

How to Successfully Start or Buy a Business in 2008

25 Strategies for Maximizing Your Opportunities

A Special Report with Predictions and Trends for the Year Ahead

by Rubin Ferziger, Esq.

New business trends make 2008 a year of great opportunity. If you want to start or buy a company, there are many advantages to moving forward now. The key to success is setting up your enterprise using proven business success principles. You'll find many of them listed in this report.

There are legal aspects to every phase of starting, buying and running a business today. Legal issues surrounding corporations, partnerships, contracts, financing, marketing, advertising, employment, taxes and insurance are key areas new company owners need to consider. Recent changes in the law have also created some traps and pitfalls to be avoided.

Here are twenty-five practical strategies to help you profit from upcoming trends, and to increase your chances of a prosperous venture. There are even a few predictions.

Please understand that none of these ideas is intended to be legal advice, nor do they replace the services of competent legal, financial and tax professionals. The smartest thing you can do in starting or buying any business is to assemble an experienced advisory team. Keeping that in mind, these proven principles will help you succeed.

1 – Buy or begin with success. Avoid buying a business that is losing money, or starting one in an industry that is trending downwards. Start or buy your business in an industry that has been on an upswing for at least three years. You should also be able to project growth for the next five years.

Being successful in business poses plenty of challenges with even the best of circumstances. With so many opportunities out there, why start with a ball and chain around your neck? Make things as easy as possible for yourself. There are people with a knack for turning around troubled companies or succeeding in difficult industries. However, this takes specialized expertise, experience and skill few possess.

The continual expansion of new international markets, along with doing business over the Internet, has created a wide range of opportunities in industries and industry sectors that are on an upswing.

There are different benefits to buying an existing business or creating a new one. Buying gives you the advantage of taking over an established firm with a known history, which has already cleared initial start-up hurdles. Starting your own firm gives you the

opportunity to create a company that precisely fits your preferences. Your individual financial circumstances, experience and personal interests will make the best route clear.

2 – Develop alternate financing. If you're applying for a loan through a commercial lender, work on developing contingency financing at the same time. That way if you don't get the loan or don't like the terms, you won't be stranded. Keep in mind that a conventional business loan may not be easy to get, especially for a new enterprise.

Put together a list of private financing sources that may be willing to participate in your venture, and start talking to them before you apply for commercial funding. Private lenders can be more flexible and are generally able to respond to opportunity faster.

This is a good idea even if you do get approval from a commercial lender. You never know when you may need money down the road. Having private sources that are familiar with your business can save you if you require cash and can't raise it elsewhere.

The main keys to convincing potential backers to invest in your company are clearly showing: how you intend to make money, share profits, limit their risk and return their capital. Get a good business plan software package, and lay it out on paper. Then ask yourself, if you were in their place would you go for this deal? If not, you'll have to modify your plan and improve your offer.

If you face rejection, don't get discouraged. Listen to the reasons why you've been turned down, and then be prepared to address those objections in your next proposal.

Whether commercial or private, be sure to have your lawyer and accountant review all loan documentation and terms, as lending transactions are subject to complex regulations. It's easy to overlook important considerations, potentially making your loan legally and financially hazardous.

Too much money can be as bad as too little. If you're fat and happy with cash, you're less likely to be as innovative and responsive to the marketplace as you otherwise would be.

3 – Know thy partner well. There are two crucial decisions about a partner that have a major impact on your future success. First, whether to have one. Second, who should you get involved with?

A partnership is only as good as the partner you select. You'll want to carefully analyze what skills, resources and other attributes each of you brings to the table, and whether your work styles and preferences truly compliment one another. More than one partner increases the risk of conflict and problems substantially.

You and your prospective partner should consider a mutual background check. It may be unpleasant to discuss, but is appropriate when personal history is unknown, unverified or suspect. Have an attorney prepare a consent form your partner signs, and hire a

background-checking agency to do a search. If you're not comfortable addressing this, have your attorney ask for it through your intended partner's law firm.

If you find the person is overloaded with debt, doesn't pay bills, or has tax liens, judgments, lawsuits, a bankruptcy, a criminal conviction or other adverse information, think twice about partnership. Unless the individual has really improved, the same set of personal characteristics that created these problems will likely infect your business. One other thing: people rarely change.

