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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

September 22, 1995

The Honorable John Milton Knotts, Jr.  
Member, House of Representatives  
500 West Dunbar Road  
West Columbia, South Carolina 29169

Re: Informal Opinion

Dear Representative Knotts:

You have asked our advice as to South Carolina's anti-stalking law "as it pertains to licensed private investigators in the process of doing their jobs." You further note:

[a] particular situation arose where a private investigator was following the spouse of a client and the investigator is being charged with "stalking."

I would appreciate any information you could provide on the law that would shed some light on this situation.

Of course, at the outset, it must be stated that this Office is not free to comment upon a pending criminal matter. Any advice which I provide herein must, therefore, be deemed only a general commentary upon the anti-stalking law as it applies to private detectives. I emphasize that I am in no way at liberty to determine whether a particular pending prosecution under the anti-stalking law is properly brought or validly initiated.

That being stated, I begin by noting that South Carolina's "stalking" law was recently amended by Act No. 94 of 1995 (effective June 12, 1995). Repealing former Section 16-3-1070, the newly-enacted law provides in pertinent part:

Section 16-3-1700. As used in this article:

... (B) 'Stalking' means a pattern of words or conduct that is intended to cause and does cause a targeted person and would cause a reasonable person in the targeted person's position to fear:

- (1) death of the person or member of his family;
- (2) assault upon the person or a member of his family;
- (3) bodily injury to the person or a member of his family;
- (4) criminal sexual contact on the person or a member of his family;
- (5) kidnapping of the person or a member of his family; or
- (6) damage to the property of the person or a member of his family.

Stalking does not include words or conduct that is protected by the Constitution of this State or the United States and does not apply to law enforcement officers or private process servers performing their official duties.

- (C) 'Aggravated stalking' means stalking accompanied or followed by an act of violence.
- (D) 'Pattern' means two or more acts within a ninety-day period.
- (E) 'Family' means a spouse, child, parent, sibling, or a person who regularly resides in the same household as the targeted person.

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A person who engages in stalking is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars, imprisoned not more than one year, or both. A person who engages in aggravated stalking is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars, imprisoned not more than five years, or both.

S.C. Code Ann. Sec. 40-17-10 et seq., on the other hand, regulates private detectives. Section 40-17-20(1) defines a "private detective business" as follows:

(1) "Private detective business" means engaging in the business of or accepting employment to obtain or furnish information with reference to the:

(a) identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of a person;

(b) location, disposition, or recovery of lost or stolen property;

(c) cause or responsibility for fires, libels, losses, accidents, damage, or injury to persons or property; or

(d) serving evidence to be used before a civil court, a board, an officer, or an investigating committee. Evidence of criminal action or involvement must be reported by the registered private detective to the Chief of South Carolina Law Enforcement Division.

Private detective business does not include persons employed exclusively and regularly by only one employer in connection with the affairs of the employer only and where there exists an employer-employee relationship unless the employer is in the detective business.

Pursuant to § 40-17-30, the Chief of South Carolina Law Enforcement Division (SLED) is authorized to register private detectives in South Carolina. To that end, the Chief is empowered to promulgate regulations consistent with the Act. He is authorized to

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determine the eligibility of applicants for registration and to investigate alleged violations of the chapter by private detectives. In order to be registered, an applicant for registration must not have been convicted of a felony or a crime of moral turpitude or have committed an act constituting fraud or dishonesty. Section 40-17-140 provides for suspension or revocation of registrations, after hearing, for various reasons, among them, a violation of the chapter, violation of a SLED regulation, conviction of a felony or a crime of moral turpitude or the illegal use, carrying or possession of a weapon or the commission of an act in the course of business constituting dishonesty or fraud.

In answering your specific question, a number of basic principles of statutory construction must be borne in mind. It is fundamental that the cardinal rule in construing any statute is to discern and effectuate legislative intent. Bankers Trust of S.C. v. Bruce, 275 S.C. 35, 267 S.E.2d 424, appeal after remand, 283 S.C. 408, 323 S.E.2d 523 (1980). A statute as a whole must receive a practical, reasonable and fair interpretation, consonant with legislative purpose, design and the policy of lawmakers. Browning v. Hartrigsen, 414 S.E.2d (S.C. 1992). Every part of and all provisions of a statute must, if at all possible, be given effect. Adams v. Clarendon Co. School Dist. No. 2, 270 S.C. 266, 241 S.E.2d 897 (1978).

