

Marketing Recreational Programs — Truth Or Consequences

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Originally published in the *Outdoor Education & Recreation Law Quarterly*, 1(3), Fall 2001. Reprinted with permission of the authors and publisher, The Outdoor Network (800-688-6387).

Every recreational program is faced with the challenge of carving out its niche in the marketplace. How do you market to the public to attract the type of participants you need to sustain your operation? How do you convince your target audience that your program is unique, challenging, professional, on the cutting edge, or whatever other adjective or phrase comes to your mind to describe your program? On top of this, how do you choose to apportion your advertising/marketing budget amongst the many information options available today? Do you put out a beautiful (and expensive) glossy four-color brochure? Do you build an elaborate website or rely on aggregated web-based travel content providers? Do you resort to T.V., radio or travel agents? Or, do you simply rely on word-of-mouth?

Choices like these are difficult — but critical — to get your program off the ground, and to keep your program in the black. However, in making marketing choices, administrators are faced with a classic tension between considerations of effective marketing and legal protection. Bottom line: how do you achieve your marketing goals, while simultaneously providing appropriate disclosure and addressing legitimate legal and risk management issues? Program administrators may be tempted to overstate, make promises they can't keep or engage in confusing jargon to maximize enrollment or revenue. Oftentimes, programs will market without considering how their words may come back to haunt them in the event of a program-related accident or injury. Here are some examples we've seen (modified somewhat, to preserve anonymity):

- The program maintains “an unexcelled safety record.”
- “It (a described outdoor program) will be safe. We do everything in our power to assure the safest adventure possible.”
- “Our highly trained instructors will assure that your son or daughter is warm, dry, safe and comfortable in the wilderness.”
- “What if I've never been caving before? No worries! ...we'll teach you in a safe and controlled environment. Caving is easy and a blast!”
- “Our partnership with the best land and adventure operators in the region and their quality service guarantee a safe and smooth trip that you will remember forever.”
- Our high standards ensure the safety as well as the quality of our guests' outdoor experience.”

- “Is it safe? You bet! Your river host provides all the equipment and expertise, you just come along for the fun. With our complete packages, we make it easy.”

- “Is it dangerous? No. Our experience has taught us that rafting trips are a safe vacation. Our first priority is your safety, and our outstanding record proves it.”

These statements provide examples of promises that can't be kept, assurances that can't be backed up, and statements that may expand an organization's duty of care. In addition, such statements are often inconsistent with those contained in the participant agreement (which customarily includes a release of a liability and an acknowledgment and assumption of risks).

Marketing experts will advise you about what advertising medium may work well for your program. In most cases, programs will choose a variety of media. Whichever way you go, choose your words carefully. A key goal is to achieve a balance in providing information about the potential risks and dangers, as well as providing details about some of the more appealing aspects of your program. In addition, you should strive for all of your materials to be consistent with one another.

Why does it matter what I say?

There are several reasons why what you say matters. Your disclosure is a vital part of the information exchange that flows between program and participant. You want to accurately describe your program so that you attract the clients you want (and enough of them!) and those who are specifically interested in what you have to offer. You want participants who understand your services and have confidence in your operation. You want participants who understand your activities, their personal responsibilities, and the risks, dangers and inconveniences to which they may be exposed should they choose your program. An organization that has taken the time to disclose valuable and accurate information (even if some of it is a bit intimidating) can reasonably expect good rapport with participants. Further, such disclosure may minimize the risk of accidents or injuries and resulting lawsuits. Well informed participants may be more prepared, psychologically, to deal with discomforts, injuries and accidents and less inclined to take legal action.

As we've discussed in previous issues of the *Law Quarterly*, all recreational activities are infused with inherent or other risks, hazards and dangers that cannot be eliminated without destroying the unique character of the activity. (In simple terms, inherent risks may be those that are desirable [e.g. moguls, white water], or those that are undesirable [e.g. falling rock or sudden, severe weather changes]). As a result, no matter how professional an organization may claim to be, it cannot assure any participant that he or she will be completely safe or free from harm. Although common law (as well as some state statutes) generally provides that

participants may not recover from providers for injuries that result from the inherent risks of recreational activities (because the provider has no duty to protect the participant from those risks), the line between inherent risks and provider negligence can be unclear. Even though you may firmly believe that an accident or injury resulted from an inherent risk, plaintiff's counsel may argue, convincingly, against you. Complicating matters, if you have a carefully worded participant agreement (containing, for example, an acknowledgment and assumption of risks and release agreement), but your brochure states that participants will be "completely safe," you can anticipate a problem.

