

AICP Virtual Town Hall

A Primer on Late Payments and Collections

January 26, 2023

ASSOCIATION OF INDEPENDENT COMMERCIAL PRODUCERS, INC. (“AICP”)

STATEMENT RE ANTITRUST LAWS

Legal Counsel for the AICP has asked us to remind all AICP members that certain topics are not proper subjects for discussion and consideration at any association meeting of members, officers, directors or committees. While it is entirely appropriate to meet as an association to discuss common programs and areas of interest, it must be kept in mind that the members are competitors and any collective action taken to eliminate, restrict, or govern competition among members is a violation of the antitrust laws. If there is any discussion among the members at association meeting relating to significant factors of competition, an inference may be raised that such discussion is for the purpose of agreeing upon a common course of business conduct.

Among the subjects which members should never discuss with competitors, are markup percentages, credit terms, conditions and prices of service, allocating or sharing of customers and refusing to deal with a particular supplier(s) or customer(s). Such discussions might lead to agreements, or be perceived as agreements - -and agreements among or between competitors regarding any of these subjects are per se violations of the antitrust laws. Such violations can lead to severe criminal and civil penalties.

It is essential, therefore, that association officers and members follow rules to prevent any association meeting from becoming a forum for the types of discussions which might lead to an understanding or agreement, express or implied, with respect to any essential element of competition. A formal agreement is not legally required for an activity to be anticompetitive. For example, the Federal Trade Commission has held that it is enough if the activity “...had the purpose, tendency and capacity to facilitate price coordination among competitors.” (In Re National Association of Music Merchants, FTC 2009).

We suggest that you review in advance all agendas for association meeting in that light and that your discussions follow the prepared agenda.

Steps to Take if your payment is late

- Review your contract's payment terms
- Is the payment late according to the terms of the agreement?
- Does the contract contain sequential liability language?
- Do you have the advertiser's contact information?

Other Factors to Consider

- How late is the payment?
- Is the payment for overages or an installment of the contract price?
- If the payment is for overages, are the overages in writing?
- Are the overages cost plus?
- Have you provided the cost-plus actualization?
- Did you assume that you didn't need approval for overages because the job or category was cost plus?

More Factors to Consider

- Is there an insurance claim?
- Was there a force majeure event?
- Was the job cancelled or postponed?

Investigate

- Are there external reasons why the payment is late?
 - Is the Cost Consultant holding up payment?
 - Is there press/public information on the agency not being able to pay its bills?
 - Has the agency or advertiser filed for bankruptcy?
 - If the agency is going bankrupt, is sequential liability in the contract?

Practical Advice

- If the contract contains sequential liability
- If the agency has entered into the contract as principal
- If the spot hasn't been approved

More Practical Advice

- Tone is important
- Once a lawyer is brought in it takes it up a notch
- Don't go into too much detail in your emails
- Don't assume responsibility for a problem until you've investigated it and reviewed all the facts
- Are you willing to accept a payment plan?

Manage Expectations

- Production
 - Payment prior to commencement of principal photography
- Post-Production
 - Payment prior to delivery
- Value date the wire

Amend Your Contracts for Future Work

- Payment terms
 - Are you in agreement with the installment percentages and timing of the payments?
 - Does the contract say: “upon approval”, “upon review”, or “upon receipt”?
 - Does the contract say: “no sooner than” X days?
- Advertiser contact information
- Cost Plus *
- C.O.D. *
- Discount for cash *

** as determined by each company independently and privately*