

Chapter 23: Business Opportunities

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

I. Introduction

The sale of business opportunities requires a real estate broker's license when the transaction involves a change of ownership or leasehold in real estate (12-61-101(2)(i) C.R.S.). The Colorado Attorney General has interpreted this statute to hold that conveyance of a business opportunity is not severable from an interest in land. Furthermore, an unlicensed person may not receive a commission on the portion of the conveyance (business opportunity) not involving real estate, if the transfer as a whole involves an ownership or leasehold interest in land.

The sale of a business opportunity may be less or more complicated than the sale of real estate. There are usually more representations to be made. A portion of the sale is intangible and therefore values are difficult to determine. A broker should recommend attorney representation to each party to the transaction.

II. Matters to be Considered

The following information is essential to successfully brokering a business opportunity.

1. **Name of business.**
2. **Location of business.**
3. **Name of owner, address, phone.**
4. **Price.** Be sure that the price quoted in the listing contract includes the broker's fee.
5. **Terms.** The amount of cash the seller demands and how large a note and purchase money chattel mortgage the seller will carry. Lending institutions may not finance business opportunity transactions and therefore the broker should nail down financing arrangements with the seller at the time of securing the listing contract.
6. **License, Franchise or Distributorship.** If a business involves a license, franchise or distributorship, arrangements must be made to see that rights are transferred and perhaps become a condition of the contract.

If the business involves the sale of liquor, both the appropriate municipal agency and the Colorado Department of Revenue must issue licenses. The requirements are stringent and the investigation of the applicant is quite thorough. Requirements will include a copy of the purchase agreement, evidence of the transfer if corporate stock is sold, a copy of the lease, lease assignment, or deed, trade name affidavit, health and hospital inspection certificate, bill of sale, receipt for personal property taxes paid, the source of financing, fingerprinting, etc.

If a distributorship is involved the manufacturer must consent and may demand certain financial standards before they will consent to the transfer.

Other businesses also may require licenses of various kinds before the buyer may operate the business.

7. **Lease.** A licensee should inspect the lease to determine any special conditions and its remaining term. The monthly rental is always important for its relationship to the business income. Determine if the lease is assignable. Since most leases prohibit assignment without the consent of the lessor, such consent must be obtained. If the lessor charges for consent, the seller will be obligated for this expense and should be told so. It is better for the seller for the buyer to obtain a new lease because the seller will remain liable to the lessor on a lease assignment if the buyer should later default on any terms. A licensee might also propose a sale to the lessor.
8. **Fixtures.** When the sale includes fixtures, check to make sure that they belong to the seller. For example, under some lease provisions, fixtures belong to the lessor on termination of the lease and cannot therefore be included in the sale.
9. **Equipment.** It is advisable to prepare a list of the equipment and determine if it is marketable and if the price is fair.
10. **Stock or Inventory.** Without an actual inventory, the broker should establish the value of the stock as closely as possible based on wholesale cost. Inquire if there is any unsaleable stock. Of course at the time of closing there must be an accurate and detailed inventory.
11. **Number of Employees.** It is important to establish the dollar amount of the payroll, and especially the status of payroll taxes.
12. **Income, Gross and Net.** The broker should review C.P.A. reports or a copy of income tax returns for previous years, or both. This is a risky situation for the licensee insofar as representations to the buyer. Agency laws on representation and disclosure apply with particular force in a business sale because there are so many different facts that may be material to the purchase. The seller's attorney may want to include a clause in the contract stating that the seller has made no representations regarding the business and that the buyer has made their own inspection of the business and takes all goods, fixtures, and other property "as is," without any warranties. Such a clause gives only limited protection and will not safeguard the seller against a clear showing of fraudulent misrepresentation. The broker should choose records that can be verified when he or she uses them for purposes of making a sale. It may be advisable to provide an income or profit-and-loss statement for the seller to complete.
13. **Accounts Receivable.** Sometimes a business sale includes all the outstanding customer accounts receivable, that is the right to collect all outstanding bills owed to the seller by previous customers. In such a case the seller "assigns" these accounts to the buyer. Such an assignment should be in the contract. But even with the assignment made, it is up to the buyer to effect the transfer. The buyer should notify each account of the change in ownership, the assignment of the account, and provide instructions on how and where to make future payments. Otherwise, the customer may continue to make payments to the original owner and the buyer would have no recourse. Sometimes the agreement of sale may provide for a notice or letter to go out to all customers over the signatures of both seller and buyer, announcing the change in management and reassuring the customer that they will get the same good service from the new owner. Such a letter could also include notice of assignment of the accounts. In assigning accounts, the seller should

affirmatively make no representations or warranties regarding the ability to collect such accounts. Only in rare cases would a seller be willing to guarantee full or a percentage of collection on accounts receivable.

