

The Supreme Court of South Carolina


Re: Amendments to South Carolina Appellate Court
Rules

Appellate Case No. 2015-001108

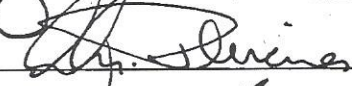
ORDER

The Chief Justice's Commission on the Profession has proposed several amendments to the South Carolina Appellate Court Rules to address issues with lawyers who are suffering from cognitive impairments. The goal of these amendments is to clarify the duties and responsibilities of lawyers and judges who notice problems, provide compassionate assistance to lawyers in need, and protect the public.

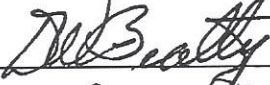
Pursuant to Article V, § 4 of the South Carolina Constitution, we adopt Rule 428, SCACR, and amend Rule 5.1, RPC, Rule 407, SCACR, and Canon 3, CJC, Rule 501, SCACR, as set forth in the attachment to this Order. These amendments are effective immediately.




C.J.



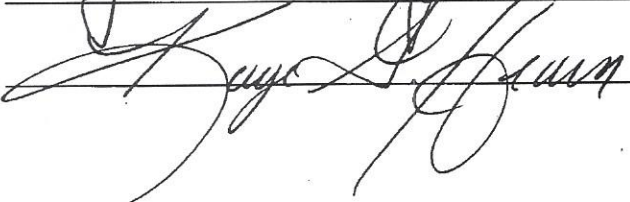
J.



J.



J.



J.

Columbia, South Carolina

August 24, 2015

Rule 428, SCACR, is adopted and provides:

RULE 428
INTERVENTION TO PROTECT CLIENTS

(a) The Executive Director of the South Carolina Bar, upon receipt of a written report or referral pursuant to Rule 5.1, RPC, Rule 407, SCACR; pursuant to Canon 3, CJC, Rule 501, SCACR; or from a member of the South Carolina Bar expressing concern about cognitive impairment of another lawyer shall take such actions as he or she deems advisable. Upon the Executive Director's recommendation, the President of the Bar may appoint one or more Attorneys to Intervene. The Attorneys to Intervene shall attempt to meet with the lawyer alleged to be impaired and, if in the best interest of both the lawyer and the public, propose a course of conduct to be followed.

(b) The Attorneys to Intervene shall promptly report to the Executive Director whether any actions were recommended to the lawyer, whether the lawyer agreed to any recommendations, and whether further action is recommended. Further action may include action under Rule 28, RLDE, Rule 413, SCACR. In the event a referral to the Commission on Lawyer Conduct is recommended by the Attorneys to Intervene, that referral shall be made by them promptly.

(c) The Attorneys to Intervene, the Executive Director of the South Carolina Bar, and the President of the Bar shall be immune from civil action for their actions taken in good faith under this rule. Information received by those Attorneys shall not be forwarded to the Office of Disciplinary Counsel in the event that a referral is not recommended under paragraph (b).

Rule 5.1(d), RPC, Rule 407, SCACR, and Comment 9 to the Rule are amended to provide:

(d) Partners and lawyers with comparable managerial authority who reasonably believe that a lawyer in the law firm may be suffering from a significant impairment of that lawyer's cognitive function shall take action to address the concern with the lawyer and may seek assistance by reporting the circumstances of concern pursuant to Rule 428, SCACR.

. . .

[9] Paragraph (d) expresses a principle of responsibility to the clients of the law firm. Where partners or lawyers with comparable authority reasonably believe a lawyer is suffering from a significant cognitive impairment, they have a duty to protect the interests of clients and ensure that the representation does not harm clients or result in a violation of these rules. See Rule 1.16(a). One mechanism for addressing concerns before matters must be taken to the Commission on Lawyer Conduct is found in Rule 428, SCACR. See also Rule 8.3(b) regarding the obligation to report a violation of the Rules of Professional Conduct when there is knowledge a violation has been committed as opposed to a belief that the lawyer may be suffering from an impairment of the lawyer's cognitive function.

Canon 3, CJC, Rule 501, SCACR, is amended to add section (G) and the following Commentary:

G. Disability and Impairment. A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to an appropriate lawyer or judicial assistance program.

Commentary:

Appropriate action means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program, such as Lawyers Helping Lawyers or the South Carolina Bar in accordance with Rule 428, SCACR.

Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate disciplinary authority. See Canon 3(D)(1) and (2).