advocates the overthrow of the Government of the United States by force or by any illegal or unconstitutional methods.

And thus the “blacklist” was born. In terminating the Hollywood 10, the studios relied on the morality clauses in their studio contracts. But the Hollywood 10 fought back, suing for breach of contract. Writer Lester Cole’s suit against Loew’s was the first to reach trial. For its part, Loew’s argued that Cole was not terminated for his political leanings. Rather, his *behavior before HUAC* supposedly violated paragraph 5 of his employment agreement, which provided:

The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.

Cole won at the trial level, but Loew’s appealed and the 9th Circuit reversed and remanded based on the jury charge. The U.S. Supreme Court denied cert. Others brought their own suits after being terminated based on morality clauses. See., e.g., *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844 (9th Cir. 1954); *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87 (9th Cir. 1957).

Interestingly, Dalton Trumbo, possibly the most famous of the Hollywood 10, did not have a morality clause in his contract. His lawyer negotiated it away during a contract renewal. This did not prevent Trumbo from being blacklisted, but it gave Trumbo a more powerful breach of contract case against MGM.

III. Post-Studio System Years

Even after the communist scare subsided, studios (and, later, television networks) continued requiring morals clauses. For example, in 1969, Universal Studios included the following language in many of its contracts:

“Morals offense means conduct by a person which is without due regard to social conventions or public morals or decency, or which degrades such person in society or brings such person into public disrepute, contempt, scandal or ridicule, or shocks, insults or offends the community or any organized group therein, or reflects unfavorably on Producer or any Producer Affiliate or any then current television exhibitor, or conduct which is described in the morals clause of a contract with any television exhibitor, which contract is applicable to photoplays in which such person has rendered or may render services.”

The clauses, while becoming more ubiquitous, were not becoming any more objective. Indeed, the broad language about “public disrepute, contempt, scandal or ridicule” still exists in many clauses today. And while that is fine as *part* of a morals (or “conduct”) provision, lawyers would be wise to include more specific language as well. After all, a key purpose of morals clauses is to allow quick action after misbehavior, rather than just lay the groundwork for lengthy and expensive discovery and litigation.

IV. Guilds' Approaches to Morals Clauses

The professional unions for writers and directors have taken an important stand. The Minimum Basic Agreement of the Writers Guild of America (“*WGA*”) bans all morals clauses. *See* Article 54. Likewise, the Minimum Basic Agreement of the Directors Guild of America (“*DGA*”) prohibits morals clauses. *See* Article 17-123. Thus, no contract for the services of a WGA or DGA member can properly include a morals clause (and, if it does, the provision is not enforceable).

In contrast, the Minimum Basic Agreement for the Screen Actors Guild-American Federation of Radio and Television Artists (“*SAG-AFTRA*”) is silent on the issue. Since actors and on-screen journalists typically are more recognizable than directors and writers, and thus their off-screen conduct has greater impact, a complete ban probably would not make sense. Thus, individual performer contracts under SAG-AFTRA may or may not include morals clauses.

V. Sexual Harassment and Morals Clauses

There are many recent examples of actors behaving badly. Harvey Weinstein, Kevin Spacey, and Louis C.K. made headlines for widespread sexual misconduct in 2017 alone. In considering ramifications, it's important to recognize that morals clauses are not the same as sexual harassment and other workplace rules and statutes.

In addition, there typically are layers of contracts, especially for television series. In many cases, a production company enters into a contract with the network that distributes a show. The production company then enters into contracts with the show's actors, who may work through loan-out corporations. The agreements at each “layer” will set out their own termination provisions, which is frequently where morals language is found.

For example, when harassment allegations about actor Kevin Spacey were revealed, the production company and the network behind “House of Cards” reacted swiftly in suspending production and announcing that the hit show would end after the current season (a decision that reportedly had been made previously), with Spacey's character being eliminated.

In considering the allegations against Spacey, some of which were from many years prior, those involved have to evaluate a series of contracts and relationships. Media Rights Capital (“*MRC*”) has a contract with Netflix to produce the series and Spacey's loan-out corporation has a contract with the production company. Spacey's contract with MRC reportedly did not contain a morals clause, and he was instead suspended based on an MRC-wide sexual harassment policy. However, because Spacey's loan-out was signed to MRC, it is unclear if the employee/company provisions apply to Spacey himself unless he personally signed a guaranty or inducement letter that was broad enough to rope in the MRC sexual harassment policy. And while Federal and state workplace statutes apply to employers and employees, the layers of agreements in this situation do not make their application automatic.

