



E-FILED
CNMI SUPREME COURT
E-filed: Feb 14 2018 10:33AM
Clerk Review: Feb 14 2018 10:33AM
Filing ID: 61687519
Case No.: 2017-SCC-0014-CRM
NoraV Borja

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

MOHAMMAD ABUL BASHAR,
Defendant-Appellant.

Supreme Court No. 2017-SCC-0014-CRM
Superior Court No. 09-0036

ORDER DENYING MOTION TO WITHDRAW AS COUNSEL

Cite as: 2018 MP 1

Decided February 14, 2018

Jonathan L. Wilberscheid, Assistant Attorney General, Office of the Attorney
General, Saipan, MP, for Plaintiff-Appellee.

Janet H. King, King Law Office, LLC, Saipan, MP, for Defendant-Appellant.

BEFORE: JOHN A. MANGLONA, Associate Justice.

MANGLONA, J.:

¶ 1 Janet H. King (“Counsel”), attorney for Defendant-Appellant Mohammad Abul Bashar (“Bashar”), moves for leave to withdraw as counsel. Counsel states that although she has represented Bashar since his proceedings in the trial court, she is now forced to withdraw because she has not been receiving payments from Bashar. Counsel’s necessity for withdrawal focuses on the consequences of Bashar’s nonpayment, such as being forced to “turn away other clients who are able and willing to pay” King Aff. 1. Counsel also claims Bashar will not be prejudiced by her late withdrawal because she has filed the Opening Brief, the Reply Brief is not required, and Bashar has time to seek new counsel to represent him in his reply and oral argument. Counsel cites no authority in support of her motion.

¶ 2 We note Counsel has represented Bashar since his proceedings in the trial court and her withdrawal at such a late stage in the case has the potential to jeopardize Bashar in presenting his defense. Counsel was not court-appointed; rather, Bashar retained private counsel to represent him in his petition to withdraw a plea and set aside a previous conviction. Because we have not had occasion to discuss the parameters of a counsel’s withdrawal for nonpayment of fees in a criminal appeal, we find it necessary to provide instruction. For the following reasons, we hereby DENY the motion to withdraw as appellate counsel.

I. FACTS AND PROCEDURAL HISTORY

¶ 3 The proceedings preceding Counsel’s motion have been lengthy, involving multiple counsels. Bashar is a Bangladeshi citizen, arriving in the Commonwealth in 1997 and marrying in 2009. He was charged with Conspiracy to Commit Marriage Fraud and Marriage Fraud in violation of 3 CMC § 4366. Based on the advice of his trial counsel, Bashar entered a plea of *nolo contendere*. The plea indicated that then-counsel had advised—and Bashar had understood—the legal consequences of the agreement, including potential immigration consequences. However, upon the United States Immigration Court finding Bashar removable due to his conviction, Bashar obtained new counsel and moved to set aside his plea and vacate the conviction and sentence, alleging previous counsel had provided ineffective assistance by failing to inform him of the deportation consequences of the plea. Although Bashar’s new counsel began preparing his appeal, he never filed the appellate brief. The appeal was subsequently dismissed, and counsel has since been disbarred.

¶ 4 Bashar then retained Counsel, who moved to set aside the plea and vacate the conviction. The trial court denied the motion, and we upheld the trial court’s order in *Commonwealth v. Bashar*, 2015 MP 4. Subsequent to our decision, Bashar unsuccessfully petitioned the United States Supreme Court for certiorari. However, throughout Counsel’s representation of Bashar, she

discovered new grounds for setting aside the plea and vacating the conviction. Counsel filed a new motion in the trial court on November 22, 2016, and following the trial court's denial, filed a notice of appeal on June 21, 2017. Counsel filed her Opening Brief on January 8, 2018; oral argument is anticipated. Bashar is currently facing deportation.

II. DISCUSSION

A. NMI Supreme Court Rule 4-1

¶ 5 NMI Supreme Court Rule 27 (“Rule 27”) governs motions, stating that any motion filed with this Court “must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.” NMI SUP. CT. R. 27(a)(3)(A). NMI Supreme Court Rule 4-1 (“Rule 4-1”) contains the grounds for Counsel’s legal argument, governing an attorney’s obligations regarding continuity of representation in a criminal appeal.¹ Rule 4-1(a)(1) discusses the duties of retained counsel:

Counsel in criminal cases, whether retained or appointed by the Superior Court, shall ascertain whether the defendant wishes to appeal and file a notice of appeal upon the defendant’s request. Counsel shall continue to represent the defendant on appeal until counsel is relieved and replaced by substitute counsel or by the defendant pro se.

