



AMERICAN
BANKRUPTCY
INSTITUTE

Rocky Mountain Bankruptcy Conference

Working Effectively with Professionals

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WORKING EFFECTIVELY WITH PROFESSIONALS OUTLINE

- Introductions and panel
 - Name, what you do, and what role you've played in an insolvency matter or bankruptcy case
 - Interactive panel, please ask questions or chime in
- We've just heard all of the various roles that professionals hold in a bankruptcy case, and it's clear our lanes can overlap. Outside of specific tasks, what do you believe is the overarching goal in a bankruptcy case?
- Who do you view as the conductor of a bankruptcy case?
 - The debtor, attorney, financial advisor ("FA"), someone else?
 - Is the attorney and FA relationship different when the FA is serving as a client officer, such as a CRO or interim CEO?
- Engagement and retention
 - In your opinion, how should an attorney source or vet the right professional?
 - Some attorneys tend to stick with the same professionals they've worked with in the past. What would you tell those attorneys?
 - When is the right time to engage a professional? Are you hired too soon, on time, too late?
 - How much input does an FA give?
 - In the FA's role as a CRO or interim CEO, who controls the referral of other professionals?
 - How much prep and leg-work do you do before an order is entered approving your employment?
- Independence
 - How important is it to you?
 - How do you maintain independence?



- When have you seen it work well?
- When have you seen it not work well?
- Setting expectations
 - Who is responsible for setting expectations?
 - What do you expect from an attorney?
 - Deliverable, timeline, costs?
 - Key events that may impact role
 - Professional specific expectations, e.g., brokers wanting estate funds to assist with repairs
 - What do you think attorneys expect from you?
 - Deliverable, timeline, costs?
- Disagreements
 - Has anyone ever had a disagreement with case strategy or how something was done? Can you tell us about it? How did you resolve that disagreement?
- Payment
 - How do you like to be paid? Section 327, ordinary course, commission?
 - Do you believe the engagement of an FA results in reduced fee opportunities for that attorney?
- Final thoughts and questions



Working Effectively with Professionals



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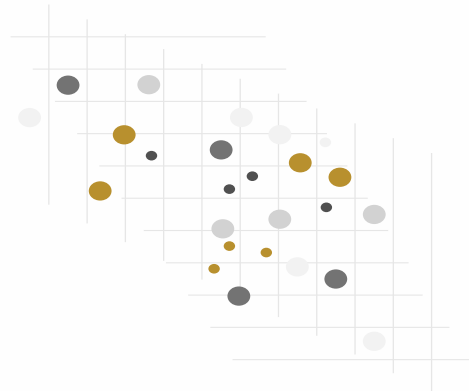


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The Good, Bad and Ugly of Financial Advisors in Your Case

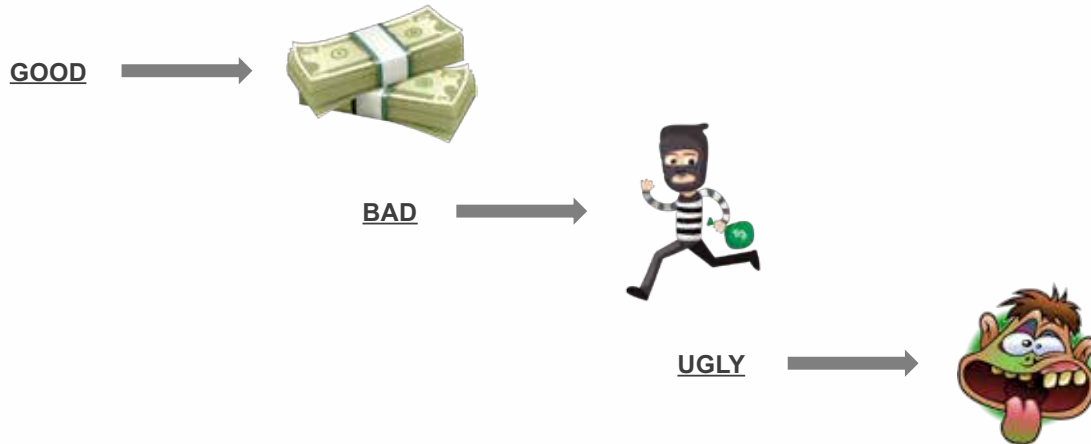
by Dan Dooley of MorrisAnderson- Chicago





OBJECTIVE

Explain Financial Advisors in Insolvency & Bankruptcy Cases



Why Do Financial Advisors Even Exist?