Don't go into partnership with someone who doesn't put money, or something of equivalent financial value, into your deal. An example of a non-monetary investment with tangible value might be making free office space available to the new venture for a couple years. This decreases the chance of a partner suddenly walking away from your business, leaving you with all the responsibilities.

Have a detailed discussion about whether you share the same goals for the business, and how the work will be divided up. This will minimize the potential of a costly and painful "business divorce" down the road. Most important of all, decide in advance how business assets and liabilities will be distributed if the partnership does end. Otherwise, here's an example of what can happen.

In one case we handled, a relationship among three brothers who inherited their father's business deteriorated. It was a classic situation. They were partners. The brother we represented did all the work and built up the business, and the remaining two wanted an undue share after it was successful. At the time he retained us, millions were at stake, and the entire business and his career were in jeopardy.

We devised a comprehensive defense covering the various business, real estate, bankruptcy and estate issues involved, and prevailed for him. However, this is an instance where good prior planning would have saved all parties from prolonged, expensive litigation.

There are also broad implications today to any business-to-business partnerships or joint venture arrangements. For example, many businesses today will create joint ventures with other firms to expand the market for their products and services. Recent legal developments surrounding the CAN-SPAM act, which imposes restrictions on unsolicited e-mails, can potentially make you liable for violations of others who market your product or service using e-mail.

Many internet-based businesses are setting up "affiliate marketing" arrangements where others can sell for them and be paid commissions on the sales. If this is how you're doing business, be wary. Each case has to be evaluated individually. While it's impossible to make sweeping generalizations, government regulation of promotional practices that are deemed excessive is a legal trend that is likely to continue.

Whatever agreement you come to with any partner, put it in writing. Incredibly, we see many partnership arrangements in which there is no written partnership agreement. It's a recipe for litigation.

4 – If the owners are thieving, plan on them deceiving. If you are interested in buying a business and find a pattern of theft or dishonesty by the owners, walk away. For example, if you discover tax evasion, royalties or license fees that intentionally haven't been paid, deliberate customer overcharges, or any other type of illegal or unethical conduct, immediately remove yourself from the deal. With a cash business especially, if there are two sets of books, that's a giant red flag.

First, recognize that if the owners have lied to, cheated or stolen from others for economic advantage, they're likely to do the same thing to you. Second, as a buyer you may inherit legal and tax liability for prior dishonest conduct of the owner. There are plenty of other clean businesses to buy.

This rule also applies to any business associate you have contact with when you start a company. If they swindle others, it's a fair bet they'll treat you the same way. Don't do business with these people. Especially don't hire them.

5 – The bigger the margins the better. Wider profit margins give more room to cover errors. You can make mistakes in any new business, whether you start or buy. If you choose a business with razor thin margins, your chances of success are smaller.

One of the great things about the continual expansion of Internet-based methods of doing business is that larger profit margins can be realized simply due to lower costs. Many successful companies today operate with a lean, virtual business model. Capital-intensive businesses sustain costs for office or retail space, additional employees and other significant expenditures. You can minimize these expenses with virtual arrangements. Think about this when choosing what business you start or buy, and how you operate.

6 – Keep your eye on sales. Sales are the lifeblood of any business, and are ultimately responsible for generating the income that pays for everything else. No sales, no business – it's that simple. Therefore, a major concern is the quality of that revenue stream, and you'll need professional advice to evaluate it. The next principle gives you a starting point.

7 - Heed the significant six. Since sales revenue is one of the most critical elements in determining business success, you should analyze it carefully. Here are six major factors to consider:

- **Repeat business.** Products and services that lend themselves to continual repurchase create a more stable cash flow for your business.
- **Backend sales.** Once you make an initial sale, what else can you sell to the same customer? These are your backend sales. If customers can purchase other goods

and services, and you improve advertising, marketing and sales activities, you're in a better position to generate more revenue.

- **Profit margin.** The bigger, the better, as previously discussed.
- **Wide range of existing customers.** Businesses whose sales depend on a few key accounts are vulnerable if those customers are lost. It can be safer to have risk spread out over many smaller streams of customer income.
- **Broad base of potential new prospects.** If you're going to maintain and increase sales, you need new buyers. In the normal course of business, you'll lose some existing customers and will have to replace them to keep sales stable. To grow beyond that, you need a market of new potential buyers that can be cultivated into a larger revenue stream.
- **No major collection issues.** If too much money is tied up in receivables for long periods, it's a drain on your business and a threat to its survival.

