

Ad-Vantage

HOW TO ATTRACT CUSTOMERS WITHOUT ATTRACTING A LAWSUIT

By Peter Cannon

Jacquelyn Queenan, co-owner of The Travel Center, Inc. in St. Louis, MO, says she's got the best rates in town. Thousands of business owners coast to coast make similar claims about their prices, products or services.

In fact nearly *every* business says it offers something better or cheaper than the competition. Such "sales talk" is generally taken with a grain of salt.

But when those claims are put into print — via advertising — the money you've sunk into promoting your products or services can actually work against you, says Lawrence Savell, an attorney specializing in product liability defense with the New York law firm of Chadbourne & Parke LLP.

"The problem is that ads typically say something about a product's quality, performance, results, ease of use or safety," says Savell. "Many product liability lawsuits take aim at the very image such efforts strive to create, claiming the message is false or misleading."

"You have to be truthful and fair to the ordinary user," adds Anne Kimball, a product defense attorney with the Chicago firm Wildman, Harrold, Allen and Dixon. "And you definitely do not want to be deceptive."

You can minimize the chance of having a claim brought against you by following a few simple suggestions.

Qualify The Details

In Queenan's case, her pricing claim is qualified — the best rates for corporate customers on regularly scheduled commercial airlines. She says you can always find a cheaper airfare out there, but would you be willing to fly on an airline you've never heard of?

According to Savell, less definite words such as "may," "might" and "could" will keep you out of trouble. So will referring to results as "possible," "variable" or "estimated." That way, you're not making a specific warranty or promise.

Play Devil's Advocate

Savell suggests that you put yourself in the place of a potential plaintiff: How could somebody use your advertising against you? Look closely at your ads, Savell says. Eliminate language or claims you wouldn't want used against you.

Christopher Thomas, manager at Ace Watch & Jewelry in Houston, TX, keeps his ads brief. He mentions only the name, address and telephone of his company, and that he buys and sells Rolex and other watches, fine jewelry and rare coins.

Suzanne and Rick Kilborn, owners of a boating safety training business, are careful about any safety guarantees in their ads.



Bulletproof

"I tell my customers when they are in the store that I will beat any legitimate offer [on a Rolex watch]," he says. "And that keeps them happy."

Thomas says he doesn't put the offer in writing but instead generates additional business by offering free repairs and replacements in many cases.

Beware of Guarantees

Savell and Kimball both advise against making outrageous promises or exaggerated guarantees about a product or service. In the event the product does not live up to its promises, the retailer and/or manufacturer will be held accountable. When in doubt, applying common sense and honesty will help.

On the other hand, overuse of less-definitive language can suggest an air of uncertainty or lack of confidence in your product or service. Look for places you *can* make promises without the potential for trouble.

Mark Gordon, general manager at Chuck's Grill in Folsom, CA, bases his ads around clear-cut two-for-one offers. His ads in local publications include coupons to attract customers to his diner. Gordon plays it safe. He uses neither absolute nor general statements about the quality of his food or service. He avoids such claims by offering a free meal if a regular meal of the same price is purchased. Such offers, Gordon says, attract new customers daily.

Susan Kitson, co-owner of Barewood Furniture Gallery in Collinsville, IL, uses newspaper advertisements, flyers and

mass mailings, including the claim "Nobody Has Higher Quality & Lower Prices."

Her gallery specializes in unfinished home and office furniture that Kitson says is the best quality in the area. The quality claim brings customers in. Then Kitson educates them on the wide selection and benefits of her goods. According to Kitson, business is booming.

Be Positive, Not Specific

Using a positive statement, sales pitch or catchy slogan about your goods or services is nothing new in advertising, and shouldn't cause a problem. "We have the best deals in town" or "No reasonable offer refused" express the manufacturer's opinion or sales talk and nothing more. Courts have considered such "puff" language to be "nonactionable."

But Savell adds a note of caution. "Some courts have demonstrated an inclination toward narrowing the scope of the 'puffing' defense and expanding liability for broad statements by manufacturers as to the quality of their products."

Safe or Not?

Even the photos you use in an ad are important. For example, notes Kimball, it wouldn't be wise to show a child pushing a lawn mower. Even though the mower isn't intended for use by a child, you might be held liable if a child is injured while helping dad with the yard work.

Similarly, Savell says, a statement claiming a product is "free from elements that might cause injury" could be asking

for trouble. He cites a case in Maryland where a person was injured after eating a bone in a supposedly bone-free chicken soup. The court ruled in favor of the plaintiff.

Suzanne and Rick Kilborn, owners of Boatwise, a boat safe-

Business97 Action File

■ *An Ounce of Prevention: Marketing, Sales and Advertising Law for Non-Lawyers* (Visible Ink Press, \$22.95) by Steven Meyerowitz looks at advertising's legal side, and offers practical ways to stay within the law. Call (800) 877-4253.

■ *Do-It-Yourself Advertising* (Wiley, \$19.95) by Fred Hahn gives insight into producing all forms of ads legally. Call (800) 225-5945.

■ *The Legal Opinion Letter* (\$3 per issue) and *Monograph* (\$10 per issue) are two of the Washington Legal Foundation's six publications. Topics include recent court decisions, news and analysis affecting advertising and product liability and feature articles by legal experts. Call (202) 588-0302.

ty and training business in Southampton, NH, offer one-day boating and navigation classes. While they are confident in the safety procedures they and their contracted trainers teach and practice, Boatwise's advertisements do not guarantee a student's safety.

Similarly, Savell says, a drain cleaner described as "safe" if you stick your hand in it should be safe for all ages, even if only intended for use by an adult. His advice: Avoid words such as

safe, non-breakable, risk-free, harmless, foolproof or accident-proof. If you advertise safety improvements, don't imply that things were previously unsafe.

"If, for competitive reasons, you feel the need to make advertising claims despite a litigation risk, at least limit such language to comparative statements rather than absolutes," says Savell. For example, use "safer" or "increased safety" instead of "safe", or "minimal maintenance" rather than "maintenance-free."

When To Seek Advice

Most small businesses don't review their ads from a legal standpoint. "It may not seem important to a small business to have legal approval," says Don Dorward, managing director of Grey Advertising in San Francisco. "But it is vital that care be taken to be sure no false claims are made."

No matter how much advice you receive, you could still be sued by a dissatisfied or injured customer. Should that occur, Savell strongly advises seeking immediate legal help.

If a customer is threatening legal action, designate a contact person (preferably you, the owner) to take all calls on the matter. Any complaints should be heard by that person only and an attorney should be contacted. All calls should then be transferred to the attorney.

And communicate internally. There is nothing worse than an uninformed employee responding to a complaint call with comments that only make things worse. When it comes to your advertising, from a legal standpoint, it pays to be vigilant. **97A**

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