

June 2017

## The Need for Strict Morality Clauses in Endorsement Contracts

Caysee Kamenetsky

*Elisabeth Haub School of Law at Pace University*, [ckamenetsky@law.pace.edu](mailto:ckamenetsky@law.pace.edu)

Follow this and additional works at: <https://digitalcommons.pace.edu/pipself>



Part of the [Contracts Commons](#), [Entertainment, Arts, and Sports Law Commons](#), and the [Marketing Law Commons](#)

---

### Recommended Citation

Caysee Kamenetsky, *The Need for Strict Morality Clauses in Endorsement Contracts*, 7 *Pace. Intell. Prop. Sports & Ent. L.F.* 289 (2017).

Available at: <https://digitalcommons.pace.edu/pipself/vol7/iss1/9>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Intellectual Property, Sports & Entertainment Law Forum by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

---

## The Need for Strict Morality Clauses in Endorsement Contracts

### Abstract

The increasing significance of morality clauses seems to directly correlate with the increase of social media platforms and avenues to live-stream events, including but not limited to Facebook, Snapchat, Instagram, and Twitter. News of an athlete's behavior can go viral in a matter of seconds. This leads company brands to seek broader terms in their morality clauses to allow them to disassociate themselves from the athlete. However, this is not always fair to the athlete, who might not have any idea that their personal-life choices could lead to the end of an endorsement contract.

### Keywords

morality clauses, athletes, endorsements, product endorsement, marketing

PACE INTELLECTUAL PROPERTY, SPORTS &  
ENTERTAINMENT LAW FORUM

---

VOLUME 7

SPRING 2017

NUMBER 1

---

THE NEED FOR STRICT MORALITY CLAUSES IN  
ENDORSEMENT CONTRACTS

*CAYSEE KAMENETSKY*

TABLE OF CONTENTS

Introduction: Explicit Morality Clauses Will Provide a Clear Message to the Athlete on What Constitutes Acceptable Behavior .....	290
A. What is a Morality Clause and Why Are They Necessary?.....	292
B. Vague Morality Clauses and Their Consequences.....	297
C. Endorsement Relationship Between Nike and Tiger Woods .....	298
D. Endorsement Relationship Between Nike and Lance Armstrong.....	302
E. How To Approach Vague Morality Clauses with a Subjective Factor-Based Test .....	303
F. Punishment Over Termination.....	305
Conclusion .....	306

Take a moment to imagine Babe Ruth on Snapchat. A bizarre thought, yes, but what do you imagine him posting? The notorious drinker and womanizer might be “snapping” himself out at a party with a time-stamp filter displaying an hour way past the acceptable mid-season curfew that the Yankees had in place for their athletes. In fact, Babe Ruth’s antics are what birthed the need for morality clauses within the realm of sport leagues and their athletes. In 1922, the New York Yankees amended their contract with Ruth to include the section that states:

[Ruth] shall at all times...refrain and abstain entirely from the use of intoxicating liquors and...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...[I]f at any time...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.<sup>1</sup>

INTRODUCTION: EXPLICIT MORALITY CLAUSES WILL PROVIDE A CLEAR MESSAGE TO THE ATHLETE ON WHAT CONSTITUTES ACCEPTABLE BEHAVIOR

Ruth’s flagrant behavior compelled the Yankees to revise their contract with the baseball star.<sup>2</sup> This amendment to the world of contracts would ultimately lay the foundation for the inclusion of morality clauses in

---

<sup>1</sup> Oliver Herzfeld, *Why Jay-Z And Other Talent Should Seek Morals Clause Mutuality*, FORBES (Jan. 2, 2014, 9:24 AM), <https://www.forbes.com/sites/oliverherzfeld/2014/01/02/why-jay-z-and-other-talent-should-seek-morals-clause-mutuality/#11e2f83e59c3> (hereinafter HERZFELD).

