

FORMAL OPINION NO. 106

Questions

Is it ethical for defense counsel in a criminal proceeding, without notifying the court or opposing counsel, to seat at the defense table at trial a person other than the defendant for the purpose of securing a dismissal of the action on the basis of incorrect identification?

Is it ethical for defense counsel in a criminal proceeding, after notifying the Court, to seat at the defense table at trial a person other than the defendant for purposes of testing eyewitness identification?

Background

These questions for decision are presented by the following factual situation:

Defense counsel seated defendant's brother at counsel table and arranged for defendant to sit in the rear of the courtroom. No statements were made by defense counsel identifying the person sitting next to him. The prosecutor put on his case, which included identification by a witness of the person sitting next to defense counsel as "the defendant, Mr. Jones."

On cross-examination, defense counsel asked the witness, "When you identified the defendant, did you mean Mr. Jones here?" gesturing to the person seated next to him. The witness affirmed the identification. (Jones was the name of the brother.)

At the close of the prosecutor's case, defense counsel successfully moved for dismissal on the basis of the incorrect identification. Neither the court nor the prosecutor had prior knowledge of the true identity of the person seated at counsel table.

Answer

The seating of the defendant at the defense table is an implied representation by defense counsel of the identity of the individual as the defendant. Actual physical presence of the defendant is, in most instances, required, and no constitutional ramifications attach to the requirement of actual physical presence of the defendant. Adequate safeguards exist concerning the constitutional ramifications of personal identification (Wade-Gilbert-Stoval Trilogy) to alleviate the necessity (or opportunity) to test in-court identification through misrepresentation. Such conduct on the part of defense counsel constitutes a misrepresentation of fact within the proscription of DR 7-102(7), if counsel participates in the act, and concealment or failure to disclose that which by law counsel is required to reveal within the proscription of DR 7-102(3), if the presence of the defendant is required by statute, rule or order of the court.

Furthermore, under DR 7-106(B)(2), a lawyer shall disclose "unless privileged or irrelevant, the identities of the clients he represents and of the person who employed him." It is difficult to conceive an example or situation during a criminal trial where identification of the client by his lawyer would fall within the confines of a privilege. This is not the situation of the existence of the lawyer-client privilege as the same existed, for example, in Baird v. Koener, 279 F.2d 623, wherein an exception was found to the general rule that ordinarily the attorney-client privilege does not include the identity of a client.

DR 7-106 governs trial conduct. The rule prohibits the knowing use of false evidence; it condemns any false statement of fact. The rule requires the lawyer to disclose the identity of the client and to comply with known customs of practice unless the intent not to comply is disclosed to the opposing counsel.

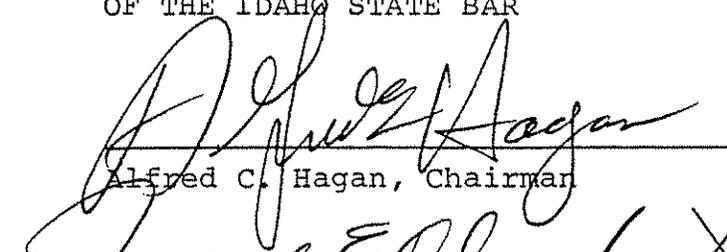
Although the positioning of a person next to defense counsel is not evidence in the technical sense, it is a fact to be perceived by the court or jury and of equal weight to formal evidence. Although the

positioning of a person at the defense table is not an explicit statement of fact, it is an implied assertion that the person seated next to the lawyer is the lawyer's client. By placing at the defense table a person other than the defendant, the attorney conceals the identity of the client. Thus, the conduct described in the first question is unethical.

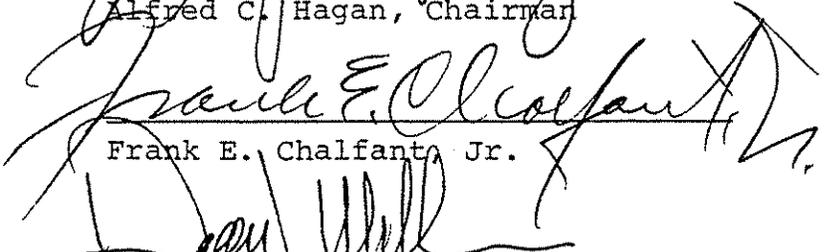
On the basis of the same reasoning, the tactic raised by the second question is also deemed unethical, unless full disclosure of the tactic is made in advance to the Court and opposing counsel and use of the tactic is allowed by the Court.

DATED this 14th day of August, 1981.

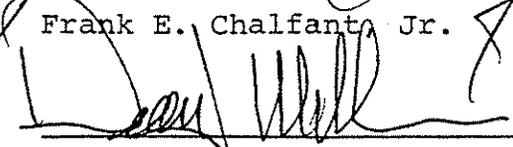
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