Get an accountant to assist you with evaluating sales. Additionally, each of these elements has legal aspects that should be reviewed with a business attorney. There are few sales activities that do not have, at the very least, contract, advertising and collection law issues.

8 – Tap multiple minds. If you're facing a business problem, or anticipating making a major decision, ask several people who have business experience from different backgrounds what they think. Others may see aspects you don't, and it may save you a fortune.

For example, in one instance a client wanted to buy a 50,000 square foot warehouse. After we reviewed the purchase, it was clear that tractor-trailer delivery trucks would have trouble accessing the property. Instead, we advised buying the property and leasing it to a third party with no tractor-trailer delivery requirements. Because the client asked for an opinion, he avoided trouble and turned a potential problem into profit.

9 – Avoid pending lawsuits and new legislation. If a company is involved in litigation, and the outcome of the suit is uncertain, that's a clear danger signal. Better to sail on calmer waters. There are many companies available for purchase, and you don't need to buy trouble.

Similarly, unless you have special knowledge and expertise, starting a company in a highly regulated industry can make it harder to succeed. At a minimum, the more tightly regulated the industry, the higher your legal compliance fees will be. It can be a significant percentage of your operating budget. This also applies to engaging in business practices that are subject to complex government agency rules.

If there's pending legislation that can drastically affect the industry in an adverse way, direct your entrepreneurial focus elsewhere, or wait until the outcome is known.

10 – Hire a commercial real estate broker who knows locations *and* landlords well.

A good broker can be a tremendous source of help in securing the right location and lease. You want one who can steer you in the direction of a landlord who will be fair and reasonable, rather than a monster in disguise. Ask other business owners who they used as a broker, and find out what their experience was in dealing with the person.

A knowledgeable broker can help research your location thoroughly. Especially if you're in a retail business, you need to have an idea of what is likely to happen in your neighborhood over at least the next several years. What new construction will be taking place, and how will it affect you? It's an important question even if you're renting an office. For example, we know of a fashion photographer who rented space near what later became a construction site, and found it difficult to concentrate amid the constant blast of jackhammers. His clientele, which included high fashion models, were also reluctant to come to his location.

11 – Your best employees can become your deadliest enemies. Does that sound like an exaggeration? It isn't. The federal Fair Labor Standards Act now imposes greater restrictions on employers with regard to overtime pay. This has recently become a hotly litigated area. If your business is in violation, you can be liable for significant fines and back wages, which are immediately due and payable. They can sink a small enterprise.

If you have people who work overtime, establish a company-wide policy that requires written permission for doing so. Put an accurate system in place for consistent daily recording of employee hours and payments. Insist that workers conform to its use. Also, don't give year-end bonuses subjectively. If you pay bonuses, have a clear performance-based formula to determine amounts, and apply it fairly to all eligible employees.

Good employees who are hard workers and put in extra hours on the job can end up being your greatest source of liability. If there's a dispute and they end up leaving your firm, they're likely to see a lawyer or go to the labor department. If you haven't paid them for overtime, you could be in a lot of trouble. Their employment attorneys and the Department of Labor can have all your payment and attendance records subpoenaed. You may then be forced to pay back wages, payroll taxes and penalties for all employees.

It's possible to inherit employment obligations just by purchasing certain assets. For example, we were hired to handle an employment matter by a firm who purchased trademarks, along with the right to sell clothing in the United States, its territories and possessions. The company fired the sales representative in Puerto Rico. The representative took legal action against our client, insisting the termination was unlawful.

Exposure to this company was potentially millions of dollars. We negotiated a settlement of less than \$200,000.00, protecting the client from serious liability. However, we predict that cases involving sales representatives will be a source of greater liability to companies

as times goes on. In New York for example, a new law requires businesses to give sales representatives who work on commission an employment contract.

12 – Insulate with insurance. You may need more types of coverage than you realize. Start by taking an inventory of all business property, and list the replacement cost of each item. This will help you determine what coverage to buy and how much. If you have an up-to-date inventory list, it can assist with getting claims settled faster. It’s also essential for verifying any losses for tax purposes. Save receipts to verify purchase prices and payments.