<sup>2</sup> *Id.*

athlete's contracts.<sup>3</sup> So, back to imagining Babe Ruth on Snapchat: it can be assumed that having his social life displayed on social media platforms would have led to a termination of his contract based on the morality clause. The morality clause in his contract with the Yankees was explicit in describing what he was *not* to do, a standard that should be practiced when negotiating any morality clause. In today's society, the instant a celebrity has a scandalous moment; it becomes public in the blink of an eye. How quickly was the TMZ video of Ray Rice dragging his wife out of an elevator after knocking her unconscious circulated around the Internet? Vertimax and Nike, who both had endorsement deals with Rice, dropped the athlete from their brand.<sup>4</sup> Babe Ruth's contract with the Yankees not only opened doors for professional leagues to start implementing morality clauses within their contracts, but has spread to contracts between top brands and their athlete endorsers as well.<sup>5</sup> Many athletes have lost out on their endorsements based on felony convictions or socially unacceptable behavior. However, it is imperative that athletes and companies agree on *strict, explicit* terms when negotiating the morality clause of an endorsement contract. A company should not be able to terminate an endorsement deal with an athlete based on broad terms that were not made

---

<sup>3</sup> HERZFELD, *supra* n.1.

<sup>4</sup> Michelle Castillo, *Ray Rice's Last Sponsor, Nike, Has Dropped Him*, ADWEEK (Sept. 9, 2014), <http://www.adweek.com/brand-marketing/ray-rices-last-sponsor-nike-has-dropped-him-160005/>.

<sup>5</sup> Herzfeld, *supra* n.1.

clear to the athlete before forming the sponsorship relationship. If termination ensues where there was a broad morality clause, a subjective, factor-based test should be used in order to determine whether or not termination is acceptable.

Over recent years, it has become very important for brands to have the ability “to suspend, terminate, and/or seek remedies from their sponsored athlete for certain actions.”<sup>6</sup> The increasing significance of morality clauses seems to directly correlate with the increase of social media platforms and avenues to live-stream events, including but not limited to Facebook, Snapchat, Instagram, and Twitter. News of an athlete’s behavior can go viral in a matter of seconds. This leads company brands to seek broader terms in their morality clauses to allow them to disassociate themselves from the athlete. However, this is not always fair to the athlete, who might not have any idea that their personal-life choices could lead to the end of an endorsement contract.

*A. What is a Morality Clause and Why Are They Necessary?*

It makes sense to first examine why and how these endorsement contracts are initially built. Endorsement contracts are made in order to grant a company sponsor “the right to use and license an athlete’s name, image, or likeness in connection with advertising the sponsor’s products or

---

<sup>6</sup> Brandon Leopoldus, *How to Structure Morality Clauses For Your Pro Athlete Clients*, LEGALINK MAG., <http://www.legalinkmagazine.com/2015/05/structure-morality-clauses-pro-athlete-clients/> (last visited Apr. 25, 2017).

services.”<sup>7</sup> While an athlete may be free for the most part to endorse any product they like, most professional sport leagues prohibit players from endorsing alcoholic beverages or tobacco products.<sup>8</sup> The NFL for instance, prohibits players from endorsing certain nutritional supplements.<sup>9</sup> In 2016, the top 100 highest-paid athletes made over \$924 million in endorsements, an increase from the \$917 million made the year before in 2015.<sup>10</sup> The contract will often limit the scope of which the company may use the image and/or likeness of the athlete.<sup>11</sup> These limitations can include radio and print

---

<sup>7</sup> *Drafting Suggestions for an Endorsement Contract*, USLEGAL, <https://sportslaw.uslegal.com/sports-agents-and-contracts/endorsement-and-appearance-contracts/drafting-suggestions-for-an-endorsement-contract/> (last visited Apr. 25, 2017) [hereinafter DRAFTING SUGGESTIONS].

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

The NFLPA will NOT enter into partnerships or endorsements with any of the following:

- Applicants whose missions and values that do not align with those of the NFLPA;
- Police- regulated businesses, such as, but not limited to, adult businesses (activities restricted to adults); tobacco firms or marketers; groups advocating hate or violence; firms or groups advocating illegal or inappropriate use of drugs or other illegal activity; businesses or entities promoting adult materials or services or with sexual associations such as massage parlors, escort services or establishments featuring, for show or sale, X-rated or pornographic movies or materials; false, misleading or deceptive endorsements/underwriters; businesses or entities whose materials, services or products are harmful to children;
- Parties to a lawsuit adverse to the NFLPA;
- Companies that promote alcoholic beverages when the target audience of the event, program or facility is under the legal drinking age;
- Parties involved in any stage of negotiations for an NFLPA or NFLPI contract, where a partnership or endorsement could impact negotiations.

