

## How not to defend yourself when examiners attack

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The scene: A bank's boardroom. The situation: Management and board is going to try to dissuade the exam team from leveling a cease-and-desist order.

The regulators are in the room, with sharpened pencils, not to say knives. And then an unhappy sound greets their ears.

"You really don't want the chairman to lean back in his chair and all of the sudden, start snoring," says banking attorney Walter G. Moeling IV. "You have no defense at that stage."

Moeling, Atlanta-based partner at Bryan Cave LLP, spoke during ABA's recent National Conference for Community Bankers regarding board members' role in today's troubled times. At one point—besides staying awake and not snoring—he gave advice on how not to defend yourself against an aggressive exam team when it meets with the board. The session he spoke at was sponsored by ABA Bank Directors Briefing newsletter, sister publication to ABA Banking Journal.

If examiners decide it's time to beat up the board, there are some defenses that you definitely don't want to bother with. Attorney Walter Moeling ticked off these real attempts at defense during his presentation.

1. "I never attended a meeting." To say that you bear no responsibility because you weren't present at meetings is a nonstarter. To say, "I wasn't in any of those meetings, the rest of the folks on the board did that, so I don't have any responsibility" doesn't cut it.

"You just confessed liability," said Moeling.

2. "I just did what the CEO [or chairman of the board] said." Regulators won't buy that, said Moeling. He told a story of a well-intentioned chairman who followed whatever his CEO said. The bank found itself in trouble, and this was the chairman's defense. Moeling's firm pulled him aside multiple times to explain that that wouldn't be acceptable to the regulators, who were from FDIC. The bank squeaked by, on the promise of hiring a new CEO. As for the chairman, Moeling said, "we kind of thought we had him cured."

The new CEO was doing a good job cleaning things up, and the examiners came in again. Things seemed promising, when the examiners praised the board for finding a new CEO able to address the bank's problems. And the chairman said, "Yes, sir, and we're doing whatever he tells us to do." Within hours of the meeting's end, Moeling had a call from the state banking commissioner's office, asking, had the chairman really said that to FDIC?

"That's just not where you want to be," advised Moeling. Examiners are predisposed to see a board as yes-men who lack the gumption to oppose the chairman and the CEO. Reinforcing that view is not healthy.

3. "We were just doing what other banks were doing," Moeling told the story of the typical bank where such defenses arise, one where a conservative game plan was tossed to the winds after market conditions and customer preferences pulled the bank away from its intended strategy.

"It's a real problem," said Moeling of the ineffective defense.

4. "The exam report didn't tell us we were doing anything wrong," Moeling said this is a major no-no.

"The examiners don't run the bank," he explained, "and they resent the heck out of it when you say to them, 'You didn't see this problem before, you didn't catch it last time'."

Not only does such defense make examiners angry, said Moeling, "It should." He said that while directors can take a little comfort from a clean examination, they shouldn't take much. "It's your job to run it," he stressed.

5. Demonstrate complete obedience to management.

Too many board minute books portray directors as rubber stamps gathered around the board table.

One practice that will help in any future defense is, occasionally, saying "no" on a vote. This is quite rare in most boardrooms, said Moeling.

Moeling emphasized that he was not urging dissent for its own sake, nor suggesting that board members play devil's advocate just to dress up the minutes. Just demonstrate that the board isn't a rubber stamp.

This article was adapted and digested from the March "The Director's Job" column in ABA Bank Directors Briefing newsletter. For a sample copy of the issue containing the full story, and an order form for the monthly board letter, e-mail to [scocheo@sbpub.com](mailto:scocheo@sbpub.com)

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