There are several different types of business insurance you may need. They include coverage for general liability, personal property, vehicles, and income loss. These are in addition to coverage for any employees you have. Look into all of them to determine which are appropriate, and inquire about business interruption insurance in particular. If a fire or other disaster devastates your business, this coverage can provide needed cash to survive and rebuild.

Find a commercial insurance broker who preferably has handled your type of business, and have your attorney examine the policy before signing up. Sometimes there are policy provisions that can have a major impact in the event of a lawsuit. A case we handled illustrates why.

We represented a family business called Paco Sport, which sells clothing to urban youth and young men in the United States. Paco Rabanne, a foreign-based perfume company, then decided to enter the U.S. market to sell clothes also. They threatened litigation against our client, claiming that use of the names “Paco” and “Paco Sport” were trademark infringements. They retained a major law firm, and a nasty, long-term legal battle followed.

As a preemptive strike, we sued and won. In the process, we employed a strategy that triggered our client’s business insurance coverage. The policy included advertising injury, which covered the trademark infringement claim and substantially subsidized litigation costs. With a careful review of the policy terms, we found a way to have the lawsuit covered. However, to do so we had to file a lawsuit in U.S. District Court in California.

One lesson of this case is that it’s important to know in advance how and when your coverage kicks in. Our client was fortunate to have a comprehensive policy that we were able to take advantage of. In today’s business and legal environment, there is no substitute for effective risk planning.

13 – Do a background check on each new hire. In 2008 and beyond, the job market is likely to become even more competitive. Overseas outsourcing to reduce labor costs is a growth phenomenon. Skilled foreign employees can do work at a fraction of what it costs to employ people locally, and entire industries are rapidly awakening to that fact. If

competition for jobs becomes tougher, the incidence of employee misrepresentation on past work experience and accomplishments can increase. We predict it will.

It's to your advantage to have a professional background-checking agency to do a public records search on each employee you hire, and make your offer contingent on it being free of adverse information. Insist on a drug test. Also, consider psychological and aptitude testing, depending on the position you're hiring for. Check all items on resumes. If you think these are excessive measures, they are minimal expenses compared to the cost of defending a potential employment lawsuit.

Here's another reason important why you should take these additional steps to protect your business. New regulations require employers to obtain and check the validity of all personal identification and right-to-work documents. If you don't, as an employer you can be arrested and suffer the consequences of a criminal conviction. This new law is an outgrowth of increased national security measures after 9/11, and has implications you need to take seriously.

14 – Set up asset protective structures and strategies. Unfortunately, litigation is showing no signs of decrease. You may be sued at sometime for something, valid or not. Therefore, it's smart to have a corporate structure or other appropriate legal entity to protect you from personal liability. The law recognizes a corporation as separate from you, and shields your personal assets. More so than ever before, without these structures or other protective devices, doing business as an individual or sole proprietorship is equivalent to making yourself a target.

15 – Register your trademarks in key markets. Any business needs to protect its intellectual property domestically. In addition, if you intend to do any business internationally, or if any aspect of your business is transacted overseas, you may want to put a foreign intellectual property protection program in place. With a website, any business today has potential international interests.

While trademark and other registrations on a full worldwide basis is beyond the ability of most small firms, you can project where you'll have the most significant current and future sales, along with any locations where manufacturing may take place. Consider these factors with regard to your competition as well. These locations are the priority registration points.

Your intellectual property, including trademarks, domain names, copyrights and patents are assets that can increase in value as your company becomes more successful. Consult an experienced intellectual property attorney about protecting them in the most cost effective manner.

What you don't protect, you can easily lose. For example, sometimes foreign distributors will register your trademark locally "on your behalf." But if your relationship with them deteriorates, you then may have to fight to regain control of your own intellectual

property. So it's necessary to take a proactive stance. All your agreements should specify that foreign agents are to abstain from registering your intellectual property.

Sometimes you need aggressive action to secure your intellectual property rights. We handled a case for a manufacturer client whose product was being counterfeited and sold on the streets of New York City. We assembled a team of private investigators and law enforcement personnel, obtained a civil seizure order, and literally broke down the door of the counterfeiter's facility. The counterfeiter ceased the illegal activity and paid damages to our client.

