Chapter 5:
Landmark Case Law and Opinions

An * in the left margin indicates a change in the statute, rule or text since the last publication of the manual.

I. Supreme Court Decision on Practice of Law by Brokers

The Colorado broker is privileged to render services to his/her client in greater degree than are brokers in other states. The practicing real estate broker, of necessity, must work closely with practicing lawyers. Each practitioner jealously guards the legal field of his or her endeavor. In Colorado the real estate broker renders service to his/her client beyond that of merely procuring a buyer. Colorado brokers should familiarize themselves with the decision of the Colorado Supreme Court in the cases of (1) *Conway-Bogue Realty Investment Co. v. Denver Bar Ass'n*, (2) *Title Guaranty Co. v. Denver Bar Ass'n*, and (3) *Record Abstract & Title Co. v. Denver Bar Ass'n*.

In the case of *Conway-Bogue Realty Investment Co. v. Denver Bar Ass'n*, 135 Colo. 398, 312 P.2d 998 (1957), the Colorado Supreme Court addressed whether real estate brokers should be enjoined from preparing certain legal documents relating to and affecting real estate and the title thereto (such as, receipts and options for purchase, contracts of sale, deeds, deeds of trust, leases), and from giving advice to the parties to such documents as to the legal effect of the documents.

In rendering its decision, the Colorado Supreme Court said:

> The first question to be determined is: Does the preparation of receipts and options, deeds, promissory notes, deeds of trust, mortgages, releases of encumbrances, leases, notice terminating tenancies, demands to pay rent or vacate by completing standard and approved printed forms, coupled with the giving of explanation or advice as to the legal effect thereof, constitute the practice of law?
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> This question we answer in the affirmative.
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> The remaining and most difficult question to be determined is: Should the defendants as licensed real estate brokers (none of whom are licensed attorneys) be enjoined from preparing in the regular course of their business the instruments enumerated above, at the requests of their customers and only in connection with transactions involving sales of real estate, loans on real estate or the leasing of real estate which transactions are being handled by them?
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> This question we answer in the negative.
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> The testimony shows, and there is no effort to refute the same, that there are three counties in Colorado that have no lawyers, ten in each of which there

> is only one lawyer, seven in each of which there are only two lawyers; that many persons in various areas of the state reside at great distances from any lawyer's office. The testimony shows without contradiction that the practices sought to be enjoined are of at least 50 years uninterrupted duration; that a vast majority of the people of the state who buy, sell, encumber and lease real estate have chosen real estate brokers rather than lawyers to perform the acts herein complained of. Though not controlling, we must make note of the fact that the record is devoid of evidence of any instance in which the public or any member thereof, layman or lawyer has suffered injury by reason of the act of any of the defendants sought to be enjoined. Likewise, though not controlling, we take judicial notice of the fact that the legislature of the state, composed of 100 members from all walks of life and every section of the state, usually called upon by their constituents to adopt legislation designed to eliminate evils and protect the public against practices contrary to the public welfare, has never taken any steps to prevent continuation of the alleged evil which we are now asked to enjoin.
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> We feel that to grant the injunctive relief requested, thereby, denying to the public the right to conduct real estate transactions in the manner in which they have been transacted for over half a century, with apparent satisfaction, and requiring all such transactions to be conducted through lawyers, would not be in the public interest. The advantages, if any, to be derived by such limitation are outweighed by the conveniences now enjoyed by the public in being permitted to choose whether their brokers or their lawyers shall do the acts or render the service which plaintiffs seeks to enjoin.

A. Summary of Decision on Practice of Law by Brokers

The following is an excellent summary of the case given by John E. Gorsuch, legal counsel for the Colorado Association of Realtors, quoted from the August 1957 issue of the Colorado Real Estate News:

> It should be kept in mind that the Court states that the practices in question do amount to the practice of law. The Court says that it will not enjoin real estate brokers from doing these simple acts, however, under the circumstances indicated, because of the Court's express belief that the public's best interest will be served by continuing the present practice. The present practice, however, means the practice shown by the evidence. In other words, the broker's activity is limited to the following circumstances:
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> 1. His office must be connected with the transaction as broker.
> 2. There must be no charge for preparing the documents other than the normal commission.
> 3. The documents must be prepared on commonly used printed, standard, and approved forms.
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> It is clear from the decision that the broker should not, under any circumstances:

