

Branch Calls Common Questions/Uncommon Solutions

by

Michael Wick
Washington Mutual Bank

Gene Elerding
Manatt, Phelps & Phillips, LLP

Ted Teruo Kitada
Wells Fargo Bank, N.A.

1. The Need For Speed

- Advance preparation
 - Create a personal code index for repeat issues
 - Use tabs and highlighting on the most often used code sections
 - Buddy system (BOCA, Northern California “Operatives,” CBA and State Bar committees; compliance officer networking)
 - Obtain advance authority to settle small matters
 - Create a numbered filing system that can grow over time
 - Identify a PR crisis consultant
 - Create quick response teams in advance of problems (wire fraud, check kites, security breaches)

- Resources
 - Google
 - Code and banking websites
 - Federal Register supplementary information (final and proposed rules), with liner notes
 - Pre-made generic release, adverse claim and indemnity forms (giving and receiving)
 - Generic service and confidentiality agreements
 - Banking agency personnel telephone list
 - Agency updates/electronic subscriptions

2. Typical Questions

- “Should we do this?”
 - Note: It may not be appropriate for an attorney or compliance officer to make what is, in reality, a business decision

- “Can you put that in writing?”
 - Translation: “Will you take responsibility for what I am about to do based on what you had to say?”

Sometimes Acceptable Responses

- “I don’t know off the top of my head. I’ll look it up and get back to you.”
- “The answer is not clear. At this point, based on what we know and having discussed some of the risks involved, I suggest . . .”
- “There is no good solution. Since this entails some risk to the bank, we will need to get management’s approval before taking action.”

3. Rules of Thumb

- If you have to ask whether to file a Suspicious Activity Report based on the unusual nature of a transaction, you should probably file a SAR.
- If you are unsure whether elder abuse is occurring, report it nonetheless.
- If accountholders, signers, partners or shareholders are in a dispute and the bank is unsure as to who is authorized to control an account, freeze the account, especially if the account agreement allows for such action.
- If you are unsure as to whether a levy is effective against a particular account, contact the levying party for more information and/or freeze the amount in question until more information is obtained. Be sure to keep your customer informed as to what is happening.
- If a check kite appears to be under way, begin placing holds on deposits and/or require deposits to be made by wire or cashier’s check; do not ask other institutions for confirmation of the kite or for information about their collected balances unless your bank is in the clear.
- Create a record of all calls, the facts communicated to you and your advice as best you can.

4. Risk vs. Reward

- Setoff (the *Miller v. Bank of America* decision)
- Litigation threshold and settlement

- Bulk filing threshold
- Accounts for foreign customers and politically exposed persons
- Civil Code §1500 (due offer of payment) accounts
- Escrow arrangements managed by a branch
- Freezing an account (unusual transactions; ambiguous levies, other good reasons)
- The **power** of an apology!

5. The Ever-So-Popular and Ubiquitous CYA Memo

- Pros and cons
- Trust and personal relationships
- Problems maintaining the attorney-client privilege

6. Common Questions

Scenario 1: Potential Elder Abuse. We have a 71-year old customer who has been sick for several years. I think she may have Alzheimer's disease. Her nephew has been bugging us to add his name to her account as a signer. Frankly, we don't trust the little weasel and are concerned that he may try to take advantage of his aunt. When he came into the branch with her two months ago, he was abusive to the staff and seemed to order his aunt around. He wouldn't let us meet with her separately, and she seemed a little confused. What do we do? He just sent us a power of attorney and said the bank would be liable if it didn't allow him to withdraw funds from the account.

Elder Abuse Considerations:

- Relationship of person seeking control of the elder customer's funds
 - Is the person a relative, a caregiver, or simply a friend?
 - How stable, trustworthy and financially sound is the person?
 - If a relative, has the person been living with the elder customer because (s)he cannot afford his/her own home? Has the customer been living at the house of the relative/caregiver?
 - Is the person already a joint owner or signer on the customer's account?
 - Is the person a likely beneficiary of the customer's estate (via will, trust or POD account)?
 - Is there any other person more appropriate for the job (e.g., spouse or adult child who lives close to the customer)?

