

Tonya Esposito ([00:00](#)):

I want to thank everyone who's joining us today for this podcast episode. My name is Tonya Esposito and I'm a shareholder in Greenberg Traurig's DC office. I am a litigator and my practice is primarily focused on all things consumer. So, that includes many things including competition and antitrust issues, as well as marketing and advertising, litigation, of course, including class action litigation. And I also help clients defend against situations where the FDA, the FTC and other regulators are involved, including the states.

([00:35](#)):

I'm here today with my lovely colleague, Jennifer Gomez, and I'm going to let Jennifer introduce herself.

Jennifer Gomez ([00:41](#)):

Thanks, Tonya, and thank you for inviting me to participate in this podcast. My practice is focused on defending businesses and corporations against lawsuits and governmental investigations. These can range from breach of contract claims, to unfair competition or fraud claims, to labor and wage disputes, or mass torts and products liability litigation. Sometimes we're defending against one plaintiff—could be an individual or another business—or an entire class of individual plaintiffs.

([01:14](#)):

I'm so excited to speak with you today about the legal issues new beauty brands should consider. It's always much better to prevent issues before they arise. So, we hope our discussion today will be helpful to those of you listening.

Tonya Esposito ([01:29](#)):

Absolutely. I couldn't agree more and I'm super excited to be here with you to talk about this topic today. So, Jennifer and I spoke at a conference together and we didn't know each other until we met at that conference, but we realized pretty quickly that our practices have a lot of synergies and commonalities and we also have a lot of common interests personally as it relates to our love and desire to discuss and be kept abreast of all things related to cosmetics and personal care products.

([01:59](#)):

So, I was thrilled when Jennifer agreed to be a part of this podcast and I'm excited that we are working together to talk about these issues. And so, here we are and this is what we're doing. So, the focus of our conversation today really stems from an idea that I came up with and it's evolved a little bit over time, but as I've mentioned, Jennifer has been really supportive and enthusiastic about working with me on this. And collectively we've worked with clients that are newer to the space of cosmetics and personal care products.

([02:31](#)):

And these clients may be new because they're part of an existing brand or perhaps a brand that is not necessarily in this space, but developing a product, a cosmetic or a personal care product that will hit the market at some point and will obviously be sold to consumers. And this includes up-and-coming brands, startup brands or folks that just have great ideas and are developing products and starting brands in their home or otherwise.

([03:00](#)):

And as I'm sure many of you know and will agree, there are a lot of these types of products that are hitting the market. And Jennifer and I have both met these types of clients and tried to work with them to help folks sort out the business side of development of these products in addition to all of the legal

issues that come into play when you're trying to get to market and work with a number of clients to get acclimated to the entire legal landscape, if you will.

[\(03:29\)](#):

And there's certainly a lot to consider and that is really the focus of today's discussion and what we're going to focus on during this podcast. Really to boil all of this down into the top five or six issues that new brands or startup brands or someone who's just entering this space for the first time should be thinking about right away, to try to mitigate or limit legal exposure and to try to set things up as nicely and as cleanly as possible for purposes of making sure that all i's are dotted and t's are crossed to ensure success.

Jennifer Gomez [\(04:07\)](#):

Yeah, if I can jump in?

Tonya Esposito [\(04:08\)](#):

Of course.

Jennifer Gomez [\(04:09\)](#):

I really admire these individuals who have these ideas that they're actually bringing to market because I'm sure all of us have these ideas and they stay in our heads. And so, for us to be in a position to help support that innovation so that the client can focus on developing the product and the fun stuff, so that we can come in and support and make sure that all the legal aspects of running a business are as robust and protected as possible. I think that is just so much fun and we have a lot of fun doing that.

Tonya Esposito [\(04:41\)](#):

I agree entirely and I think it's just lovely to see clients succeed and for us to be a part of that success. So, with that in mind, I think that the most important message for anyone listening today is that if you are a new brand or a startup brand, it's really important to make the initial investment upfront in terms of familiarizing yourself with the legal landscape, understanding what support you might need from a lawyer or what legal services or other advice you might need before you enter the market, from a legal perspective, that monetary investment that you make upfront is oftentimes invaluable.