In the case of Harvey Weinstein, TMZ has claimed that they have a copy of his 2015 employment contract with The Weinstein Company. According to TMZ's reporting, the

contract provides that Weinstein merely has to pay a fine¹ and reimburse The Weinstein Company for settlements or judgments resulting from sexual harassment or any other “misconduct” or improper treatment that violates the company’s Code of Conduct. As long as Weinstein pays, it is considered a “cure” for his misconduct. (See “*Harvey Weinstein Contract with TWC Allowed for Sexual Harassment*,” which was posted on tmz.com on October 12, 2017.)

VI. EXAMPLES OF CLAUSES

Following are some sample clauses and provisions that we have encountered, some better than others:

A. From a scripted television series contract:

“If Producer in its reasonable but good faith opinion believes Performer has committed an act which constitutes a felony offense involving moral turpitude under federal, state or local laws, or is indicted or convicted of any such offense, Producer shall have the right to delete the billing provided for in this Agreement from any broadcast or other uses which are thereafter made of the episode(s) in which Performer appears. In addition, to the extent such event interferes with Performer's ability to fully and completely render all material services required hereunder or Producer's ability to fully exploit the Series, Producer shall have the right to treat such act as a default under the applicable provisions hereof.”

B. From a news show contract:

“If artist commits any act or becomes involved in any situation, or occurrence, which brings artist into public disrepute, contempt, scandal or ridicule, or which justifiably shocks, insults or offends a significant portion of the community, or if publicity is given to any such conduct . . . company shall have the right to terminate.”

C. From a general performer contract:

“The Actor shall conduct himself with due regard to the public conventions and morals. The Actor shall not, either while rendering such services to the producer or in his private life, commit an offense involving moral turpitude under Federal, state or local laws or ordinances. The Actor shall not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, public disrepute, contempt, scorn, or ridicule, or that will tend to shock, insult or offend the community or public morals or decency or prejudice the producer of the motion picture, theatrical or radio industry in general.”

D. From a reality show performer contract:

¹ This language regarding fines for sexual harassment and misconduct is purported to be in Weinstein’s contract: “You [Weinstein] will pay the company liquidated damages of \$250,000 for the first such instance, \$500,000 for the second such instance, \$750,000 for the third such instance, and \$1,000,000 for each additional instance.”

(a) Producer shall have the right to terminate Artist's services and/or this Agreement for any reason (with or without cause, as determined by Producer) effective at any time, after which Producer shall have no further obligations to Artist hereunder except for appropriate payment or adjustment with respect to any Artist services satisfactorily completed prior to such termination, provided that Artist is not in breach of this Agreement and/or this Agreement has not been terminated for cause.

(b) In furtherance of the foregoing, Producer will have the right to terminate this Agreement for cause, which includes, without limitation, making disparaging remarks about the Program or any party involved with the Program, or Producer or Network, or their employees, agents or assigns, any breach of this Agreement, insubordination, dishonesty, intoxication, resignation, or failure, refusal, or neglecting to perform Artist's services at the times and places and in the manner required or to fulfill Artist's other obligations under this Agreement, significantly changing Artist's on-air appearance without Producer's and/or Network's prior written consent, failure to conduct Artist's self with due regard to social conventions or public morals or decency, participation in any "adult" media (as determined by Producer or Network in its sole discretion) or commission of any act (in the past or present) which degrades Artist, Producer or Network or the Program, or brings Artist, Producer or Network or the Program into public disrepute, contempt, scandal or ridicule in the sole judgment of Producer or Network. Upon termination for cause, neither Producer nor Network shall have any further obligation to Artist (including, but not limited to, any payment obligations).

E. From the force majeure clause in an independent feature film contract:

If Employee commits any act or becomes involved in any situation or occurrence which, in the reasonable determination of Producer, brings Employee into public disrepute, scandal or ridicule (including, without limitation, an arrest for any offense) , or shocks or offends the public or any community (including, without limitation, language perceived as derogatory toward a particular person or group), or negatively affects the public image of the Producer or Production in any way, or fails, refuses, neglects, or threatens to refuse to render services or to fulfill Employee's obligations hereunder for any reason whatsoever, including without limitation, default, sickness, disability, unavoidable accident, or death of Employee, Producer shall have the right to suspend this Agreement while such event continues and/or to terminate this Agreement immediately without providing an opportunity for cure. **Without limiting the foregoing, Employee acknowledges that Employee's abuse of drugs (legal or illegal) or of alcohol, disorderly conduct or inappropriate behavior in public is grounds for immediate dismissal.**