- Are the customer's funds being withdrawn because (s)he is moving to live with the attorney-in-fact in a different city?
- Amount in question
 - Does the account hold a substantial amount of the customer's liquid assets?
- Age and original purpose of power of attorney
 - Was the power of attorney given for a specific purpose that no longer applies (e.g., to take care of matters while the customer was on vacation in Europe for several weeks in 1999)?
 - Was the power created at the same time as a will or trust? Was an attorney involved in the process?
 - If the customer has not been competent for some time, was (s)he competent at the time the power of attorney was executed? [Note: Although the bank may, in good faith, honor a power of attorney if it is without "actual knowledge" of the principal's incapacity, nothing prevents the bank from attempting to gain that knowledge.]
- Durable vs. nondurable power of attorney
 - If nondurable, does the customer still have the capacity to contract? [Although there may not be a duty to inquire, the law does not prohibit an inquiry, even in situations where the attorney-in-fact provides a Probate Code § 4305 affidavit.]
 - Does the power of attorney comply with all legal requirements?
 - Can the bank contact the persons who notarized/witnessed the power of attorney? Can they confirm the customer's capacity at the time the power was signed?
- Proposed transaction
 - Does it appear to be for the benefit of the customer, the attorney-in-fact, or the person who appears to be controlling/abusing the customer?
 - Are the funds being used for the ordinary expenses of the customer (e.g., taxes, mortgage, nursing home, doctor bills, or utilities)?
- Access to doctor, pastor, attorney or other unbiased persons who know the customer
 - Note the privacy and attorney-client privilege issues.
- Ability to speak with the elder customer to determine his/her intent
 - By telephone
 - In person, but separate from the person who may be abusing the customer

- Current age and health of the elder customer
 - Signature comparison with what is on file with the bank
 - Still competent to act?
- Are there provisions in the account agreement that might allow the bank to freeze the account for the customer's ultimate benefit?
- Can the bank get the transacting party, at least in the interim, to limit the transactions for a specific purpose (e.g., to pay nursing home expenses)? Can bank under debit authorization issue a cashier's check to pay nursing home expenses to assure payment for the benefit of elder?
 - Consider automatic payments via ACH
 - Note the problem with ongoing bank reviews
- If the bank is unable to "get comfortable" with the transaction, should it consider closing the account and issuing its check or wire the funds to an account in the customer's name at another institution?

Scenario 2: BSA. One of our business customers (a video store owner) came into the branch yesterday and deposited exactly \$5,000 in cash. Later in the day, another employee of the company (from a different store location) deposited \$5,000 into the same account, but at a different branch. How soon do we have to file a Currency Transaction Report? Do we need to file a SAR?

BSA Considerations

- Is the customer on your exempt list?
- Has the customer performed transactions similar to the one in question? Have CTRs been filed in the past for this customer? Are cash deposits typical? Is this amount of cash normal for this type of business?
- Is there anything unusual about the cash, e.g. all new bills, bundled, same denomination?

Scenario 3: Currency subject to an IRS levy. We were served today with an IRS levy. Just prior to the service, our customer delivered currency to a cash vault location designated by the Bank. Our customer's business generates a high volume of currency, and it regularly during the course of a business day delivers the currency to that location. We normally count and confirm the currency against the deposit slip and credit the customer's account at the end of the business day. The IRS is taking the position that the levy attaches to the currency delivered to the Bank pre-levy -- during the course of the business day. Is the IRS' legal position correct?

The IRS is arguing that, while a formal debtor/creditor relationship may not have been established in connection with the delivered currency (as the Bank had not confirmed the amount delivered by the customer), mere possession of the currency by the Bank as tangible personal property subjects that property to the levy. It has warned us that any person in possession of or obligated with respect to property must surrender the property upon service of a levy (26 U.S.C. § 6332(a)) and that failure to deliver the property may subject the Bank to a penalty of 50% of the value of the property (26 U.S.C. § 6332(d)(2)).