[\(05:23\)](#):

It's priceless, I would say, because you put yourself in a position, we would hope, to avoid any unnecessary litigation or regulatory issues including any third-party litigation going forward. And so, that's what Jennifer and I are working toward together in connecting with clients in this space and trying to provide that guidance and that counsel upfront.

Jennifer Gomez [\(05:49\)](#):

Yeah. Tonya, as you were talking, one thing that popped in my mind is about getting these legal documents in place early. You're going to scare off the people that you actually don't want to partner with when you have formal legal writings in place.

[\(06:03\)](#):

All relationships, whether they're personal or business can go sour at some point. And sometimes you're in this honeymoon stage and things are going very well and promises are made and people have all these great intentions and then something unexpected happens. And if you have these legal documents,

they're going to protect you from the outset, and like I said, dissuade some folks who may not ultimately have your best interest in mind. They will be dissuaded from signing these documents. So, even mentioning them I think would be a good way to swat away the folks that you ultimately don't want to partner with.

Tonya Esposito ([06:38](#)):

Yes, I agree completely. That's an excellent point. I also think that it helps you as a newer company, a new brand to present more formally or professionally if you have your house in order, right? If you have these documents in place. It sends the message to the marketplace and anyone that you may ultimately partner with that you've thought this through, you've been strategic about it, as I said, you have your house in order. And these are things that are important as you're establishing a brand and trying to present yourself to the marketplace.

([07:13](#)):

And that's not to say that this is an adversarial versus a collaborative effort. It very much should be a collaboration in many regards, but I think that it's important to certainly protect yourself, protect your brand, and just go about it very smartly.

Jennifer Gomez ([07:30](#)):

And I would add that when you do these steps early, it not only lends legitimacy to your business, it demonstrates to others that you've invested very strongly into your company and that will inspire them to have the confidence to invest in you as well.

Tonya Esposito ([07:48](#)):

I couldn't agree more. 100%. So, certainly having all these documents in place is a great starting point. And just very briefly, let's tick off a few of them. And Jennifer, please jump in here anywhere that you have anything to add.

([08:06](#)):

But obviously non-disclosure and confidentiality agreements are really important. The core of many startup businesses and new players in this market is the ideas, right? So, it's what you've got going on internally in the inner workings of the business. So, you want to make sure that you're protecting that information. And clearly you'll be in a situation where you need to share it at some point to collaborate and to engage with third parties, and to do that in writing certainly helps. But to get your product to market, you want to be careful, you want to protect everything that have developed and are developing. So, a great way to do that is to make sure that anyone you're working with is not only aware that you're going to expect them to sign a nondisclosure or a confidentiality agreement, but that they understand what that means.

Jennifer Gomez ([08:59](#)):

And in our view, having a non-disclosure agreement is going to result in a more productive conversation because if you're speaking to someone that's not under a non-disclosure agreement, you might hold back because you don't want to reveal the secret sauce, right? But if you have the non-disclosure agreement in place, then it's going to lead to a better conversation, especially if you're speaking to someone that may be an expert in an area that you're not an expert in and you're seeking counsel and advice. So, there's many benefits for why you would want to have such an agreement in place and have it early on. And you can always blame the lawyers.

Tonya Esposito ([09:36](#)):

That's right.

Jennifer Gomez ([09:37](#)):

Tonya and I say, you can say, "My lawyer, she is making me get these agreements in place with everyone I'm speaking with. It's nothing personal. I just really need to have it in place." So, it doesn't need to feel awkward. It doesn't have to come across as though you don't trust that person or it's too formal. You could always blame the lawyers for this.

Tonya Esposito ([09:57](#)):

I couldn't agree more. Absolutely. It's just a very convenient thing to do and something that I actually encourage all my clients to do when they feel the need, just blame it on the lawyers.