1. Prepare any legal documents as a business, courtesy or favor, for any transaction with which he is not connected as broker, either with or without pay.
2. He should not prepare any documents which cannot be properly prepared on the standard and approved printed form.
3. He clearly should not draw wills, contracts, agreements and so forth, except the initial binder contract or other customary agreements of the type used to bind the transaction or sale.
4. In addition, it would appear in the best interests of the public and also in conformity with the Court's opinion for the broker to:
    a. Always recommend to the purchaser that the title be examined.
    b. Inform the parties that each has a right to have the papers prepared by an attorney of their own choosing.
    c. Advise the parties that each has a right to be represented at the closing by an attorney if they desire.
    d. In spite of the permission to prepare such documents, there will inevitably arise situations in which the legal complications are beyond the knowledge of the broker. In such instances an attorney's assistance should always be sought.

In conclusion, it could be said that the Supreme Court will allow the brokers to prepare these legal documents on standard and approved printed forms by filling in the blanks therein, with information obtained from the usual sources, in transactions with which they are connected as brokers, when they receive no compensation for these acts other than their ordinary commission. It is to the interest of every broker that these limitations be properly recognized and followed so that the Supreme Court would not have a reason to change its opinion at a future date.

The final words of Mr. Gorsuch's summary bear repeating: "It is to the interest of every broker that these limitations be properly recognized and followed so that the Supreme Court would not have a reason to change its opinion at a future date."

With privilege granted, there must be no abuse. The same authority that granted it may take a privilege such as this away. A privilege respected may be retained. A careless regard is not sufficient. There must be a careful determination and application of what is authorized practice of law by a real estate broker.

The Court in its decision referred to the use of standard and approved forms but did not elaborate. Consequently, it was necessary to establish what is a STANDARD and what is an APPROVED form.

Any form purchased from a stationery store or a printer may or may not be a "standard and approved" form. The printer is under no obligation to determine what is standard or what is approved. However, the real estate broker may have such an obligation. Therefore, the brokers needed some guidance and support in their determination of what is a standard and approved form.

In the years following the *Conway-Bogue* decision, the business of real estate practice grew rapidly. There appeared to be less and less standardization of legal forms. Each association of brokers or each locality and even individual brokers used its or their individual form, often times drafted with personal prejudice.

The real estate industry became concerned that its privilege to practice law, within the limited sphere, might be abrogated by the court. In 1970, the Colorado Association of Real Estate Boards passed a resolution requesting the Real Estate Commission to approve standard forms and to make their use compulsory. In response to this request, the Real Estate Commission held public hearings on the question. The consensus of opinion drawn from the hearings was almost unanimous: the industry wanted the Commission to use its authority to standardize forms throughout the state. As a result, the Commission in 1971 did promulgate and adopt Rule F, which was submitted to the Attorney General. The Attorney General concluded that Rule F was a constitutional exercise of the Commission's rule-making authority.

Rule F covers forms for listing contracts, sales contracts, exchange contracts, disclosure forms, settlement sheets, extension agreements, and counterproposals. At the time of this writing, Rule F does not cover forms for business opportunity listing or sales contracts, management agreements, leases, warranty deeds, etc. In these areas, the broker must use his or her best judgment.

In 1993, the legislature gave the Commission statutory authority to promulgate standard forms for use by real estate licensees. (12-61-803(4) C.R.S.)

In the area of listing and conveyancing covered by Rule F, it is to the advantage of the general public and of real estate licensees to use the Commission approved forms. Much of the wording used in these approved forms has been interpreted by the Supreme Court and its meaning is known. Other portions have been rewritten to conform to Supreme Court opinion when older provisions have been found invalid. Economic conditions have also necessitated changes. Changes can also be expected in the Commission approved forms, but reasonable notice will always be given to licensed brokers.

