

Celebrity Endorsement Agreements: Contracting With The Stars



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How to negotiate a celebrity endorsement contract.

CELEBRITY ENDORSEMENTS sell. Your clients may, therefore, find themselves hiring celebrities to endorse their products or services. And you may find yourself drafting agreements to govern that relationship.

Whether you represent a celebrity or a company hiring one, here are the most important points to cover in a typical celebrity endorsement agreement. The final agreement will, of course, depend largely on the particular business context. You will often need to cover issues beyond those suggested here. Still, this list will give you a good starting point.

For more on this topic, see Michael P. Allen, *Sponsorship and Promotional Rights Agreements: Practical Advice for Lawyers*, 47 *The Practical Lawyer* 4, 49 (June 2001) and Gregory J. Battersby & Charles W. Grimes, *Multimedia and Technology Licensing Agreements* §§6:1 *Drafting Celebrity Endorsing Agreements*, 6:3 *Celebrity Endorsement Agreement* (West Nov. 2005). Battersby and Grimes have published extensively on this and related topics (see www.gandb.com/library.html).

This article assumes that your client will develop a high-end residential condominium and hotel project, and has engaged a celebrity—an actor, an athlete, a leading real estate lawyer, whoever—to endorse the project and

promote sales. The range of possible celebrity engagements knows no end.

1. Parties

Figure out who needs to sign the agreement. A celebrity will often act through a management company. In that case, satisfy yourself that the management company has authority to sign for and bind the celebrity. The management company will become your client's counterparty for at least some "legal" components of the relationship. In those cases, wherever this article refers to the "celebrity," you may need to refer instead to the management company.

Are any trademarks, copyrights, logos, or other intellectual property associated with the celebrity? Will your client want to use them or refer to them? If so, who has authority to allow their use?

Make sure everyone you need is at the table and signs the agreement.

2. Define The Endorsed Product

Define the product or service the celebrity will endorse. This will help you think through other provisions in your agreement and figure out exactly what you will want the celebrity to do. If the celebrity will endorse a hotel and condominium project, is it just this one project? Or will the endorsements also cover the developer's other future projects? In what geographic region? Everywhere? And what if the project changes?

3. Duration

Make the agreement last as long as possible, while preserving your client's flexibility to terminate the celebrity relationship if it no longer adds value. Include not only the "obvious" period for the agreement but also some possible extension, so your client can "finish up" its marketing. For example, TV commercials might run after the main term of the agreement expires. And if the celebrity's name or photograph appears on products, your

client will need the right to sell that inventory until exhausted.

Your client may also want the right (or a right of first option of some kind) to renew the contract or continue the relationship for other projects.

4. Services Required

What does your client expect from the celebrity? Try to describe in detail, to the extent you can, what the celebrity will actually do to promote the project or other product. If you anticipate the celebrity will make promotional appearances, try to define how that will work.

On the other hand, undertaking a celebrity endorsement program does not have the specificity of building an office building or marketing a piece of real estate. And the endorsement program may take shape and change over time. Questions to ask include:

- How many appearances will the celebrity make?
- When?
- Where?
- How much notice must your client give?
- What scheduling procedures will govern?
- How long will the celebrity be expected to appear?
- Will the celebrity support only a particular part or all parts of the project?

If the celebrity will endorse a new condominium hotel, for example, think about whether the celebrity will remain associated with the hotel after its opening date. This could require coordination with the hotel manager and the marketing activities the manager will control. If the celebrity simply agrees to visit or "hang out" at the project for a certain time, define what that means. For athletes, your client will often need to schedule any in-person appearances around the playing season for the particular sport.

Try to have your client think creatively with help from the marketing team. Include "catch-all"

and “best efforts” provisions so you can ask the celebrity to do more if you forgot to list it the first time. For a list of activities that a celebrity endorser might agree to perform, see the Appendix at the end of this article.

Remember, though, that a celebrity’s first priority must be his or her profession. The celebrity’s services as an endorser must take second place to the celebrity’s “day job.”

5. Compensation And Timing Of Compensation

The compensation arrangement—how much and when—will represent a business negotiation that will vary for every transaction. The fewer obligations your client imposes on the celebrity, the lower the compensation and vice versa. A more well-known celebrity can command higher compensation.

Your client may agree to pay a fixed fee periodically, plus contingent compensation for particular activities or results. To the extent that compensation depends on sales, your client will first want to deduct taxes, transaction costs, bad debts, returns (actual and projected), and whatever else your client can justify. If the celebrity wants the right to audit, your client will want to make that right as narrow, brief, and difficult to exercise as possible. Prohibit the use of contingent-fee auditors.

Ideally, your client won’t need to compensate the celebrity until the celebrity has done everything he or she was supposed to do. This isn’t realistic, of course, but you should phase the compensation to reflect services rendered.