([10:08](#)):

Another very important document or concept to keep in mind when you're first starting off is corporate formation documents and insurance. So, what kind of a corporation are you or what kind of a corporate entity would you like to form? Is it an LLC? Is it a corporation? Is it another form of a corporate entity? These are things to think about.

([10:31](#)):

And certainly, insurance is equally as important. So, depending on what your ultimate goals are, where you're located, how you want to endeavor to protect your personal liability, and again, the location of your business, is it a home office? Are you in a corporate setting? All of that really needs to be considered and thought through pretty carefully and addressed in the early stages. Because I've actually worked with younger clients and newer clients or companies, I should say, who are out there selling great products in the marketplace, and I've actually worked with them for a while only to find out that there is no corporate formation for some of these individuals who are, again, selling these great products. So, no insurance, no protection. And that's just something that is a very basic introductory item that should be handled before you endeavor to put any kind of a product on the marketplace and expose yourself to any form of legal liability, which will certainly come when you're dealing with consumers.

Jennifer Gomez ([11:40](#)):

It's so important too, that before you even form your company legally, that you think about what regulations you're opening yourself up to, because all states have different regulations and some are more onerous than others, and some regulators are more aggressive than others. It's important to consider these things before you embark on this journey.

([12:02](#)):

There's also what I would call draft regulations or up-and-coming regulations, things that are percolating out there but haven't been adopted yet. So, if you partner with our office, for example in Albany, we have such a pulse on what's going on in state government in New York, in terms of which proposed legislations have legs and which ones we don't think do, so they're less of a concern. These are all the things that we can help you think through before you formalize your corporate documents.

Tonya Esposito ([12:34](#)):

Yeah, that is an excellent point. I mean, having that local or inside knowledge of what's forthcoming, what's on the table, can be very, very helpful, particularly in a highly regulated space like this. And the same is true for Washington, which is where I am. Having your ear to the ground, if you will, can be very, very helpful. In Washington we certainly have every regulator you can think of at the federal level and locally as well. And luckily, the GT team here, including myself, has lots of experience not only working with these agencies but talking to them pretty regularly in dealing with them in investigations or litigation or just mixing and mingling in the same circle. So, I do think that is a very important consideration, an upfront consideration, I would say.

[\(13:31\)](#):

Some other things that I quickly want to address are co-founder agreements. So, we both know that everyone goes into partnerships with the best of intentions and sometimes it doesn't work out, and that's unfortunate. And there are disagreements that you just can't resolve, can't get past, and so it's always good to have something concrete in writing and upfront so that if a dispute does arise, there's a pretty clear path or some form of a formalistic way to deal with those types of disputes. Oftentimes it's not pretty and not something that anyone really wants to think about, but definitely I think it's a perfect measure of protection for any company that has more than one person, is just at the beginning of where they are going with their journey, and so, important to consider upfront.

Jennifer Gomez [\(14:21\)](#):

I agree. It can get very messy if there's not a formal writing in place. If you're the one putting in all the work and someone else is riding the coattails, there needs to be something in writing to make sure that there's accountability on both ends and there's clarity of what the rules are and what's to be done with the profits and so forth.

Tonya Esposito [\(14:41\)](#):

Absolutely. I mean, that certainly makes it so much easier when it's just laid out upfront. There's no mystery at the end of the day, and something to consider.

[\(14:52\)](#):

The next subcategory of documents that I wanted to touch on briefly is related to agreements with vendors and third parties and suppliers, which can be critical partners in developing and in putting a brand out there into the market.

[\(15:10\)](#):

I can't tell you how many times I've worked with clients who have had longstanding relationships with suppliers or vendors of a particular ingredient or some aspect or component of a product that they're putting into the marketplace, and they don't have any real formal agreement in place. And that certainly may work with no issue for some period of time, but if at some point there does become an issue with quality or any kind of an inspection or inquiry or some issue that arises in connection with an ingredient or a component that you're relying on a third party for, not having that formal agreement in place with a supplier or a third party can really expose a brand to lots of expensive litigation and certainly, regulatory inquiries. And it can actually be enough to shut a company down. I've actually seen that happen as well.