Company Side

- Objectivity
- Develop Common Facts
- Develop "Action" Plan
 - Typically generate a ROI on their cost
- Negotiate "Agreed" Plan
- Familiar with emergencies (i.e., no cash)
- Help company understand uncertainty



Bank Side

- Verify Projections and Values
- Recommend Company Actions
- Improve Bank Recovery
- Assist in Negotiating Agreed Plan
- Establish sound communication with company





Why Attorneys May Resist Bringing Financial Advisors into Their Case

- Inexperience with Financial Advisors
- Prior bad experiences
- Concern over cost/benefit
- Concern that Financial Advisors could give conflicting advice
- Concern that fee potential could be diluted



What Attorneys Should Get When A Financial Advisor is Engaged

- Collaborative Insolvency Partner
- Improved understanding of key facts
- Financial Projections that can be relied upon
- Comfort that cash will be managed well
- Improvements to Company's Financial condition
- Regular communication on Company issues
- Focus on the end game





Weak Financial Advisors

- Egos impacting case
- Financial projections and values not realistic
- Discredits other professionals
- No clear plan of action
- Poor communicator
- Not decisive
- Withholds important information
- Not a deal maker
- Appears to act in self interest (fees)



Strong Financial Advisors

- Builds credibility with all stakeholders
- Creates realistic, but conservative, financial projections
- Takes action decisively
- Objective view
- Prefers collaboration over conflict
- Excellent communicator
- Shares information with all key stakeholders
- Looks at role through a cost vs. benefits lense
- Strong deal maker
- Accessible and responsive
- Focus on critical issues
- Willing to take charge and lead
- Organized and timely



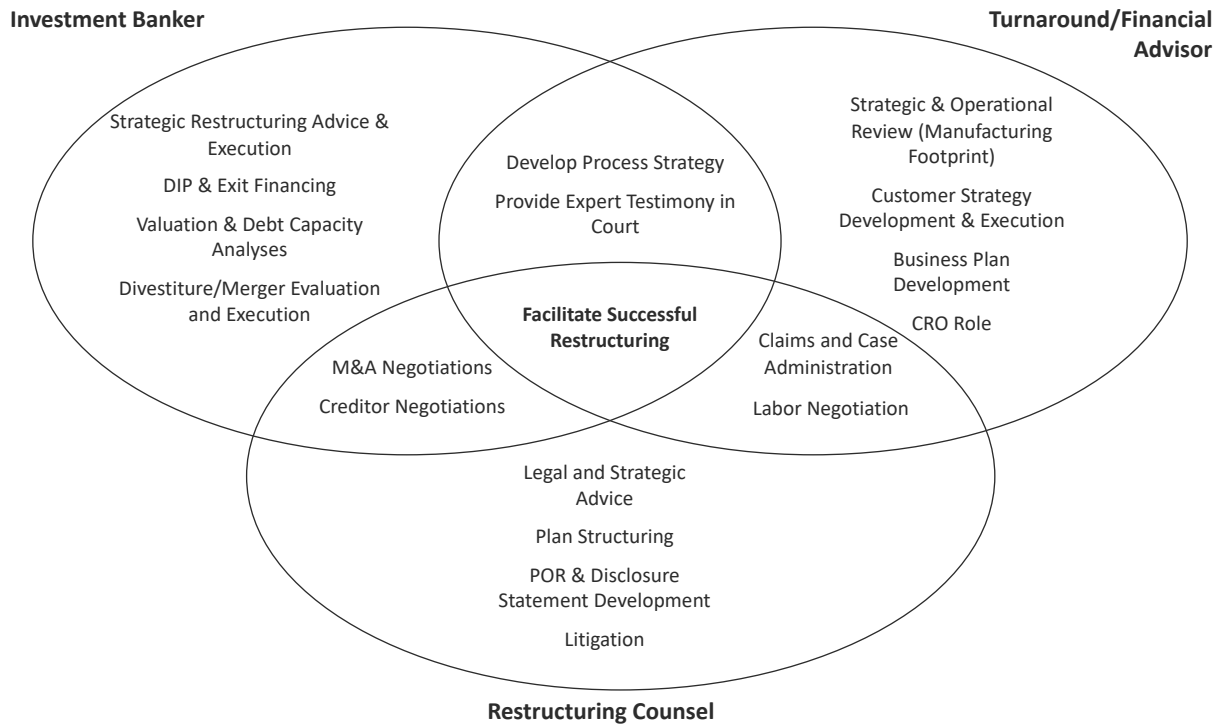


Recommending a Financial Advisor

- What skill set does the situation require?
- Personality and work style must fit client
- Industry experience is helpful
- Can a consultant help you do a better job?
- Does consultant's prior experience generate confidence among the parties?
- Is the consultant results driven?
- Is the consultant good at making deals?
- Does the benefit outweigh the cost?



