

## Exercise #2 Examples

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### From Cheetah's perspective:

Cheetah wants to minimize Acme's ability to terminate the contract. Accordingly, a morals clause does not benefit Cheetah, so he would prefer to omit the clause from the contract.

Nevertheless, Cheetah may not be able to do so. First, Acme has the cash and Cheetah wants it, so Acme may have more leverage than Cheetah (although because Cheetah is helping Acme develop a revenue stream, Cheetah could have leverage over Acme sufficient to negotiate away the clause). Second, Acme's investments in personnel, manufacturing equipment and marketing depend on Cheetah's brand, and Acme needs some threat to make Cheetah feel some negative consequences for Cheetah's bad behavior.

If you are Cheetah's attorney and proposing a first draft, you can take one of three principal approaches:

- Approach #1: play hardball and omit the clause in your first draft, rationalizing that if Acme wants the clause, they can ask for it. Sometimes this works because Acme's attorney won't notice the clause's absence or will feel like Acme lacks the leverage to demand it. More frequently, Acme's attorney will (a) be miffed by the omission, and (b) propose his/her own morals clause that will be harsher than anything Cheetah would have proposed.
- Approach #2: play softball and propose a clause that Acme will think is favorable to them. This reduces negotiation costs, but Cheetah may give up more than he wants (or than Acme needed) in doing so.
- Approach #3: propose a clause between these two extremes—generally favorable to Cheetah, but still enough to acknowledge Acme's desire for a clause. This approach has two advantages: (1) by explicitly addressing the issue, Acme will not pay much attention to the clause or, if they do, will not be as miffed as if it were excluded, and (2) to the extent the clause is negotiated, Cheetah has the advantage of having framed the issue favorably to him.

Typically, when drafting a first draft, I use approach #3. Consider the following:

“Acme may terminate this Agreement if Cheetah is convicted of a felony (and has exhausted or waived all appeal rights).” (20 words)

There are 2 principal limitations in this clause:

- Convicted and exhausted appeal rights. Because this is a very late stage in the criminal process, the contract continues during the prosecution period and cannot be terminated if Cheetah is found innocent.
- Felony. A felony is more serious than misdemeanors and statutory violations.

As a first draft, I would probably only propose this restriction. If I felt I needed to go further, I might add one additional limitation like:

“Acme may terminate this Agreement if Cheetah is permanently banned from participating in PPPPA-sanctioned events.” (PPPPA = Professional Ping-Pong Player Association).

### **From Acme’s Perspective:**

Acme can use one of two drafting techniques to conform Cheetah’s behavior.

First, Acme can enumerate a laundry list of harmful behaviors. The idea is that if Acme makes a comprehensive list, Acme will be protected from all unwanted activities. Unfortunately, it’s extremely hard to draft comprehensively. Inevitably, something is missing when you need it. Further, it can be costly/time-consuming to negotiate these lists; the parties tend to fight over each word.

Second, Acme can draft an abstract restriction that contains a superset of objectionable behaviors. Inevitably, these clauses regulate behavior overinclusively, putting Cheetah in breach of contract pretty much from day 1. To avoid the harshness of this result, Acme might suggest that Cheetah enumerate desired exclusions from the broad restrictions.

When I control the drafting from Acme’s perspective, I pick the second approach over the first. Consider the following (starting from Example #7 given to you):

“Cheetah shall not commit any act that could injure his or Acme’s reputation.” (13 words)

Doesn’t this cover everything that Acme cares about? Acme doesn’t want its reputation hurt by this relationship, and it doesn’t want Cheetah’s reputation hurt because that degrades the value of his brand to them. The “could” further expands the behavior set governed by the clause; read literally, the “could” applies to any behavior that has any potential negative impact on the public’s perception. Some courts would constrain the reading of “could” using doctrines like the implied covenant of good faith and fair dealing, but nevertheless “could” means that Cheetah will breach the contract on day 1 and Acme can enforce the provision in its discretion.