[\(16:13\)](#):

So, I always advise my clients to not only have these agreements in place with third parties, but to revisit them pretty regularly so that whatever the term of the agreement is, you should be looking at those before they expire to make sure that updates that are necessary have been negotiated and worked into

the next round of contracts. And so in doing that, you actually have to think about indemnity and if something happens, something goes wrong, who's going to be responsible for it?

Jennifer Gomez ([16:42](#)):

Actually, that's something that I was going to jump in about because as a maker of a product, you already have so much to worry about. You don't want to take on the responsibility of being held accountable for the bad actions of someone else that is working with your product.

([17:00](#)):

So, when a consumer is putting together a complaint, they're not thinking, "Oh, I really love the maker of X, Y, Z product. I'm only going to go after the third party that handle the product." No, they're going to sue everyone they possibly can to try and get as much discovery as they can, to make their complaint as robust as possible and shore up whatever claims that they have. They're also going to want to reach into the deepest pockets, so of course they're going to include the manufacturer in their complaint. You're really exposing yourself to a lot more than you should if you don't have robust third-party agreements to shield you from liability when those third parties either don't hold up their end of the bargain or don't do the best job that they should be doing.

Tonya Esposito ([17:48](#)):

Absolutely. And again, just something to consider upfront that will make your life so much easier in the event of a dispute, in the event of something going wrong. It will hopefully put you in a position to protect yourself and avoid some of that litigation and other exposure that may come along.

([18:10](#)):

The last category of documents that I think we should touch on today, that are also very important are employment contracts or employment agreements and relatedly, covenants not to compete. So, if you're a brand who is employing people, that certainly comes with a whole universe of laws and regulations that you need to take into consideration. And unfortunately we don't have enough time today to really delve into the intricacies of that world, but it's worth mentioning because it's very important that you know that there are obligations and there is a regulatory framework that applies to the employer-employee relationship, of course.

([18:51](#)):

So, keep that in mind and make sure you're considering that aspect of doing business as your company grows. And relatedly, you are going to have employees that are going to work with you for a while, may leave, may have been critical to your business at some point, or have been longtime employees who have knowledge of the inner workings or the secret sauce of your brand or your products and your business generally.

([19:16](#)):

It's really important to take into consideration what happens when that employee wants to move on to a competitor, move on to another player in the market, and that player may be related to your business or do exactly what it is or something very similar to what you are doing. Again, this is a very general overview, but very important to consider both of these aspects of doing business as part of your desire to put a product on the marketplace and take a small or a startup company to a mid-size or a larger size company.

Jennifer Gomez ([19:54](#)):

The last thing you would want is for someone to learn from all your experience, the things that have gone well, the things that have not gone well, and then for them to run and start their own company. That's going to take some of the market share away from you, and only be able to succeed in that space because of all the knowledge that you imparted on that person. So, it's extremely important that there are legal documents in place to protect you from that type of situation.

Tonya Esposito ([20:23](#)):

Absolutely. So, Jennifer and I have covered a whole lot so far, but we have a few more big picture items that we're going to try to hit on briefly so that we can in this episode, in any event, cover what we think is the whole landscape.

([20:42](#)):

And the next big topic that I wanted to mention is intellectual property. Again, I'm not going to be able to get into specifics here, but essentially if you have a brand or a product that you're going to put out into the marketplace and there's something unique about the packaging or the design, or you've got some imaging or other aspects of the product that are unique to you and your business and you've created and developed that product or that design, you want to take into consideration how you can protect that intellectual property. It's really important that you do that sooner rather than later, because it could ultimately, just like all the other topics we've covered today, lead to a situation where you've got some legal exposure. You're exposed, and someone could certainly infringe or try to steal your intellectual property rights, which could ultimately lead to more litigation and more disputes.

([21:41](#)):

But suffice it to say that say intellectual property should certainly be on your mind if you are starting up, formulating a product, just putting something out into the marketplace, you should be thinking about that issue.

