Endorsement and Sponsorship Agreement

Pitfalls: Promoting and Protecting Brands

Negotiating Exclusivity, Morals Clauses, Termination and IP Rights
With Local and National Celebrities and Athletes

WEDNESDAY, DECEMBER 18, 2013

1pm Eastern    |    12pm Central    |    11am Mountain    |    10am Pacific

Today’s faculty features:

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§ 255.0 Purpose and definitions.

(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute.

The Guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. The Guides do not purport to cover every possible use of endorsements in advertising. Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.

(b) For purposes of this part, an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.

(c) The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term endorsements is therefore generally used hereinafter to cover both terms and situations.

(d) For purposes of this part, the term product includes any product, service, company or industry.

(e) For purposes of this part, an expert is an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to what ordinary individuals generally acquire.
**Example 1:** A film critic’s review of a movie is excerpted in an advertisement. When so used, the review meets the definition of an endorsement because it is viewed by readers as a statement of the critic’s own opinions and not those of the film producer, distributor, or exhibitor. Any alteration in or quotation from the text of the review that does not fairly reflect its substance would be a violation of the standards set by this part because it would distort the endorser’s opinion. [See § 255.1(b).]

**Example 2:** A TV commercial depicts two women in a supermarket buying a laundry detergent. The women are not identified outside the context of the advertisement. One comments to the other how clean her brand makes her family’s clothes, and the other then comments that she will try it because she has not been fully satisfied with her own brand. This obvious fictional dramatization of a real life situation would not be an endorsement.

**Example 3:** In an advertisement for a pain remedy, an announcer who is not familiar to consumers except as a spokesman for the advertising drug company praises the drug’s ability to deliver fast and lasting pain relief. He purports to speak, not on the basis of his own opinions, but rather in the place of and on behalf of the drug company. The announcer’s statements would not be considered an endorsement.

**Example 4:** A manufacturer of automobile tires hires a well-known professional automobile racing driver to deliver its advertising message in television commercials. In these commercials, the driver speaks of the smooth ride, strength, and long life of the tires. Even though the message is not expressly declared to be the personal opinion of the driver, it may nevertheless constitute an endorsement of the tires. Many consumers will recognize this individual as being primarily a racing driver and not merely a spokesperson or announcer for the advertiser. Accordingly, they may well believe the driver would not speak for an automotive product unless he actually believed in what he was saying and had personal knowledge sufficient to form that belief. Hence, they would think that the advertising message reflects the driver’s personal views. This attribution of the underlying views to the driver brings the advertisement within the definition of an endorsement for purposes of this part.

**Example 5:** A television advertisement for a particular brand of golf balls shows a prominent and well-recognized professional golfer practicing numerous drives off the tee. This would be an endorsement by the golfer even though she makes no verbal statement in the advertisement.

**Example 6:** An infomercial for a home fitness system is hosted by a well-known entertainer. During the infomercial, the entertainer demonstrates the machine and states that it is the most effective and easy-to-use home exercise machine that she has ever tried. Even if she is reading from a script, this statement would be an endorsement, because consumers are likely to believe it reflects the entertainer’s views.

**Example 7:** A television advertisement for a housewares store features a well-known female comedian and a well-known male baseball player engaging in light-hearted banter about products each one intends to purchase for the other. The comedian says that she will buy him a Brand X, portable, high-definition television so he can finally see the strike zone. He says that he will get her a Brand Y juicer so she can make juice with all the fruit
and vegetables thrown at her during her performances. The comedian and baseball player are not likely to be deemed endorsers because consumers will likely realize that the individuals are not expressing their own views.

**Example 8:** A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog’s fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.

§ 255.1 General considerations.

(a) Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser. [See §§ 255.2(a) and (b) regarding substantiation of representations conveyed by consumer endorsements.

(b) The endorsement message need not be phrased in the exact words of the endorser, unless the advertisement affirmatively so represents. However, the endorsement may not be presented out of context or reworded so as to distort in any way the endorser’s opinion or experience with the product. An advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser’s views at reasonable intervals where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors’ products, and the advertiser’s contract commitments.

(c) When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product. [See § 255.1(b) regarding the “good reason to believe” requirement.]

(d) Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers [see § 255.5]. Endorsers also may be liable for statements made in the course of their endorsements.
**Example 1:** A building contractor states in an advertisement that he uses the advertiser’s exterior house paint because of its remarkable quick drying properties and durability. This endorsement must comply with the pertinent requirements of Section 255.3 (Expert Endorsements). Subsequently, the advertiser reformulates its paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of the contractor’s endorsement, the advertiser must contact the contractor in order to determine whether the contractor would continue to specify the paint and to subscribe to the views presented previously.

**Example 2:** A television advertisement portrays a woman seated at a desk on which rest five unmarked computer keyboards. An announcer says, “We asked X, an administrative assistant for over ten years, to try these five unmarked keyboards and tell us which one she liked best.” The advertisement portrays X typing on each keyboard and then picking the advertiser’s brand. The announcer asks her why, and X gives her reasons. This endorsement would probably not represent that X actually uses the advertiser’s keyboard at work. In addition, the endorsement also may be required to meet the standards of Section 255.3 (expert endorsements).

**Example 3:** An ad for an acne treatment features a dermatologist who claims that the product is “clinically proven” to work. Before giving the endorsement, she received a write-up of the clinical study in question, which indicates flaws in the design and conduct of the study that are so serious that they preclude any conclusions about the efficacy of the product. The dermatologist is subject to liability for the false statements she made in the advertisement. The advertiser is also liable for misrepresentations made through the endorsement. [See Section 255.3 regarding the product evaluation that an expert endorser must conduct.]

**Example 4:** A well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks every chicken perfectly in thirty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the bag. In each attempt, the chicken is undercooked after thirty minutes and requires sixty minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the oven roasting bag and places the bag in one oven. He then takes a chicken roasting bag from a second oven, removes from the bag what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need. A significant percentage of consumers are likely to believe the celebrity’s statements represent his own views even though he is reading from a script. The celebrity is subject to liability for his statement about the product. The advertiser is also liable for misrepresentations made through the endorsement.

**Example 5:** A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser’s products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion’s ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for misleading or unsubstantiated
representations made through the blogger’s endorsement. The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services. [See § 255.5.]

In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

§ 255.2 Consumer endorsements.

(a) An advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, i.e., without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.

(b) An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser’s experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser’s experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.¹

¹ The Commission tested the communication of advertisements containing testimonials that clearly and prominently disclosed either “Results not typical” or the stronger “These testimonials are based on the experiences of a few people and you are not likely to have similar results.” Neither disclosure adequately reduced the communication that the experiences depicted are generally representative. Based upon this research, the Commission believes that similar disclaimers regarding the limited applicability of an endorser’s experience to what consumers may generally expect to achieve are unlikely to be effective.

Nonetheless, the Commission cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement. Although the Commission would have the burden of proof in a law enforcement action, the Commission notes that an advertiser possessing reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive will avoid the risk of the initiation of such an action in the first instance.
Advertisements presenting endorsements by what are represented, directly or by implication, to be “actual consumers” should utilize actual consumers in both the audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.

Example 1: A brochure for a baldness treatment consists entirely of testimonials from satisfied customers who say that after using the product, they had amazing hair growth and their hair is as thick and strong as it was when they were teenagers. The advertiser must have competent and reliable scientific evidence that its product is effective in producing new hair growth.

The ad will also likely communicate that the endorsers’ experiences are representative of what new users of the product can generally expect. Therefore, even if the advertiser includes a disclaimer such as, “Notice: These testimonials do not prove our product works. You should not expect to have similar results,” the ad is likely to be deceptive unless the advertiser has adequate substantiation that new users typically will experience results similar to those experienced by the testimonialists.

