P.E.R.C. NO. 82-37

STATE OF NEW JERSEY
EFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF HAWTHORNE,

Respondent,

-and-

Docket No. CO-79-216-47

HAWTHORNE P.B.A. LOCAL 200,

Charging Party.

Appearances:

For the Respondent, Dorf & Glickman, Esqs.
(Mark S. Ruderman, of Counsel)

For the Charging Party, Osterweil, Wind & Loccke, Esqs.
(Manuel A. Correia, of Counsel)

DECISION AND ORDER

On February 20, 1979, an Unfair Practice Charge was filed with the Public Employment Relations Commission by the Hawthorne P.B.A. Local 200 (the "PBA" or the "Charging Party") alleging that the Borough of Hawthorne (the "Borough" or the "Respondent") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). In particular, the PBA alleged that the Borough had violated the Act when it transferred the negotiating committee co-chairman, Peter W. Van Der Velde, from the Detective Bureau to the Patrol Division in retaliation for pursuing a contractual grievance concerning overtime. This action is alleged to have been a violation of N.J.S.A. 34:13A-5.4(a)(1), (2) (3), (4), (5) and (7). 1/

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or
(continued)

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 29, 1980. A hearing was scheduled and held before Hearing Examiner Joan Kane Josephson on February 19, 1981.

At the hearing, the Borough made a Motion to Dismiss the Complaint supported by an affidavit of Gerald L. Dorf, Special Labor Relations Counsel for the Borough. The basis of the Motion was that the PBA had agreed to withdraw the unfair practice charge presently before the Commission and an additional grievance as part of the settlement of the 1979-80 contract negotiations reached between the PBA and the Borough. Counsel for the PBA objected to the Motion stating that the affidavit was made by a member of the law firm currently representing the Borough in the unfair practice hearing and that it was his understanding that if either a member of his firm or a member of the Borough's firm would be placed in the position of testifying as to the settlement

1/ (continued)
coercing employees in the exercise of the rights guaranteed to them by this Act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (7) Violating any of the rules and regulations established by the commission."

agreement, then both firms under the Disciplinary Rules of the Code of Professional Responsibility would be obligated to withdraw from the case. The Hearing Examiner reserved decision on the Motion and offered the PBA an opportunity to submit a responding affidavit subsequent to the hearing. The parties were then given an opportunity to present relevant evidence on the unfair practice, examine witnesses and argue orally.

Post-hearing briefs were submitted. The PBA argued that it was its position that in accordance with Ethics Opinions and Regulations, specifically DR 5-101 and 102,[2/] counsel for the

2/ DR 5-101 Refusing Employment when the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or believes that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment, and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.
(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5-102 Withdrawal as Counsel when the Lawyer Becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or believes that he or a lawyer

(continued)

PBA or any member of the firm should not and could not be a witness with respect to a matter which may become prejudicial to their client's case. Counsel for the PBA was notified by the Hearing Examiner that she did not agree that the Code prevented the submission of an affidavit by an attorney who had been a participant in the settlement agreement involving the underlying charge. The Hearing Examiner further advised Counsel that if an answering affidavit was submitted which raised factual disputes with the affidavit submitted on behalf of the Borough, she would reconsider ruling on the effect of DR 5-101 and 5-102. Counsel for the Charging Party submitted a Notice of Motion for an Order staying a determination of the matter pending receipt of an opinion from the Professional Ethics Advisory Committee concerning the propriety of counsel for the Charging Party or a member of that firm testifying as a witness in a hearing.

On August 10, 1981, the Hearing Examiner issued her Decision and Order On Respondent's Motion to Dismiss, H.E. No. 82-3, 7 NJPER ___ (¶______ 1981). She concluded that in light of

2/ (continued)
in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue in the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or believes that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

case precedent establishing the strong public policy favoring settlements in lieu of litigation and honoring those settlement agreements reached,[3/] and in light of the fact that in Honeywell, supra, n.3, the court in dealing with the same argument concerning DR 5-101 and 102 found those rules not to be of sufficient weight to influence the swell of public policy favoring settlement, the Respondent's Motion to Dismiss the Complaint in its entirety was granted and the Charging Party's Motion to Stay the Decision was denied.