The NFLPA reserves to right to sever the partnership or endorsement based on the existence and extent of Partner’s business relationships that may be contrary to existing NFLPA relationships or the NFLPA’s mission. NFLPA will submit reasonable notice to the Partner in this instance.

(<https://www.nflpa.com/about/partnership-and-endorsement-policy>)

<sup>10</sup> Sam Webber, *Top 100 Highest-Paid Athlete Endorsers of 2016*, OPENDORSE (Jun. 29, 2016), <http://opendorse.com/blog/2016-highest-paid-athlete-endorsers/>.

<sup>11</sup> DRAFTING SUGGESTIONS, *supra* n.7.

only, or may extend to television, film, billboards, etc.<sup>12</sup> The contract will further lay out the duties and obligations of the company and athlete, how payments will accrue, roles of agents and attorneys, and of course, reasons for termination.<sup>13</sup> Usually, under the termination clause will be a term stating that “cases in which the athlete is found guilty of a crime or is found to have been part of unethical or immoral conduct...” will allow for rightful termination of the athlete.<sup>14</sup> There are times when an endorsement contract says no more than that, which creates a vague morality clause. There is a need for further elaboration on these terms so that the athlete is fully aware of what other immoral acts may constitute termination of the contract.

Companies are choosing to spend big bucks on notable athletes and their image because people idolize celebrities, especially athletes. Professional athletes can provide important benefits to companies, such as an increase in brand recognition, positive associations between the company and likeability of the athlete, and distinguishing brand personalities. It has been noted that just *one* endorsement can increase sales almost immediately by 4%.<sup>15</sup> So what is in it for the athlete? There are times when the athlete is extremely passionate about a certain product and are happy to lend their

---

<sup>12</sup> DRAFTING SUGGESTIONS, *supra* n.7.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Steve Olenski, *How Brands Should Use Celebrities For Endorsements*, FORBES (July 20, 2016, 2:43 PM), <https://www.forbes.com/sites/steveolenski/2016/07/20/how-brands-should-use-celebrities-for-endorsements/2/#3d4230426064>.

name and likeness to a brand they have confidence in. Additionally, a simple answer to the question is: money. Celebrities began to discover that endorsements are an easy way to make money. By lending “his or her name to a product, pose for a couple of ads, maybe show up at some retail events, drinks with the agency after the shoot...the checks roll[ed] in.”<sup>16</sup> Some of today’s biggest endorsement contracts include LeBron James with Nike, Roger Federer with Wilson, Peyton Manning with Papa Johns, and Steph Curry with Under Armour. While endorsements like these have done wonders for countless companies, the desire to sign big athletes to major companies has led to the need of stronger morality clauses within the contracts.

Morality clauses are necessary when creating endorsement contracts because athletes are humans who make mistakes; their mistakes just happen to be broadcasted in the limelight.

These clauses are negotiated and every word matters because *only the actions falling within the language of the clause is covered*. Most of these clauses in one way or another cover criminal, scandalous, reprehensible, drug/alcohol abuse, or other actions looked down upon by the general public. Defining what conduct is covered in each agreement can be difficult, and if a situation arises where the morality clause is triggered, it may result in additional negative press if there is a dispute between the sponsor and the athlete.<sup>17</sup>

---

<sup>16</sup> Robert Passikoff, *When It Comes To Nike Celebrity Endorsements, They Have To Make Sure The Shoe Fits*, FORBES (Dec. 12, 2013, 10:22 AM), <https://www.forbes.com/sites/robertpassikoff/2013/12/12/if-the-nike-brand-dont-fit-lebron-cannot-commit-2/#77937914177f>.

<sup>17</sup> Leopoldus, *supra* note 6.

Emphasis added.