16 – Copyright your sales materials. Your brochures, sales letters, marketing e-mails, flyers and all other advertising materials should be copyrighted, as you would any other intellectual property your business owns. Often these items are expensive to produce. If you don't protect them, don't be surprised when your competition starts using the same or very similar material.

17 – Run your business with the absolute minimum number of employees. Having employees involves lots of supervision, paperwork, expense, and potential liability. Your exposure increases exponentially with each one you add to the payroll. Independent contractors and part-time employees make for a leaner, cleaner operation. However, you'll need to be sure that any independent contractors you hire adhere to specific tax rules that apply to them. Talk to your accountant about it.

This isn't suggesting you shouldn't run a large, bustling and successful enterprise with many workers. It simply means to be sure you get the best possible use of your employee resources, hiring only as many people as you actually need.

18 – Have an e-mail policy. There's almost no area of liability more dangerous today than the threat posed by unrestricted e-mail. E-mails can be forwarded to anyone, including competitors, government agencies and the press. If you end up in a lawsuit, your e-mails can be subpoenaed. With existing technology, electronic discovery experts can even recover e-mails you have deleted.

In fact, firms that specialize in recovery of e-mail for litigation purposes are in a rapidly growing industry. We predict that eventually, almost all e-mail and other computer-related communications will be fully retrievable.

Your policy should prohibit anyone in your company from writing e-mails that are in any way offensive or insulting to any person or group, contain profanity or inappropriate sexual language. Even certain references to defeating your competition can be deemed anticompetitive in a court of law, especially if they're phrased in a way that suggests wanting to put them out of business.

Essentially, any writing that can be interpreted as having malicious intent, or seen as insensitive to others, can be legally damaging. Additionally, no one should be discussing legal issues in e-mails. Under current law, e-mail communication is considered public if

it travels over the network of a commercial Internet Service Provider. Use of e-mail can be a waiver attorney client privilege. That means anything you discussed in confidence with your attorney on that issue may be openly revealed in court proceedings.

Have your attorney draft an e-mail policy for your business, and clearly explain it to all your employees. Then have them read and sign it. If you have to fire anyone because of an e-mail related offense and are later sued, it can help minimize your liability.

19 – Better to negotiate than litigate. Litigation is usually expensive. And not just in terms of money. The time and energy involved in sustaining or surviving a lawsuit can exhaust you and demoralize you. Negotiating can be a smarter approach.

An experienced business attorney who negotiates on your behalf can help keep you out of court. Here's an example: our firm was retained by a Canadian company that suspected its U.S. partner of theft. The scenario had all the signs of a major lawsuit, with years of court battle. Rather than litigating, we negotiated a buyout package for our client. The end result was they got rights to the American store, kept their trademark and were able to continue doing business in the United States. If we had litigated, all this would have been in jeopardy. The lesson: stay out of court whenever you can.

Also, if you know someone who has sued others many times or who likes to use the law to intimidate people, avoid doing business with him or her. Some people you can't negotiate with reasonably.

20 – Be an on site, hands on manager. If you're not there to watch your business, you're asking for trouble. Small businesses typically don't have the elaborate controls you find in large corporations. In our experience, successful company owners monitor every aspect of their operations, and pay attention to details.

Be aware that with an absentee owner business, you may find some of your profits absent. Employee mismanagement, misuse of company property and time, along with outright theft are real dangers.

21 – Find a banker who knows your business. In shopping around for a bank, speak with branch managers and ask if they handle other customers in your business or industry. In particular, you want to know if they've made loans to other companies like yours. The advantage is you'll have a banker who better understands your needs. If you do apply for a loan, he or she may be able to give helpful advice that will increase your chances of approval.

22 – Have a disaster recovery plan. We live in an age of increasing crisis. 9/11. Hurricane Katrina. Aging, asbestos-laden underground pipes that explode without warning. Much of business infrastructure today is contained in technology, which can be both a blessing and a curse. If your computer system is destroyed or malfunctions, crucial business records can be permanently lost.

Every business needs a way of backing up all data daily, to a safe location off premises. Important documents that are in paper format should be scanned and stored. Setting up this kind of plan needn't cost you a lot. What is prohibitively expensive is the crippling effect of a disaster on a business that isn't protected, and poised to recover as quickly as possible. Test your plan to make sure it works.

