

March 17, 2020

RE: Potential COVID-19 effects on commercial agreements

It is always PPA's desire to assist our members through difficult times. Certainly, the current circumstances surrounding the spread of Coronavirus, and the resulting civil and economic disruption associated with it, qualifies as difficult. Our customer service center has received a handful of calls from PPA members asking for clarification regarding their options and obligations pertaining contracted agreements with clients. Most particularly, the questions focus on:

- A photographer's obligation to photograph an event at which they are not comfortable (because of the health risk). In other words, is there a way out of the agreement without being held responsible?
- A photographer's obligation to return down payments for events that are cancelled.

There are many considerations when attempting to address the issues, among them being state and local laws, and individual contractual agreements. As a result, PPA cannot offer specific legal advice on any given situation. However, we do offer the following to help members make the best decisions possible:

1. Follow the terms of your agreements. Where there is no ambiguity, stay within the terms you agreed.
2. Do everything you can to work cooperatively with your clients. Many events have been cancelled. Others will be postponed, but will be rescheduled. Now is the time to establish yourself as their "photographer for life" by demonstrating genuine concern for your clients' circumstances. It is in times like these that you earn your brand!

So with that in mind, let's take a look at three examples offered by Attorney Stephen Morris, partner at Meadows, Macie, and Sutton (Atlanta). Morris also oversees PPA's Indemnification Trust cases.

Example 1: Act of God/Force Majeure Clause with Non-Refundable Deposit

Contract clause A reads:

Upon the signing of this agreement by both parties hereto, the photographer will reserve the time agreed upon and will not make another reservation for the specific time frame. For this reason, all deposits are non-refundable even if the date is changed or if the wedding becomes cancelled for any reason.

Contract clause B reads:

If the photographer cannot perform this agreement in whole or in part due to a fire or other casualty, acts of God or nature or terror, or other cause beyond the control of the parties or due to Photographer's illness or injury, then the photographer will return all fees to the Client(s) (minus any costs already used i.e. plane tickets) but shall have no further liability with respect to this agreement.

Stephen's response:

This is the set-up we most commonly see in wedding photography contracts. Clause A advises that the deposit is non-refundable if the date is changed or the wedding is cancelled for any reason. However, the second clause creates an exception to that rule. A full refund of all monies paid is required if the photographer is unable to perform the agreement due to circumstances "beyond the control of the parties".

There is always room for an argument that a pandemic is "an act of God or Nature," however the best analogy is the application of these clauses in hurricane-prone areas. Typically, if a couple cancels on their own initiative because of the threat of a hurricane the "act of God or nature" provision will NOT apply as the decision was within the control of the parties. However, the situation is different when the government declares an evacuation of the area where the contract is to be performed or road closures prevent any access to the facility. In those cases, a full refund of all payments would be due under this agreement.

Applying the language to the current situation: If a couple cancels this contract due to their own fear or concern regarding coronavirus, the photographer would likely be able to retain the non-refundable deposit. However, if the wedding is canceled because of a government quarantine – the Act of God/force majeure clause would likely be applied and a full refund (less any fees for services already incurred) would be appropriate under the language of the agreement.

Example 2: Non-Refundable Deposit, But No Force Majeure Clause

A non-refundable reservation fee of \$___ is due at the time of the signing of this agreement. After receipt of this fee, the photographer will reserve the date and time agreed upon and will not make other reservations for that date and time. For this reason this fee is non-refundable, even if the date is changed or the wedding is canceled for any reason.

Stephen's response:

Another common approach is the contract that contains non-refundable retainer provisions and may also address limits of liability in the event of illness of the photographer – but that does NOT contain an "Act of God" or "Force Majeure" clause. In these cases, the bargain struck by the parties will normally allow the photographer to retain the non-refundable deposit as the unambiguous language indicates retention of the retainer if the wedding is canceled for any reason.

Example 3: All Payments Non-Refundable, No Force Majeure Clause

Contract clause A reads:

A non-refundable reservation fee of \$___ is due at the time of the signing of this agreement. After receipt of this fee, the photographer will reserve the date and time agreed upon and will not make other reservations for that date and time. For this reason this fee is non-refundable, even if the date is changed or the wedding is canceled for any reason.

Contract clause B reads:

In the event of a cancellation by the client for any reason, the client agrees that the Studio shall be entitled to retain all funds paid toward the balance of the contract as liquidated damages.

Stephen's response:

Liquidated damages provisions are sometimes upheld but are generally disfavored in contracts where the damages can fairly easily be determined. Photographers often argue that they should be entitled to keep all funds paid in the event of a cancellation due to lost profits and sales opportunities. However, our experience has been that Courts will generally take the position that since no work was performed the photographer is obligated to return the payments received for which no actual costs were incurred so that the photographer does not receive an unearned windfall from the cancellation of the contract.