II. Companion Decision on Practice of Law

On the same day as *Conway-Bogue*, the Colorado Supreme Court decided the cases of *Title Guaranty Co. v. Denver Bar Ass'n*, 135 Colo. 423, 312 P.2d 1011 (1957), and *Record Abstract & Title Co. v. Denver Bar Ass'n*, which were taken as companion suits from which one decision was rendered.

The bar associations sought to enjoin the title company and the abstract company from preparing for others certain legal documents, giving advice as to the legal effect thereof, and performing other acts that allegedly constituted the unauthorized practice of law.

The court reduced the issues to three:

1. Wherein one of the defendant corporations prepared papers incidental to the making of a loan from funds belonging to the corporation.

The court held that in such a case the defendant may prepare the notes, deeds of trust, or mortgages incidental to making the loans. That the defendant could not be restrained even if at the time of the closing the defendant had a firm commitment for the sale of the loan.

2. In situations where the parties involved in the transaction use an "escrow service" or "closing service" provided by the defendant corporations wherein they draft deeds, promissory notes, trust deeds, mortgages and receipt and option contracts, and the defendants set a minimum fee and a sliding scale of charges for this service.

The court mentioned that the defendants actively solicit such business, although it is the same service that real estate brokers render as an incident of their business and without separate charge. The court held that the defendants were conducting a separate, distinct and other business, much of which constituted the practice of law and could properly be restrained.

3. The third problem presented was where the defendant's "closing service" was used and the defendant also sold title insurance on the property involved.

The court held that the defendants may be enjoined and that the "escrow service" or "closing service" was not necessary or incidental to the issuance of title insurance and that the attorneys employed by them were representing the corporation and not the parties involved. The court said in part: "To hold otherwise would be to authorize corporations to practice law for compensation."

The court began its opinion by stating that this should be read and considered in connection with the opinion on the case between the real estate brokers and the lawyers.

III. Licensee Acting on Own Account-Commission Jurisdiction

The Commission staff is often asked whether it can investigate complaints against a licensee where the licensee is not involved as an agent in the transaction. The answer is yes. The Commission can investigate and take disciplinary action against a licensee acting on the licensee's own account where the licensee acts in a dishonest manner. Typical examples are where the licensee/owner does not disclose a known defect, fails to disclose the licensee's licensed status as a purchaser or provides fraudulent information on a loan application.

Printed in relevant part below is the Colorado Court of Appeals case of *Seibel v. Colorado Real Estate Commission* (530 P.2d 1290 (1974)) in which the issue of the Commission's jurisdiction over "non-agency" activities arose.

Ed. Note: The statutes cited in this opinion are now found in Title 12, Article 61, Parts 1 through 8, C.R.S.)

> This appeal raises the question of jurisdiction of the Colorado Real Estate Commission over acts of a broker in negotiating the acquisition of an interest in real estate for his own use. The hearing officer and the Colorado Real Estate Commission, directly, and the district court, by implication, all concluded that the real estate brokers licensing act, C.R.S. 1963, 117-1-1 et seq. and rules adopted by the commission pursuant to that statute do apply to the conduct of licensed brokers in real estate matters relating to actions taken for their own account. We affirm.
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> Appellant (Seibel) is a licensed real estate broker. Intending to purchase a home owned by persons named Debord for his own use, he signed a receipt

and option agreement, proceeding through the listing broker, Roberts. Seibel was not able to close on the agreed date, and accepted return of his deposit.

Several days later, one Arvidson signed a receipt and option agreement relating to the same property, again proceeding through Roberts. Seibel was not aware of this transaction. He personally contacted the Debords and attempted to have them sign a new contract for sale of the property to him. This proposed contract stated that Seibel and Roberts would divide the commission equally. All of the contacts by Seibel with the Debords regarding the second contract were made without the consent or approval of the listing broker.

After Seibel learned of the Arvidson contract, he recorded the original receipt and option agreement. The Debord-Arvidson sale was closed with $500 being placed in escrow to cover the cost of a possible quiet title suit to clear the records of the Seibel contract.