Example 2: An advertisement disseminated by a company that sells heat pumps presents endorsements from three individuals who state that after installing the company’s heat pump in their homes, their monthly utility bills went down by $100, $125, and $150, respectively. The ad will likely be interpreted as conveying that such savings are representative of what consumers who buy the company’s heat pump can generally expect. The advertiser does not have substantiation for that representation because, in fact, less than 20% of purchasers will save $100 or more. A disclosure such as, “Results not typical” or, “These testimonials are based on the experiences of a few people and you are not likely to have similar results” is insufficient to prevent this ad from being deceptive because consumers will still interpret the ad as conveying that the specified savings are representative of what consumers can generally expect. The ad is less likely to be deceptive if it clearly and conspicuously discloses the generally expected savings and the advertiser has adequate substantiation that homeowners can achieve those results. There are multiple ways that such a disclosure could be phrased, e.g., “the average homeowner saves $35 per month,” “the typical family saves $50 per month during cold months and $20 per month in warm months,” or “most families save 10% on their utility bills.”

Example 3: An advertisement for a cholesterol-lowering product features an individual who claims that his serum cholesterol went down by 120 points and does not mention having made any lifestyle changes. A well-conducted clinical study shows that the product reduces the cholesterol levels of individuals with elevated cholesterol by an average of 15% and the advertisement clearly and conspicuously discloses this fact. Despite the presence of this disclosure, the advertisement would be deceptive if the advertiser does not have adequate substantiation that the product can produce the specific results claimed by the endorser (i.e., a 120-point drop in serum cholesterol without any lifestyle changes).

Example 4: An advertisement for a weight-loss product features a formerly obese woman. She says in the ad, “Every day, I drank 2 WeightAway shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140 pounds.” The advertisement accurately describes the woman’s
experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed WeightAway shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which she achieved her results, the ad is not likely to convey that consumers who weigh substantially less or use WeightAway under less extreme circumstances will lose 110 pounds in six months. (If the advertisement simply says that the endorser lost 110 pounds in six months using WeightAway together with diet and exercise, however, this description would not adequately alert consumers to the truly remarkable circumstances leading to her weight loss.) The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (e.g., that WeightAway is an effective weight loss product).

If, in the alternative, the advertisement simply features “before” and “after” pictures of a woman who says “I lost 50 pounds in 6 months with WeightAway,” the ad is likely to convey that her experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (e.g., “most women who use WeightAway for six months lose at least 15 pounds”).

If the ad features the same pictures but the testimonialist simply says, “I lost 50 pounds with WeightAway,” and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (e.g., “most women who use WeightAway lose 15 pounds”).

Example 5: An advertisement presents the results of a poll of consumers who have used the advertiser’s cake mixes as well as their own recipes. The results purport to show that the majority believed that their families could not tell the difference between the advertised mix and their own cakes baked from scratch. Many of the consumers are actually pictured in the advertisement along with relevant, quoted portions of their statements endorsing the product. This use of the results of a poll or survey of consumers represents that this is the typical result that ordinary consumers can expect from the advertiser’s cake mix.

Example 6: An advertisement purports to portray a “hidden camera” situation in a crowded cafeteria at breakfast time. A spokesperson for the advertiser asks a series of actual patrons of the cafeteria for their spontaneous, honest opinions of the advertiser’s recently introduced breakfast cereal. Even though the words “hidden camera” are not displayed on the screen, and even though none of the actual patrons is specifically identified during the advertisement, the net impression conveyed to consumers may well be that these are actual customers, and not actors. If actors have been employed, this fact should be clearly and conspicuously disclosed.

Example 7: An advertisement for a recently released motion picture shows three individuals coming out of a theater, each of whom gives a positive statement about the movie. These individuals are actual consumers expressing their personal views about the movie. The advertiser does not need to have substantiation that their views are representative of the opinions that most consumers will have about the movie. Because the consumers’ statements would be understood to be the subjective opinions of only three people, this advertisement is not likely to convey a typicality message.
If the motion picture studio had approached these individuals outside the theater and offered them free tickets if they would talk about the movie on camera afterwards, that arrangement should be clearly and conspicuously disclosed. [See § 255.5.]

§ 255.3 Expert endorsements.

(a) Whenever an advertisement represents, directly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser’s qualifications must in fact give the endorser the expertise that he or she is represented as possessing with respect to the endorsement.

(b) Although the expert may, in endorsing a product, take into account factors not within his or her expertise (e.g., matters of taste or price), the endorsement must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he or she is expert and which are relevant to an ordinary consumer’s use of or experience with the product and are available to the ordinary consumer. This evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement. To the extent that the advertisement implies that the endorsement was based upon a comparison, such comparison must have been included in the expert’s evaluation; and as a result of such comparison, the expert must have concluded that, with respect to those features on which he or she is expert and which are relevant and available to an ordinary consumer, the endorsed product is at least equal overall to the competitors’ products. Moreover, where the net impression created by the endorsement is that the advertised product is superior to other products with respect to any such feature or features, then the expert must in fact have found such superiority. [See § 255.1(d) regarding the liability of endorsers.]

Example 1: An endorsement of a particular automobile by one described as an “engineer” implies that the endorser’s professional training and experience are such that he is well acquainted with the design and performance of automobiles. If the endorser’s field is, for example, chemical engineering, the endorsement would be deceptive.

Example 2: An endorser of a hearing aid is simply referred to as “Doctor” during the course of an advertisement. The ad likely implies that the endorser is a medical doctor with substantial experience in the area of hearing. If the endorser is not a medical doctor with substantial experience in audiology, the endorsement would likely be deceptive. A non-medical “doctor” (e.g., an individual with a Ph.D. in exercise physiology) or a physician without substantial experience in the area of hearing can endorse the product, but if the endorser is referred to as “doctor,” the advertisement must make clear the nature and limits of the endorser’s expertise.

Example 3: A manufacturer of automobile parts advertises that its products are approved by the “American Institute of Science.” From its name, consumers would infer that the “American Institute of Science” is a bona fide independent testing organization with expertise in judging automobile parts and that, as such, it would not approve any automobile part without first testing its efficacy by means of valid scientific methods. If the American Institute of Science is not such a bona fide independent testing organization
(e.g., if it was established and operated by an automotive parts manufacturer), the endorsement would be deceptive. Even if the American Institute of Science is an independent bona fide expert testing organization, the endorsement may nevertheless be deceptive unless the Institute has conducted valid scientific tests of the advertised products and the test results support the endorsement message.

Example 4: A manufacturer of a non-prescription drug product represents that its product has been selected over competing products by a large metropolitan hospital. The hospital has selected the product because the manufacturer, unlike its competitors, has packaged each dose of the product separately. This package form is not generally available to the public. Under the circumstances, the endorsement would be deceptive because the basis for the hospital’s choice—convenience of packaging—is neither relevant nor available to consumers, and the basis for the hospital’s decision is not disclosed to consumers.

Example 5: A woman who is identified as the president of a commercial “home cleaning service” states in a television advertisement that the service uses a particular brand of cleanser, instead of leading competitors it has tried, because of this brand’s performance. Because cleaning services extensively use cleansers in the course of their business, the ad likely conveys that the president has knowledge superior to that of ordinary consumers. Accordingly, the president’s statement will be deemed to be an expert endorsement. The service must, of course, actually use the endorsed cleanser. In addition, because the advertisement implies that the cleaning service has experience with a reasonable number of leading competitors to the advertised cleanser, the service must, in fact, have such experience, and, on the basis of its expertise, it must have determined that the cleaning ability of the endorsed cleanser is at least equal (or superior, if such is the net impression conveyed by the advertisement) to that of leading competitors’ products with which the service has had experience and which remain reasonably available to it. Because in this example the cleaning service’s president makes no mention that the endorsed cleanser was “chosen,” “selected,” or otherwise evaluated in side-by-side comparisons against its competitors, it is sufficient if the service has relied solely upon its accumulated experience in evaluating cleansers without having performed side-by-side or scientific comparisons.