Consider this: if you've got your customer and supplier records, along with your books, even if you have to move to a temporary location, chances are you can figure out a way to continue. Without this information, your operation is brought to an immediate and perhaps permanent standstill.

Without a solid crisis plan in place, you'll find it almost impossible to validate or prove anything from a legal, tax and financial perspective.

23 – For business issues, hire a business lawyer. Business transactions today are more complex than ever before, and business law has many facets. You'll get excellent general legal protection from a law firm with broad experience in handling corporate structures, partnerships, contracts, real estate, employment issues, financing arrangements, and intellectual property. Look for a firm that has handled many start-ups or purchases of the size you intend, and that has a solid reputation.

An experienced business attorney will have some very practical ideas for you. For example, let's say you're interested in buying an upscale restaurant, and are concerned whether the owner's sales figures are accurate. If tablecloths and napkins are laundered and changed after every meal, request the laundry bills. Multiply the number of tablecloths laundered per week by the average check amount. Then take the average amount spent per person, and multiply that by the number of napkins laundered. These two numbers will give you a more accurate idea of the kind of sales you're really looking at.

The idea is to have a lawyer who can address most of your day-to-day questions and issues. Sometimes a specialist in a particular area may be needed, and your attorney can refer you to appropriate counsel. But for efficiency, you want the ability to make one phone call to a firm you trust and get your legal questions answered.

24 – Consult counsel early. The time to bring your lawyer in is at first sign of any trouble that may have a potential legal implication. Problems get expensive as time passes and more damage is done. If you consult your attorney early on, you may avoid major legal fees, particularly those associated with litigation, which are the nightmare of every business.

For example, if there's a collection problem involving a significant sum, that's a good time to call your lawyer quickly. Serious collection problems ultimately mean a write-off or legal action, both of which cost you money. But once you've reasonably determined you're unlikely to be paid, the sooner your lawyer can act on your behalf, the less costly the problem can be.

In a collection case we handled, a knitting wear supplier hadn't been paid for two years. We obtained full payment, with our client waiving only the interest charges. The client was happy, and lucky in this circumstance. Sometimes unpaid debts can put a company out of business.

If there are any existing or potential debt issues with a business you want to buy or start, evaluate them carefully. More stringent credit policies may be preferable to sales that go bad for nonpayment.

One proven way to minimize legal difficulties is to have your attorney review and amend your contracts as new situations arise. For example, if you have various agreements you routinely use with customers or clients, you may find as time goes on that a number of scenarios arise which they do not cover. When this happens, speak with your lawyer about drafting some language to add to your paperwork. If similar events occur again and you have the proper wording included, you'll have better protection if there's a dispute.

There are times to have your attorney operate in the background, advising and orchestrating events without being directly involved. These are instances where the direct involvement of a lawyer can complicate things, and raise anxiety levels unnecessarily. Ask your lawyer which approach is best for the situation you're dealing with.

25 – Know the business. In reality, this is the very first success principle, but people often think of it last. Your chances of success are much higher if you start or buy a business you have experience in. Succeeding in business is tough enough without the burden of complete ignorance added to it. Pick something you know. More importantly, pick something you love. If you don't enjoy what you do, you'll find it hard to sustain your motivation and keep going during difficult times.

If you don't already have experience in the business, try it out before investing your money. Get a job in the industry, even if it's a part-time or temporary position. Being in business is like being married. You don't know the complete story until you live together. At the very least, if you're going to buy a business, go there and watch what happens for a week. You may be surprised at what you discover.

The most overlooked business success principle.

Go with your gut. If something doesn't look right, feel right or smell right, check it out. Call in advisors who have experience in that area. In the long run, investing in knowledgeable minds can potentially save you hundreds of thousands, if not millions of dollars.

Use these principles as your guide, and you'll find your journey to profits and success can be much easier. We've found that smart entrepreneurs live by proven business strategies that have stood the test of time. They can work for you too.

About Rubin Ferziger, Esq.

Rubin Ferziger, Esq. is a business and real estate attorney practicing in New York City. He has represented commercial clients and individuals for over thirty years. He handles matters involving corporate law, partnerships, financing, contracts, employment issues and intellectual property. As a sole practitioner, he brings a creative approach to complex legal issues, and is dedicated to his clients and their success.

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