Companies take on a significant risk when they sign an athlete to their brand. Although the athlete normally does wonders in ringing in exponential sales, the company must keep in mind the behavior and personality of the athlete because the athlete is whom the public relates the brand to. In order to protect their brand from harm, companies push for broad terms within the morality clause of their endorsement contracts allowing them the right to terminate in any situation they find fitting. Counsel for the athletes, however, will often fight for stricter terms so that their client cannot be terminated without explicit language allowing so.<sup>18</sup> An example of a vague morality clause will normally include the following language:

If at any time, in the opinion of Sponsor, Athlete becomes the subject of public disrepute, contempt, or scandal that affects Athlete's image or goodwill, then Company may, upon written notice to Athlete, immediately suspend or terminate this Agreement and Athlete's services hereunder, in addition to any other rights and remedies that Sponsor may have hereunder or at law or in equity.<sup>19</sup>

Essentially, companies believe harm to their image begins at publicity, not at conviction. This means that if an athlete is accused of something that they may not have had any part in, a company still may want to disassociate

---

<sup>18</sup> *Nike Terminates Paquiao Contract, Morals Clause Violation to Blame?*, THE FASHION LAW (Feb. 19, 2016), <http://www.thefashionlaw.com/home/nike-terminates-contract-with-paquiao-morals-clause-violation-to-blame> [hereinafter FASHION LAW].

<sup>19</sup> Donald R. Simon, *Don's Diatribe: When Endorsement Deals Go Bad*, KC MAG., <http://www.thisiskc.com/2013/02/by-don-simon-14/> (last visited Apr. 25, 2017).

from the athlete in order to prevent any major falls in sales or negativity attached to the brand's name. This is where a need for stricter morality clauses becomes necessary. An athlete should be fully aware of specific conduct that can lead to the termination of their contract. Allowing companies the leeway of termination in any situation makes for an unfair advantage. The morality clause must explicitly state what the athlete must do in order to trigger termination.

*B. Vague Morality Clauses and Their Consequences*

What happens when an athlete is terminated for conduct that was not explicitly stated in their endorsement contract? Chris Webber was famously terminated from his contract with Fila, but was successful in his suit against the company for wrongful termination. Webber was arrested for marijuana possession while at the airport, which resulted in a termination of his contract with Fila. However, the morality clause in the contract between the clothing brand and the NBA star stated that termination only happened at conviction. "An arrest is not the same as a conviction for a crime or a plea of no contest."<sup>20</sup> Fila's president at the time, Jon Epstein, stated that "[I]n no way does Fila condone the use of illicit drugs...[w]e expect our athletes to conduct themselves in an exemplary manner on and off the court, and we

---

<sup>20</sup> Brian R. Socolow, *Reading Between The Lines*, LOEB&LOEBLLP (Feb. 2004), <http://www.loeb.com/articles-articles-20040201-readingbetweenthelines>.

are taking this issue very seriously."<sup>21</sup> The White House Director of the Official National Drug Control Policy even made a statement applauding Fila on their contract termination with Webber.<sup>22</sup> Consequently Webber filed a suit against Fila, stating that the morality clause in their contract only allowed for termination when there has been a conviction, not “just a charge” of drug possession.<sup>23</sup> Webber received a \$2.6 million judgment from Fila for the wrongful termination.<sup>24</sup> Although the Fila/Webber endorsement contract probably contained strict language within the morality clause (seeing that it spelled out the type of conviction necessary to trigger termination), it most likely did not include language stating Fila’s position on drug-use, which is what they used to publicly condemn Webber and his behavior, along with reasoning his termination. A stricter morality clause that included this would have prepared Webber and possibly deterred him from possessing drugs in the first place. Additionally, Fila should have analyzed the severity of Webber’s behavior and instead, issue a public statement of condemnation and/or punish Webber monetarily, not simply terminate him for reasons not included in his endorsement contract.

### *C. Endorsement Relationship Between Nike and Tiger Woods*

---

<sup>21</sup> CBSNEWS.COM Staff, *Fila Drops Webber For Pot Bust*, CBS NEWS (Aug. 28, 1998, 8:48 PM), <http://www.cbsnews.com/news/fila-drops-webber-for-pot-bust/> [hereinafter CBSNEWS].

<sup>22</sup> CBSNEWS, *supra* n.21.

<sup>23</sup> Socolow, *supra* n.16.