Example 6: A medical doctor states in an advertisement for a drug that the product will safely allow consumers to lower their cholesterol by 50 points. If the materials the doctor reviewed were merely letters from satisfied consumers or the results of a rodent study, the endorsement would likely be deceptive because those materials are not what others with the same degree of expertise would consider adequate to support this conclusion about the product’s safety and efficacy.

§ 255.4 Endorsements by organizations.

Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of subjective factors that vary from individual to individual. Therefore, an organization’s endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. Moreover, if an organization is represented as being expert, then, in conjunction with a proper exercise of its
expertise in evaluating the product under § 255.3 (expert endorsements), it must utilize an expert or experts recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relevant merits of such products. [See § 255.1(d) regarding the liability of endorsers.]

**Example:** A mattress seller advertises that its product is endorsed by a chiropractic association. Because the association would be regarded as expert with respect to judging mattresses, its endorsement must be supported by an evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of mattresses in general and not designed with the unique features of the advertised mattress in mind.

§ 255.5 Disclosure of material connections.

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed. For example, when an endorser who appears in a television commercial is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reason to know or to believe that if the endorsement favored the advertised product some benefit, such as an appearance on television, would be extended to the endorser. Additional guidance, including guidance concerning endorsements made through other media, is provided by the examples below.

**Example 1:** A drug company commissions research on its product by an outside organization. The drug company determines the overall subject of the research (e.g., to test the efficacy of a newly developed product) and pays a substantial share of the expenses of the research project, but the research organization determines the protocol for the study and is responsible for conducting it. A subsequent advertisement by the drug company mentions the research results as the “findings” of that research organization. Although the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser’s payment of expenses to the research organization should be disclosed in this advertisement.

**Example 2:** A film star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must, of course, comply with § 255.1; but regardless of whether the star’s compensation for the commercial is a $1 million cash payment or a royalty for each product sold by the advertiser during the next year, no disclosure is required because such payments likely are ordinarily expected by viewers.

**Example 3:** During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the rankings. She responds by attributing the improvement in her game to the fact that she is seeing the ball
better than she used to, ever since having laser vision correction surgery at a clinic that she identifies by name. She continues talking about the ease of the procedure, the kindness of the clinic’s doctors, her speedy recovery, and how she can now engage in a variety of activities without glasses, including driving at night. The athlete does not disclose that, even though she does not appear in commercials for the clinic, she has a contractual relationship with it, and her contract pays her for speaking publicly about her surgery when she can do so. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity’s endorsement. Without a clear and conspicuous disclosure that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive. Furthermore, if consumers are likely to take away from her story that her experience was typical of those who undergo the same procedure at the clinic, the advertiser must have substantiation for that claim.

Assume that instead of speaking about the clinic in a television interview, the tennis player touts the results of her surgery – mentioning the clinic by name – on a social networking site that allows her fans to read in real time what is happening in her life. Given the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser. Because that information might affect the weight consumers give to her endorsement, her relationship with the clinic should be disclosed.

Assume that during that same television interview, the tennis player is wearing clothes bearing the insignia of an athletic wear company with whom she also has an endorsement contract. Although this contract requires that she wear the company’s clothes not only on the court but also in public appearances, when possible, she does not mention them or the company during her appearance on the show. No disclosure is required because no representation is being made about the clothes in this context.

**Example 4:** An ad for an anti-snoring product features a physician who says that he has seen dozens of products come on the market over the years and, in his opinion, this is the best ever. Consumers would expect the physician to be reasonably compensated for his appearance in the ad. Consumers are unlikely, however, to expect that the physician receives a percentage of gross product sales or that he owns part of the company, and either of these facts would likely materially affect the credibility that consumers attach to the endorsement. Accordingly, the advertisement should clearly and conspicuously disclose such a connection between the company and the physician.

**Example 5:** An actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. He is asked for his “spontaneous” opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the restaurant informing all who entered that day that patrons would be interviewed by the advertiser as part of its TV promotion of its new soy protein “steak.” This notification would materially affect the weight or credibility of the patron’s endorsement, and, therefore, viewers of the advertisement should be clearly and conspicuously informed of the circumstances under which the endorsement was obtained.
Assume, in the alternative, that the advertiser had not posted a sign on the door of the restaurant, but had informed all interviewed customers of the “hidden camera” only after interviews were completed and the customers had no reason to know or believe that their response was being recorded for use in an advertisement. Even if patrons were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

**Example 6:** An infomercial producer wants to include consumer endorsements for an automotive additive product featured in her commercial, but because the product has not yet been sold, there are no consumer users. The producer’s staff reviews the profiles of individuals interested in working as “extras” in commercials and identifies several who are interested in automobiles. The extras are asked to use the product for several weeks and then report back to the producer. They are told that if they are selected to endorse the product in the producer’s infomercial, they will receive a small payment. Viewers would not expect that these “consumer endorsers” are actors who were asked to use the product so that they could appear in the commercial or that they were compensated. Because the advertisement fails to disclose these facts, it is deceptive.

**Example 7:** A college student who has earned a reputation as a video game expert maintains a personal weblog or “blog” where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

**Example 8:** An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer’s product. Knowledge of this poster’s employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.

**Example 9:** A young man signs up to be part of a “street team” program in which points are awarded each time a team member talks to his or her friends about a particular advertiser’s products. Team members can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the team member’s endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.
Popular entertainment is big business, a fact never lost on business itself. In an age when an actor can sell to the American public a much sought after image of itself, and consequently assume presidential leadership, sellers of consumer products and services continue to seek profitable associations for themselves with highly visible and well-regarded artists and personalities from all fields of entertainment.

Entertainers make news through such activities as performances, career activities, politics and charity involvements. For a large segment of the public, almost any activity or pronouncement of some prominent celebrity may itself be newsworthy. Through endorsement or spokesperson relationships, the sellers of consumer products and services hope (i) to capture public attention through commercial materials featuring the association, (ii) to persuade the public of the product's worthiness through the endorsement or association of an artist spokesperson in whom the intended market group has confidence, and (iii) to vest the product itself with some of the artist’s charismatic appeal through the association.

Artists from the musical field are much sought after as endorsers/spokespeople for two reasons: they are particularly important voices to and for the highly desirable youth market for consumer goods and services and, as musical artists, they often conjure up a particularly visceral spell on the emotional as well as rational impulses of their audiences — whether on record, music videos or (hope advertisers) radio/television commercials.

There are opportunities at all levels for popular musical artists to expand their careers (and incomes) from such ancillary commercial activity. Artists' representatives may wish to develop relationships with advertising agencies or executives to periodically explore such opportunities. Representatives of small and large consumer oriented concerns are increasingly drawn to the "sex" appeal such associations can give their advertising.

A sponsoring company will generally seek to develop such relationships in the context of a long-term marketing or public relations strategy. Advertising or public relations firms which regularly deal with such activities will usually conduct the negotiations for such arrangements, based on client directions, taking into account advertising/marketing budgets and the nature of the client’s marketing object.
Endorsement agreements are typically drafted by the attorney for the advertising agency or public relations firm representing the sponsoring company seeking to engage the artist's services as a spokesperson or for celebrity endorsement. In the sample agreement provided, an advertising agency ("Agency") contracts on behalf of the sponsoring company ("Client") for the services of artist ("Artist").

(name and address of artist) (date)

Dear (name of artist):

This will constitute the agreement between you ("Artist") and (name of agency) ("Agency"), as Agent for our client (name of sponsor) ("Client") for Artist to render his services in connection with certain television and radio commercials, presentations and point-of-purchase advertising for Client's product (name of product) ("Product") on the following terms and conditions:

Comments

As in other service agreements in this series, artist may be engaged directly for such services, or through the auspices of a loanout company. The sample agreement contemplates direct employment.¹

The preamble to the agreement should begin by setting out the products or services for which artist's endorsement is required, although this may be in the body of the agreement if a detailed description of the products or services is required.

