community BANKER

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Welcome to the September/ October issue of the COMMUNITY BANKERS' ADVISOR.

The ADVISOR is prepared by attorneys at Olson & Burns P.C. to provide information pertaining to legal developments affecting the field of banking. In order to accomplish this objective, we welcome any comments our readers have regarding the content and format of this publication. Please address your comments to:

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The attorneys at Olson & Burns represent a wide range of clients in the financial and commercial areas. Our attorneys represent more than 30 banks throughout North Dakota.

You are asking . . . . .

Q: A personal representative, an only child, wants her name as the POD beneficiary on the account for her recently-deceased mother's *estate*. Her father is deceased, and her reasoning is that, ultimately, the money will come to her anyway. We have refused to do so. She wasn't happy, but we are correct, right?

A: You are most certainly correct. The "Estate of Joan Smith" will never die, so there cannot be a POD – it would make no sense. When the personal representative has finished her tasks and the Estate is closed, she can close the account and disperse the funds therein according to the will or however disbursements are to be made.

Q: Please settle something for us. Suppose we have a check that is made payable using "and/or" - for example, "Pay to the order of Captain Crunch and/or Mr. Clean." Is it payable as an "or" or does the "and" determine how it should be paid. Our training has always been that when it's an "and/or", the "or" should take priority over the "and."

A: You were correctly trained. The statute addressing the identification of the person to whom an instrument is payable, N.D.C.C. § 41-03-10(4), provides as follows:

> If an instrument is payable to two or more persons alternatively, it is payable to any of

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them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them. *If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively.*

Breaking this down, if the check is payable to Crunch OR Clean, either Crunch or Clean may negotiate it. If it's payable to Crunch AND Clean, Crunch and Clean must negotiate it together. If it's payable to Crunch AND/OR Clean, the "ambiguous" principle applies and the check is handled as if it's payable to Crunch OR Clean. See the last sentence in the statute, which we have italicized above.

Some banks have enacted the policy that requires *all* payees of a check made payable to multiple payees alternatively must endorse the check. In other words, whenever there is an "OR", whether it's an "AND/OR" or just an "OR", both Crunch and Clean would always have to endorse. Even though N.D.C.C. § 41-03-10(4) does not require this, the idea is to simply avoid any trouble that might come with an endorsement claim, even though the statute would protect the bank. Going that extra step for protection over and above the requirements of the UCC is strictly a bank decision.

Q: Our customer is a small corporation and it is in the process of changing to a limited liability company with a new tax ID number. The customer wants to change the entity status on the account, use the new tax ID number, BUT keep the same account number. We have said no to that request, but the customer has asked again. *Can* they keep the same account number even though they are changing to an LLC with a new tax ID number?

A: An odd request – changing the entity status and the tax ID number, but wanting the same account number. Do not go along with that plan because who knows what can of worms you'll open: IRS issues? Mixed-up transaction issues with checks coming in to the corporation being put in the LLC account? Changing a corporation to an LLC creates an entirely new entity and the law looks at this as a different "person." The corporation no longer exists; an account opened for a now-nonexistent person should not be transferred to another person. When John Smith dies, you wouldn't give his account number to Sue Jones, would you?

Q: A limited liability company customer opened an account and wants to have a POD beneficiary listed. Never heard of this - comments?

A: A limited liability company is a legal entity, and though it is treated as a "person", it will not die. Designating a POD (payable on death) beneficiary for the bank account of an LLC would make no sense, would have no effect, and would look rather foolish. See our response to the first question, above.

Employee Documentation Best Practices

Documenting employee performance, behavior, or discipline can be a chore to get through as quickly as possible for most supervisors and managers. There are, however, many benefits to both the employer and the employee in properly documenting employee performance, discipline, and misconduct. Regular and routine documentation may help an employee realize that certain levels of performance or kinds of behavior are unacceptable and can help him or her change the performance or behavior in the future.

