

By Michael L. Antoline, J.D.

Nightmare on Elm Street

Sloppy pricing practices can turn your spa operation into a horror story.

CURTIS E. LAPH OWNED THE ELM STREET SPA IN Loma Linda, California, where he experienced a spa owner's worst nightmare. After spending \$5,000 to print a brochure touting his new day-at-the-spa package including pedicure, manicure, massage and facial, and mailing it to everyone on his client list, Laph discovered a disastrous mistake: The package price of \$250 was incorrectly printed as \$2.50. Was Laph under an obligation to meet that ridiculously low price?

Shortly thereafter, during the dog days of summer, a client walked into Elm Street Spa wielding Laph's spring spa menu. The menu's listed price for a facial was \$65, but it had since gone up to \$75 where it has remained for several months. Did Laph have to honor the lower price? What if the client was the chaperone for a prebooked busload of Little Miss Issippi Beauty Pageant contestants who were all expecting \$65 facials?

Finally, how about this for a chilling event? During an Elm Street Spa facial on Mr. Krueger, one of Laph's best clients, the esthetician suggested an aromatherapy scalp massage as well. Believing the massage was complimentary, Krueger agreed, and was outraged later when his bill reflected an additional \$25 for the add-on (and believe me, no one wanted to outrage Krueger). Was the spa obligated to erase the add-on service fee?

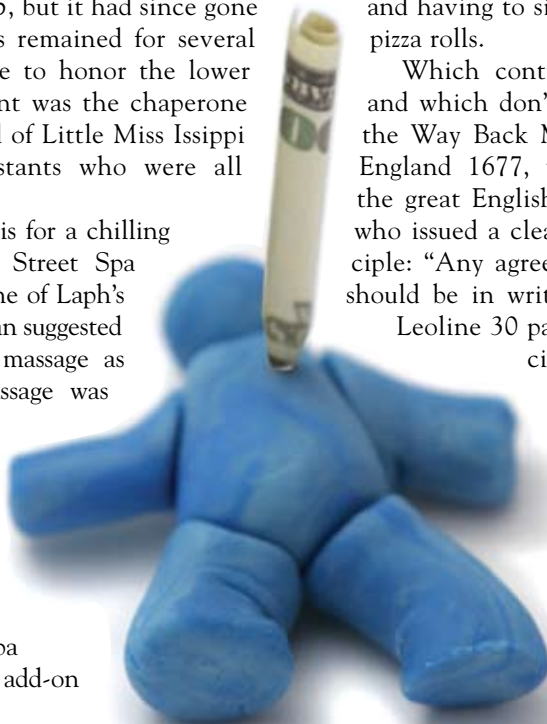
I Know What You Signed Last Summer

The resolution of such nightmares lies in—you guessed it—the principles of contract law. “Oh, jeez, not again,” you say. Sorry, but remember, you chose business over the arts. So let's explore how contract law applies to these situations.

First we need to dispel a myth. Except for a few circumstances, not all contracts have to be in writing. Oral contracts are binding and enforceable just like written contracts. You might ask, “Wouldn't it be better if all contracts were in writing?” Not at all; commerce would come to a grinding halt. Imagine going to the grocery store and having to sign a contract to buy a box of pizza rolls.

Which contracts need to be in writing and which don't? If we were to all pile into the Way Back Machine and set the dial for England 1677, we'd be in the presence of the great English lawyer Sir Leoline Jenkins, who issued a clear, profound and simple principle: “Any agreement that's really important should be in writing.” Amazingly, it took Sir

Leoline 30 paragraphs to set out this principle, but set it out he did, and it was memorialized in a piece of legislation called the Statute of Frauds and Perjuries. Why the funny name? Well, at the time London was as badly behaved as the town of Deadwood during the gold rush. Commerce was burgeoning, there was lots of money to



be made and lots of crooks to steal it. In short, everyone was making promises (contracts) and breaking them—and lying about it. Sir Leoline felt it was time to lay down a few guidelines for commerce. So, following his principle, he determined that the following types of contracts must be in writing:

- Contracts involving the sale of land (important)
- Contracts that take more than a year to complete (important, especially in personal service contracts; folks should not be made the equivalent of indentured servants on the mere word of another)
- Contracts in which someone agrees to be responsible for someone else's debt (important if you've ever heard the words, "Mom will pay for it")
- Contracts where one side of the bargain is a promise to marry (*über* important!)
- Contracts for the sale of goods worth more than 10 pounds sterling, which is \$500 American (see parentheses, third item above)
- A couple more that are too boring to include

Most states have incorporated these ancient principles and guidelines into current laws. But just about every kind of contract not listed above can be spoken and still be binding.