14. **Number of Years Business Operated.** To establish the stability of the business.
15. **Reason for Selling.** The buyer will want to know this.
16. **Covenant Not to Compete.** The buyer of a going business may seek assurance that the seller will not go back into business on a competitive basis at some other location. Thus if buying a restaurant from a seller who expresses an intent to retire, the buyer would do well to obtain a specific contractual promise that the seller will neither operate nor buy another restaurant in the same locality for a specified period of time (e.g. five years). Otherwise if the seller finds that retirement is not as expected he or she may decide to go back into business and draw from previous loyal customers. This kind of clause is called a “restrictive covenant” or “covenant not to compete” and is enforceable. It should be limited as to time and territory to the extent necessary to protect the goodwill for which the buyer is paying. If the agreement does not include such a covenant, there is no protection for the buyer, and the seller may compete immediately after the sale. The buyer can, of course, show by oral evidence that the seller represented that they would not compete (constituting grounds for rescission for fraud) or that there was a promise made orally that the seller would not compete (which may be difficult to prove absent a carefully written contract embodying their entire agreement).

III. The Uniform Commercial Code

The Uniform Commercial Code repealed past laws on chattel mortgages. Under the current code there must be a security agreement of some type between the parties. A chattel mortgage may still be the security agreement although other forms of security agreements are superseding the chattel mortgage form. The code further provides, with a few exceptions, that a financing statement must be filed in order to perfect the security interest. When the financing statement covers timber, minerals or other fixtures that are or will become attached to real estate, it must be filed with the county clerk and recorder in which the real property exists. In other instances, the financing statement is filed with the Secretary of State. (4-9-401 C.R.S.)

In 1994 and 1995 a board was created within the Colorado Department of State charged with implementing a central indexing system for simplifying the filing and retrieval of all security interests. The system does not replace the need to record documents affecting real estate with the county clerk and recorder pursuant to 38-35-109 C.R.S.

A security agreement is sufficient for filing if it contains the same information that is required by law to be included in the financing statement. The necessary information consists of the names and addresses of the debtor and secured party, the social security number and tax ID of the debtor and a statement indicating the types and description of the collateral. (See the examples in this chapter.)

A maturity date extending 5 years or less is effective until the maturity date plus 60 days. With longer maturity dates the statement is effective for 5 years from date of filing. One may file a continuation statement within certain time limitations (4-9-403 C.R.S.). Failure to file a

continuation statement within the required period does not affect the validity of the security agreement. The filing is merely for giving constructive notice that the debt exists.

The complete Uniform Commercial Code effective July 1, 1966 covers many facets of personal property sales, therefore business opportunity transactions may be affected by the law on sales, commercial paper, bank deposits and collections, letters of credit, warehouse receipts, bills of lading, investment securities and other documents of title.

IV. The Colorado Use Tax

The Colorado Use Tax, (39-26-Part 2, C.R.S.) is a form of sales tax, payable on the transfer of furniture, equipment, etc. The **buyer** is obligated to pay this tax by statute. The broker has the duty to inform the buyer of this obligation.

Occasionally, but perhaps more often than in other real estate transactions, the broker may wish to receive an advance fee for services in the sale because of the expense involved in the promotion of a business opportunity. In such a case, the broker must comply with Commission Rule E-2.

A. Forms and Settlement

The sample forms shown in this chapter are typical of a business opportunity transaction but are not necessarily all-inclusive. If the real estate is to be conveyed with the business, the broker would use a Commission-approved exclusive right-to-sell listing contract for real estate, amend it to describe the business, and also provide a bill of sale.

The closing statement forms for a real estate transaction may be used for business opportunity transactions with very little alteration. The worksheet indicates the sale of a business, including goodwill, lease, and fixtures for a price of \$14,500. The cost of the inventory is listed separately and is in the amount of \$7,850. The seller in this case is taking a note in the amount of \$17,000 secured by a purchase money chattel mortgage. The same principles apply in the debiting and the crediting of the parties. The sample transaction shown on the worksheet in this chapter should be self-explanatory. Of course, the broker will sign and provide the seller and buyer each with a statement of their respective debits and credits, and the broker will retain a signed copy from both parties. Compliance with Commission Rule E-5 is also necessary.

It is not enough to say that the sale of business opportunities is a specialized field. The field itself is further divided into specialties. There are brokers who deal only in motels, others are expert in liquor outlets or restaurants. Some brokers concentrate on the negotiation of corporate sales where stock transfers are necessary.