The PBA, on August 24, 1981, pursuant to N.J.A.C. 19:14-4.7, filed a request to review the Hearing Examiner's decision alleging that submission of any affidavit from a member of the firm which represented the PBA during the settlement is improper and a possible violation of the Code of Professional Responsibility. Further, it was alleged that any determination of this matter pending a receipt of an opinion from the Advisory Committee of Professional Ethics would act as a denial of due process of law.

The Commission affirms the decision of the Hearing Examiner finding that the underlying dispute was settled and that the Charging Party had agreed that the Unfair Practice Charge would be withdrawn as a term of that settlement. The Charging Party was given ample opportunity to submit evidence to contravene the affidavit filed by the attorney for the Borough, but chose not

3/ Honeywell v. Bubb, 130 N.J. Super. 130 (App. Div. 1974), Jannerone v. WIT Co., 65 N.J. Super. 472 (App. Div. 1961), certif. den. sub nom Jannerone v. Calamoneri, 35 N.J. 61 (1961).

to based upon its understanding of the Disciplinary Rules.[4/] In Honeywell v. Bubb, one of the cases relied upon by the Hearing Examiner, the issue was whether a settlement which appeared to be beyond reproach could be invalidated solely because of a possible infraction of the disciplinary rules (DR 5-101 and 102). The court stated:

> ...the substantial question before us is whether the settlement agreed upon by the parties was unfair or achieved in such a manner as to justify refusal to enforce it. In view of the strong policy favoring the settlement of controversies, the refusal to enforce the settlement should not obtain because of a possible infraction of the disciplinary rules referred to unless there is some basis for concluding that the attorney's conduct had an adverse impact on the settlement. Absent circumstances indicating that his conduct may have improperly influenced the course of settlement negotiations to the detriment of his clients' interests, we see no valid basis for disturbing a settlement otherwise fair.
> Honeywell at 137. (emphasis supplied)

The Honeywell case was decided with full attention being given to the disciplinary rules and it was concluded that the key consideration was not the disciplinary rules themselves, but rather the conduct of the attorney during the course of the settlement. In this present case, there has been no indication that the settlement itself was not beyond reproach or that the settlement was detrimental to the PBA's interest. Further, when given the chance to submit contrary evidence to the assertions made by counsel for the Borough in his affidavit, or anything which would

4/ The Hearing Examiner's Decision and Order on the Motion to Dismiss sets forth that the PBA was given nearly six months and several opportunities to submit a response to the Borough's position on the alleged settlement.

suggest that the settlement should not be enforced, counsel for the PBA declined, continuing to hold fast to the disciplinary rules. This was in spite of the fact that the Hearing Examiner had informed him that she did not believe that the Code of Professional Ethics prevented a member of his firm from submitting an affidavit under the circumstances of this case.

It must be pointed out that if Counsel for the PBA did believe that the submission of this affidavit would place him in possible conflict with DR 5-101 or 102, notwithstanding the Hearing Examiner's contrary position, he and his firm were free to withdraw from the case and advise the PBA to retain other Counsel as he would have to testify. As indicated in the Hearing Examiner's decision, approximately five months elapsed from the time this issue first arose and the time when the Hearing Examiner advised the PBA that unless some contrary evidence was submitted on the Borough's motion to dismiss she would issue a decision. More than another month passed before she issued her decision. During that time, the only submission by the PBA was its motion seeking a stay pending receipt of an opinion from the Advisory Committee. It appears that the request for this opinion was submitted simultaneously with the Motion for the Stay in July.