<sup>24</sup> *Id.*

Over the past 10 years, athletes such as Michael Vick, Maria Sharapova, Lance Armstrong, and Ryan Lochte all lost their endorsement deals after public scandals forced brands to disassociate themselves from the celebrities. While these athletes were once known for their skill, their names today are laced in infamy with scandal and wrongdoing. Some brands, however, decide to stick by their endorser even after there is some form of socially unacceptable behavior. Tiger Woods signed a five-year, \$40 million endorsement deal with Nike in 1996.<sup>25</sup> The following year, Woods went on to win the Masters while wearing a red Nike shirt, black hat, and black pants on championship Sunday. This would become his signature look and continued to be a driving force for Nike golf apparel over the following years.<sup>26</sup> Everything was running smoothly for Nike golf: in 2006 they extended their contract with Woods for an undisclosed amount of money, signed then number two in the world Suzann Pettersen and Charl Schwartzel in 2008, and had sponsored athletes win 23 tournaments combined in 2009.<sup>27</sup> However, in November 2009, one of Nike's most prominent sponsors became headline news.<sup>28</sup> The drama unfolded after Woods and his then-wife were in a minor car accident in Florida.<sup>29</sup> From

---

<sup>25</sup> Michael Chwasky, *The History of Nike Golf*, GOLF (Aug. 5, 2016), <http://www.golf.com/equipment/history-nike-golf>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Tiger Woods timeline: How the drama unfolded for the golfer*, MIRROR (Feb. 18,

there, websites and tabloids began speculating that the car accident might be connected to recent reports that Woods had cheated on his wife with a cocktail waitress in New York. *Id.* In December, a plethora of women stepped forward to claim that they too had relations with the pro golfer. Woods' image was quickly tarnished as he went from a beloved, all-American athlete to a womanizer who had let down his fans. Gatorade was the first company to drop its endorsement of Woods on December 9<sup>th</sup>. Gillette, another big brand who endorsed Woods, distanced themselves from the golfer and stated that they were "limiting his role" in marketing to "support his desire for privacy."<sup>30</sup> Nike, on the other hand, stood by Woods' side throughout the entire scandal. While the language of the morality clause between Nike and Woods is not public knowledge, expert attorneys agree that the clause probably contained "forgiving" language.<sup>31</sup> Fernando Pinguelo, an attorney who has written extensively on morality clauses, believes that the contract would have only triggered termination in the event of a felony conviction.<sup>32</sup> "Violating societal norms" probably wasn't enough for Nike to cut ties with one of the world's most famous golfers.<sup>33</sup> Companies like Nike are skilled in analyzing the pros and cons of

---

2010), <http://www.mirror.co.uk/news/uk-news/tiger-woods-timeline-how-the-drama-202391> (hereinafter MIRROR).

<sup>30</sup> MIRROR, *supra* n.29.

<sup>31</sup> Erin Geiger Smith, *Will "Morals" Clauses Impact Tiger's Endorsements?*, BUSINESS INSIDER (Dec. 8, 2009), <http://www.businessinsider.com/will-morals-clauses-impact-tigers-endorsements-2009-12>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

disassociating from an athlete or keeping them signed, and aware of which decision will cause the company most harm.

It is interesting to note the different approaches brands take when deciding whether or not to terminate an athlete endorser. Gillette decided that Woods no longer played a role in their marketing efforts and terminated their relationship with him quickly after the scandal spread (around three months after news of his infidelity first broke). “[We] want winners and Tiger Woods isn’t a winner anymore” a spokesperson for Gillette stated.<sup>34</sup> As previously stated, Nike did not drop Woods – instead, they cut his \$20 million per-year in half for two years as punishment, an alternative to termination.<sup>35</sup> Nike saw Woods for the talented athlete he was and had stood by his side since 1996. Woods did things that he was not proud of and he publicly apologized for them. Notably, his poor conduct was not related to his athletic career. Lance Armstrong, for example, exhibited behavior that went directly against Nike’s athletic brand. Economist Andrew Zimbalist said that, “[o]ne fundamental and very basic distinction between Lance Armstrong and Tiger Woods...is that Lance Armstrong cheated to achieve his success in biking and Tiger Woods did not cheat ... to achieve his success in golf.”<sup>36</sup>

---

<sup>34</sup> James Robinson, *Tiger Woods dropped by Gillette*, THE GUARDIAN (Dec. 24, 2010), <https://www.theguardian.com/media/2010/dec/24/tiger-woods-dropped-by-gillette>.