ADVISORY ROLES



ABI Rocky Mountain Conference

SETTLEMENT FACTSHEET



NAR and plaintiffs have reached a proposed settlement agreement that would end litigation of claims brought on behalf of home sellers related to broker commissions. The agreement would resolve claims against NAR, over one million NAR members, all state/territorial and local REALTOR® associations, all association-owned Multiple Listing Services (MLSs), and all brokerages with an NAR member as principal that had a residential transaction volume in 2022 of \$2 billion or below. The settlement is subject to court approval.

COVERAGE OF NAR'S RELEASE

There have been a lot of incorrect statements about the releases in the NAR settlement. To be clear, nearly every REALTOR® is covered by the release we negotiated in the settlement.

- If you are affiliated with any of the following brokerage groups and are an independent contractor, **you are covered by the proposed settlement** — even if your brokerage may not be covered:
 - Douglas Elliman, Inc.; Douglas Elliman Realty, LLC; eXp Realty, LLC; eXp World Holdings, Inc.; Hanna Holdings, Inc.; HomeSmart International, LLC; Howard Hanna Real Estate Services; Redfin Corporation; United Real Estate; or Weichert, Realtors®.
- All other REALTORS® who are members of NAR as of the date of the class notice are covered by the release we obtained under this proposed settlement.
- The release specifically includes all brokerage firms with a principal who is a REALTOR® whose residential transaction volume in 2022 was 2 billion dollars or below.
- Unfortunately, and despite our best efforts to fight for their inclusion, the release does not include brokerage firms whose residential transaction volume in 2022 was above 2 billion dollars.
- For those companies, the settlement provides a mechanism they can pursue if they desire to be included in the release — but to be clear, the settlement does not obligate any of those companies to settle under these terms.
- The settlement provides a cap and an opportunity to mediate a different outcome but it does not obligate these top brokerages to pursue this option if they don't desire.
- Notably, the agreement would release over one million members, all state/territorial and local REALTOR® associations, and all REALTOR® association-owned MLSs that agree to the practice changes.

SETTLEMENT FACTSHEET

**Implications for Members**

- Over one million NAR members are released from liability nationwide.
- NAR's release covers all members unless they are an independent contractor or employee of HomeServices of America or one of its affiliates (the last corporate defendant still litigating the Sitzler-Burnett case), and employees of the remaining corporate defendants named in the cases covered by this settlement.

Implications for Brokerages Owned by Members

- Brokerage entities owned by members that had a residential transaction volume of \$2 billion or below are released from liability nationwide.
- While we would have preferred to protect all industry players, ultimately NAR could not persuade the plaintiffs to include the largest brokerages.
- The agreement provides a mechanism for nearly all brokerage entities that had a residential transaction volume in 2022 that exceeded \$2 billion to obtain releases efficiently if they choose to use it.

Implications for NAR and other REALTOR® Associations

- NAR is released from liability nationwide.
- Any officers, directors, or other participants in NAR activities are released from liability nationwide for their role or participation in NAR.
- All state/territorial and local associations of REALTORS® are released from liability nationwide.

Implications for Association-Owned MLSs

- The release includes all MLSs that are wholly owned by one or more REALTOR® associations.

Implications for Other MLSs

- The agreement provides a mechanism for other MLSs to be covered by it if they choose to use it.
- This mechanism includes opting into the MLS practice changes that are a part of the agreement and paying a per-subscriber fee to the Settlement Fund.
- While we would have preferred to protect all industry players, the MLSs not wholly owned by a REALTOR® association were excluded by plaintiffs.

NEW RULE ABOUT OFFERS OF COMPENSATION ON MLS

We were able to retain the right of consumers to continue to have cooperative compensation as an option so long as they pursue it off-MLS through negotiation and consultation with real estate professionals.

- NAR has agreed to put in place a new rule prohibiting offers of compensation on the MLS. The change will go into effect in late July 2024.

Implications for Members

- There will continue to be many ways in which buyer brokers could be compensated, including through offers of compensation communicated off MLS — as we have long believed that it is in the interests of the sellers, buyers, and their brokers to make offers of compensation — but using the MLS to communicate offers of compensation would no longer be an option.
- The types of compensation available for buyer brokers would continue to take multiple forms, depending on broker-consumer negotiations, including but not limited to:
 - Fixed-fee commission paid directly by consumers
 - Concession from the seller
 - Portion of the listing broker's compensation
- Compensation would continue to be negotiable and should always be negotiated between agents and the consumers they serve.