Although we have mentioned that Rule 4-1(a)(1) governs withdrawal of counsel in a criminal context, *Leis v. Knecht*, No. 2016-SCC-0030-CIV (NMI Sup. Ct. Apr. 24, 2017) (Order Granting Counsel’s Withdrawal at 1) (unpublished), we have not elaborated on the rule further.

¶ 6 We have, however, had occasion to discuss withdrawal of counsel in a civil case due to a conflict of interest, *Hwang Jae Corp. v. Marianas Trading & Dev. Corp.*, 4 NMI 142, 145 (1994), and in a criminal case where the court-appointed counsel believed the appeal was frivolous. *See Commonwealth v. Santos*, 2013 MP 10 ¶ 16 (adopting in part the withdrawal procedure announced in *Anders v. California*, 386 U.S. 378 (1967)). We have also emphasized the importance of diligent representation in criminal appeals:

Every advocate has essentially the same professional responsibility whether he or she accepted a retainer from a paying client or an appointment from a court. . . . In preparing and evaluating the case, and in advising the client as to the prospects for success, counsel must consistently serve the client’s interest to the best of his or her ability.

Santos, 2013 MP 10 ¶ 16 (quoting *Anders*, 386 U.S. at 438–39); *see, e.g., In re*

¹ NMI Superior Court Rule of Practice 5(d) (“Rule 5(d)”) discusses withdrawal of appearance in the Superior Court. This order only discusses procedures for withdrawal as applicable to counsel on appeal and thus, although portions of the analysis may apply, is not meant to modify Rule 5(d).

Disciplinary Proceedings of Woodruff, 2013 MP 1 ¶ 17 (suspending counsel who routinely failed to follow through with clients' cases and stating that "[w]e decline to risk a similar fate for current and future clients"). With such precedent in mind, we interpret NMI Supreme Court Rule 4-1(a)(1).

¶ 7 "As author of the Commonwealth Rules of Appellate Procedure, we have the authority to interpret the meaning sought to be conveyed" by the rules' language. *Tudela v. Marianas Pub. Land Corp.*, 1 NMI 179, 185 (1990). "[W]hen our rules are patterned after the federal rules it is appropriate to look to federal interpretation for guidance," *Ishimatsu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 60 (citation omitted), as such interpretations "can be highly persuasive." *Tudela*, 1 NMI at 184 (citation omitted).

¶ 8 State and federal appellate courts have enacted various procedures for moving for withdrawal as counsel on appeal, both for appointed and retained attorneys. *See, e.g.*, 9TH CIR. R. 4-1; 2ND CIR. R. 4.1; TEX. R. APP. P. 6.5. Our rule mirrors the Ninth Circuit's Rule 4-1(a) governing the continuity of representation on appeal. *See* 9TH CIR. R. 4-1(a) (stating rule and including additional sentence for appointment of counsel pursuant to federal statute). Our rule is also substantially similar to the First, Second, and Eleventh Circuits' rules regarding appellate counsels' representation on appeal.² Notably, the majority of these circuits include specific procedures counsel must follow in the case of withdrawal.

¶ 9 Different requirements apply based on the grounds for withdrawal. For example, appointed counsel wishing to withdraw due to the frivolousness of an appeal must file a brief in accordance with *Anders v. California. Santos*, 2013 MP 10 ¶ 16; *see also* 2ND CIR. LOC. R. 4.1(b) ("Counsel who seeks to withdraw . . . on the ground that the appeal presents no nonfrivolous issues must file a motion and brief in accordance with *Anders v. California . . .*"); 1ST CIR. LOC. R. 46.6(c)(4) (stating "[i]f the reason for the motion is the frivolousness of the appeal, a brief following the procedure described in *Anders v. California*" should accompany the motion to withdraw). Withdrawal based on other grounds requires distinct procedures. The First Circuit, for example, requires a motion stating the reasons for withdrawal to be accompanied by either defendant's completed application for appointment of replacement counsel, defendant's affidavit stating defendant has been advised that he or she may