Jennifer Gomez ([21:55](#)):

The other consideration is the regulatory landscape. As we've mentioned, there's state and local regulations, but obviously federal as well. Cosmetics don't need FDA approval, but they sure are regulated by the FDA. So, you have the Federal Food, Drug, and Cosmetic Act. You have questions about whether a cosmetic may constitute a drug or a device. You have the Fair Packaging and Labeling Act where the FDA monitors the labeling of cosmetics, so it's extremely important to be cognizant of what claims you're making on a label. There's the Modernization of Cosmetics Regulation Act, which just passed in 2022, and we'll likely be putting together a podcast on that because there's so much to discuss about what new beauty brands need to make sure they are doing in order to remain in compliance with that.

([22:56](#)):

Then there's state regulations, as we mentioned earlier, like California for example, has broadened their ban on certain products like PFAS and other chemicals. And so, it's extremely important that you're aware of the regulatory landscape when you are running a business that is extremely regulated such as cosmetics.

Tonya Esposito ([23:21](#)):

Following up on what Jennifer just addressed in terms of the regulatory landscape, certainly something that is paramount and really, really important for purposes of avoiding legal exposure. The counterpart to that, I think, is also keeping in mind the dangers of the plaintiff's bar and claims that could arise based

on your product. So, anything from the way you advertise your product, the way you market your product, the messaging that is being pushed out to the consumer in connection with your product, all of these things come with a whole another bucket, if you will, of possible legal exposure. And it is certainly most helpful to make yourself aware of those possible claims in advance of hitting the marketplace and keep the guidance of counsel in mind when formulating marketing campaigns and working toward the imaging of your brand and how you want to ultimately get your product into the hands of consumers. And that is certainly something that I do with clients on a regular basis, and I know that Jennifer has worked with clients to help in that regard as well.

[\(24:55\)](#):

So, just to sum up, I think that it's important to consider all of the things we've mentioned here today and to again, keep in mind that it sounds like a lot, it sounds like it's expensive. It certainly does come with a monetary investment, but Jennifer and I are here to tell you that making that upfront investment is really invaluable. Making sure that you have a good foundation as you're hitting the marketplace and developing your product is something that will put you in the right position to avoid not all, but many of the issues that we've addressed today.

Jennifer Gomez [\(25:42\)](#):

Tonya and I can of course defend you if you are in a predicament, but our view is that it's so much better and cost-effective, less painful, less stressful to prevent certain issues from arising. And so, we can also advise on compliance issues, pre-litigation matters to ensure that it doesn't even get to a formal lawsuit, which at the end of the day can turn into this PR nightmare that you don't want. So, when someone Googles your product, you want your product to shine, not whatever legal troubles you may have.

Tonya Esposito [\(26:19\)](#):

I couldn't agree more. I think that's the right view and the right approach. And Jennifer and I would love to work with you and to figure out how best to position your company and your brand to be successful and not worry about legal exposure and litigation and other issues.

Jennifer Gomez [\(26:40\)](#):

So, Tonya, I think this is one podcast of, I hope, many to come on different issue areas. So, maybe we can talk a little bit about some other ideas that are coming down at a later point in time?

Tonya Esposito [\(26:54\)](#):

Yeah. I think that we have lots to talk about here. We have plans for the immediate future to not only delve more deeply into the topics we've talked about today, many of which deserve their own podcast episode, but I think to actually provide some insight into what we think 2024 and beyond may hold.

[\(27:15\)](#):

And in that regard, we're going to put together some additional programming that will allow prospective clients to connect in person to further discuss these topics and hopefully also network with individuals who are not only interested in all of the things we've talked about today, but also wanting to know more about what the future holds. So, we'd ask everybody who's tuned in today to keep listening and to stay tuned for that upcoming announcement.

Jennifer Gomez [\(27:44\)](#):



I'm very excited for this event. I'm looking forward to it. It's always great connecting with more people who are working in this space, and Tonya and I would love to support your efforts.

Tonya Esposito ([27:55](#)):

We absolutely would. So, if you're a new brand or if you're an upcoming brand or if you're interested in just learning more about how we can help you in the process of growing your brand, please stay tuned and we certainly hope you'll consider joining us.