Business Opportunity Worksheet

Seller:		Buyer:				
Property Address:						
Settlement Date: January 15, 2XXX			Proration Date: January 15, 2XXX			
Legal Description:						
	Seller		Buyer		Broker	
	Debit	Credit	Debit	Credit	Debit	Credit
Price: (Business, lease, fixtures)		\$14,500.00	\$14,500.00			
Inventory: (On closing date)		7,850.00	850.00			
Deposit:				\$1,500.00	\$1,500.00	
Security agreement payable to:	\$17,000.00			17,000.00		
Security agreement assigned:						
Interest on loan assumed						
Recording: financing statement			2.00			\$2.00
trade name affidavit			1.50			1.50
Bulk Transfer Notice: (publication)	7.50					7.50
Lease security deposit:		600.00	600.00			
Lease transfer fee:						
Personal property taxes: \$240.00						
Seller 1/2 mo. Buyer 1 1/2 mo.	10.00		230.00			240.00
Water rent:						
Rental income: \$340.00/mo (Pd.)		170.00	170.00			
Special Taxes:						
Insurance: (ZYG Co.)		172.50	172.50			
Term: 1 yr Exp.: Dec. 31 Prem.:						
New insurance:						
Attorney's fee:						
Seller:	100.00					100.00
Buyer:			100.00			100.00
Other:						
Commission on sale:	1,450.00					1,450.00
Subtotals	\$18,567.50	\$23,292.50	\$23,626.00	\$18,500.00	\$1,500.00	\$1,901.00
Balance due to/from seller	\$4,725.00					4,725.00
Balance due to/from buyer				\$5,126.00	5,126.00	
TOTALS	\$23,292.50	\$23,292.50	\$23,626.00	\$23,626.00	\$6,626.00	\$6,626.00

Income Statement

COMPANY NAME: _____			
LOCATION: _____			
INCOME STATEMENT (Profit and Loss) for periods indicated.			
Current Period is for _____ months End Date _____			
UNAUDITED	Period	Period	Period
GROSS SALES AND REVENUES			
MERCHANDISE COSTS (Adjustment inv.)			
GROSS PROFIT			
OVERHEAD COSTS AND OUT OF POCKET			
Utilities & phone (exclusive income)			
Insurance			
Advertising and other selling			
Repairs and maintenance			
Supplies and miscellaneous			
Legal and accounting			
Rent			
Business (auto-transportation)			
Other:			
TOTAL			
WAGES, SALARIES, PAYROLL TAXES			
Wages			
Salaries			
Taxes			
Owner-Partner draw			
Total compensation costs			
MARGIN FOR OVERHEAD AND PROFIT			
BUSINESS PROFIT before depreciation & int.			
Source of information: _____ Owner _____ CPA _____ Bookkeeper			

B. Colorado UCC Financing Statements

Brokers are advised to contact the Secretary of State office for information on approved Financing Statement forms: <http://www.sos.state.co.us/>

Colorado Revised Statutes § 4-9-502. Contents of financing statement – record of mortgage as financing statement – time of filing financing statement.

- (a) Subject to subsection (b) of this section, a financing statement is sufficient only if it:
 - (1) Provides the name of the debtor;
 - (2) Provides the name of the secured party or a representative of the secured party; and
 - (3) Indicates the collateral covered by the financing statement.
- (b) Except as otherwise provided in section 4-9-501 (b), to be sufficient, a financing statement that covers as-extracted collateral or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures, must satisfy subsection (a) of this section and also:
 - (1) Indicate that it covers this type of collateral;
 - (2) Indicate that it is to be filed for record in the real property records;
 - (3) Provide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in a record of the mortgage of the real property; and
 - (4) If the debtor does not have an interest of record in the real property, provide the name of a record owner.
- (c) A record of a mortgage is effective, from the date of recording, as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut only if:
 - (1) The record indicates the goods or accounts that it covers;
 - (2) The goods are or are to become fixtures related to the real property described in the record or the collateral is related to the real property described in the record and is as-extracted collateral or timber to be cut;
 - (3) The record satisfies the requirements for a financing statement in this section other than an indication that it is to be filed in the real property records; and
 - (4) The record is duly recorded.
- (d) A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.

4-9-521. Uniform form of written financing statement and amendment.

- (a) A filing office that accepts written records may not refuse to accept a written initial financing statement in the form and format adopted from time to time by the secretary of state, except for a reason set forth in section 4-9-516 (b).
- (b) A filing office that accepts written records may not refuse to accept a written record in the form and format adopted from time to time by the secretary of state, except for a reason set forth in section 4-9-516 (b).