ADVISORY ETHICS OPINION 87-06

SYNOPSIS:

An attorney-witness who is involved in a civil action as a party and not as an advocate may retain an associate from his own law firm to represent him.

FACTS:

Attorney A has been named as sole defendant in a civil action and will almost certainly be called as a witness. He wishes to retain Attorney B, an associate in his law firm, to represent him.

DISCUSSION:

DR 5-101(B) provides that a lawyer shall not accept employment in pending litigation if he knows or it is obvious that he, or a lawyer in his firm, is to be called as a witness. The ethical considerations underlying the role are threefold: (1) to avoid the appearance that the testifying lawyer is distorting the truth for this client's sake; (2) to eliminate the possibility that a lawyer, by virtue of his oath as witness, will also enhance his credibility as an advocate; and (3) to prevent a situation where opposing counsel must attempt to impeach the credibility of a lawyer-adversary.[1]

The rule is triggered only where a lawyer acts as both witness and advocate or where trial counsel's law partner is a witness but not a party.[2] Since Attorney A is a party and will not act as an advocate, DR 5-101(B) is not implicated here.

As a general rule, members of the bar have, as all litigants, the right to select their own attorney.[3] There is nothing in the facts before us which would override the operation of that rule. We conclude that Attorney A may retain Attorney B to represent him.

[1] *International Electronics Corp. v. Flanzer*, 527 F.2d 1288, 1294 (2d Cir. 1975); *See Bottaro v. Hatten Associates*, 680 F.2d 895, 897 (2d Cir. 1982).
[2] *Id.* at 897.
[3] *Id.* at 897; *International Electronics Corp. v. Flanzer,* 527 F.2d 1288 at 1295.