

Athletes, Scandals and Sponsorships: Why Morals Clauses Are More Important Than Ever

Several athletes have made news lately for controversial actions. Colin Kaepernick's decision to not stand for the national anthem and Ryan Lochte's activities in Brazil during the Rio Olympic Games are just two recent examples of athletes with high profile sponsorships who face high profile controversies. So, what do advertisers do when they find themselves sponsoring an athlete in such a position? Kaepernick has not lost any sponsors thus far, but Lochte has lost several key sponsors.

For a sponsoring brand, an athlete's scandal or controversy can present both a business challenge and a legal one. From a business perspective, the advertiser has to decide whether the situation potentially reflects so negatively on the brand that a suspension or termination of the relationship is warranted. If that is the case, then the advertiser has to determine from a legal perspective whether it has the right to suspend or terminate the relationship under the sponsorship agreement. In these situations, with potentially millions of dollars and the brand's core values at stake, the morals clause becomes the most highly scrutinized provision of the sponsorship agreement.

The morals clause is often one of the mostly highly negotiated and important provisions in an endorsement deal. It allows the sponsor either to suspend or terminate a sponsorship agreement in the event that the athlete, celebrity or other endorser violates the clause. Behavior that is criminal, that is scandalous, or that might tarnish the advertiser's brand is typically deemed to violate the morals clause.

Defining what constitutes scandalous behavior can be a key issue for the advertiser, and this can often be a sticking point in sponsorship contract negotiations. The advertiser usually wants a broad definition so it has more discretion to terminate or suspend the agreement. The athlete, celebrity or other endorser, in contrast, usually wants a more narrow definition in an effort to make the relevant standard a less subjective one. From an advertiser's perspective, it is very important to define clearly what type of conduct is considered a violation of the clause so fewer questions arise when a potential violation occurs.

Another key consideration is the remedy for a violation of the morals clause. The advertiser generally prefers to have the option to suspend or terminate the contract, or even impose a financial penalty, depending on the severity of the situation and damage to the brand. The various consequences for

violation of the clause should also be clearly laid out in the agreement, indicating what actions the advertiser will take based on the actions of the athlete, celebrity or other endorser.

It may also make sense for the agreement to give the advertiser the right to pay the athlete a certain minimum amount and to use or not use the content featuring the athlete, in its discretion. This is another point that is likely to be negotiated up front in the agreement. For example, if an athlete is accused of sexual assault, a sponsoring advertiser may choose to remove all forms of advertising featuring the athlete from the marketplace as quickly as possible; however, if the agreement states that the athlete will be paid a minimum sum, regardless of the advertiser's use or non-use of the underlying content, the advertiser will be bound to pay the athlete that minimum sum under the terms of the agreement.

If an advertiser chooses to part ways with an athlete, it will need to replace the advertising content featuring the athlete with another option quickly. This minimizes the impact on the brand and is typically something that is easier to do in the online environment than in the offline environment. Because it is important to act quickly in these situations, it is prudent for advertisers to have backup advertising materials in place. If backup advertising is not in place, the advertiser may still need to move to pull its ads as soon as possible so as to avoid further damage to the brand.

The advertiser should also consider whether it wants to issue a public statement announcing it will no longer be working with the athlete and that it does not condone the athlete's behavior. While pulling the ads is important, it may also be important to stress the core values of the brand by publicly stating that the actions of the athlete are not in line with those values. Such actions may help further distance the brand from the controversy.

With 24/7 news, mobile devices and technology, when an athlete or a celebrity makes a misstep, it is more visible more quickly than ever. That means it is more important than ever for an advertiser to protect itself with a clear, enforceable morality clause in every sponsorship agreement so that it can preserve as many options as possible for itself should a scandal or other controversy arise.

This article also appeared in the September 9, 2016 edition of the *Daily Journal*.

Char Pagar is a Partner and a former member of VLP's Executive Committee. She helps clients advertise, market, and promote their businesses in accordance with federal and state law. She also represents companies in government investigations of their advertising and marketing practices.