

7720 Libery



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

February 9, 2004

The Honorable Larry A. Martin
Senator, District No. 2
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Martin:

You have asked whether "the Priest-penitent privilege referred to in Sections 19-11-90 and 20-7-550 extend[s] to all clergy?" By way of background, you have presented a letter from Ms. Laura Hudson, Public Policy Coordinator of the South Carolina Victim Assistance Network which states the following:

[s]ince the passage of the legislation requiring clergy to be added to those mandated to report child abuse and neglect (H.3199 June, 2003), some questions have arisen concerning whether or not clergy of denominations other than Catholic come under the "priest/penitent" relationship included in the new law. I reason that they are, and I know that the authors of the legislation certainly intended for them to be included (Rep. James Smith, Senator James Ritchie).

For the reasons set forth below, it is our opinion that this privilege applies generally to all clergy.

Law / Analysis

In South Carolina State Highway Dept. v. Booker, 260 S.C. 245, 195 S.E.2d 615 (1973), our Supreme Court noted that "South Carolina recognizes privilege in civil matters in attorney-client relations, husband-wife relations, and priest-penitent relations."

260 S.C. at 254. As recently amended by Act No. 94 of 2003, S.C. Code Ann. Sec. 20-7-550 provides as follows:

[t]he privileged quality of communication between husband and wife and any professional person and his patient or client, except that between attorney and client or clergy member, including Christian Science Practitioner or religious healer, and penitent, is abrogated and does not constitute grounds for failure to report or the exclusion of evidence in a civil protective proceeding resulting from a report

pursuant to this article. However, a clergy member, including Christian Science Practitioner or religious healer, must report in accordance with this subarticle except when information is received from the alleged perpetrator of the abuse and neglect during a communication that is protected by the clergy and penitent privilege as defined in Section 19-11-90.

Section 19-11-90 further states:

[i]n any legal or quasi-legal trial, hearing or proceeding before any court, commission or committee no regular or duly ordained minister, priest or rabbi shall be required, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline of his church or religious body. This prohibition shall not apply to cases where the party in whose favor it is made waives the rights conferred.

Confusion has evidently been created by the use of the term "priest-penitent" privilege. As the Court noted in United States v. Dube, 820 F.2d 886, "[t]o use the term 'priest' as the government does, although a common practice, see, e.g., Trammel v. United States, 445 U.S. 40, 45, 51, 100 S.Ct. 906, 909, 912, 63 L.Ed.2d 186 (1980), might suggest application only to a particular religion not involved in this case; we will therefore refer to it simply as the clergy-penitent privilege."

Nothing in § 19-11-90 limits the scope of the privilege to a religion specifically involving a "priest." Nor is there any indication in this statute that the privilege does not extend to members of the clergy generally. While the Code Title to § 19-11-90 does refer to "priest-penitent privilege," such term is not referenced in the body of this Code Section. Rather, § 19-11-90 makes reference to the privilege's applicability as being to a "regular or duly ordained minister, priest or rabbi"

In construing both § 20-7-550 as recently amended by Act No. 94 of 2003, as well as § 19-11-90, several principles of statutory construction are relevant. First and foremost, is the fundamental rule of construction which requires that the legislative intent must be ascertained and given effect. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Such legislative intent must prevail if it can reasonably be discovered from the language used. Clearly, the legislative wording is construed in light of the General Assembly's intended purpose. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964). In essence, the statute as a whole must receive a reasonable, practical and fair interpretation consistent with the purpose, design and policy of the lawmakers. Caughman v. Cola. Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948).

Moreover, the legislation's words must be given their plain and ordinary meaning without resort to a forced or subtle construction which would work to limit or expand the operation of the statute. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). The plain meaning of the statute cannot be contravened. State v. Leopard, 349 S.C. 467, 563 S.E.2d 342 (2002). Courts must apply

the clear and unambiguous terms of a statute according to their literal meaning. State v. Blackmon, supra.

The term "clergy" is ordinarily defined as "[t]he body of people ordained for religious service." The American College Dictionary (3d ed.). In Rivers v. Rivers, 292 S.C. 21, 354 S.E.2d 784 (Ct. App. 1987), overruled on other grounds, our Court of Appeals discussed the clergy-penitent privilege as created by § 19-11-90 at some length. There, the Court recognized that

[c]onfidential communications made to clergymen were not privileged at common law. In re Swenson, 183 Minn. 602, 237 N.W. 589 (1931). In South Carolina, the clergyman-penitent privilege owes its origin to Section 19-11-90 ... [thereafter quoted in full].

Under our statute, then, there are four conditions that must be established before the clergyman-penitent privilege applies. There must be (1) a confidential communication; (2) the confidential communication must be disclosed to a regular or duly ordained minister, priest, or rabbi; (3) the confidential communication must be entrusted to the clergyman in his professional capacity; and (4) the confidential communication must be one that is necessary and proper to enable the clergyman to discharge the functions of his office according to the usual course of practice or discipline of his church or religious body.

Like the attorney-client privilege [State v. Love, 275 S.C. 55, 271 S.E.2d 110, cert. denied, 449 U.S. 901, 101 S.Ct. 272, 66 L.Ed.2d 131 (1980)], the burden of showing the facts required to establish the clergyman-penitent privilege rests on the party objecting to the disclosure of the communication. Not every communication made to a clergyman is privileged, of course. In the Matter of Fuhrer, 100 Misc.2d 315, 419 N.Y.S.2d 426 (1979). The question of whether a communication is privileged is a question for the trial judge to decide, after making a preliminary inquiry into the surrounding facts and circumstances leading up to the making of the communication. In re Swenson, supra. The determination by the trial judge of the question of privilege is conclusive, in the absence of an abuse of discretion. State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976).

Section 20-7-550, as amended, makes it clear also that the term "clergy member" includes a "Christian Science practitioner or religious healer" Therefore, consistent Rivers v. Rivers and § 19-11-90, the clergy-penitent privilege in South Carolina would include any "regular or duly ordained minister, priest or rabbi." The sweep of the privilege would also likely extend, pursuant to § 20-7-550, to a Christian Science Practitioner or religious healer and penitent.

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Conclusion

The so-called "priest-penitent" privilege in South Carolina is, in reality, a clergy-penitent privilege applicable generally to all clergy. Consistent with Rivers v. Rivers, supra and § 19-11-90, the clergy-penitent privilege includes any "regular or duly ordained minister, priest or rabbi." The privilege's sweep would also likely extend, pursuant to § 20-7-550, to a Christian Science Practitioner or religious healer and penitent. Section 20-7-550 makes it clear, however, that all members of the clergy, as defined above, must report incidents of child abuse or neglect, except where the information is received from the alleged perpetrator of the abuse and neglect during a communication protected by the clergy-penitent privilege, as defined herein [i.e. as part of a communication "to a regular or duly ordained minister, priest or rabbi ..."].

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an