Considerations: This is a difficult issue if the Service's position is supported:

- Post levy, a bank would need to investigate post levy deposits appearing on the books of the bank at the end of the business day, to determine if unconfirmed pre-levy currency constituted a deposit. Administratively, the handling of levies served by the Service would become highly burdensome.
- A levy served by the Service may impact currency in night depositories delivered by a merchant prior to the levy but unconfirmed by a bank.
- A levy served by the Service may impact unconfirmed currency in the possession of messengers under a messenger/merchant arrangement. While under merchant/messenger agreements the messenger is an agent of the merchant, possession of the currency by the messenger may subject the currency to a levy; as such messengers are regularly employees or agents of the bank.

Scenario 4: The Ambiguous Levy. We just received a levy that is directed against the accounts of "Nathan's Video Inc." We don't have an account in exactly that name. We do have an account in the name of "Nathan's Inc." It is a video store and has the same address as shown on the levy for Nathan's Video Inc. What do we do?

Levy Considerations

- Identify the amount sought and how much was in the account at the time of the levy.
- Identify what type of levy is involved (e.g., IRS vs. money judgment).
- Determine what other documentation the bank has available to identify its customer (e.g., Fictitious Business Name Statement, Articles of Incorporation, name used on checks, loan applications, and tax filings)
- Contact the levying party and/or the customer for more information.
 - Determine whether there has been a change in corporate status (e.g., a sale of the company).
 - Is the customer familiar with the plaintiff/action? Does the customer admit to being a party to the action in question?
 - Does the customer object to the bank's compliance with the levy against the account?

- Will the customer provide the bank with a declaration under penalty of perjury that confirms it is not the party subject to the levy? Will the customer provide a hold harmless in favor of bank?
- Does the bank have a loan outstanding to its customer? Is it considering taking any action to offset the account as a result of the levy or for any other reason? [Note: sometimes a customer will even ask its bank to setoff accounts, rather than pay a levy]
- *Da-Green Electronics, Ltd. v. Bank of Yorba Linda* (9th Cir. 1989) 891 F.2d 1396; *Grover v. Bay View Bank*, 87 Cal.App.4th 452 (Cal. App. 1 Dist., 2001)

Scenario 5: Security Breach. Yesterday, we discovered that several home loan files and deposit records were missing from our branch. We've searched everywhere, but can't find them. Today, when we checked the trash bins out back, we located the records. It's possible that the janitor threw them out by mistake, but he doesn't recall doing so. What do we need to do now, if anything?

Considerations:

- Are the files intact? Is everything where it is supposed to be (e.g. loan documents on right side and bracketed)?
- Is the janitor your employee or a contractor?
- Is it reasonably possible that misuse of the information occurred?
- Does GLBA even apply?

Scenario 6: Bank Address of Checks. We have a business customer who wants to open a payroll account. He doesn't want to have the bank's address printed on the checks as he has employees in several locations around the state. He wants to make an arrangement with us to have his employees go to any branch to cash their payroll checks. Can we accommodate his request?

Considerations:

- See *Fleming v. Dollar Tree*, 2006 WL 2975581 (N.D. Cal.).
- Labor Code § 212 considerations.
- See also *Liliana Solis v. Regis Corporation*, 2007 WL 4328806 (N.D. Cal.).

Scenario 7: Minor Accounts. One of our best customers has asked us to open a checking account for his 16-year old. Can we do that?

Minor Considerations:

- The problem: the minor's right to disaffirm most contracts before or shortly after the minor attains maturity
- Will the minor be the sole owner of the account, or will it be a joint account with the parent? Does the parent want to be able to access account funds or account records?
- Will the parent agree to assume responsibility for the actions of the minor and to indemnify and hold the Bank harmless from any loss caused by any disaffirmance by the minor or his estate?
- Will there be a cap placed on the amount the Bank allows to be deposited? How will the Bank manage the cap?
- Is the minor emancipated? (i.e., married, on active duty, or declared emancipated by a court)?
- Will the funds being placed in the minor's account be gifts from the parent?

Scenario 8: Access to Account Records. One of our longtime customers says that she is the newly elected Vice President of the Wednesday Night Book Club, which maintains an account with us. She has asked for a copy of the Club's last statement. Does she need to sign the signature card first? Can we give her a copy of the statement since there isn't anything that she can do with the information and there isn't much in the account anyway?