Pursuant to statute, proceedings were held before a hearing officer of the Colorado Real Estate Commission on alleged violations of both the real estate brokers licensing act and a commission rule. The hearing officer found that the commission had jurisdiction, that Seibel was guilty of improper and dishonest dealing in making direct contact with the sellers, that Seibel had violated both C.R.S. 1963, 117-1-12 (1) (t), and Real Estate Commission Rule E-13, and therefore recommended that his license be suspended for a period of not less than thirty nor more than ninety days.

C.R.S. 1963, 117-l-12 (1) (t), proscribes conduct "which constitutes dishonest dealing" Real Estate Commission Rule E-13 specifies that: A real estate broker shall not negotiate a sale, exchange, lease or listing contract of real property with an owner for compensation from such owner if he knows that such owner has a written unexpired contract in connection with such property which grants an exclusive right to sell to another broker, or which grants an exclusive agency to another broker.

The Real Estate Commission approved and adopted the findings of the hearing officer, and suspended Seibel's license for a period of thirty days. The district court reversed the commission's finding that Seibel had violated the statute, but affirmed the finding that he had violated Rule E-13. The matter was remanded to the commission to impose whatever penalty the commission felt was warranted for the violation of the rule. The commission thereupon suspended plaintiffs license for ten days, and this appeal followed.

Seibel urges that 1965 Perm. Supp., C.R.S. 1963, 117-1-2(4), provides him a specific exemption from the authority of the commission in this case, since he was attempting to buy the home for his personal use and was not acting as a real estate broker. The pertinent paragraphs of this section state that:

"(a) The terms 'real estate broker' or 'real estate salesman', as used in this article, shall not apply to any of the following:

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(e) Any owner of real estate acting personally, or a corporation acting through its officers, or regular salaried employees, in his or its own behalf with respect to property owned or leased by him or it, except as provided in subsection (2) of this section;

(f) Any person, firm, partnership, or association acting personally, or a corporation acting through its officers or regular salaried employees, in his or its own behalf as principal in acquiring or in negotiating to acquire any interest in real estate . . . ."

. . . .

Considering the statute in light of these principles, we conclude that the purpose of the exemption section of 1965 Perm. Supp., C.R.S. 1963, 117-1-2(4), is to permit an owner of property to sell it, or to permit one to purchase property for his own account without having to procure a real estate license. These paragraphs have no application to the matter of discipline of licensed real estate brokers and salesmen. To interpret the statute as Seibel urges, would be to adopt an illogical and unduly restrictive meaning of the regulatory provisions of the entire statute.

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Hence we conclude that where a real estate broker is dealing in real estate for his own account, the Colorado Real Estate Commission has jurisdiction over his acts and can suspend or revoke his license for proven violations of the licensing statute or of the commission's rules. A broker can no more be allowed to violate the rules of the Real Estate Commission when purchasing property for his own account than he can when purchasing it for a client.

IV. Attorney General's Opinion on Business Opportunities

Michael B. Gorham, Deputy Director
Division of Real Estate

Dear Mr. Gorham:

I am responding to your request of February 9, 1983, for an attorney general's opinion concerning the requirement of a real estate license to receive a commission in the sale of a business opportunity and possible exceptions to that requirement.

QUESTIONS PRESENTED AND CONCLUSIONS

Your questions ask

1. *A person receives compensation for performing acts as basically set forth in C.R.S. 1973, 12-61-101(2)(i). Does the statute require such a person to obtain a real estate broker's license where the change in ownership or interest in real estate is an integral part of the business or business opportunity transaction, but is not negotiated or offered by the person? The answer to your first question is "yes", unless the person falls within one of the statutory exemptions contained in C.R.S. 1973,12-61-101(4), as amended, or C.R.S. 1973, 12-61-101 (2)(i).*

2. *If the answer to No. 1, is "yes" under what circumstances, if any, could a person involve himself in the transfer of a business or business opportunity for compensation without violating C.R.S. 1973,12-61-101(2)(i).*

The statute under consideration, C.R.S. 1973, 12-61-101(2)(i), grants an exception to the requirement of a real estate license to receive a commission for the sale of a business opportunity. Other circumstances where a license is not required are those situations within the ambit of C.R.S. 1973, 12-61-101(4) et seq.