VII. Drafting & Negotiating Considerations

Morals clauses can be useful and, in some cases, necessary. Their negotiation, however, can be contentious and lead to bad feelings during a time when parties are trying to reach agreement about a project. In our view, it is important for attorneys who are negotiating morals clauses to start by analyzing at least the following broad issues:

- A. *Why* is a morals clause desired in the particular situation? If you cannot answer this question, then you do not understand the deal.
- B. What *objective* facts will trigger the application of the clause? Remember that a quick resolution should be a key goal.
- C. Will any subjectivity be involved? Is reasonableness required (and, if so, how is it measured)?
- D. Will there be a specific “marker” for determining if the clause has been violated, such as a reference or data point?
- E. What are the allowable remedies and, if there is a choice, are they mutually exclusive?
- F. What is the process *and deadline* for making a decision on remedies?

Each of the foregoing categories obviously has a number of sub-considerations. Here are some more specific questions to ask yourself during negotiations and drafting:

- A. Does it apply to future conduct? Past conduct? Past conduct if publicized during the contract term?
- B. Does it apply to mere potential to bring harm, or must it cause actual injury? How is the harm measured and who decides?
- C. Does it protect just the employer, or also related parties, such as sponsors and advertisers?
- D. What conduct triggers a violation? It is important that there be something to judge it against.
 - 1. What type of transgressions are covered? Only crimes, felonies or convictions? Or any conduct breeding adverse moral sentiment? Acts of moral turpitude that violate laws?
 - 2. Does it cover alleged violations that turn out to be false or conduct that “may be considered” a violation? Is an arrest required? An arrest that is not dismissed within X days? Is an allegation on Twitter sufficient? How much time does the “employer” have to make a decision on whether to pull the trigger on the clause?
- E. What are the effects/remedies if a morals clause is invoked?
 - 1. Termination?
 - 2. Suspension?

3. Recovery of financial penalty?
4. Damages for breach?
5. Right to withhold all future monies (i.e., remaining compensation due)?
6. Seek a refund of monies paid?
7. Right to remove or withhold credits?
8. Does talent have the opportunity to cure?

F. Who determines whether the morals clause has been violated?

1. Sole discretion of employer? If employer is a corporation, at what level must the decision be made?
2. Binding arbitration with independent third-party review? Who chooses the forum and the arbitrator? Or is there a panel?
3. Due process protections that give opportunity for talent to defend prior to termination?
4. What is the interim remedy? A key point of a morals clause is to allow quick action when something goes awry – not to engage in lengthy and expensive litigation. So, while arbitration (or litigation) *might* be useful to determine damages that must be paid or previous sums paid that must be returned, it is not a good approach for quickly determining *if* there has been a breach.

G. Can a morals clause be enforced if talent is using a loan-out company? The inducement letter or guarantee that accompanies every loan-out agreement should address this.

H. If talent is employed directly by a network, is he/she subject to general employment rules of the network? This is important because sometimes there *is* a direct contract (although, in our experience, less and less so for fictional shows).

VIII. Reverse Morals Clauses

A reverse morals clause is “a reciprocal contractual warranty to a traditional morals clause intended to protect the reputation of talent from the negative, unethical, immoral, and/or criminal behavior ...” of the company it is contracted to. Porcher L. Taylor, III. et al., *The Reverse-Morals Clause: The Unique Way To Save Talent’s Reputation and Money In A New Era of Corporate Crimes and Scandals*, 28 *Cardozo Arts & Ent. L.J.* 65, 68 (2010). As a result of what some call the “Enron effect,” certain celebrities are negotiating provisions that allow *them* to terminate agreements when an employer company behaves badly.

As with more traditional morals clauses, it is necessary to understand when these reverse clauses can be triggered and what remedies are available. For example, does a particular actor get to decide on his own when he feels his employer has misbehaved? This could create havoc for networks that rely on long-term performer contracts. As far as remedies go, it might not be enough to allow only termination of a relationship. For example, a celebrity endorser who has recorded several commercials touting a particular company will want to be able to halt the further use of her/his name and image in advertising (not just be released from future work).

Recent examples involving this concept include The Weeknd and H&M, Natalie Portman and Dior, and Jay Z and Barneys.