1. TERM: The initial term of this Agreement shall commence (date) and shall continue until (one year from date) (the "Initial Term"). At the end of the Initial Term, any and all rights granted herein by Artist to Agency shall immediately terminate unless the option(s) described herein are exercised by Agency. Agency shall have the option, exercisable in writing no less than (e.g. thirty) days prior to the end of the Initial Term, to utilize existing or to produce and utilize new Commercial Materials (as said term is defined in Clause 2(c) herein) for one additional one-year period (the "Second Term"). All of the terms and conditions of the Agreement applicable to the Initial Term shall apply in respect to the Second Term, to begin immediately upon the expiration of the Initial Term. Notwithstanding the foregoing, if Agency exercises its Second Term option as provided above, it shall have the right to commence the Second Term on any date between (date) and (date) without affecting the termination date of the Second Term; i.e., the Second Term shall be extended by a period equal to the number of days by which the Initial Term shall have been reduced. Agency shall have the option, exercisable in writing no less than (e.g., thirty) days prior to the end of the Second Term to utilize existing or to produce and utilize new Commercial Materials for one additional one-year period (the "Third Term") upon all of the terms and conditions of the Agreement applicable to the Second Term except as to compensation payable to Artist, which the parties shall negotiate in good faith. The Third Term shall begin immediately upon the termination of the Second Term. If no agreement concerning the compensation payable to Artist for the Third Term has been reached by the earlier of (i) sixty days following such request or (ii) ninety days prior to the expiration of the Second Term, either party may elect to cease further negotiation. The Second Term

¹ Converting the agreement to a loanout can be accomplished by attaching a loanout rider and inducement letter similar to the rider and letter found in Chapter 145, supra, or by simply making the loanout company the contracting entity for the services of artist and inserting at the end of the agreement an inducement paragraph similar in form to that provided as Exhibit "A" to this agreement infra. In either case, artist should have a direct general employment agreement with the loanout company encompassing the contemplated services.

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and the Third Term shall be referred to as the “Option Term”.

Comments

1. The term of the endorsement agreement will usually be one year (the “Initial Term”) plus a reasonable preliminary period for the preparation of the commercial materials (i.e., radio and television commercials, print advertisements, etc.) containing artist’s appearance and/or endorsement which will be used during the term (the “Commercial Materials”). Unique promotional campaigns (e.g., a special event or trade show, or a seasonal product) may require more or less time. Artist is generally interested in minimizing the time frame while maximizing compensation. Agency may have the opposite objective. Artist may also want the commencement or conclusion of the term to coincide with a scheduled tour, album release, or expiration of a record deal. It is thus useful for both parties to discuss fully the product and promotional cycle in evaluating the appropriate term.²

If the dates selected by agency are arbitrary, artist may also seek to link the expiration of the agreement to the earlier of a fixed date or one year from the first appearance of the commercial materials, if earlier.

The use of additional option periods which may extend the term of the relationship is common in artist endorsement agreements, as a considerable time is often required to establish a positive association between the artist and the client, and once established the client may choose to capitalize on the relationship to the greatest extent possible. The option of extending the agreement allows the agency the opportunity to continue that association and to expand upon it (e.g., agency may wish to add new products to an advertising campaign, or enter new domestic or foreign territories with the commercial materials). With respect to the exercise by agency of option terms, artist should seek to obtain the renewal commitment as early as possible before the conclusion of the first term, with thirty days being a typical cut off.

In addition to specifying the length of the extended term, the option provision should indicate whether agency intends to extend its use of commercial materials produced in the initial term or plans to produce new commercial materials. The production of new commercial materials normally merits increased compensation for the additional services rendered by artist. Agency should also specify whether or not any additional products will be included in the option term(s), and whether the commercial materials may be used in other markets or media. Artist’s compensation for the additional option term(s) will reflect each of these variables.

The sample agreement contemplates that the relationship between artist and agency may be repeated in the option term, although agency should also seek to obtain the right to produce new commercial materials at its option. Agency will generally seek to produce new commercial materials for each term for both the benefit of the client and for its own billings. Artist should generally encourage the production of new commercial materials as it not only may justify higher fees each year (assuming artist appears for additional production days in each term) but also ensures a contemporary and current appearance for artist in the commercial materials to be utilized. The sample agreement gives agency the option of accelerating the introduction of new “second term” materials prior to the conclusion of the “first term,” if required.

2. SERVICES: Agency shall have the right during the Initial Term and each Option Term to utilize Artist’s services as a performer (both on or off-camera in the case of television), spokesperson and/or endorser for the Product upon the following terms and conditions:

(a) Artist shall perform in the production of:

(i) two(2) [30] second television commercials;

(ii) one(1) [60] second radio commercial together with one adaptation thereof;

(iii) one(1) [one to three] minute promotional audio tape to be used by Agency and/or Client for non-consumer sales meetings; and

² Also see Chapter 155 regarding Tour Merchandising agreements.
(b) Artist shall appear in photography sessions (to be conducted on television or radio production days) for the purpose of taking still photographs for use in counter display cards and similar point-of-purchase advertising containing Artist’s name, likeness and/or statement. Agency shall alternatively also have the right to use stills “lifted” from the television commercials for such purpose.

(c) The items listed in subparagraphs 2(a) and 2(b) are hereinafter referred to individually and collectively as the “Commercial Materials.” Artist shall have the right of prior reasonable approval with respect to Artist’s photographs, likenesses and statements.

(d) Artist will be required to make himself available for [two(2)] production day(s) for the production of television and radio commercials and the video tapes described in Clause 2(a). Artist shall be available to render services for up to ten (10) hours, not including scheduled breaks, during each such production day period. The scheduling of said production day(s) shall be mutually determined by the parties hereto subject to Artist’s professional availability.

(e) If Client so requests, Artist shall be available to render services at still photographic sessions in connection with the production of print Commercial Materials on additional production days, in excess of the required production days, subject to the payment of the additional compensation provided for in Clause 4(d).

(f) It is understood that script and layout materials shall be reasonably compatible with Artist’s personality and/or style, and that Artist shall have the right to approve script and print copy which reflects Artist’s personal experience with and opinion (“testimonial”) of the Client’s Product hereunder. Such approval shall be deemed to be Artist’s representation and warranty that such testimonial copy in fact reflects Artist’s personal experience with and opinion of Client’s Product and shall not be unreasonably withheld or delayed. If Artist does not approve or is unable to approve copy essential to Client’s marketing and creative strategy, in addition to any other remedies it may have, the Client shall have the right to terminate this Agreement.

(g) If and to the extent that Client or Agency shall reasonably request for the purpose of complying with requirements or proposed requirements of the Federal Trade Commission, the several networks and any print medium concerning the use of testimonials and endorsements in advertising, Artist will furnish affidavits attesting to Artist’s use of and preference for the Product in a form similar to Exhibit “A” attached hereto.

(h) In the event that, in connection with the rendering of any of Artist’s services hereunder, Artist is required by Agency to travel any distance which Artist would otherwise not have been required to do, Agency will reimburse Artist for first class, round trip transportation expenses and the hotel room charges only incurred for the purpose of fulfilling Artist’s obligations under this Agreement for any period during which Artist is required by Agency to render such services, plus $[75–250] per day (including each calendar day or any part of which Artist travels or is on location thereunder) in lieu of reimbursement for any item of expense other than transportation and hotel room charges.
Comments

2. The agreement should specify in detail the number and duration of commercials to be produced and utilized and the number of production days (and if possible the dates) for which the artist's services will be required. A typical campaign for television, radio and print may require two (2) thirty second television commercials, two radio commercials of fifteen and/or thirty seconds duration, and sufficient stills for print ad usage. A day or two for the production of materials for each medium is usually adequate. The number and length of such commercials will, of course, be determined by the advertiser. Still photographs can generally be "lifed" from film or video footage, although agency may require separate still photography on a production day or on an additional day specifically designated for such purpose.

