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The State of South Carolina
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Dear Ms. Killian:

On behalf of the Department of Social Services, you have requested an opinion "as to the meaning of the term 'clergy' as it is used by S.C. Code § 20-7-510." Specifically, you wish to know if the term "clergy," as used in the foregoing provision, "includes lay pastors, deacons, elders and/or others who do pastoral counseling."

Law / Analysis

Section 20-7-510 is part of the Child Protection Act of 1977 and requires or permits persons to report child abuse or neglect. Subsection (A) provides as follows:

> [a] physician, nurse, dentist, optometrist, medical examiner, or coroner, or an employee of a county medical examiner's or coroner's office, or any other medical, emergency medical services, mental health, or allied health professional, member of the clergy including a Christian Science Practitioner or religious healer, school teacher, counselor, principal, assistant principal, social or public assistance worker, substance abuse treatment staff, or childcare worker in a childcare center or foster care facility, police or law enforcement officer, undertaker, funeral home director or employee of a funeral home, person responsible for processing films, computer technician, or a judge must report in accordance with this section when in the person's professional capacity the person has received information which gives the person reason to believe that a child has been or may be abused or neglected as defined in Section 20-7-490. (emphasis added).

Subsection (C) provides that "[e]xcept as provided in Subsection (A), any person who has reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse and neglect may report in accordance with this section." The identity of the person making

a report must be kept confidential by the agency or department receiving the report except as provided, pursuant to Subsection (E) of § 20-7-510.

In accordance with § 20-7-540, a person required or permitted to report child abuse or neglect "is immune from civil and criminal liability which might otherwise result" by reason of his or her reporting in good faith such incidents. Good faith is rebuttably presumed in any reporting. Failure to report a case of child abuse or neglect by a person required to report pursuant to § 20-7-510 is a misdemeanor and the person convicted thereof is subject to a fine of not more than five hundred dollars or imprisonment for not more than six months, or both.

Section 20-7-550, as last amended by Act No. 94 of 2003, further states that

> [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. (emphasis added).

Act No. 94 of 2003 substituted the phrase "member of the clergy including a Christian Science Practitioner or religious healer" for "or Christian Science Practitioner, religious healer" in § 20-7-510. In § 20-7-550, the phrase "clergy member, including Christian Science Practitioner or religious healer" was substituted for the word "priest" preceding "and penitent." Moreover, the second sentence of § 20-7-550 – therein requiring a "clergy member, including Christian Science Practitioner or religious healer" to 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 and penitent privilege – was added by Act No. 94 of 2003.

In answering your question, 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.

In addition, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant. Hair v. State, 305 S.C. 77, 406 S.E.2d 332 (1991). Where a statute is remedial in part and penal in other parts, the remedial portions are to be construed liberally, to carry out the purpose of the act; the penal portions are to be construed strictly, however. McKenzie v People's Baking Co., 205 S.C. 149, 31 S.E.2d 154 (1944); Op. S.C. Atty. Gen., Op. No. 91-13 (February 15, 1991).

The term "clergy" is ordinarily defined as "[t]he body of people ordained for religious service." The American Heritage College Dictionary (3d. ed.). Consistent therewith is the general rule that in order for the clergyman – penitent privilege to apply, among other things a confidential communication must be disclosed "to a regular or duly ordained minister, priest, or rabbi ...." Rivers v. Rivers, 292 S.C. 21, 26, 354 S.E.2d 784, 787 (Ct. App. 1987). (emphasis added).

Courts elsewhere have concluded that various church officials are not members of the clergy or clergymen. For example, in Holy Trinity Orthodox Church of East Meadow v.O'Shea, 186 Misc.2d 880, 720 N.Y.S.2d 904 (2001), the Court concluded that a choir director who was also an ordained sub-deacon and cantor was not an "officiating clergyman" within the meaning of an exception in the property tax law. In State v. Gooding, 989 P.2d 304 (Mont. 1999), the Montana Supreme Court held that the wife of a church deacon was not a member of the clergy for purposes of the priest-penitent privilege. And in In Re Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990), the Court noted that a clergyman "is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably so to be by the person consulting him." Id. at 384, n. 13.

Likewise, courts have held that lay ministers are not clergymen for purpose of the clergy-penitent privilege. In U.S. v. Napoleon, 46 M.J. 279 (1997), the U.S. Court of Appeals for the Armed Forces noted that "the term 'lay' means 'not of the clergy.'" As a result, the Court found that "the term 'lay minister' is ambiguous and could cover a broad range of persons, including musicians, ushers, and various attendants to the person presiding at a religious service. United States v. Garries, 19 M.J. 845, 859-60 (AFCMR 1985) aff'd. on other grounds, 22 M.J. 288 (CMA 1986) was cited by the Court; Garries concluded that communication to a church deacon was not privileged because the deacon was not qualified to perform substantive pastoral duties. Moreover, the Court was of the view that appellant had not met the burden of showing she "reasonably believed" the lay minister to be a clergyman.