We also believe it significant that the information in the affidavit did not pertain to the merits of the case presented at the hearing. Courts have generally applied the prohibition in the Code when an attorney's testimony would be necessary concerning the merits of the case, but not testimony concerning settlement

of the matter.[5/] The merits of the unfair practice allegations were not discussed in the affidavit; only the allegation of the prior settlement was discussed. Thus, Counsel for the Borough did not testify nor was his affidavit relevant to the merits of the charge as the case was presented at the hearing. The settlement issue was broached only in the motion to dismiss submitted at the commencement of the hearing.[6/]

Having reviewed the Hearing Examiner's decision and the issue raised in the request for review, the Commission finds that the Hearing Examiner's conclusions are supported by the record, that no prejudicial error has occurred, and that there are no compelling reasons for reconsideration of any rules or policies raised herein.

Accordingly, based upon the foregoing discussion, the Commission affirms the Hearing Examiner's ruling.

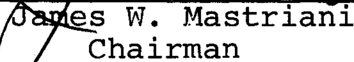
5/ See, Kridel v. Kridel, 85 N.J. Super. 478 (App. Div. 1964); Perazelli v. Perazzeli, 147 N.J. Super. 53 (Chan. Div. 1976).

6/ The Hearing Examiner was presented with the affidavit by Mr. Dorf as part of the Borough's motion made at the commencement of the hearing. Since both parties were present with their witnesses and the hearing was expected to, and did, only take one day, the Hearing Examiner elected to proceed with the hearing on the merits of the charge rather than postpone the matter at that point. Under the circumstances, we agree with her decision. However, we would note that the better practice for the Borough would have been to have filed this motion and affidavit in advance of the hearing so that the question of the settlement and its related ethics problem could have been resolved prior to the litigation of the merits of the charge.

ORDER

IT IS HEREBY ORDERED that the Complaint in this matter is dismissed in its entirety.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Hipp, Newbaker, Parcells and Suskin voted in favor of the decision. Commissioner Graves voted against the decision.

DATED: October 2, 1981
Trenton, New Jersey
ISSUED: October 5, 1981

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H. E. No. 82-3

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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In the Matter of

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Respondent,

-and-

Docket No. CO-79-216-47

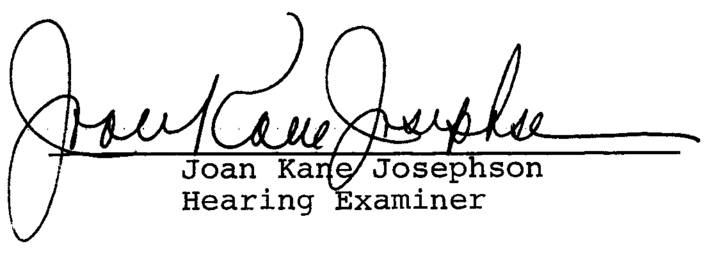
HAWTHORNE PBA LOCAL 200,

Charging Party.

ERRATA

The Hearing Examiner's Decision and Order on Respondent's Motion to Dismiss in the above-captioned matter which issued August 10, 1981, is hereby corrected as follows:

Page	Line	Delete	Substitute
Cover	12	Gerald L. Dorf	Mark S. Ruderman



Joan Kane Josephson
Hearing Examiner

DATED: August 24, 1981
Trenton, New Jersey

H. E. No. 82-3

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF HAWTHORNE,

Respondent,

-and-

Docket No. CO-79-216-47

HAWTHORNE PBA LOCAL 200,

Charging Party.

SYNOPSIS

A Hearing Examiner grants a respondent's Motion to Dismiss the Complaint. The motion was supported by an affidavit of respondent's counsel that the underlying matter was settled and the charging party had agreed to withdraw the charge. The charging party did not submit a responding affidavit and argued that the Code of Professional Responsibility prohibited an attorney from submitting an affidavit on behalf of his then client. The Hearing Examiner relied on court cases that accepted attorneys' testimony of settlement in dismissing cases because of the public policy favoring settlement of litigation.

Pursuant to N.J.A.C. 19:14-4.7 the case will be closed ten days after issuance of the decision unless the charging party requests the Commission review the action.

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

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Appearances:

For the Respondent, Dorf & Glickman, Esqs.
(Gerald L. Dorf, Esq.)

For the Charging Party, Osterweil, Wind & Loccke, Esqs.
(Manuel A. Correia, Esq.)