SETTLEMENT FACTSHEET

**Implications for home buyers and sellers**

- This settlement would preserve the choices consumers have regarding real estate services and compensation.
- After the new rule goes into effect, listing brokers and sellers could continue to offer compensation for buyer broker services, but such offers could not be communicated via the MLS.
- The settlement expressly provides that sellers may communicate seller concessions — such as buyer closing costs — via the MLS provided that such concessions are not conditioned on the use of or payment to a buyer broker.

NEW RULE ABOUT WRITTEN AGREEMENTS

- NAR has long encouraged its members to use written agreements because they help consumers understand exactly what services and value will be provided, and for how much.
- The settlement provides that MLS participants working with buyers must enter into written agreements with those buyers.
- This change will go into effect in late July 2024.

Implications for members and home buyers and sellers

- After the new rule goes into effect:
 - MLS participants acting for buyers would be required to enter into written agreements with their buyers before touring a home.
 - These agreements can help consumers understand exactly what services and value will be provided, and for how much.

WHY SETTLING NOW MAKES SENSE

NAR explored settling throughout the litigation and also carefully considered the other legal options available to us. These included:

- **Appealing:** A win on appeal would only have addressed the verdict in the Sitzler-Burnett case (not any of the copycat cases) and may only have resulted in a new jury trial, leaving members and consumers with continued uncertainty.
- **Chapter 11 reorganization:** In theory, Chapter 11 would have enabled NAR to eliminate its own liabilities while pursuing an appeal of the Sitzler-Burnett verdict. But we believe that would have left members with continued uncertainty and potential liability risk. Chapter 11 would also have paused the litigation against NAR but not the other defendants in the cooperative compensation cases.

Ultimately, while NAR continues to believe that it is not liable for the home seller claims related to broker commissions and that we have strong arguments challenging the Sitzler-Burnett verdict, we decided to reach this settlement to put claims to rest for over one million NAR members and other parties who would be released under the agreement.

SETTLEMENT FACTSHEET



NAR OPERATIONS

- Nothing about this settlement changes NAR's commitment to lead our industry forward and support our members.
- One of the critical advantages of this agreement is that NAR would be able to pay the settlement amount over time.
 - NAR would pay \$418 million over approximately four years.
 - This is a substantial sum, and it will be incumbent on NAR to use our remaining resources in the most effective way possible to continue delivering on our core mission.
- We will continue to deliver unparalleled value to, and advocacy on behalf of, REALTORS®, including through our learning opportunities and resources, research, and member tools.
- NAR has evolved multiple times in its history, including by introducing the MLS Model Rule in 1990s in response to calls from consumer protection advocates for buyer representation, and is doing so again now.
- Our leadership and staff remain focused on their work to deliver the value that has set this association apart for so many years.

WHAT'S NEXT

- Notably, certain groups must opt in to be covered by the settlement. As of April 19, REALTOR® and non-REALTOR MLSs as well as brokerages with 2022 total transaction volume for residential home sales exceeding \$2 billion must take action within 60 days.
- The deadline for these actions is June 18, 2024.
- All agreements reached through this mechanism would be subject to court approval.
- The hearing for final approval is scheduled to take place on November 26, 2024.
- For more information about executing the opt-in mechanisms please visit facts.realtor.
- For questions about completing an opt-in agreement, please contact Mike Rohde at mrohde@nar.realtor.
- Additionally, we will move to have copycat litigation about the MLS cooperative compensation Model Rule stayed, or paused, as to NAR pending the settlement approval process.

NAR MEMBERS CAN CONTINUE TO ACCESS THE LATEST INFORMATION ABOUT THE SETTLEMENT ON FACTS.REALTOR.

NAR WILL ALSO CONTINUE TO PROVIDE UPDATES ABOUT THE SETTLEMENT PROCESS AS IT UNFOLDS ON COMPETITION.REALTOR.

Faculty

Patrick R. Akers is a bankruptcy and commercial litigation attorney and a director with Fennemore Craig, P.C. in Denver. He represents asset-purchasers, debtors, landlords, secured and unsecured creditors, and trustees in commercial bankruptcy and litigation matters involving bankruptcy, insolvency and restructuring. Mr. Akers received his B.A. with distinction and honors from the University of Iowa, his M.B.A. from Auburn University and his J.D. *cum laude* from the University of Notre Dame.