Moreover, in In re Cueto, 554 F.2d 14 (2d Cir. 1977), the Second Circuit held that the status of lay minister "does not fall within the scope of any recognized privilege" and thus "gives ... no right to be treated differently from other citizens." Id. Similarly, in In re Commitment of J.B., 766

N.E.2d 795 (Ind. 2002), the Court of Appeals of Indiana held that a deacon of the Church of Jehovah's Witnesses was not encompassed within the clergy-penitent privilege. There, in rejecting the assertion of privilege, the Court stated:

> [o]n appeal, J.B. claims that he had counseled with Dilts in a "priest/penitent capacity." .... However, J.B. presented no evidence of Dilts' particular role within the Church of Jehovah's Witnesses, or the role of a "deacon generally within the Church of Jehovah's Witnesses. Moreover, J.B. has neglected to set forth any evidence explaining the nature or circumstances of his communication with Dilts, other than his conclusion that it fell under the priest penitent privilege. Hence, J.B.'s unsupported argument cannot prevail, especially in light of our duty to construe the privilege narrowly.

Id. at 801.

Other authorities, however, reach a somewhat different conclusion, based primarily upon the relevant facts. For example, in Reutkemeier v. Nolte, 161 N.W. 290 (Iowa 1917), the Supreme Court of Iowa held that an elder of the Presbyterian Church qualified as a "minister" for purposes of the clergy-penitent privilege. There, the Court recognized that whether a particular officer of a church organization is a "minister" for purposes of the privilege must be determined by the ecclesiastical doctrines and laws of the particular denomination. The Court reviewed the hierarchy and governing rules of the Presbyterian Church, concluding that "the ruling elders have nothing to do with the temporal affairs of the church, but deal wholly with its spiritual side and discipline." Moreover, the Court noted that "[t]he denomination itself by its confession of faith characterizes these elders as a 'ministry of the gospel.'"

Further, in State v. Glenn, 115 Wash. App. 540, 62 P.3d 921 (2003), the Court concluded that a church elder was a member of the clergy for purposes of the clergy-penitent privilege. In that case, the Court noted that the elder was ordained prior to the conversation in question and was empowered to perform a marriage. Accordingly, "the trial judge could reasonably find by a preponderance of the evidence that Eide was ordained and thus was 'clergy' for purposes of the clergy/penitent privilege." 62 P.3d at 925.

And, in In re Murtha, 115 N.J.Super. 380, 279 A.2d 889 (1971), a Catholic nun was held not subject to the privilege because the Catholic church did not allow the nun to perform the function of taking confession. In so ruling, the Court stressed that "[c]ounsel has been unable to find anything in Catholic doctrine or practice that would give Sister Margaret the right to claim the priest-penitent privilege." In the Court's view, there existed "no authority, textual or decisional, to support the contention now advanced that a nun qualifies for the privilege." 279 A.2d at 893.

It is apparent from the language of § 20-7-510, including the amendments contained in Act No. 94 of 2003, that the General Assembly's intent was to retain the clergy – penitent privilege, and to define the term "member of the clergy" for the purposes of the reporting requirement consistently

with its usage in the context of this privilege. That being the case, it is evident that whether or not a particular church officer (other than an ordained minister, priest or rabbi, which obviously is included) is a "member of the clergy" for purposes of § 20-7-510's duty to report child abuse or neglect is a fact-specific question. As courts have recognized, resolutions of the issue of whether a church official is a "member of the clergy," "clergyman" or "minister" depends upon the ecclesiastical doctrines and laws of the particular religious denomination involved. Reutkemeier, supra. Employing this analysis, a Presbyterian elder has been held to be a "minister of the gospel" for purposes of the privilege because of the unique nature of that officer in the Presbyterian Church. And, as the Court in Eckmann v. Bd. of Ed. of Hawthorn Sch. Dist. No. 7, 106 F.R.D. 70 (1985) concluded in holding that a nun was entitled to invoke the privilege in a communication made to her as spiritual director, the position of spiritual director "is a recognized office in the Catholic Church, and is considered to be a form of the ministry of the Gospel by the Church." Id., at 72.

Clearly, the purpose of § 20-7-510 "is to save abused and neglected children from injury and harm by establishing an effective reporting system and encouraging the reporting of children in need of protection ...." Op. S.C. Atty. Gen., June 22, 1990. On the other hand, § 20-7-510 imposes a criminal penalty for failure to report such child abuse and neglect. Thus, it is likely that the court will strike the appropriate balance, depending upon the facts.

Conclusion

Accordingly, it is our opinion that, generally speaking, the church officers and officials referenced in your request would not be deemed "members of the clergy" for purposes of § 20-7-510's reporting requirements. However, as the case law above cited concludes, each case must be judged on its own facts. Depending upon the doctrine of the particular religious denomination, such officer may be deemed a "member of the clergy" for purposes of the clergy-penitent privilege – the context in which § 20-7-510 et seq. appears to be applicable. In light of the broad remedial purpose of the child abuse or neglect reporting requirements, a case-by-case analysis to determine the applicability of § 20-7-510 in a given instance would likely be warranted.

The General Assembly may wish to further clarify the applicable statutes to make it clear as to the exact scope of the reporting requirements in the context of a "member of the clergy." Of course, even if a particular church officer is not mandated to report child abuse or neglect pursuant to § 20-7-510(A), such person is permitted to do so pursuant to § 20-7-510(C).

Very truly yours,

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Assistant Deputy Attorney General

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