

---

## CREDIT DOCUMENTATION: WILL THE EMAIL YOU SEND TODAY HAUNT YOU TOMORROW?

Community bank lenders should find a lesson in this week's Goldman Sachs revelations

\* \* \*

By documentation, I mean much more than just security agreements, corporate resolutions, and promissory notes. Rather, I'm talking about how lenders document credit overall, including what they say, and to whom, in their emails and memoranda.

The Senate hearing this week on Goldman Sachs' activities sheds a spotlight into the sometimes murky corner of what constitutes proper documentation.

Email, Twitter, even doodles, could hang you...

Documentation of the credit arrangement that you have with your borrower is absolutely necessary.

Ask any examiner-or, for that matter, your loan review officer. It's important to leave tracks, so to speak, on current activities of the business and the mutual undertakings of the bank and the borrower. While theoretically it's all summarized in the note, loan agreement, general ledger, and the like, in actual practice there's much more to a relationship than the letter of the deal.

Often, in litigation, if a soured relationship gets to that stage, a loan officer's documentation will be used to substantiate the bank's position in court.

There's a dark side, of documentation, though.

There are times when a banker might be too candid. Emails (and that includes other popular social communication tools such as Twitter, Facebook, and the like) can leave a trail of embarrassing attitudes and dispositions toward the borrower.

In this day of lender liability exposure, where a bank chooses an aggressive collection posture against a delinquent borrower, the credit file or internal emails can reflect the lender's frustration and impatience with the perceived stalling or possibly improper behaviors of the borrower.

Any of this is subject to ultimate discovery by lawyers for the other side, to the possible embarrassment of the bank.

The CEO of one of my past employers was a compulsive doodler. One day he had to sit through the several-hours-long deposition testimony of a seriously delinquent borrower. The CEO's notes reflected a combination of information, a collection of graffiti-like doodles, and this comment:

"He's a lying son of a \_\_\_\_\_. " (expletive deleted)

These notes came out later as one of the documents in the discovery process and it ultimately had what bank's counsel felt was a negative impact on the judge and jury.

Read what you write as an outsider

Some of us may have been amused just this week in our reading of the Goldman Sachs trader's emails who referred to himself as "the fabulous Fab." Such braggadocio and related comments did not favorably contribute to his image as a financial practitioner with solid credentials for fairness, rectitude, and decorous behavior as a representative of his firm.

Most of us who have experienced any litigation activity associated with our borrowers can recall advice of counsel such as: "Don't put that in the credit file." Or, worse, after-the-fact observations like:

"I wish that memo hadn't been there."

It's not because the statements or observations were not true. Rather, they were subject to possible misunderstanding in a context that could be-and often was-exploited by opposing counsel.

#### Loose emails sink bankers

I had a workout credit a number of years ago where my bank was owed a substantial sum by the president of a community bank. Security consisted of the president's stock in his institution. The loan's purpose was completely unrelated, but, by virtue of the collateral, my bank was intimately concerned about the bank's performance.

The bank's condition due to asset quality was severely impaired and it ultimately failed.

In the middle of all of this, the president and his mother, who owned a substantial equity interest in her own right, had a very public falling out.

She was outspokenly critical of her son's administration and management of the bank (and frankly, she was right). The son fumed to me one day that he wished he could keep his mother from talking about the bank's condition around their small town.

"It's not that she's not telling the truth," he allowed. "She's telling it in too many places."

Have any of us ever done that with an email or memo to the file?

The discussion of interpersonal relationships and activities requires thoughtfulness and care. And who is expected to be more discrete than a banker?

Yet we forget these things in our casual conversations, whether face-to-face or by email or memo.

There were phrases that were contained in several of the publicly released Goldman Sachs emails-abbreviations like

"FTF" (face to face), meaning that the writers were aware of the sensitive nature of the information and were almost calling the reader's attention to their concerns and caution.

Cover yourself-but don't trap yourself in your own cover!

We live in a very litigious age and banks are attractive targets for litigation I suppose for the very reason that Willy Sutton\* offered as the reason that banks are held up so often.

As we go about our daily activities, we need to be sure that the credit files contain enough information for examiners and Loan Review to be able to assess the current condition and activity of the borrower and properly risk-rate the credit. At the same time, we need to be discrete, and exercise some restraint in what we say or, perhaps more to the point, how we say it.

Just this past week, I read that high school students send an average of 100 text messages a day. That's 100 sends and probably an equal number of receives.

What could be that important, I wonder?

The same question has occurred to me for years in the volume of stuff that we leave in the credit files. Not all of this is useful and, worse, not all of it is helpful.

And even worse, some of it may be bombs waiting to go off.

[\* Editor's note: According to legend, that is. Sutton never actually said that he robbed banks because "that's where the money is," but as the fictional newspaperman in John Ford's "The Man Who Shot Liberty Valance" said, when the legend becomes the fact, print the legend. For more about the legend of Willie, from the files of ABABJ, [click here.](#)]

About Ed O'Leary:

Veteran lender and workout expert O'Leary spent more than 40 years in bank commercial credit and related functions,

working with both major banks as well as community banking institutions. He earned his workout spurs in the dark days of the 1980s and early 1990s in both oil patch and commercial real estate lending.

O'Leary began his banking career at The Bank of New York in 1964, and worked at banks in Florida, Texas, Oklahoma, and New Mexico. He served as a faculty member and thesis advisor at ABA's Stonier Graduate School of Banking for more than two decades, and served as long as a faculty member for ABA's undergraduate and graduate commercial lending schools.

Today he works as a consultant and expert witness, and serves as instructor for ABA e-learning courses and a frequent speaker in ABA's Bank Director Telephone Briefing series. You can hear free audio interviews with Ed about workouts here. You can e-mail him at [etoleary@att.net](mailto:etoleary@att.net). O'Leary's website can be found at [www.etoleary.com](http://www.etoleary.com).

Order Ed O'Leary's two-hour "Improving Your Bank's Workout Function" CD