As a result, your words should be carefully chosen. You should provide enough information so that those interested in your program will get an accurate picture of what you have to offer. Eliminate the surprises as well as you reasonably can. Make an effort to describe your program in terms of content, mission, activities, geographic location, staff qualifications and other important details, but do so carefully. You must be able to back up what you say. Avoid absolute statements, hyperbole, superlatives or vague terms that may convey a message you do not intend. Balance the information disclosed to prospective applicants and participants. That is: provide information about the way in which programs are run *as well as* the inherent or other risks and dangers associated with recreational/adventure activities.

Adequate disclosure is more than a legal issue, of course. It is a matter of basic fairness and ethical treatment of your clients.

Marketing and Legal Issues

Some people say, "Wait a minute. If I say too much about inherent risks and legal matters, I'm going to scare people away from my program." Or, "I'm sure those reading my brochures understand that I'm engaging in a little harmless 'puffing.' People know to take advertising with a grain of salt, don't they?" Well maybe or maybe not — a court or jury may not tolerate your puffery.

A variety of legal issues coming up in case law encourage accurate and careful disclosure. Let's look at a few examples: (We've pulled these from a few cases and included case citations for those of you who may want to review the facts and court rulings in more detail.)

- A program has a carefully worded participant agreement, disclosing the inherent risks of the activity and containing an acknowledgment and assumption of risks along with a release of liability for the program's negligence. However, that same program has a brochure that states information inconsistent with the participant agreement — that participants are "assured of their safety," etc. An accident occurs on the program with a resulting lawsuit. Plaintiff's counsel makes an argument that the inaccurate statements contained in the marketing materials form the basis for a separate breach of contract claim against the program. (*See, Brooks v. Timberline Tours*, 127 F. 3d 1273 [10th Cir. Co. 1997]).

- A participant is injured by an inherent risk of a recreational activity. The program's brochure assures prospective participants that it will eliminate this particular inherent risk from the activity. The participant files suit against the program. The court rules that the program is liable. The court reasons that although generally, programs are not responsible to participants for injuries resulting from inherent risks, in this case, the program promised to protect participants from those risks. (*See, Sunday v. Stratton*, 390 A. 2d 398 [Vt. 1978]).

- The court refuses to uphold a release of liability and assumption of risk agreement, stating, "[the decedent] did not know of the dangers inside the cave — the release read more as an enticement than as a warning of specific risks that the tour members would confront." (*See, Coughlin et al. v. T.M.H. International Attractions*, et al., 895 F. Supp. 159 [Ky. 1995]).

- A program's brochure assures that its practices "exceed industry standards" — but doesn't specify the industry standards referred to. An accident occurs and a lawsuit is filed. A participant agreement used by the organization is found unenforceable. The case goes to a jury. On the stand, plaintiff's expert refers to numerous "industry standards" that the instructors did not meet in this particular case. The program was unaware of the standards plaintiff's expert cites. Although the program doesn't believe these other standards are relevant to the particular case, the program's representatives are forced to explain why and how their instructor met some, but not other standards (fictitious).

These examples illustrate that inaccurate, overblown or vague terms can expose programs to claims for breach of contract, misrepresentation, fraud, or elevated or unexpected standards of care.

Provide accurate information that you can back up. In addition, don't forget that misrepresentations can invalidate the transaction with the client — including the participant agreement. Oral statements (inconsistent with your written information) can be equally damaging or complicating in the event of an accident and resulting lawsuit. Further, consider the photographs you choose to highlight in your brochures and on your website. Do your photos impart an accurate picture of your program? If your program takes place in the mountains, for example, consider a picture of a snow scene in July, or a simulated rescue, in addition to the traditional (and easier to collect) pictures of smiling faces and sunny weather. (And be sure your photos depict appropriate safety measures, such as helmets, PFDs, etc.) Remember, too, that omissions are as dangerous as affirmative messages. You should reasonably anticipate what the client and families would or should want to know. Finally, be cautious of overstating the dangers of your activities. You may find you've attracted a client whose mission is to show staff and fellow participants just how courageous and fearless he or she is.

Conclusion

Consider carefully the disclosure of relevant, accurate and internally consistent information to prospective

participants. There are words or phrases that can convey your message. Find them and use them. If your message is not accurate, you are not doing your job. Importantly, you cannot assure participants' safety. Don't try — your audience doesn't expect it anyway. You can show pride in your operation without making such assurances. You can provide a balance of information about your program, the inherent risks, and participants' responsibilities without a "doom and gloom" approach. Tell the truth and address the relevant issues; and, if yours is a quality program which manages its risks effectively, the clients will come — and their disappointments, and yours, will be minimized. If you address your marketing materials from this perspective, you may reduce injuries or accidents, the occurrence of claims or lawsuits, and your ultimate liability.

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