HEARING EXAMINER'S DECISION AND ORDER
ON RESPONDENT'S MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on February 20, 1979, by the Hawthorne PBA Local 300 (the "PBA" or the "Charging Party") alleging that the Borough of Hawthorne (the "Borough" or the "Respondent") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act") by transferring the negotiating committee co-chairman of the PBA, Peter W. VanDerVelde, from the Detective Bureau to the Patrol Division in retaliation for pursuing a contractual grievance concerning overtime. This action is alleged to have been a vio-

lation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4), (5) and (7). [1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 29, 1980, at which time a hearing was scheduled for December 11, 1980. The hearing was rescheduled and held on February 19, 1981.

At the hearing the Respondent made a Motion to Dismiss the Complaint supported by an affidavit of Gerald L. Dorf, Special Labor Relations Counsel for the Borough of Hawthorne. The basis of the Motion was that the PBA had agreed to withdraw this unfair practice charge and grievance as part of the settlement of the 1979-80 contract negotiations reached between the PBA and the Borough. Counsel for the Charging Party objected to the motion based on an affidavit of a partner of the law firm representing the Borough. He stated on the record that their firm would withdraw from the case if a member of the Charging Party's counsel's firm was called as a witness because he believed such testimony would violate the Disciplinary Rules of the Code of Professional Responsibility. I reserved

1/ These subsections prohibit public employers, their representatives or agents from: "(1) interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; (2) dominating or interfering with the formation, existence or administration of any employee organization; (3) discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act; (4) discharging or otherwise discriminating against any employee because he has signed or filed an affidavit petition or complaint or given any information or testimony under this Act; (5) refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (7) violating any of the rules and regulations established by the commission."

decision on the motion and offered the Charging Party an opportunity to submit a responding affidavit subsequent to the hearing. The parties were then given an opportunity to present relevant evidence on the unfair practice charge, examine witnesses and argue orally.

Post-hearing briefs were submitted. The Charging Party again argued that since the Code of Professional Responsibility, specifically DR 5-101 and DR 5-102, prohibited a member of their law firm from appearing as a witness in this matter, they would neither appear as a witness nor submit an affidavit unless directed to do so by the Commission. On June 29, 1981, I advised counsel for the Charging Party that I did not agree that the Code prevented submission of an affidavit of an attorney as to settlement of the underlying charge. [2/] On July 13, 1981, counsel for the Charging Party filed a Notice of Motion for an Order staying a determination of this matter pending receipt of an opinion from the court concerning the propriety of counsel for Charging Party or a member of that firm testifying as a witness in a hearing.

An Unfair Practice Charge having been filed with the Commission, a Motion for Dismissal having been made by the Respondent and a Motion to Stay the Decision having been made by the Charging Party, and, after consideration of the said Motions, affidavits and arguments, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

2/ Counsel was advised that if an answering affidavit was submitted that presented controverted facts requiring credibility judgments at a reconvened hearing, a decision on DR 5-101 and 102 would be made under those circumstances.

The basis of the Charging Party's Motion to Stay the Decision is that neither party will incur harm or prejudice since the merits of the dispute have been presented to the undersigned. The Motion is denied.

The undersigned does not feel that this matter should be further delayed while the Charging Party now requests a decision on submitting an affidavit, particularly since this issue was raised six months ago. At the hearing on February 19, 1981, the Charging Party was given an opportunity to submit an answering affidavit, which affidavit was to have been received by February 27, 1981. None was received. A letter received on April 22, 1981, accompanying the Charging Party's brief argued that DR 5-102 prevented a member of that law firm from appearing as a witness. On June 29, 1981, the Charging Party was advised that I did not believe the Code prevented a member of their firm from submitting an affidavit under these circumstances and that this decision would be issued within ten days unless something was submitted that presented controverted facts. [3/] The Respondent strongly objected to the undersigned granting the Charging Party an additional opportunity to submit an affidavit long after the agreed upon time lines had elapsed. The Motion to Stay the Decision was submitted on July 14, 1981. The Motion is denied.