Most importantly, a statute must be construed in light of existing law. It is well recognized that repeals by implication are not favored by the courts, and in order to repeal a statute on account of asserted conflict or repugnancy with another statute, the repugnancy must not only be plain, but the two statutes must be incapable of any reasonable reconciliation. City of Rock Hill v. S.C. Dept. of Health and Env. Control, 302 S.C. 161, 394 S.E.2d 327 (1990).

Here the private detective enactment is indeed reconcilable with the anti-stalking statute. The elements of "stalking" are very specific and are related to causing a reasonable person in the targeted person's position to fear certain acts of violence against them. Under ordinary circumstances, a private detective acting within the scope of the authority given him by virtue of his registration as a private detective would certainly not be committing the acts constituting stalking as now defined. This is in contrast to the stalking laws in other states which prohibit the mere act of following a person, "which could draw even private detectives, policemen, or suspicious neighbors within its coverage." Moreville, Stalking Laws: Are they Solutions For More Problems? 71 Wash. U. Law Quarterly 921 (Fall 1993).

It is true that South Carolina's new stalking law makes certain specific exceptions to the statute, and that the work of private detectives is not expressly mentioned in the exceptions. Law enforcement officers or process servers performing their official duties

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are expressly excepted. Based upon the situation as you have described it, the "process server" exception would appear not to be applicable here.

However, the question of whether a private detective is a law enforcement officer for purposes of the statute need not be reached, because when a person is acting within the scope of authority granted by a private detective's registration, such activity would be "words or conduct that is protected by the Constitution of this State or the United States ...". It is well-recognized that both the Federal and State Constitutions protect the right to pursue a lawful occupation or calling of one's choice. As the United States Supreme Court has stated, the "right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes with the 'liberty' and 'property' concepts of the Fifth Amendment." Greene v. McElroy, 360 U.S. 474, 492, 79 S.Ct. 1400, 1411, 3 L.Ed.2d 1377 (1959). In Board of Regents v. Roth, 408 U.S. 564, 572 (1972), the Court expounded upon this principle; holding that the "liberty" protected by the Due Process Clause,

... denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men.

A private detective's occupation, where the detective is acting within the scope of his authority, would be included within this Constitutional protection. See, Johnson v. Tsapsis, 186 W.Va. 642, 413 S.E.2d 699 (1991).

Thus, it is my opinion that the legitimate work of a private detective falls within the exceptions for constitutionally protected words or conduct set forth in the anti-stalking statute. Such legitimate activity could, therefore, be asserted as a valid defense for any prosecution under the anti-stalking law if the facts warrant that the activity is legitimate. See, Kenneth R. Thomas, Congressional Research Service, Anti-stalking Statutes: Background and Constitutional Analysis 1, 10 (1992). [concluding that such exceptions are really unnecessary to be included in stalking statutes because "... if an act is constitutionally protected, then the statute prohibiting that act would be unenforceable."] Here, it would appear that private detective work would fall outside the statute's prohibition where the facts show that the particular activity is legitimate and comports with the activity which is authorized by the Private Detective Act. Thus, such facts could be asserted as a valid defense to a prosecution.

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I might add that, just as with any defense in a criminal proceeding, the validity of that defense depends entirely upon the particular facts involved. If the detective's conduct is within his authority as a registered detective under South Carolina law consistent with the Private Detective Act and other laws, he will have a valid defense. But if the detective's conduct is beyond the scope of that authorized by virtue of his registration, then obviously that person's status or registration as a detective would not immunize unlawful conduct from either liability or prosecution. Private detectives who act beyond their licensed authority may, without question, be held liable for invasion of privacy, for example. 6 S.C. Juris. § 27 at 234 et seq. The same rule would be applicable to stalking if the facts justify such a finding.

### CONCLUSION

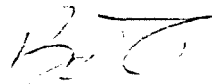
The anti-stalking statute must be read in conjunction with, not as a repeal or amendment of, the Private Detective Statute. As a general rule, if a private detective's conduct is not legitimate, in other words, beyond the scope of that authorized by virtue of his registration as a private detective under the Private Detective Act, then obviously that person's status as a registered private detective would not immunize such unlawful conduct from liability or prosecution. If the charge is stalking, each and every element of the offense would have to be determined by a jury, beyond a reasonable doubt.

However, if the detective's conduct is within the scope of authority as a registered private detective under South Carolina law, the detective would possess a valid defense to any charge of stalking because his conduct would be "protected by the Constitution of this State or the United States ...". Of course, the ultimate resolution of this question depends upon the particular facts.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook  
Assistant Deputy Attorney General

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