Daniel F. Dooley, CTP is a principal and CEO at MorrisAnderson in Chicago and has a national reputation in turnaround management, operations improvement, debt restructuring and assuming C-level positions for clients. Mr. Dooley is a frequent speaker at industry conferences and a regular published author for industry periodicals. He has served multi-year terms on the board of directors of both the Turnaround Management Association (TMA), for which he served as president of its Chicago chapter, and ABI. Mr. Dooley has planned and implemented significant financial improvements for clients in many industries, including aerospace, agriculture, automotive, capital equipment, distribution, food, health care, metals, oil and gas, restaurants and transportation. Prior to joining MorrisAnderson in 1997, he served as an executive with several Fortune 500 manufacturers, including Illinois Tool Works (ITW), an industrial manufacturer, and Allied Signal, an automotive electronics and aerospace manufacturer. He has served on board of directors and been a key advisor to small and large corporations and nonprofit organizations. Mr. Dooley has successfully managed numerous projects for middle-market companies and assumed dozens of interim-management positions as an independent director, CEO, CRO and CFO for client companies nationwide. During his career, he has negotiated numerous transactions involving debt-restructuring, supplier accommodations and business sales. Mr. Dooley specializes in the development and implementation of cost-reduction and restructuring plans, as well as restructuring negotiations between companies and their creditors. He educates company ownership and management on realistic business plans, implementation of cost and liquidity improvements, and effective end-game strategies for clients. He also collaborates with management on issues related to turnaround, restructuring plans and business sales. Mr. Dooley has achieved results for companies in the automotive, aerospace, agriculture, capital equipment, metals, health care, transportation, food, distribution, oil and gas, and real estate industries. He is also a contributing author to *The Chief Restructuring Officer's Guide to Bankruptcy: Views from Leading Insolvency Professionals* (ABI 2013). Mr. Dooley received his B.B.A. and M.B.A. in finance from the University of Minnesota Carlson School of Management.

Leigh A. Flanagan is a real estate broker with LIV Sotheby's International Realty in Denver. After graduating law school, she joined the U.S. Department of Justice U.S. Trustee Program, went on to clerk for several U.S. Bankruptcy Court Judges for the District of Colorado, then entered private practice primarily representing chapter 11 debtors. While practicing law, Ms. Flanagan obtained her Colorado real estate broker license in 2007. She officially transitioned from the practice of law to a full-time real estate broker by joining LIV Sotheby's International Realty in 2015. While the majority of her real estate clients are outside the bankruptcy and legal system, Ms. Flanagan has sold many properties for chapter 7 trustees and chapter 11 estates in Colorado. In addition to being a member of the National Association of Realtors and Denver Metro Association of Realtors, she is a member of

the Luxury Real Estate Board of Regents. Ms. Flanagan received her B.S. in political science from the University of Colorado in 1999 and her J.D. from the University of Colorado School of Law in 2003.

Sanjay Marken is a director with Hilco Corporate Finance in Houston. He has 16 years of experience advising companies and their constituents during periods of transition. Mr. Marken's advisory engagements include MolyCorp, the City of Detroit, the Commonwealth of Puerto Rico and AMF Bowling Worldwide. Prior to forming Exigent Partners, he was a vice president at Miller Buckfire & Co. Mr. Marken currently serves on the board of directors of a bedding and home products company and previously served on the board of Corsicana Mattress Company during its chapter 11 case. He received his B.S. *magna cum laude* in finance and information Systems from the Stern School of Business at New York University.

Matthew McKinlay, CMA, CTP is a director, managing partner, and turnaround and restructuring advisor at Amplēo in Boise, Idaho, where he is responsible for the turnaround and restructuring services of the company and the Idaho market. Before joining Amplēo in 2017, he worked for nearly 20 years as a chief financial officer, chief restructuring officer, turnaround advisor, bankruptcy trustee and receiver of numerous companies by helping solve difficult financial and operational challenges. Mr. McKinlay is trained in forensic accounting and has prepared several expert reports and testified at trial as an expert. In addition to helping small and mid-sized businesses through financial crises, he sits on the board of directors for the Turnaround Management Association's Rocky Mountain Chapter, the Risk Management Association's Idaho Chapter, and the Tru-Grocer Federal Credit Union. He is also an active angel investor in Idaho companies. Mr. McKinlay received his M.B.A. in finance from the Marriott School at Brigham Young University as a Hawes Scholar.