The basis of the Respondent's Motion to Dismiss the Complaint is that the underlying dispute was settled and the Charging Party had agreed that the Unfair Practice Charge would be withdrawn. The affidavit of Mr. Dorf submitted with Respondent's Motion sets

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3/ See Attachment A.

out the details of the settlement which were agreed upon on May 4, 1979. No evidence has been submitted to controvert this affidavit and, therefore, viewing the evidence most favorably to the party opposing the matter, the Respondent's Motion for Dismissal is granted.

"Embedded in our jurisprudence is the principle that the settlement of litigation ranks high in our public policy." Honeywell v. Bubb, 130 N.J. Super. 130, 135 (App. Div. 1974). [4/] In Honeywell the parties' attorneys placed a settlement agreement on the record in the trial court. Subsequently one of the parties attempted to refute the settlement arguing DR 5-101 and 102 prevented the parties' attorneys from participating in the settlement negotiations after having represented the parties in the ogiginal dispute. Statement of the settlement was presented to the court by one of the attorneys and the other attorney was present and concurred in the statement. The reviewing court relied on the record of settlement placed on the record by the attorneys and the agreement was found to be enforceable against their clients because of the "strong policy favoring the settlement of controversies." While the attorneys' roles vis a vis DR 5-101 and 102 were questioned in this case, their submissions of evidence of the settlement was not questioned. Rather, the issue was whether attorneys who represented clients in an original matter should be involved in settlement of court claims arising therefrom.

In cases dealing with settlement, courts frequently must

4/ The voluntary resolution of public employer-employee disputes was declared by the Legislature as the public policy of this State in enacting the New Jersey Employer-Employee Relations Act.

rely on affidavits or testimony of attorneys that their clients have, or have not settled cases. Because courts place the settlement of litigation so high in public policy, they are consistently reluctant to set aside settlements. Jannarone v. W.T. Co., 65 N.J. Super. 472, 476 (App. Div. 1961), certif. denied sub nom. Jannarone v. Calamoneri, 35 N.J. 61 (1961). In Jannarone, one of the parties tried to repudiate a settlement agreement in a negligence case. Affidavits of settlement by the attorneys were submitted to the trial court. The Appellate Division ordered that the settlement be enforced. The same attorneys continued to represent their respective clients in the Appellate Division without any question being raised as to disciplinary rules' violations and the Court relied on the attorneys' affidavits. "Barring fraud or other compelling circumstances, our courts strongly favor the policy that settlement of litigation be attained and agreements thereby reached, be honored." Honeywell v. Bubb, supra.

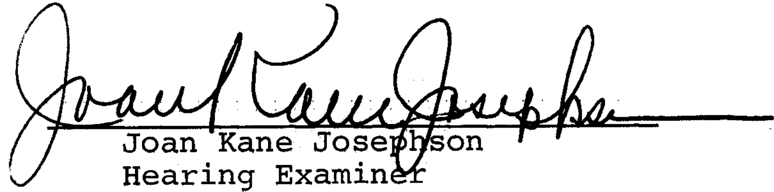
Courts have generally applied the prohibition in the Code of Professional Ethics when an attorney's testimony is necessary concerning the merits of the case, but not testimony concerning settlement of the underlying matter. Kridel v. Kridel, 85 N.J. Super. 478, 487 (App. Div. 1964); Perazzelli v. Perazzeli, 147 N.J. Super. 53 (Ch. Div. 1976).

For the reasons set forth above, and since the only facts before me indicate this matter was settled on May 4, 1979, and

further since this matter has been pending before the Commission since February 20, 1979, pursuant to N.J.A.C. 19:14-4.7, the Respondent's Motion to Dismiss the Complaint in its entirety is granted.

ORDER

It is hereby ORDERED that the Complaint in this matter be dismissed in its entirety.



Joan Kane Josephson
Hearing Examiner

DATED: August 10, 1981
Trenton, New Jersey

ATTACHMENT A

DR 5-101 Refusing Employment when the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or believes that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment, and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5-102 Withdrawal as Counsel when the Lawyer Becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or believes that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue in the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or believes that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.