

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 95-39

May 10, 1995

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: B. Allan Benson, Acting Associate General Counsel

SUBJECT: Sources for Establishing Alter Egos, Disguised
Continuances, and Successors

In developing the evidentiary record in a case recently litigated in Denver, Contempt Senior Trial Attorney Dan Collopy uncovered a tremendous volume of public and private records that were useful at trial. Attached is an outline he has prepared of sources which Regions may wish to utilize when investigating alter ego, disguised continuance, and successor cases. With respect to bank records, Regions are reminded that **The Right to Financial Privacy Act**, 12 U.S.C. 3401 et seq., prohibits the Government from obtaining, from a financial institution, financial records of a "customer," as defined in 12 U.S.C. 3401(4),(5), unless certain procedures are followed. See Casehandling Manual Sections 10590.2, 10593.6 and 10601.3.

Any questions concerning this matter may be addressed to me, your Assistant General Counsel or the Contempt Litigation Branch.

Attachment

cc: NLRBU

B.A.B.


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SOURCES FOR ESTABLISHING ALTER EGOS, DISGUISED CONTINUANCES, AND SUCCESSORS

State Departments of Labor and Employment

Evidence: Provided certified copies of unemployment insurance records for predecessor and successor companies showing similarity of employee complement, transfer of tax rate based on claim history from predecessor to successor, and computer print-out showing predecessor and successor account numbers. In addition to providing accurate lists of employees for successor/predecessor companies on a quarterly basis, their reports also list wages per employee over the annual \$10,000 threshold. Because employers in many states do not have to pay any unemployment tax for wages in excess of a fixed amount, often \$10,000 per annum per employee, there is an incentive for a successor to simply assume the predecessor's account.

State Departments of Revenue Motor Vehicles Division

Evidence: Where vehicles are transferred from the predecessor to the successor, particularly where the successor has a line of credit secured by the vehicles, motor vehicle records may contain affidavits authorizing the transfer (and whether moneys were exchanged), the date of such transfers, statements of ownership, titles of those making the transfer, and assignment of title documents.

Note: In order to obtain the necessary information, I asked the clerks to search their records for all vehicles owned by the successor and the predecessor going back to the period of time immediately before the creation of the successor. Although many agencies have a policy of charging a substantial fee for copies of ownership documents, they may agree, with a little coaxing, to produce all requested records for no fee. The Colorado's Motor Vehicles Division provided over 100 pages of ownership records for no fee in the *Reliable Electric* case.

State Departments of Regulatory Agencies State Electrical Boards

Evidence: When an electrical contractor transfers its state license from its predecessor to its successor, many states require contractors to complete registration materials which state the name of the "New" and "Old" companies.

State Secretary of State's Offices

Evidence: Pulled copies of UCC financing statements and releases that showed lender releasing security interest in the name of successor although the lien was established in the name of predecessor. Search of corporation files revealed several other companies where principals of both predecessor and successor companies were also involved.

City and County Government

Contractor's Application and/or Building Permits

Evidence: Lists the name of sole proprietor, names of partners, or corporate officers, titles, ages, residences, and supervisors. In addition to the contractor applications that contain this information, they also have building permits which show the volume and valuation of work performed, and require a "contractors" signature.

Occupational Privilege Tax

Evidence: Computer reports show initial tax liability date and payment history for predecessors and successors.

Internal Revenue Service

Federal Tax Returns

Evidence: Schedule E of Corporate Form 1120 lists ownership, compensation, and percentage of time devoted to business of corporate officers. Schedule H (2) of Corporate Form 1120 also lists any individuals, partnerships, and corporations who own 50% of filing corporation's voting stock. ***Note: I'm not sure IRS will release taxpayer info without consent of taxpayer. This needs to be checked out.***

Small Business Administration

Personal Financial Statements

Evidence: Lists the assets and liabilities of corporate officers owning 20% of corporate stock or any person or entity providing a guaranty on an SBA loan. Includes schedule for ownership, number of shares, cost, and market value of corporate stock.

Bonding Companies

Evidence: In order to obtain performance bonds, contractors must submit personal and corporate financial statements, contract solicitation materials, and letters of introduction setting forth the inner workings of the company. These financial statements, particularly when used to create "history" for the successor entity, may simply adopt the financial data for the predecessor. In *Reliable Electric*, the successor adopted predecessor's data for two years in 3 different financial statements prepared by 3 different accounting companies. These same financial statements were later adopted by the successor when the bonding agent used them to obtain bonding for the successor.

Accountants

Evidence: Files contain notes of conversations with company representatives as to ownership and handling of funds between predecessor and successor. Because there is no recognized accountant-client privilege under federal law, state laws recognizing this privilege do not apply in Board investigations (See attached brief). Files also contain working papers, financial statements, and tax returns.

Contractors

Evidence: Construction files, as part of the proposal by the successor or predecessor for the work, may contain letters of introduction, resumes of their principals and statements of prior experience and projects. Construction files also contain extensive correspondence between the principals of the successor/predecessor and the Contractor, releases, joint check payment agreements identifying suppliers on the project, and checks showing which entity was paid for the work. Construction contracts also generally require written assignments of subcontracted work, a formality ignored by some successors.

Suppliers

Evidence: Files contain credit applications which have been submitted to set up a new account for the successor and which contain the financial history of the successor (sometimes incorporating financial data of predecessor). Files also contain invoices that show when work was billed, which entity was billed, and account numbers for specific projects for particular subcontractors. Suppliers' records can be used to establish continuity of account numbers for successors and predecessors.

Banks

Finally, bank records, in addition to showing where the predecessor/successor gets and spends its money, also include signature cards,

corporate resolutions, loan applications, loan commitments, loan guarantees, security agreements, promissory notes, deeds of trust, and other documents which may show ties between the successor and predecessor companies. In *Reliable Electric*, the bank's files contained a letter from the bank to the principals of the predecessor company restating a conversation in which the principals indicated that, in order to get out from under an IRS tax lien, they were going to set up a holding company to own and operate the successor company which was going to take over the predecessor's business.

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