² 1ST CIR. LOC. R. 46.6 ("An attorney who has represented a defendant in a criminal case in the district court will be responsible for representing the defendant on appeal, whether or not the attorney has entered an appearance in the court of appeals, until the attorney is relieved of such duty by the court of appeals."); 2ND CIR. LOC. R. 4.1(a) ("A criminal defendant's counsel, whether retained or appointed, is responsible for representing the defendant on appeal unless relieved by this court."); 11TH CIR. R. 46-10(a) ("Retained counsel for a criminal defendant has an obligation to continue to represent that defendant until successor counsel either enters an appearance or is appointed under the Criminal Justice Act, and may not abandon or cease representation of a defendant except upon order of the court.").

retain or appoint replacement counsel and expressly electing to appear pro se, or defendant's affidavit stating defendant has been advised of his or her appellate rights and expressly electing to withdraw the appeal. 1ST CIR. LOC. R. 46.6(c)(1)-(3); *see also* 9th Cir. R. 4-1 (including same requirements with one additional option). The Second Circuit includes these same options and also requires counsel, before moving for withdrawal, to advise the defendant that he or she must promptly obtain other counsel, and, if retained, ensure the defendant completes the appropriate application forms; if defendant wants to appear pro se, counsel must advise defendant of deadlines in writing. 2ND CIR. LOC. R. 4.1(d)(1).

¶ 10 In particular, withdrawal as counsel in a criminal appeal due to the defendant's inability to pay requires counsel to follow a stringent standard. In *United States v. Vilar*, the Second Circuit discussed its rule for withdrawal of counsel in a criminal appeal due, in part, to the defendant's failure to pay legal fees. 731 F.3d 255, 255 (2nd Cir. 2013). There, defendant's retained attorneys represented that "they have told [defendant] that they are not continuing on the case without fees . . . [and] he owes them for prior expenses as well." *Id.* at 256. In a letter, the attorneys stated that defendant consents to their withdrawal since he is unable to pay, and in a later letter asked that they be relieved as his attorneys if new counsel is appointed for defendant. *Id.* at 256–57. The *Vilar* court confirmed that the attorneys' request to be relieved is not sufficient "to permit the abandonment of their client . . ." *Id.* at 257. Instead, counsel must file a motion asking for permission to withdraw, and "is responsible for representing the defendant unless relieved by th[e] court." *Id.* (quoting 2ND CIR. LOC. R. 4.1(a)). Importantly, the court found that "[n]on-payment of legal fees, without more, is not usually a sufficient basis to permit an attorney to withdraw from representation." *Id.* (citation and internal quotation marks omitted). Further,

[U]nder the circumstances, a motion to withdraw at this late stage of the appeal on the ground of nonpayment of fees should set forth the terms of the retainer agreement, if one was executed, or any other understanding with respect to fees, as well as the amount of fees already paid and the amount of fees sought for remaining work.

Id. at 258. The court then denied the motion without prejudice, finding it premature. *Id.*

¶ 11 We find *Vilar* persuasive. The rules for withdrawal of counsel, as enacted and applied in the federal courts, create duties when withdrawing as counsel in a criminal appeal in addition to those currently enumerated in our rules. We interpret Rule 4-1(a) to encompass these additional instructions. At a minimum, counsel must file a proper motion to withdraw including either a showing that counsel has been replaced by substitute counsel or an affidavit from the defendant stating that he or she has been advised of his or her right to counsel on appeal and consents to counsel's withdrawal in light of this

understanding. Furthermore, when counsel's specific reason for withdrawal is due to the client's failure to pay, counsel must specify the terms of any understanding with respect to fees, the amount of fees already paid, and the amount of fees sought for remaining work in light of the stage of the appeal in his or her motion to withdraw.