ANALYSIS C.R.S. 1973, 12-61-101 (2)(i), as amended, sets forth a definition of a "real estate broker" in the sale of a business opportunity. The statute states:

(2) "Real estate broker" or "broker" means any person, firm, partnership, association, or corporation who, in consideration of compensation by fee, commissions, salary, or anything of value or with the intention of receiving or collecting such compensation, engages in or offers or attempts to engage in, either directly or indirectly, by a continuing course of conduct or by any single act or transaction, any of the following acts:

(I) Negotiating or attempting or offering to negotiate the listing, sale, purchase, exchange or lease of a business or business opportunity or the goodwill thereof or any interest therein when such act or transaction involves directly or indirectly any change in the ownership or interest in real estate, or in leasehold interest or estate, or in a business or business opportunity which owns an interest in real estate or in a leasehold unless such act is performed by any broker-dealer or insurer-dealer licensed under the provisions of article 51 of title 11, C.R.S. 1973, who is actually engaged generally in the business of offering, selling, purchasing or trading in securities or any officer, partner, salesman, employee or other authorized representative or agent thereof;

C.R.S. § 12-61-101(2)(i) was adopted in 1965 in response to the Colorado Supreme Court's decision in Cary v. Borden Co., 153 Colo. 344, 386 P.2d 585 (1963). In that case, the supreme court, based on the old definition of a real estate broker found in C.R.S. § 117-1-2(1), adopted the minority New York rule and allowed recovery of a commission by an unlicensed person in the sale of a business opportunity where the interest in real estate was not the dominant feature of the whole transaction.

In Broughall v. Black Forest Development Co., 196 Colo. 503, 593 P.2d 314 (1978), the Colorado Supreme Court found that the legislative intent of C.R.S. § 12-61-101(2)(i) in changing the definition of a real estate broker was to bring Colorado in line with the majority New Jersey rule. That rule defines a real estate broker to include anyone who negotiates any transaction that directly or indirectly involves a change in ownership in real estate or who negotiates a change in ownership of a business or business opportunity which includes an interest in real estate or in a leasehold. Kenny v. Patterson Milk & Cream Co., Inc., 110 N.J.L. 141, 164 A. 274 (1932). This definition does not require that the change in the interest in real estate or in a leasehold be negotiated. Nor does the definition require that the change in ownership or interest in real estate be an integral part of the transaction. Furthermore, the transaction is not severable so that an unlicensed person may receive a commission on the portion of the sale not involving real estate, if the transfer as a whole involves the transfer of an interest in land or a leasehold. Broughall v. Black Forest Development Co., supra.

C.R.S. 1973, 12-61-101(2)(i) does not require that the transfer of an interest in real estate or a leasehold be negotiated or offered to bring one within the definition of a real estate broker. It only requires that one negotiate a transfer of a business or business opportunity, and that the business or business opportunity include an interest in real estate or a leasehold.

Furthermore, the statute in question sets forth a very broad definition of "negotiating". "Negotiating" has been interpreted to mean the simple act of introducing the buyer and seller, thus bringing that act under the license laws and requiring a license before receiving a commission on the sale of a business opportunity. Brakhage v. Georgetown Associates 33 Colo. App. 385, 523 P.2d 145 (1974).

Because the answer to question 1 is "yes" I will set forth the circumstances under which a person could receive compensation for the sale of a business opportunity, although not licensed as a real estate broker.

(The Opinion set forth all of the exceptions to licensing requirements under 12-61-101(4). These are not repeated for the sake of brevity.)

Therefore, if a person falls within one of these exceptions, he does not need to obtain a real estate salesman's or broker's license.

V. Summary

The change in the licensing law to bring Colorado under the majority New Jersey rules requires that a person be licensed to receive compensation for the sale of a business or business opportunity where there is also a transfer of an interest in real estate or a leasehold, no matter whether the interest or leasehold is negotiated or if the interest is insignificant in comparison to the rest of the transaction. Also, the transaction must not be separable so that one can avoid the licensing requirement and collect compensation on the basis of the sale of the business or business opportunity only.

Circumstances under which compensation can be had without a license are set forth in the exception provided in C.R.S. § 12-61-101(2)(i) and the exception to the definitions of "real estate broker" found in C.R.S. § 12-61-101(4).