It Knows You're Alone

For a binding contract to come into existence it must possess certain elements. We won't cover them all here, but in relation to the nightmares we talked about earlier there are two important contract principles that apply. For a contract to be binding, it must 1) include an offer to do something, and 2) create the power of acceptance.

Here's an example. Ron Popeil says, "I'll sell to the members of our viewing audience this Ronco Showtime Rotisserie 5000 for three easy payments of \$53.30." Is this an offer? Yes; a reasonable person would understand Popeil as having made an offer. It helps that the offer was made to a specific group (the viewing audience), that the quantity was specified (one, implied by "this" rotisserie, although we know



Popeil has lots more in stock) and that a specific price was named.

Now let's change the Popeil spiel a little. Suppose he says, "I have a Ronco Showtime Rotisserie 5000 and I want \$159.90 for it." Is this an offer? No. Words are important. Ron says he "wants" \$159.90 and this implies he might take less. This is more of an offer to negotiate the price. More importantly, the first offer is specific enough to create the power of acceptance in the purchaser. In other words, there's enough in the offer such that if a buyer calls in and says, "I'll take one," it creates a binding agreement.

Now we can analyze the fact patterns that gave rise to spa owner Laph's nightmares. Remember the brochure that was mailed to his customer list? The complete day-at-the-spa package price was printed as \$2.50 rather than the correct price of \$250. Was

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Laph legally obligated to give all comers a day at the spa for \$2.50? After all, the offer was reasonably clear. It accurately described the

services, it was sent to a specific group and included a specific price (regrettably, 1/100 of what it should have been, but specific nonetheless).

This meets all the criteria for a valid offer. But did it create the power of acceptance in the customer? The answer is no. A reasonable person, especially a current client, looking at that ad would realize that a mistake had been made. A clearly mistaken price in an advertisement creates no power to accept.

How about Laph's spring menu facial price of \$65, \$10 less than his current price? When a client comes in waving the spring price list, does the spa have to honor the lower price? The spring menu was specific in all regards and created a valid offer with the power to accept it. What's more, you may recall that the Elm Street Spa is in Loma Linda, California. Under California law, a business owner must provide his or her service at the lowest advertised price. Ouch. Laph is stuck.

This illustrates two key points: 1) Contract law may be supplemented by various state laws and can vary, so it's important to know what your state statutes say about advertising mistakes, and 2) In contract law, an offer technically remains open until withdrawn or accepted. Put an expiration date on price lists, and if prices haven't changed upon expiration, print another price list with a new expiration date. The expiration date withdraws the offer. What about putting in the phrase, "Prices subject to change without notice"? This can't hurt; however, courts are loath to enforce contracts that are uncertain in their terms. The "prices subject to change" language may create a situation wherein a court would decide there's ambiguity about the price, leaving the price list to be construed as an offer not capable of acceptance. This, of course, would be favorable to the spa owner. However, different states may come to different conclusions on this issue.

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Finally, let's look at the facial during which one of Laph's therapists suggests an aromatherapy scalp massage to a loyal client, who, upon

receiving the bill with the additional \$25 charge, becomes irate because he thought the massage was complimentary. Is Laph on the hook?

Well first, Laph, don't be a dope. If the guy's a good customer, take the charge off the bill and he'll stay a customer. But legally, the answer depends on the words the therapist used and the circumstances. Did the therapist say to the client, "I would like to give you an aromatherapy scalp massage"? This might be construed not as an offer to sell the customer the service but to provide it as a comp. Did the therapist suggest, "Hey Freddy, would you like to try our new aromatherapy scalp massage?" This might very well be construed as an offer. If the client remained silent but allowed the therapist to proceed with the scalp massage, the offer could have been considered accepted. Contract acceptance can sometimes be implied from performance.

Finally, under certain circumstances, would a reasonable client have construed the aromatherapy scalp massage suggestion as an offer or a gift? These things sometimes depend on the context. Had Laph's therapists given clients complimentary add-on services in the past? If so, it might have been reasonable for the client to have assumed the massage was complimentary.

I'd like to tell you that Curtis E. Laph's story has a happy ending, but like most tales of this genre, it ends with horror, loss and a sadder-but-wiser hero. Laph's pricing policies resulted in a hideously slashed profit margin for the Elm Street Spa. And Krueger had to go searching elsewhere for a spa that could keep up with those much-needed manicures. There's a lesson in there somewhere. ●

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