

Do You Need a Legal Physical?

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When was the last time you had a physical? What about a legal physical? If you've got a product you're selling on TV, online or at retail, it may be a good idea to get one from a qualified attorney.

The Examination

Not to worry you, but here are just a few of the subject matters to be considered in the course of such an examination:

- **Product/Patent rights.** If you obtained your product or invention from someone else, do you have a written contract? Does it include all the rights you need to market the product for as long as you will need to market it and in all the channels of distribution you desire? Is there a patent application or patent? Should a patent application be filed, and if so, by whom and at whose expense? What about international IP protection? Can the product be marketed without infringing someone else's patent, i.e., has a search of other patents been conducted? Are the royalty and other financial obligations clear?
- **Name/Trademark rights.** If you obtained the name or trademark of your product from someone else, do you

have a written contract? Is it a license or assignment? Does it give you the rights you need to use that name or trademark in commerce as and when you desire? In the contract, is it clear who is indemnifying whom and holding them harmless against future third-party claims, alleging trademark infringement if any arising out of the use of the mark? Is the mark even available for commercial use in the United States or does it infringe registered or unregistered "common law" trademark rights of a third party? Is it confusingly similar with a third party's mark? Has a full search been done on this, i.e., beyond just a Google search and a www.upsto.gov search? If it is available, should a U.S. trademark application be filed, and if so, what kind, by whom and at whose expense? Is the mark too descriptive to be registered with ease or too easy for someone else to come close to with a similar but lawful "knockoff" name? What about international registrations? And, is the name perhaps too good, meaning the FTC might view it as being deceptive if it impliedly conveys to the ordinary consumer that your product has some benefit, if that claim isn't substantiated?





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- **Ad Copy/Copyrights.** Who owns the spot or infomercial for your product? Who owns the content of the website? Is there a written, signed “work-made-for-hire” agreement or copyright assignment contract with every person who provided any creative input, so the “chain of title” is clear and is in your name for copyright purposes? Has the material been registered with the U.S. Copyright Office? What about registering the material with U.S. Customs? In your contracts, is it clear who is indemnifying whom against third-party claims, alleging copyright infringement arising out of the material?
- **Production.** Is there a production contract? Is it clear? Does it include the necessary “work-made-for-hire” language? Does anyone (e.g., talent) have a right of script review or approval? Have you consulted with legal counsel about the script and advertising claims? Are there any edits that should be made or supers or disclaimers added for legal reasons? Were the product demonstrations “rigged” in any way? Is there a release form signed by all on-camera talent? Is there a testimonial affidavit signed by all of your testimonialists? How were they recruited? Were any of them paid or given anything and if so how much, when, by whom and for what?

If you have an expert (e.g., a doctor) who is going to endorse your product in your ad, what exactly did he or she do to evaluate the product and to support whatever he or she is saying or implying about it in the ad; and is there a signed expert endorsement affidavit to back it up? Under your contract, is it clear who will indemnify whom for any third-party claim of copyright infringement or false advertising arising from the ad?

- **FTC claims review.** No advertising should be done without there having been some FTC claims review or consultation ahead of time. What express claims are being made? What would the FTC believe the implied claims are? Liability exists for both express and implied claims. For each, do you have adequate substantiation according to FTC precedent? Given your product and your claims about it, what degree of substantiation would the FTC likely require? Do you need a clinical? Do you need two? Does it need to have a placebo group or other design features? Is there any preexisting substantiation you can borrow from, that may apply to your product and your claims? What edits

could be made and what supers or disclaimers added, for a reduced legal risk level? What substantiation could be developed? Does your product or your claim about it fall into a category that the FTC historically has been interested in (e.g., weight loss)? Are you subject to other regulatory bodies such as the FDA? Do you use testimonials? If so, have you ascertained and are you disclosing the results that one can “generally expect” from use of your product in the depicted circumstances? Are you using the word “free” and if so how and why? Are you “guaranteeing” any results? In terms of the online space, is your privacy policy adequate? Are your terms of use adequate? Are you running a sweepstakes or contest? Are you using disclaimers and disclosures properly and in the right locations? Are you using online affiliates or affiliate networks? If so, is their conduct in compliance with the FTC Act and the FTC’s guidelines? The same question goes for any bloggers or other social media participants you pay or to whom you may send free product or gifts. Are they, for example, disclosing the material connection that they have with you (e.g., that you gave them free product)? Finally, in your contracts, who is indemnifying whom for FTC or other third party (e.g., attorneys general) claims of false or deceptive advertising?

- **Contracts.** Does everyone who has an obligation to you, and does everyone who has a right to be paid by you, have a signed contract? Is anything vague, ambiguous, unclear or otherwise a “loose end,” and if so which party does that favor?

Consult with an Expert

On some of the above matters, it may be reasonable to defer getting legal advice until you’ve tested your campaign and you know it will make money; but on others, it is a major risk to do that. Figuring out which is which is the first step. As they say on TV, “always consult your physician before beginning this or any other exercise program...”

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