Of course, being lawyers, our first and foremost thought is that good documentation may act to ward off a lawsuit like a cross to a vampire. If an employee contests an action that had been taken against him because of poor performance or behavior issues, or files a lawsuit, thorough documentation can prevent such actions from going beyond the preliminary stages.

Your routine documentation doesn't have to read like a military briefing - the document may be an informal handwritten note put into an employee's file. However, documentation should *always* include the dates and names of all parties involved.

Strong documentation will be especially important if an employee or ex-employee sues your bank saying his or her firing or discipline was based on illegal discrimination. That includes race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. For example, if two employees commit a similar offense, an employer many not discipline them differently because of one of these listed things. Commonsense, detailed ongoing documentation by management will prove that performance and not a supervisor's bias was the reason for the firing or discipline. As with any employee records, supervisors should stick to the facts and stay objective when documenting discipline, and avoid opinions (such as "I think she is just putting in time and waiting for retirement in three years." That's a double-whammy – your opinion *and* a reference to age, a discriminatory no-no.).

What to do and how to do it.

Help limit your bank's legal risk by training managers and supervisors to follow three fundamental principles when documenting discipline. The documentation should be:

1. Immediate. Supervisors should take notes right after an incident occurs. It's much harder for an employee to cast doubt on the supervisor's motives if a written explanation comes right on the tail of the action.

2. Accurate and believable. When an outside observer like a judge, a jury, or a state or federal investigator is called to pass judgment on your Bank's side of the story, specific, detailed comments add legitimacy. The more specific the documentation, the greater the credibility - for example, instead of noting that "Roger's work has been careless lately," it's better to record that "In each of his last three audits, Roger made at least three significant accounting mistakes that needed corrections and followup."

3. Agreed upon. If both sides agree on what happened, it's much harder for either side to later change claims. Try to get employees involved in the documentation process. Supervisors might ask the employee to summarize her input in writing, and then compare it to their own recollections. If they can't reach an agreement, try to get detailed statements from any witnesses.

How would it sound in court?

When documenting employee failings or shortcomings, always ask yourself "How would this sound if it were read aloud in court?" If the language used even suggests a discriminatory or retaliatory motive, your Bank could find itself in legal trouble.

So before supervisors hit the print key or put the handwritten note in the file, they should ask themselves these questions:

- Did I limit my written comments to an employee's on-the-job performance?
- Am I objective when it comes to analyzing an employee's work?
- Can my words be interpreted as unprofessional, degrading, or sarcastic?
- Did I make certain that I get all the facts from all involved parties?

Even the most informal note put into an employee's file should meet those four criteria.

BANKRUPTCY CRIME DOESN'T PAY

A 48-year-old Iowa man who was sentenced to 46 months in a federal prison for fabricating grain elevator scale tickets and for bankruptcy fraud has lost the appeal of his sentence. From approximately October 2008 to October 2009, Michael Recker first

bribed, and then threatened, an elevator employee into issuing false certificates and payments for grain that was either substandard, or had not actually been delivered to the elevator, in violation of federal law. The elevator employee fabricated eight false grain elevator tickets, in exchange accepting thousands of dollars in bribes from Recker. The grain elevator paid Recker more than $20,000 based on the false tickets. In conjunction with this scheme, Recker interfered with Internal Revenue laws, also in violation of federal law, by concealing the proceeds obtained from the false grain tickets. While investigating the false grain ticket scheme, the government discovered that Recker also committed bankruptcy fraud by failing to disclose his ownership and later sale of a combine on his bankruptcy schedules, and by lying under oath about the combine's ownership at a meeting of bankruptcy creditors. In a recent opinion, the 8th U.S. Circuit Court of Appeals says Recker was properly sentenced last year to 46 months in prison. The judges of the appeals court concluded that the sentencing judge properly considered Recker's initial denial of his actions and his 15 previous convictions for unrelated crimes for which he was treated leniently by Iowa courts. United States v. Recker, 2014 U.S. App. LEXIS 16092 (August 21, 2014).