¶ 12 Here, like in *Vilar*, Counsel's request to withdraw from further representation of Bashar is not sufficient to permit Counsel's withdrawal. Counsel's motion to withdraw cites no legal authority, contains no information regarding substitution of counsel, includes no affidavit of Bashar's understanding of his right to counsel, and provides no description of their fee agreement. Thus, we are unable to adequately assess what information, if any, Counsel has provided to Bashar or steps she has taken to ensure he is able to timely receive substitute counsel. We must conclude she did not satisfy the mandates of Rule 4-1(a) and deny her motion.³

B. Model Rules of Professional Conduct

¶ 13 Such a conclusion is consistent with the Model Rules of Professional Conduct ("Model Rules").⁴ We have previously stated the Model Rules apply to those practicing law in the Commonwealth. *See Hwang Jae Corp.*, 4 NMI at 146 n. 13 ("Any person practicing law in the Commonwealth is subject to the disciplinary jurisdiction of the Courts of the Commonwealth and the Commonwealth of the Northern Mariana Islands Bar Association Disciplinary Committee. Under these rules the Model Rules of Professional Conduct . . . apply to those persons as well.") (citation and internal quotation marks omitted). Thus, in reviewing a motion to withdraw, it is appropriate to consult the Model Rules for additional guidance. *See, e.g., Saipan Lau Lau Dev. v. Superior Court*, 2001 MP 2 ¶ 58 (using the Model Rules to address a conflict of interest issue).

¶ 14 Model Rule 1.16(b) discusses bases for permissive withdrawal, enumerating when an attorney may decline or terminate representation. Model Rules of Prof'l Conduct r. 1.16(b) (Am. Bar Ass'n 2016). Counsel's motion appears to pertain to Model Rules 1.16(b)(5) and (6). Model Rule 1.16(b)(5) permits an attorney to seek to terminate representation when "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's

³ Had Counsel properly filed for withdrawal, we would consider Bashar's nonpayment in more detail. We note, however, that the late stage of the appeal and Counsel's representation of Bashar since his trial court proceedings render the work remaining to be minimal. Replacing Counsel, on the other hand, would result in added costs, delayed resolution of Bashar's appeal, and waste of judicial resources.

⁴ The Model Rules note that a "lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law." Model Rules of Prof'l Conduct Preamble ¶ 7 (Am. Bar Ass'n 2016). Thus, the Model Rules recognize, in prescribing their scope, that they should be interpreted with reference to the law. Model Rules of Prof'l Conduct Scope ¶ 14 (Am. Bar Ass'n 2016).

services.” Withdrawal under such basis requires the attorney to first give “reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.” Model Rule 1.16(b)(6) also permits withdrawal when “representation will result in an unreasonable financial burden on the lawyer”

¶ 15 Counsel has not provided sufficient information to inform us whether she satisfies circumstances for permissive withdrawal. Specifically, Counsel has not provided us with the details of her retainer agreement, if any, with Bashar, such that would allow us to determine whether Bashar “fail[ed] substantially to fulfill an obligation.” *See* Model Rules of Professional Conduct r. 1.16(b)(5) (Am. Bar Ass’n 2016). And Counsel has not informed us whether she has given Bashar reasonable warning of her withdrawal. Thus, she does not satisfy Model Rule 1.16(b)(5). Although Counsel has stated that she “cannot afford to continue with clients who are unable to pay for legal services,” King Aff. 1, and that continuing to represent Bashar will force her “to turn away other clients who are able and willing to pay,” *id.*, she has not demonstrated an unreasonable financial burden. Continued representation may result in some financial burden, but counsel herself admits that she has already filed the Opening Brief and the Reply Brief is optional. While continuing to represent Bashar in oral arguments may be a small burden to counsel, withdrawal at this late stage of representation would cause a materially adverse effect on Bashar’s interests, as well as the Court’s scheduling. The Model Rules pertaining to permissive withdrawal further support denying Counsel’s motion.

III. Conclusion

¶ 16 We find good cause under both the NMI Supreme Court Rules and the Model Rules to order Counsel to continue representation. Counsel has not provided us with sufficient information so as to allow us to properly consider her withdrawal. Regardless, diligent representation by Counsel requires serving Bashar’s interests to the best of her ability; Bashar’s comports with deadlines and timely presenting his appeal must supersede any temporary financial burden to Counsel. The motion to withdraw as appellate counsel is hereby DENIED.

SO ORDERED this 14th day of February, 2018.

/s/
JOHN A. MANGLONA
Associate Justice