Access Considerations

- Does the customer have any paperwork to back up her request, e.g. a resolution, by-laws, newspaper article?
- Just call the current signer on the account.
- Don't assume she is telling the truth even though the matter seems relatively insignificant.

Scenario 9: Altered v. Counterfeit Item. One of our customers is disputing a check that posted against his account. He says the check was altered. It's possible that it may have been a washed or counterfeit check -- we can't tell, since the original check was destroyed by the Bank. We only have an image of the posted check. When we returned the check to the depository bank with our breach of warranty claim (for the alteration), it rejected our claim and took the position that the check was a counterfeit and that we had returned it too late (after our midnight deadline). Which of us is correct?

- See *Wachovia Bank, N.A. v. Foster Bancshares, Inc., and Foster Bank* 457 F.3d 619 (7th Cir. 2006).

- Compare *Wachovia Bank* with *Bank of America, N.A. v. Mazon State Bank* 2007 WL 2714117 (N.D.Ill.), 63 UCC Rep.Serv.2d 994, following *Foster Bancshares* and holding that even if the original is available, the paying bank wins where the original does not clearly show whether the item is altered or counterfeit.

Scenario 10: Setoff. One of our loan customers has just been arrested for committing a rape. We have a loan out to his store. Can we setoff his account with us? If the company has time deposits, do we impose an early withdrawal penalty? Can we take other company property that we are holding (e.g., in a safe deposit box)?

Setoff Considerations:

- Contract provisions allowing for acceleration of loan and setoff
- Bank account terms involving setoff
- Pros and cons of acting on “insecurity” clauses
- Availability of collateral and other means to repay the loan
- The ownership of the account vis-à-vis the borrower
- Some situations where setoff may not be proper:
 - When the account contains special purpose deposits (funds which the bank knows or should know are held for others or are designated for a special purpose, such as a broker’s impound account)
 - With certain exceptions, when the bank is confronted with the imminent filing of a petition in bankruptcy and the setoff (within 90 days of the date of filing) would represent an improvement in the bank’s position. By exercising its right of setoff within the preference period, the bank forfeits the right it otherwise would have to seek relief from the Bankruptcy Court in the form of adequate protection (e.g., collateral dedicated by the Court) in exchange for its rights against amounts on deposit.
 - Absent court approval, upon the filing of a petition in bankruptcy (note: you may be able to place a temporary freeze on the account pending a motion for relief from the automatic stay)
 - Where the bank by its conduct waives the right to setoff
 - When the account is an Individual Retirement Account (*Kruger v. Wells Fargo Bank*, 11 Cal.3d 352, 113 Cal. Rptr. 449)

- Generally, when the debt and the deposit do not involve the same parties, in the same capacities
- When an IRS levy for the funds is served before the setoff is accomplished (IRC § 6332)
- When the setoff for a consumer “debt” would reduce the customer’s aggregate DDA balance below \$1,000.00 (Financial Code § 864)
- If a consumer returns the response form mentioned in Financial Code §864 within 20 days
- When the setoff would include deposits protected from creditors (i.e., funds from sources exempt from attachment and execution)
- When the offset relates to a cardholder’s indebtedness arising from a consumer credit transaction (i.e., a consumer MasterCard, VISA or other “credit card” plan transaction)(Reg. Z § 226.12(d))
- When the indebtedness is secured by real property
- When the bank fails to exercise its setoff in advance of the final payment of checks drawn on the same funds (UCC § 4303)
- When the debt is not yet due
- When it clashes with a competing, perfected security interest of another party

Scenario 11: Money Laundering. One of our elderly customers deposited \$1000 using 10 crisp \$100 bills. She has never deposited cash previously into her account -- only her Social Security checks. She refuses to tell us where she got the money. Do we need to file a Suspicious Activity Report (“SAR”), as this is not typical behavior for her?

Money Laundering Considerations

- Is this a one-time occurrence?
- Is there anything otherwise unusual about the customer’s conduct?
- Do you have reason to believe that the customer is making a micro deposit?
- Does the customer have friends or family who are of dubious character?