<sup>35</sup> FASHION LAW, *supra* n.4.

<sup>36</sup> Emily Kay, *Why Nike stands by Tiger Woods but dumps Lance Armstrong*,

*D. Endorsement Relationship Between Nike and Lance Armstrong*

Armstrong's behavior can be heavily contrasted with that of Woods'. Armstrong continued to deny all doping allegations as early as 2004, just weeks before the Tour de France.<sup>37</sup> This was the same year Armstrong launched the Livestrong campaign, joining forces with Nike to promote the charity.<sup>38</sup> In 2011, Armstrong announced that he was retiring from cycling (for the second time) as he was still being accused of doping.<sup>39</sup> At this time, a "federal grand jury inquiry into whether or not Armstrong led a doping ring on the U.S. Postal Service racing team" was conducted.<sup>40</sup> A former teammate admitted on a 60 Minutes interview that he witnessed Armstrong inject performance enhancing drugs. Finally in 2012 the truth was revealed: the USADA (United States Anti-Doping Agency) produced 1,000 pages of evidence that ultimately led to Armstrong being stripped of his seven Tour de France wins, as well as a lifetime ban from the International Cycling Union.<sup>41</sup> Nike, who was the driving force in helping to build Armstrong's global recognition of Livestrong, cut ties with the

---

SBNATION (Oct. 19, 2012, 1:35 PM), <http://www.sbnation.com/golf/2012/10/19/3526602/tiger-woods-nike-lance-armstrong>.

<sup>37</sup> Erin Teare Martin & Beth Rowen, *Lance Armstrong Timeline*, INFOPLEASE, <https://www.infoplease.com/spot/lance-armstrong-timeline> (last visited Apr. 25, 2017).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Timothy Rapp, *Timeline of Lance Armstrong's Career and Eventual Downfall*, BLEACHER REPORT (Jan. 14, 2013), <http://bleacherreport.com/articles/1484496-timeline-of-lance-armstrongs-career-and-eventual-downfall> (hereinafter BLEACHER REPORT).

<sup>41</sup> *Id.*

athlete, as well as his charity.<sup>42</sup> In 2013, Armstrong admitted during an interview with Oprah Winfrey to his doping, as well as forcing his teammates to dope.<sup>43</sup> His conduct went against everything that an athletic endorser stands for: he continuously lied and denied all doping accusations, cheated his way through seven Tour de France wins, bullied his teammates into taking performance enhancing drugs, and has even admitted that he would still be doping had he not been caught.<sup>44</sup> Although Armstrong and Woods both behaved in a socially unacceptable way, one athlete's conduct was related to his athletic career while the other was part of his personal life. It is likely that Nike's morality clauses with Woods and Armstrong were similar, seeing that both athletes are household names and probably had a lot of leverage in their contract negotiations. Even if both morality clauses included forgiving language, it is clear to see why Nike terminated their contract with Armstrong, but kept Woods as a sponsor and instead of termination, punished him by cutting his contract in half.

*E. How To Approach Vague Morality Clauses with a Subjective Factor-Based Test*

At the end of the day, the company looks at how the athlete's

---

<sup>42</sup> BLEACHER REPORT, *supra* n.40.

<sup>43</sup> *Id.*

<sup>44</sup> Ben Rumsby, *Lance Armstrong admits he would still be lying about doping if he had not been found out*, THE TELEGRAPH (Aug. 19, 2014), <http://www.telegraph.co.uk/sport/othersports/cycling/lancearmstrong/11044592/Lance-Armstrong-admits-he-would-still-be-lying-about-doping-if-he-had-not-been-found-out.html>.

conduct will affect their brand's image and financial status and this affects how companies design their morality clauses in contracts with professional athletes. There is a need for stricter morality clauses between companies and athletes and it is important that the athlete is protected from wrongful terminations. It is understandable that the company will not want to associate themselves with negative behavior (example: Nike with Armstrong) but it is equally as important that the company realizes the risk they are taking by signing athletes and that termination should ensue only in extreme circumstances. Matters that happen in one's personal life should be analyzed subjectively when vague terms in the contract do not provide for a remedy. Imposing a subjective factor-based test to determine, when a contract's morality clause is vague, whether or not an athlete should be terminated would provide better protection and fairness to the athlete. The test could look at whether or not the athlete's behavior was directly related to their professional career or if it happened in their private life, how the athlete handled themselves after the incident (did they lie or immediately apologize), if the conduct was so extreme and outrageous as to justify termination (example: Ray Rice with Nike), and how the company has handled athlete's violation of morality in the past. This test would help protect the athlete from wrongful termination in instances where the morality clause is vague and would prevent the company from immediately

cutting ties with the athlete for reasons that may not be justified.