If a celebrity endorses a condominium and hotel project, for example, the sell-out may take a while, particularly for multiple phases. So your client might want to give the celebrity only the right to occupy a condominium unit in the project during the sell-out. The celebrity might receive outright ownership of the unit itself (or a right to buy at a large discount) only after your client has

completed its marketing program and the celebrity has delivered the endorsements and other services promised.

6. Expenses

What expenses will the celebrity incur (e.g., travel, hotel or utilities and maintenance for condominium unit, meals, etc.)? Which of these, if any, does your client intend to pay? The celebrity will typically expect first-class travel and hotels throughout, to say nothing of personal assistants to prepare for any appearances.

7. Performances

If the celebrity will perform, additional issues will arise, such as royalties for songs and possible claims by musicians or third parties. These issues and their resolution are not intuitively obvious, and will require involvement of a lawyer with expertise in the music business.

For rock musicians in particular, the amenities and perquisites for any performance have become a bizarre subspecialty of contract negotiations. Contracts for these performances often include many pages of specifications that can rival the “specs” for a small construction job. To see more than 200 contract riders of this type, for information and amusement rather than as models, visit www.thesmokinggun.com, then click on “Backstage” at the bottom of the home page.

8. Use Of Name/Photograph

Will any of your promotional materials, or anything else at the project, actually use the celebrity’s name or photograph? If so, your agreement should expressly allow it. The celebrity may want approval rights, but trim them back as much as you can.

Try to obtain pre-approval of any specific use or format that might raise questions or concerns (e.g., displaying the celebrity’s name in six-foot-high letters on a billboard next to the project or in skywriting over major beaches).

Also, if you contemplate trying to attract “paparazzi,” the celebrity will not be able to approve their work.

9. Exclusivity

What kind of exclusivity do you want? Don’t just prohibit the celebrity from endorsing directly competing products or services, such as high-end condominiums in the same county where your client’s project is located. You might also want to prohibit the celebrity from undertaking incompatible or potentially offensive, inappropriate, or controversial marketing programs (e.g., acting as spokesman for a low-end hotel chain or discount store, the fur industry, ski vacations if your client’s condominiums are by the beach, abortion rights, politicians, religious or quasi-religious causes, etc.). You might not want the celebrity to participate in any public activities that might be identified with your client’s competitors.

How you approach this subject will depend on the size and nature of the market your client has targeted. It will also depend on the particular celebrity involved, and that celebrity’s attraction for controversy. A leading movie star who has repeatedly expressed strong support for the war in Iraq, for example (is there one?), may not want to agree to sit down and shut up to protect your client from controversy.

Exclusivity may start to burn off at a certain point or if the celebrity’s compensation during a particular period has not reached a particular level. Conversely, exclusivity may also continue for some time after the main agreement terminates.

Even after full termination of the endorsement relationship, you may still want to bar the celebrity from undertaking future promotion programs, for other sponsors, that somehow refer to a slogan or theme the celebrity used in your client’s program.

10. Infringement

What happens if the celebrity violates the exclusive, or someone else uses the celebrity’s name or picture to promote a competing project? In general, you want your client to have the right to take action and obtain appropriate equitable relief. The celebrity should authorize your client to enforce the celebrity’s rights, at least if the celebrity does not do so.

11. Death/Insurance

If the celebrity’s death would significantly impair the marketing program, consider obtaining a suitable life insurance policy, something like a “key person policy,” to cover this risk. This would require the celebrity’s consent. Consider similar issues about the celebrity’s disability or injury.

12. Changes In Activities

What assumptions are you making about the celebrity’s activities? If the celebrity is a tennis star, for example, would you want to rethink the arrangement if they decided to hang up their racquet in favor of practicing trusts and estates law full time? Your client may want the right to terminate if the celebrity does not maintain a certain level of involvement in his or her “primary” celebrity role.

13. External Surprises

Think about what could go wrong (externally) and how it might affect the relationship between your client and the celebrity. Examples include construction delays, substantial interference with travel to the local area, and natural disasters.

14. Early Termination

If your client were to drop the project, what should happen to the arrangement with the celebrity? In a substantial real estate development project, the client will probably want the right to decide not to proceed. This might trigger some equitable

dollar compensation and then the parties should go their separate ways.

On an equally optimistic plane, what happens if your client decides the relationship with the celebrity isn't working out or adding as much value as the client thought? Again, your client should have the right to terminate with some equitable compensation, less than the full compensation originally contemplated.

Early termination could also require a notice period (or payment in lieu of notice).

The celebrity might want some minimum "test period" before your client can end the relationship. Conversely, your client may want a "probationary" period, with the right to terminate for any reason or no reason during the first, e.g., 90 days. All of these points can be negotiated, probably in tandem with negotiating up-front payments and termination fees.