Scenario 12: Inquiry involving deceased customer domiciled in foreign nation. We have a claimant to a deposit account maintained by a deceased customer who had been residing in

England at the time of his death. The account has a balance of \$25,000. We have been told that a probate of our customer's estate has been opened in England and that a personal representative has been appointed there under the laws of England. Can we transfer the funds to him? What procedure should we follow?

Considerations:

- What law governs this request? Does California law govern as to the claim? Civil Code § 946 provides: "If there is no law to the contrary, in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile." Absent a small estate affidavit or similar procedure available to the claimant under the laws of England, is the personal representative required to commence ancillary administration? Probate Code § 12500, et seq. Note that while a personal representative from a sister state may in lieu of ancillary administration use the small affidavit procedure (Probate Code § 13100) under Probate Code § 12570 if the conditions under § 13100 are satisfied, this procedure is unavailable to a personal representative appointed under the laws of a foreign nation. (Note also that the authority of a personal representative does not extend beyond the jurisdiction of the government under which the personal representative was invested with authority, except to the extent expressly authorized by statute. Code of Civil Procedure § 1913(b).)
- Small estate affidavit (Probate Code § 13100, et seq.) May the claimant use the small affidavit provided the claimant is a successor (Probate Code § 13006)? Note that Civil Code § 946 qualifies the applicability of the laws of England by providing "if there is no law to the contrary, in the place where personal property is situated...." Does this mean law to the contrary in California or in England? If this qualification means the law of England, we may not have Probate Code § 13100 available. If this qualification means the law of California, Probate Code § 13100 may be available, if the claimant satisfies the conditions therein.

Scenario 13: Trust Certifications. Our branch doesn't have a notary. The Bank's procedures, however, call for us to obtain a notarized trust certification whenever a trust account is opened. Is that absolutely necessary? We are losing customers because they don't want the hassle of finding a notary in order to open an account.

Trust Considerations

- Probate Code §§ 18100 and 18100.5
- Policy exception procedures

Scenario 14: Unincorporated Associations. Our good customer, Flower Dimwitty, wants to open an account with us for her Spring Street Gardening Club. She has a check payable to the Club that she wants to deposit to establish the account. She also wants to get \$250 in cash back to cover the cost of supplies for an upcoming Club meeting. She says she doesn't have articles

of incorporation or a corporate resolution. What documentation do we get for an unincorporated association?

Considerations:

- Whatever we can get!
- Typically there is a lack of formality about governance matters.
- May need to have a sit down and come to an understanding with all the principals.
- Who is the maker of the check from? What if it is Jane?

Scenario 15: Power of Attorney. We have an attorney-in-fact who wants to be added as a signer under a power of attorney to an existing deposit account. However, he has been “blacklisted” by the Bank due to a loss we suffered a few years ago. Are we required to add the attorney-in-fact as an authorized signatory to the deposit account?

Considerations:

- Liability to bank if bank refuses to honor a statutory form power of attorney. Probate Code § 4406. May attorney-in-fact compel bank to honor the statutory power of attorney?
- Liability to bank if bank refuses to honor a nonstatutory power of attorney accompanied with an affidavit to the effect that power of attorney has not been terminated; the authority has not been revoked; and the principal is not deceased. Probate Code § 4306.
- What information may bank provide to principal if bank declines to honor the power of attorney, notwithstanding the liability?
- Would the Bank have rejected him as a signer at the time the account was opened? Probate Code § 4300.

May the bank recognize the power of attorney merely for the purpose of permitting the attorney-in-fact to close the account and issue a cashier’s check payable to the principal?

Scenario 16: Foreign Accountholders. A U.S. subsidiary of a company based in the Marshall Islands and incorporated in New York wants to open a checking account with us. We have no prior relationship with the subsidiary company. For Customer Information Program (“CIP”) purposes, what documentation we need on the company based in the Marshall Islands?

Considerations:

- What, are you crazy?

- Business decision – is the account worth the risk and research involved?
- Marshall Islands website is a place to start.
- Does the company have banking relationships in the U.S.? Get permission, in writing, to speak with your counterpart and the law firm which represents them.
- Are you a business bank? “No”, is this how you want to start?

41214113.1