An example of a time a test like this was probably implemented was when Nike decided to terminate their contract with Ray Rice. In 2014, TMZ released a video showing Rice knocking his then-fiancé, now wife, unconscious and dragging her out of an elevator.<sup>45</sup> The video circulated quickly and led to the NFL suspending Rice indefinitely.<sup>46</sup> Nike has built a reputation for standing by its athletes during controversial times, including Tiger Woods, Kobe Bryant<sup>47</sup> and Michael Vick<sup>48</sup> (Nike dropped Vick but ultimately re-signed him). While it is unclear to the public what Nike does to determine whether or not they will terminate an athlete sponsor, it is probable that they implemented an analytical strategy similar to that of a subjective, factor-based test. Rice's behavior, and more likely than not the fact that this behavior was caught on film, most likely surpassed Nike's level of acceptance and led to their decision to terminate.

#### *F. Punishment Over Termination*

The athlete should be fully aware of what conduct justifies rightful termination. Further, the conduct should be explicitly stated, be limited to severe circumstances spelled out with explicit language, and, in instances

---

<sup>45</sup> Eric Olson, *Nike and others cut ties with Ray Rice*, BOSTON GLOBE (Sept. 10, 2014), <https://www.bostonglobe.com/sports/2014/09/09/nike-terminate-ray-rice-endorsement-contract/w2DYuEn7rJ23BkMNTiuhDJ/story.html>.

<sup>46</sup> *Id.*

<sup>47</sup> Kobe Bryant faced rape allegations in 2003.

<sup>48</sup> Michael Vick faced legal trouble for dog fighting in 2008.

where the clause is silent, should be required to pass a subjective factor-based test. Additionally, implementing fines and sanctions may serve a better purpose than termination. Some agreements today allow for “companies to levy fines and/or recoup payments rather than terminate for a morals-based contractual violation.”<sup>49</sup> In Webber’s case, the White House stated that termination by Fila of Webber was a way to manifest a positive message to children who look up to these NBA stars.<sup>50</sup> Fila may have viewed the termination as smart for their brand, but so would have a public apology by Webber and a donation to a community youth program. Fines also may prove to be a better way of forcing athletes to be on their best behavior.<sup>51</sup>

#### CONCLUSION

The rise of social media platforms has made morality clauses more important in today’s society. “Due to the proliferation of new forms of media, which has greatly increased the speed with which information is disseminated to the public, talented individuals are now significantly more scrutinized than they have been in the past.”<sup>52</sup> “Diverse conceptions of morality and opposition to inhibiting freedom of expression present distinct

---

<sup>49</sup> Socolow, *supra* n.16.

<sup>50</sup> CBSNEWS, *supra* n.17.

<sup>51</sup> Socolow, *supra* n.16.

<sup>52</sup> Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347, 351 (2009).

obstacles to morals clauses today. Although morals clauses have played an important role in motion picture, television, athletics, and advertising contracts for over a century, it is unclear what effect they will have in the future.”<sup>53</sup> Some argue that morality clauses may lose relevance because of an “increasingly lax moral climate.”<sup>54</sup> It seems unlikely that morality clauses will become obsolete, but stricter morality clauses and a subjective factor-based test for analyzing vague morality clauses will allow for a better system when it comes to endorsement contracts between companies and athletes.

---

<sup>53</sup> Caroline Epstein, *Morals Clauses: Past, Present and Future*, JIPEL (Jan. 6, 2016), [http://jipel.law.nyu.edu/vol-5-no-1-3-epstein/#\\_ftn8](http://jipel.law.nyu.edu/vol-5-no-1-3-epstein/#_ftn8).

<sup>54</sup> *Id.*