

Court Requires Expert Witness to Have a Body and a Brain

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A recent case addressed the interesting question of whether a corporation could serve as an expert witness. The matter involved a breach of fiduciary duty case coordinated with an appraisal proceeding, in re Dole Food Company (“Dole”). The defendants designated Stifel, Nicolaus & Company, Incorporated (“Stifel”), a corporation, to serve as their expert witness regarding the value of Dole.

The expert reports were signed by Seth Ferguson, a Stifel managing director, and Michael Securro, a Stifel employee, but only as authorized representatives of Stifel and not in their personal capacity. Mr. Ferguson appeared for deposition as the person most knowledgeable (“PMK”) regarding the reports, but defense counsel objected to the suggestion that the opinions rendered belonged to him personally and reiterated that Stifel was the expert, not Mr. Ferguson. Presumably, the distinction would allow Stifel to rely on the collective knowledge and experience of all Stifel personnel, rather than solely Mr. Ferguson.

Plaintiffs argued that an expert witness must be a biological person, with defense pointing to the various other instances where the law treats a corporation as a person.

The Court found that the Rules of Evidence support that a witness must be a biological person, citing the following rules with which a corporation cannot comply:

- Rule 602 requires that a witness must be able to testify from personal knowledge.
- Rule 603 requires that a witness be able to take an oath or make an affirmation.
- Rule 612 contemplates that a witness has a memory that can be refreshed.
- Rule 615 assumes that a witness can hear the testimony of other witnesses, such that the witness might need to be sequestered.
- Rule 702 requires that the expert be “qualified” as such “by knowledge, skill, experience, training or education” and be able to apply “reliable principles and methods” to the facts of the case.
- Rule 703 contemplates that an expert can perceive facts or data.

And, more eloquently stated:

"Lacking a voice, a corporation cannot testify. Lacking ears, it cannot hear. Lacking a mind, it cannot have personal knowledge or a memory to be refreshed. Lacking a conscience, it cannot take an oath or provide an affirmation. And because of its incorporeal nature, it cannot even meet Delaware's statutory requirement that a person taking an oath do so "with the uplifted hand."

The Court further noted that no one is permitted to testify through an agent, as Stifel tried to do with Ferguson, without suffering from both speculation and hearsay. While rules of procedure enable parties to obtain testimony from a PMK, such a witness testifies as a biological person and not a legal construct.

The exclusion of Stifel likely had little ultimate impact in this particular matter, since the Court allowed Defendants to substitute Mr. Ferguson, requiring only that he adopt Stifel's expert reports as his own, citing *Merion Capital, L.P. v. 3M Cogent, Inc.*, 2013, which permitted a member of the expert's team to replace the original expert where the replacement expert *"read [the previous expert's] expert report, spoke with members of [the previous expert's] team, and ultimately adopted [the previous expert's] conclusions."* In conclusion, the Court stated

"Ferguson has a body and brain. Assuming he is otherwise qualified, he can serve as an expert witness. Stifel has neither and cannot."

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