Artist should be certain to secure a right of reasonable approval over the photographs, likenesses, statements, etc., portraying artist in the commercial materials. This can readily be accomplished by requiring agency to submit to artist a minimum and maximum number of photographs or likenesses which agency proposes to use several days (or weeks) before they are actually required by agency, at which time artist is permitted a reasonable period of time to select a negotiated percentage (often 50%) of the submitted materials for use by agency. When no specific dates are agreed upon for the production of the commercial materials, artist should be given reasonable notice of agency's production schedule once it is available, and artist's services should then be subject to artist's professional availability. Additional compensation should be negotiated for any additional production days which may subsequently become necessary for reasons not within artist's control. Formulas for compensating artist for such additional days are discussed below. The number of hours for which artist's services are required for a production day should also be specified, with ten (10) hours constituting a fairly standard period.

Of equal importance to artist as approvals is an agency assurance that the commercial materials will correspond with artist's public personality and character. Agency will likewise seek assurances that the language of the commercial materials and of artist's endorsement are "verifiable" and that artist's subsequent behavior will be consistent with such materials (e.g., after concluding production of commercials for a major soft-drink company, artist should not appear at a press conference drinking a competing soft-drink). Agencies have particular cause for concern in view of public interest group, state consumer affairs department and Federal Trade Commission monitoring of "truth in advertising." For this reason, the use of affidavits in connection with endorsements is growing more common. Agency may, as in the sample agreement, insist upon the right to terminate the agreement in the event of any material inconsistency between artist's endorsement of the client's product or services, and any subsequent statements or actions by artist, whether on or off camera.

When production of the commercial materials is to take place away from artist's principal residence, or when artist is required to travel from work at any other distant location because of the requirements of agency, artist will request transportation (the prominent artist will demand and receive first class transportation) and expenses for hotel, local transportation and meals (usually a per diem expressed in U.S. dollars ranging from one hundred to two hundred fifty dollars) as required. The agency will generally prefer to reimburse artist for such expenses upon submission of vouchers, while for convenience artist should seek to have such expenses covered by non-reimbursable advance.

3. USAGE:

(a) During the Initial Term and each option term, Client shall have the right to the unlimited broadcast use and reuse of the television commercial(s) produced hereunder during any such term (i.e., Initial Term, Second Term or Third Term) as it may elect, in the United States, its territories and possessions and commonwealths, Canada and the Caribbean area (herein referred to as the "Territory") on any and all network and local television programs broadcast under the full or partial sponsorship of the Client, on cable systems and/or cable networks and other carriers, and as spot announcements on television.

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4 See affidavit "Exhibit 'A' infra.

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(b) During the Initial Term and each option term, Client shall have the right in the Territory to use Artist’s name, likeness, photograph, signature or facsimile thereof, in print Commercial Materials produced pursuant to Clause 2 hereof, for publication and display, as the Client shall in its sole discretion determine, in print magazines, including but not limited to, cooperative advertising and retail tie-in promotions, point-of-sale material, product packaging, the Client’s Annual Report and internal sales and marketing pieces. During each option term, Client shall have the further right to use such print Commercial Materials as specified in this subparagraph (b) in the United Kingdom, Australia and Europe (the “Expanded Territory”), subject to an aggregate media expenditure limit of (e.g., $500,000.00) in the expanded Territory.

c) Artist agrees that the Client may continue to distribute for a period of six months after the expiration of the Initial Term and each option term or the termination of this Agreement any packaging materials bearing Performer’s name, photograph or likeness. Client shall not be required to withdraw or remove from sales outlets any of the packages or point-of-sale materials containing Artist’s name, photograph or likeness.

d) During the Initial Term and each option term, Client shall have the right to use Artist’s name, likeness, voice and photograph for the purpose of publicizing the Commercial Material in trade contests and trade publications and to the Client’s and Agency’s employees and shareholders.

Comments

3. Apart from the physical services rendered for the production of the commercials, the anticipated usage of the commercial materials is the principal determinant of artist’s compensation under the agreement. No fixed formula exists for calculating the value of the “talent” component of any single advertising campaign. Two similar companies may have substantially different budgets and campaign strategies for their advertising. Artist may be perfectly suited for one but not at all for the other. Although many advertising agencies try to maintain the “talent” portion of the overall budgets of their clients’ ad campaigns at ten percent (10%) or less of total production and marketing expenses, actual deals will vary widely. Issues to be considered include whether the advertising campaign is to be local, regional, national, worldwide? Are newspapers, magazines, radio, television, billboards or other methods of usage to be licensed? Will artist be the sole spokesperson for client’s promotions during the term or only one of several spokespersons? If the sole spokesperson, will artist be appearing in all or only a portion of client’s scheduled advertising? If television is to be utilized, will the commercial materials be placed in network, local or cable spots? Prime-time or late night?

Generally the identity of the client and the product and the scale of exposure inherent in the planned ad campaign, will suggest the answer to the foregoing questions, but artist should seek as many answers as possible in the course of negotiating the deal if the agency’s and client’s plans are not contained in the initial proposal to artist.

Artist should also seek to ensure that agency’s strategy for the use of the commercial materials is commensurate with artist’s stature in the entertainment industry. A badly produced and mounted advertising campaign could lead to negative associations. In some circumstances, an oversaturation of even a high quality campaign can have a similar effect on the public’s view of a product and the artist associated with it. For this reason, artist should seek some right of reasonable approval over the campaign or at least obtain minimum guarantees regarding media expenditures.

When the basic agreement in any way restricts the use of the commercial materials in any media or marketing area, agency may seek and artist should be prepared to negotiate the option to extend its usage upon payment of additional compensation, e.g., agency may want the right to shift from newspaper to magazines, or from radio to television, etc.

4. COMPENSATION: In full consideration for the performance of the provisions of this Agreement to be performed by Artist, and for the rights and options herein granted, Client agrees to pay and Artist agrees to accept the following:

(a) In consideration of Artist’s performance of all services hereunder during the Initial Term in connection with the services described in Clause 2(a) including, without limitation, the production of television, radio and other audio-visual Commercial Materials and the usage rights granted hereunder for such Commercial Materials during such Term, Agency shall pay and Artist agrees to accept the sum of (e.g., fifty-thousand dollars). Such sum shall be due

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within 10 business days after execution of this Agreement by Artist and receipt by agency of a copy of this Agreement countersigned by Artist.

(b) In consideration of Artist’s performance of all services hereunder during the Initial Term in connection with the production of the print Commercial Materials and the usage rights granted hereunder for such print Commercial Materials during such Term, Agency shall pay and Artist agrees to accept the following sum: (e.g., twenty-five thousand dollars). Such sum shall be due within 10 business days after Performer’s initial performance of the required services as specified in Paragraph 2.

(c) For each option term as to which Client exercises its option set forth in Paragraph 1, Agency shall pay and Artist agrees to accept the following sums for the respective Option Terms:

Second Term — ______________________ (e.g., $50,000)
Third Term — ______________________ (e.g., $60,000)

Such sums shall be full payment for Artist’s performance during each Option Term of all services described herein during such term in connection with the production of television Commercials and print Commercial Materials as described herein and for the usage rights granted hereunder. One-half of the applicable payment for each Option Term
shall be due within 10 business days after the start of the Option Term and the balance six months thereafter.

**Comments**

4. Client’s budget and artist’s stature (is artist a “superstar,” a “star,” or merely a celebrity?) will form the principle parameters of negotiations for artist’s compensation. Factors such as those addressed in clause 3 above become important additional variables. Artist should try to secure all of his compensation under the agreement on the signing of the agreement. Failing this, artist should negotiate for a substantial percentage of his compensation on signing, with the balance due upon completion of his production services. Artist’s counsel should also seek to have artist’s services made pay-or-play. This protects artist from being penalized by client’s decision to forego the endorsement or to substitute a different spokesperson after the deal has already been struck.

Use of artist’s photographic image in a national print campaign (newspapers, magazines and/or direct mail) may be worth from ten to fifty thousand dollars assuming no radio or television advertising is also employed in connection with the campaign. The use of several radio voice-overs in connection with such a campaign may be worth two to four times that amount, plus residuals. As expected, television commercial appearances bring the largest total — from fifty thousand to several hundred thousand dollars or more — again depending on the stature of artist. Combining these media mean even greater dollars. By way of example, deals from Pepsi Cola reportedly reached several million dollars for Michael Jackson and Lionel Richie. The sky may not be the limit.