The company engaging a celebrity endorser will also want the right to terminate the arrangement if the celebrity:

- Does something that is offensive or contrary to your client's best interests, or gets involved in some kind of scandal or other negative news reports. (Your client might want to act as judge, jury, and executioner on this issue. More typically, though, you should expect to see an objective test, such as whether "mainstream media outlets have publicly reported" that the celebrity has "acted in a manner that is generally perceived by the public to be socially reprehensible and significantly beyond generally accepted norms");
- Misrepresents or conceals the celebrity's background;
- Is indicted or accused of some form of criminal activity (conviction shouldn't be necessary);
- Fails to remain in the public eye, which can be defined in some reasonable way depending on what kind of celebrity is involved;

- Fails to maintain a certain performance level (e.g., winning at least a certain number of games or races every year); or
- Retires.

Will termination make your client whole in any of these cases? If not, you may want the right to claim something more than just a right to terminate. But your client could probably never persuade a court of the exact "damages" any of these events caused. Hence you may want to give your client the right to liquidated damages. The celebrity may reject the concept out of hand and try to negate any possible liability (beyond termination of the agreement) under these circumstances. Your client will at least want the right to retain any sums still due the celebrity at that point.

Conversely, the celebrity will want termination rights if your client violates the agreement or, perhaps, fails to market its goods or services to a certain defined degree. (Remember, the celebrity benefits, too, by being in the public eye. If this arrangement doesn't achieve that result, the celebrity may want to rethink it.)

15. Suspension

Your client might want the right to suspend the celebrity endorsement arrangement, without losing it, and suspend monthly payments, if for some reason your client suspends or delays its underlying business.

For example, if environmental surprises force your client to suspend its condominium development for a year, your client might want to be able to "keep" the celebrity tied to the project, but suspend payments while the project is stalled.

16. Agency/Brokerage

The celebrity should agree to pay any agency commissions, management fees, administration fees, and so on (just like real estate brokerage commissions), except to the extent that your client has expressly assumed that obligation.

17. Coordinate With Other Marketing

Your client will want to coordinate the promotional activities that involve the celebrity with the rest of the client's marketing program. This doesn't affect the agreement with the celebrity much, except that it emphasizes the need for the client to have strong controls over exactly what the celebrity does and when.

18. Confidentiality

How confidential does the client want the relationship with the celebrity to be? Define that understanding as part of the agreement. Conversely, will the celebrity expect the client to keep the arrangement confidential? Laws and regulations (such as FCC rules on "promotional consideration") may require "disclosure" of the fact that your client compensated the celebrity. Any confidentiality clause will need to include the usual exclusion for legally compelled disclosure, which could turn out to be rather broad.

And what if the celebrity breaches the confidentiality clause? Damages will be next to impossible to prove. So you may want to provide for liquidated damages and the right to withhold any amounts your client still owes the celebrity.

19. Previous Agreements

The celebrity will need to assure your client that his or her arrangements with your client do not violate any previous agreements with other marketers, sponsors, companies, or other third parties.

CONCLUSION • If a celebrity endorsement agreement covers these points, and whatever further points might arise from thinking about your client's business strategy and expectations and negotiating the points suggested above, then your client should be well on its way to having a celebrity endorsement arrangement that will add value, not produce unpleasant surprises or impose an unreasonable burden.

APPENDIX

Possible Celebrity Responsibilities Under Endorsement Contract

A celebrity might agree to perform some of the following tasks under a hypothetical contract providing for the celebrity to endorse a high-end hotel and condominium project. The celebrity's responsibilities will vary, of course, with all the circumstances, including the nature of the project, the expectations of the parties, and the recommendations of your client's marketing team:

- Appear at press conferences to announce project-related milestones;
- Announce the celebrity's plans to travel to the project for vacations and events;
- Use the celebrity's photograph in brochures, websites, on-site signage, promotional give-away products;
- Cross-link between the celebrity's website and the project's website;

- Host parties for other celebrities, thought leaders, media, real estate lawyers, etc., either on-site or in major cities, themed to promote the project;
- Arrange photo shoots, movie shoots, etc., at the project (although media companies will probably have their own ideas of appropriate locations);
- Reside at the project a certain number of days every year, and try to make sure the media knows about these living arrangements;
- The celebrity will be entitled to, and should try to use, a certain amount of free food, beverage, and spa services at the hotel every month;
- Perform at the project (additional compensation);
- Own, dock, and/or use a boat at the project, if it includes boating-related components;
- Allow the developer's PR team to notify paparazzi of celebrity's arrival, departure, and other activities at the project;
- Mention the project in press interviews (and elsewhere), particularly if arranged by the developer's PR team;
- Participate in design or brainstorming sessions about the project, so that promotional materials can say that the design reflects the celebrity's ideas and suggestions (see, e.g., www.jadenyc.com);
- If the celebrity is a musician, assist in developing or performing a theme song;
- Attend marketing events;
- Cooperate in whatever promotional/PR activities the developer's PR team comes up with from time to time (wide open—the celebrity may insist on approval rights);
- Participate in events that the hotel manager arranges; coordinate the celebrity's promotional activities with the hotel manager's marketing and pre-opening plans; and
- Not discuss "off-limits" topics about the project, such as timing, phasing, future amenities, cost, construction progress, celebrity's compensation, marketing plans, or topics that might raise securities law issues (e.g., investment projections).