Celebrities may negotiate for multiples of the AFTRA minimums, or may instead barter their services for the client’s goods or services. (E.g., a recording artist appearing on behalf of an automobile manufacturer may get a new car annually for five years; a local celebrity appearing on behalf of a local car dealer may negotiate for a year’s free lease on a new car — the value of which is “ordinary income.”) Counsel should be aware that there are no standard deals in this field, and should be creative in approaching these issues as trends may vary from industry to industry, community to community, and year to year. Counsel may wish to consult with offices of major advertising or talent agencies prior to negotiating deals in this field.

Artist’s counsel might find it advantageous to negotiate separately for each service rendered by artist — often the “sum of the parts” can be greater than a negotiated overall fee. In addition to allocating artist’s compensation among guaranteed and optional services under the principal agreement, artist may seek to have allocations specified among the uses to be made in various media so as to have a basis for guild pension, health and welfare (“PH & W”) contributions or for payment of commissions to any agency representing artist which may be based upon compensation from services in a specific medium. For example, artist may have separate agencies representing him in television (acting) and radio (musical composition and performance) in which case an allocation is useful. In addition, AFTRA, SAG, and the AF of M cover different services in different media. A specified allocation of compensation for the television, radio, print, and music rights will determine the amounts against which their respective PH & W contributions may be calculated. The allocations may also be useful in establishing guidelines for future endorsement deals.

Likewise, compensation for any optional extensions of the term should be set out in the agreement. Artist will generally have cause to demand an increase in his compensation from year to year (since it can be assumed that the endorsement campaign was sufficiently successful to motivate the agency to exercise the option), with the size of the increase based, in part, upon the additional services to be rendered in subsequent terms. Or artist could receive simply a flat percentage increase across the board. The increase may also be indexed to the increase in client’s budget for its advertising campaign during the renewal year (e.g., first year base compensation, plus ten percent of any increase in sponsor’s expenditures for newspaper, radio and television), or measurable changes in artist’s stature during the preceding year of the endorsement arrangement (e.g., net change in record sales, tour attendance, or a featured role in network television or motion picture productions). In most instances, the increase of compensation is a fraction of the initial compensation, ranging from five percent to twenty percent unless additional services are required of artist or other material elements of the agreement are modified.

If the principal agreement is for use of the commercial materials in a specified number of markets rather than nationally (for example, when client is a retail chain with operations in selected cities only or if client wishes to test a market campaign in one major metropolitan area), artist may be entitled to additional compensation if the materials are used in other than the originally contemplated markets during the course of the

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term. The same result may be appropriate where the commercial materials are made available to franchisees or customers of the client on a cooperative advertising basis and additional uses in new markets occur during the term. The increase in compensation may be prorated on the basis of the number of markets in the original deal, or may entail a consideration of the demographics of the new market (which is the way print advertising space or television air time is itself typically calculated for commercial purposes).

If a territory is expanded from the United States to worldwide, the compensation could easily increase by fifty to one hundred percent.

(d) For each additional production day, in excess of the required production days, on which Artist renders services at Client’s request pursuant to Paragraph 2(e) in connection with the production of print Commercial Materials, Agency shall pay and Artist agrees to accept the sum of (e.g., $1000.00). Payment shall be due within 10 business days after the rendering of such services.

(e) Any additional sums that may be due hereunder, including but not limited to extra fees for overtime and holding fees shall be credited at AFTRA scale against the guaranteed sums payable under this Agreement.

(f) Agency shall make direct payments of the appropriate union pension and welfare fund contributions required on account of Artist’s engagement hereunder.

(g) Any additional sums which may become due hereunder shall be paid as they become due.

**Comments**

The sample agreement in Subclause (d) also addresses “overtime” situations where additional production days are required (i.e., where production of commercial materials runs into extra days and guild minimum payment requirements must be satisfied, or when artist is able to negotiate additional salary). Artist may seek a flat fee for each additional day or partial day at a fixed sum ranging from five hundred to five thousand dollars per day. Alternatively, reference can be made to a guild agreement covering the contemplated services, and “overtime” compensation may be made payable at the guild’s minimum rate or at a multiple of such rate. Typically, artist may be paid two or three times guild minimum in these situations.⁵

(h) Agency shall provide Artist with quarterly use statements (the “Statements”) as to the use of all Commercial Materials. Said Statements shall be accompanied by all payments in excess of the guaranteed amount, if any, for the relevant year of the Term required by virtue of such use.

**Comments**

Subclause (h) requires delivery to artist of statements reporting the actual use of the commercial materials. This information is most relevant where artist derives compensation as a function of the manner and frequency with which the commercial materials appear. Artist may also find this information useful in negotiating subsequent endorsement deals or in assessing in general the exposure artist may have obtained under the agreement.

5. **EXCLUSIVITY.** During the Term of this Agreement, Artist shall not render services nor authorize or permit the use of Artist’s name, likeness, voice, endorsement or biographical material, directly or indirectly to promote or advertise in any media, any competing products or companies. This restriction is not intended to preclude Artist from appearing in television or radio programs which may be sponsored by similar products provided that Artist does not appear in any commercial portion of such program including billboards, lead-ins to or lead-outs from such commercial

⁵ See comments to “Pay or Play” Clause 14 infra.

⁶ See ¶ 140.01[3] supra for the names and addresses of the relevant guilds and unions.

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portions and make specific product mention therein.

**Comments**

5. Once client has engaged artist as a spokesperson or for an endorsement, it has an interest in maintaining artist’s exclusive association with the advertised service or product in the public mind for the duration of the term. Conversely, any exclusivity restricts artist’s opportunity to earn income from restricted sources, i.e., other endorsement or promotional relationships. The value of this exclusivity to both parties should thus be factored into the compensation payable under the agreement—the more restrictive the covenant, the greater the compensation artist will seek to command. A broad exclusivity provision will limit the right of artist to endorse not only similar products, but often entire categories of products. For example, artist endorsing a carbonated soda may be restricted from endorsing any food or beverage product. Artist may react to such a provision by demanding increased compensation of as much as fifty to one hundred percent over the sums payable for “non-exclusive” services. Counsel should keep in mind, however, that artist’s desirability as a spokesperson by other sponsors is generally limited by an affiliation with another product unless artist is a major star. The sample contract takes a middle ground by staking out fairly reasonable restrictions on artist’s appearances in a competitive context. The concept of “competing products or companies” may nonetheless sometimes merit definition. For example, Honda Motorcycles may reasonably seek to restrict artist from appearing on behalf of Kawasaki Motorcycles, but what about Yamaha Musical Instruments or Nissan Automobiles? Artist’s representative will in such cases assess the likelihood that a second endorsement deal could be secured, and then pit the “lost opportunity value” to artist against the potential (speculative) damage to sponsor in determining the strength of artist’s negotiating position.

If artist is a touring professional, artist may also seek to avoid unnecessarily restricting tour sponsorship opportunities by virtue of such exclusivity requirements. Where restrictions cannot be avoided, artist should seek some sponsorship guaranty from the client toward artist’s tour during the term or, in the alternative, limit client to a first refusal right for tour sponsorship (i.e., client would have the right to match an offer for tour sponsorship but could not preclude artist from making a deal with a third party unless it matches the deal being offered by such party). 7

6. **PERFORMANCE OF SERVICES:**

(a) Artist will render services hereunder in accordance with the scripts and/or other materials furnished by Agency for such purposes. However, the content of all commercials and other materials produced hereunder shall be subject to Artist’s prior approval to be exercised reasonably and in good faith. Artist warrants the delivery and truthfulness of any personal endorsement or representation made by or attributed to Artist in the commercials or materials produced hereunder. Artist will render services in a professional and artistic manner to the best of Artist’s ability and all of Artist’s services hereunder will be subject to Agency’s approval, direction and control at all times, and Artist will comply with whatever reasonable instructions, suggestions and recommendations Agency may give in connection with the rendition of such services.

(b) Artist agrees that, while this Agreement is in force, Artist shall use Client’s Products. In the event Artist discontinues using the Products, Artist shall promptly notify Agency in writing of such fact and Client shall have the

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7 For a discussion of tour sponsorship issues, see Chapter 150, Tour Sponsorship and Chapter 155, Tour Merchandising, supra. See also Chapter 150 supra discussing live performance.

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right to terminate this Agreement forthwith.

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<td>6. The requirements in the sample agreement that artist render services in a professional fashion, that all endor-</td>
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<td>sements be truthful, and that artist will comply with reasonable instructions in the production of the commercial materials are fairly straightforward. Once again, however, artist should be certain to obtain approval rights over the script and other materials which are to be utilized.</td>
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<td>Client may require artist to actually use the endorsed product or service during the term, and may deem such use material to the agreement. If language to that effect is required, it may be incorporated as in the affidavit attached as Exhibit “A” to the sample agreement. Artist should be careful to govern artist’s behavior accordingly.</td>
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<td>7. RIGHTS: All advertising material produced hereunder will be and remain the absolute property of Client forever. Artist acknowledges that he does not now have and in the future will assert no right, title or interest of any kind or nature whatsoever therein, or in or to any component part or tape, dub or copy or element or character or characterization thereof. Furthermore, Client shall have the right at any time during the term of this Agreement to make any revision or versions of all or any part of the Commercial Materials to conform to the requirements of individual markets as Client may desire, subject to Artist’s reasonable approval as aforesaid. Client shall have the full and complete right during the term of this Agreement to broadcast, use, reproduce, copyright, renew copyright and/or exhibit the commercials and other materials as hereinabove provided as well as the right to use the same at meetings held or attended by Client or for trade purposes. Furthermore, Client shall have the right during the term of this Agreement to use Artist’s name, approved likeness, voice, approved biographical material and approved endorsement in television, radio and audio-visual Commercial Materials and in print advertising as hereinabove provided and limited including trade advertisements and trade selling materials.</td>
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<td>7. Agency’s rights to the artist materials under the agreement should be subject to the fulfillment of all payment obligations to artist. Where the use of artist’s name, likeness, voice, and biographical material are included in the rights section, artist should make certain that such use is subject to the various approval requirements specified elsewhere in the agreement and discussed above.</td>
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<td>In addition, artist may seek to restrict agency’s rights to manufacture materials, including posters and memorabilia, the distribution of which (whether on a free promotional basis or commercially) might compete with artist’s own merchandising. For example, T-shirts sporting artist’s image with the logo of a beer company on the back, if distributed gratis at artist’s tour appearances, could significantly reduce the volume of sales of other merchandise directly licensed by artist and sold at the concert site and could materially interfere with artist’s other contractual obligations. From artist’s point of view, therefore, the agreement should make clear that no merchandising rights are included in the endorsement arrangement without specific negotiation. Agency may on the other hand insist on some limited right to use artist’s photograph, name, likeness, etc. in a limited number of “merchandising” type items for its own internal or trade promotional purposes. If such use is permitted by artist, some restrictions on the type of items, production runs, time, place and manner of distribution, etc., should be considered. Artist should always insure that the rights to all commercial materials, still photos, etc., will be retained exclusively by the client/agency and that all commercial materials will be destroyed at the conclusion of the agreement. This approach is intended to avoid, for example, the risk of an immensely popular print ad acquiring an afterlife as a commercial art poster or in another unauthorized form.</td>
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8. BREACH: If Artist at any time should breach any material provision of this Agreement, or at any time fail, neglect or refuse to fulfill any of his obligations hereunder, then Client shall have the right, in addition to its other le-

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8 See Chapters 154–156 and 158 regarding such merchandising.

9 For useful language see the Tour Merchandising Agreement, FORM 155-1, clause 5 supra.

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gal and equitable remedies, to terminate this Agreement forthwith (in which event Client shall thereupon take all reasonable steps to cease as promptly thereafter as reasonably practicable all use of materials containing Artist’s name, voice, likeness, biographical material or endorsements), and a portion of that part of the guaranteed sum theretofore paid to Artist for the Term in which such termination occurs shall be repaid to Client. The portion to be so repaid shall equal:

(a) that part of such guaranteed sum which has theretofore been paid to Artist, less
(b) the guaranteed sum for such Term when multiplied by a fraction the numerator of which is the number of days remaining in such Term after cessation of all use of materials containing Artist’s name, voice, likeness, biographical material or endorsement and the denominator of which is the total number of days in such Term.

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<td>8. Artist and agency/client should be certain that the agreement is not subject to termination for other than a material breach of its terms and conditions. In addition, wherever possible, all “material” terms should be identified as such. Agency may also seek the right to terminate the agreement in the event of artist’s death or disability, even if all artist’s physical services have been rendered, plus repayment of a prorated portion of artist’s compensation proportionate to the reduced term. As provided in the sample agreement, upon termination, agency should immediately cease its use of the commercial materials, although agency may desire a reasonable wind up period for the publication or exhibition of ads or commercials or the sale of products in packaging featuring artist which have already been contracted for and which cannot be withdrawn without unreasonable inconvenience (e.g., where commercials have already been edited into a syndicated television show which has in turn been distributed or transmitted for delayed broadcast, or artist’s likeness has otherwise been incorporated in products which are already on the shelf).</td>
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9. **MORALS:** During the term hereof, Artist will conduct himself at all times with due regard to public morals and conventions. If Artist shall have committed or shall commit any act or do anything that is or shall be an offense involving moral turpitude under Federal, State or local laws, or which brings him into public disrepute, contempt, scandal, or ridicule, or which insults or offends the community, and which thereby injures the success of Client or any of Client’s products or services, shall make any statements in derogation of the Client or Product and such statements are made to the general public or become a matter of public knowledge, then at the time of any such act or at any time within ten (10) days after Client or Agency learns of any such act, Client shall have the right, in addition to its other legal and equitable remedies, to terminate this Agreement forthwith, (in which event Client shall thereupon take all reasonable steps to cease as promptly thereafter as reasonably practicable all use of materials containing Artist’s name, voice, likeness, biographical material or endorsements) and a portion of the guaranteed sum theretofore paid to Artist for that Term shall be repaid to Client as computed in Clause 8.

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| 9. The endorsement agreement is one of the few service agreements in the entertainment industry for which a morals clause is readily defensible. If required, the artist will want the terms of such a clause to contain the most limited and objective criteria possible. Just as the definition of pornography has varied from community to community over the years (as well as from year to year), so standards of personal conduct may vary. The opinions of agency or client based in Salt Lake City may differ from those of a Los Angeles headquartered concern.

Where an artist’s reputation in the entertainment industry is built on wild behavioral antics, a “morals clause” may pose particular problems. Negotiable guidelines as to grounds for agency termination could conceivably be narrowed to arrest or indictment for a felony, resulting in a verifiable/quantifiable decline in consumer acceptance of the product, etc. Actionable “derogatory statements” might also be limited to those which agency can “prove” resulted in specific adverse impact.

In these times of highly publicized corporate scandals and product liability actions, artist may in turn seek a reciprocal right of termination in the event of a client action which adversely affects artist’s reputation by association. |

10. **UNION COMPLIANCE:** Artist represents and warrants that, to the extent permitted by law, Artist is and will re-

Jay Shanker
main a member and signatory, respectively, of any union or organization having jurisdiction over services rendered by Artist hereunder, i.e., the Screen Actors Guild and the American Federation of Television and Radio Artists. Agency similarly represents and warrants that, to the extent permitted by law, it is a signatory to the applicable union agreements and codes governing Artist’s services hereunder. Artist’s employment hereunder shall be subject to the terms and conditions of the applicable union agreements and codes (and Client and Agency shall have the maximum benefits which may be obtained under such union agreements and codes), and if there is any conflict between the provisions of such union agreements and codes and this Agreement, this Agreement shall be deemed modified to the minimum extent necessary to eliminate the conflict.

11. **RIGHT TO CONTRACT**: The parties hereby warrant and represent that they are free and have full right to enter into this Agreement and to perform all of their obligations hereunder and to grant all rights hereunder without violating the legal or equitable rights of anyone.

12. **NOTICES**: Any notice to be given by Agency or Client to Artist hereunder shall be deemed to have been sufficiently given if delivered personally or mailed by certified mail to Artist at the above address, with a courtesy copy to (name and address of attorney for artist). Any notice so mailed shall be deemed to be given on the day it is mailed.

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**Comments**

10. If artist belongs to any guild with jurisdiction over all or a portion of the contemplated employment (e.g., Screen Actors Guild or American Federation of Radio and Television Artists), artist should be certain that the agency or other party which is the employer of record for the engagement is (or immediately applies to become) a signatory. If agency is actively engaged in the production of commercial materials for use over the electronic media, it will probably be a signatory to the applicable agreements and will accordingly require artist’s membership in the appropriate union or guild. If artist is not yet a member of the union or guild with jurisdiction over the contemplated services, he cannot be held in breach of the provision so long as he applies for membership. Artist should be aware of the membership regulations of relevant guilds and should be prepared to comply with their requirements.

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13. **COMMISSIONS**: Artist warrants and represents that neither Client nor Agency shall be under any obligation for the payment of any commissions to agents of Artist on account of this Agreement.

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**Comments**

13. The provisions of this clause contrast with the practice in some industries of the buyer of services or property paying all fees related to the closing of the deal. If artist wishes to structure his compensation so that commissions to his or her representatives are paid directly by the agency (either to reduce his or her direct income for tax purposes or to obtain an indirect “bonus” from the agency), this should be negotiated up front and documented accordingly.

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14. **PAY OR PLAY**: The payment to Artist of the consideration provided for herein will fully discharge all obligations hereunder of Client and Agency and neither Client nor Agency shall be obligated to use any Commercial Mate-

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Jay Shanker
rialis or other advertising materials made hereunder or to make use of Artist's services hereunder.

Comments

14. The term "pay-or-play" is common in entertainment industry employment when artist has any "negotiating clout." This provision (which is usually subject to negotiation and is not automatically offered by agency) assures artist of payment of the compensation guaranteed under the agreement so long as artist is not in breach of his obligations. If agency decides after the agreement is signed to substitute another personality to render services in lieu of artist, or elects for any reason after production of the commercial materials not to use them, artist's compensation is guaranteed. Artist should seek language acknowledging that the pay or play obligation commences upon signature of the agreement.

As a corollary, artist should obtain the right to injunctive relief if any commercial materials are used by agency without full payment to artist of the compensation provided for or if agency uses materials which were not properly approved by artist.

Artist may also wish to provide for termination of the agreement if commercial materials are not produced, or, if produced, are not utilized in the contemplated manner, within a fixed period of time following the date of the agreement. If this occurs, artist would have the choice of keeping his compensation under the pay-or-play provision and sitting out the term, or of reimbursing agency for all or a portion of his compensation in order to seek a substitute agreement with another sponsor, should exposure be more valuable to artist than the income from the agreement.

15. **INDEMNIFICATION:** Artist agrees to indemnify and hold harmless Client, Agency and their respective officers, directors, agents, licensees, employees, successors and assigns from and against any and all loss, cost, liability and expense including, without limitation, reasonable attorneys' fees: (a) arising out of any breach by Artist of any undertaking, warranty, representation or agreement contained herein or (b) arising out of the proper exercise of rights granted hereunder.

Agency and Client, jointly and severally agree to similarly indemnify Artist, and in addition, to similarly indemnify Artist in respect of claims relating to the Product, including claims arising directly or indirectly from the use of Artist's name, voice and likeness hereunder (including further without limitation, the use thereof in a manner pre-approved by Artist).

Comments

15. Both artist and agency should seek full indemnification from the other for claims and damages arising out of any breach of their respective obligations. Artist should also secure full indemnity for any products liability action in which artist may become a party as a result of his affiliation with client or agency (and artist may desire to be named as an additional insured on client's products/liability policy). Artist can try to put a cap on his liability under this provision equal to the amount of compensation earned during the term in which the breach occurs.

16. **SUBSTITUTION:** All rights described in this Agreement as vested in or owned by Agency, are vested in or owned by Agency for and on behalf of Client. Client, at any time, shall have the right to designate any advertising agency or firm in connection with this Agreement in the place and stead of Agency, and upon said designation, this Agreement shall be read and construed as if the name of the agency or firm so designated by Client were substituted for the word Agency, wheresoever the same may appear in this Agreement, and Agency will thereupon be re-
leased from all obligations and duties which it may have undertaken to perform thereafter under this Agreement.

**Comments**

16. Sponsors switch ad agencies with the same regularity that artists switch talent agencies (and counsel). If client seeks this right of substitution, artist may request assurances that the substitute agency will be equal in stature (e.g., number of national offices, annual billings, etc.) to the agency making the deal. If artist is entering the agreement based upon a personal relationship with an executive of the agency itself, artist may seek a “key-man” clause stipulating that future options of any kind may only be exercised if that individual is retained on the account. Nevertheless, since the substitution may have a positive impact on the success of the campaign, artist should consider this issue pragmatically.

Artist should be certain that “substitution” applies merely to advertising agencies and not the product or service artist has agreed to promote.

17. **WAIVER:** The failure of any party hereto to exercise the rights granted them herein upon the occurrence of any of the contingencies set forth in this Agreement shall not in any event constitute a waiver of any such rights upon the occurrence of any such contingencies.

18. **APPLICABLE LAW:** This Agreement and all materials and/or issues collateral hereto shall be governed by the laws of the State of (name), applicable to contracts made and performed entirely therein.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of ________________.

By ________________

AGREED:

________________________

(Artist)

[The following may be inserted as Artist’s ratification of agreements between agency/client and Artist’s loanout company.]

I have read and am familiar with all of the terms and conditions of the foregoing Agreement. I represent, warrant and agree that I shall render all services, grant all rights and observe all restrictions necessary to enable Contractor [i.e., the loanout] to comply with its obligations thereunder. I shall look solely to (name of loanout) for full payment of any compensation due me for all services performed by me, for all rights granted by me, and for discharge of all other obligations of an employer.

Dated: ________________

________________________

Artist

**Comments**

17. Agreements of this type are common in every community in the country. A large number are nevertheless negotiated in or concern services performed in New York or California as New York and California are popular homes of numerous major corporations, advertising agencies, and commercial production houses. The laws of New York and California are the most fully developed in this area, and thus the outcome of their application to disputes can be better predicted than may be the case for the laws or courts of other jurisdictions. Nonetheless, convenience factors may be paramount to one or both of the parties in picking applicable law even when New York or California jurisdiction is available.

**EXHIBIT “A”**

**AFFIDAVIT**

Jay Shanker
I HEREBY DEPOSE AND STATE THAT I DO USE THE (product name) AND THAT THE STATEMENTS MADE BY OR ATTRIBUTED TO ME IN THE COMMERCIALS AND OTHER ADVERTISING MATERIALS ARE TRUE.

Witnessed: ____________________

______________________________
"Artist"

Sworn to before me
This __________ day of, 19 __________

______________________________
Notary Public

State: _________________________
County of: ______________________

Comments
Exhibit ‘A’. Testimonial Affidavit. The sample affidavit will confirm artist’s use/recommendation of the product. Artist will want it drafted narrowly (e.g., “Artist uses the Product” versus “Artist uses the product to the exclusion of similar Products”). As the exhibit by reference forms an integral part of the agreement, behavior contrary to that affirmed in the affidavit may be grounds for termination by agency/client.

Entertainment Industry Contracts
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