

1980 S.C. Op. Att'y. Gen. 71 (S.C.A.G.), 1980 S.C. Op. Att'y. Gen. No. 80-36, 1980 WL 81920

Office of the Attorney General

State of South Carolina

Opinion No. 80-36

March 25, 1980

*1 Honorable Donald V. Meyers

Solicitor

Eleventh Judicial Circuit

Lexington County Courthouse

Lexington, South Carolina 29072

Dear Solicitor:

You have requested an Opinion from our Office pertaining to the legality of certain conduct occurring at a St. Andrews night club known as Beethovens. It is our understanding that certain male strippers are performing at the said location, and you are requesting an Opinion respecting the legality of this conduct.

[Section 16–15–260, Code of Laws of South Carolina \(1976\)](#) defines the meaning of obscene or obscenity with respect to conduct occurring within the State of South Carolina. The following Code sections are applicable to the issue raised by your Opinion request:

[Section 16–15–260\(a\)](#) provides that ‘obscene or obscenity means any work, material or performance which, taken as a whole, appeals to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole, does not have serious literary, artistic, political, educational, or scientific value. In order for any matter to be determined ‘obscene’ the trier of fact must find:

(1) that the average person, applying contemporary community standards would find that the matter taken as a whole, appeals to the prurient interest, and

(2) that the matter depicts, or describes, in a patently offensive way, sexual conduct specifically defined by this Section or authoritatively construed by the courts of this State as being a portrayal of patently offensive sexual conduct as the phrase is used in the definition of obscene, and

(3) that the matter taken as a whole, lacks serious literary, artistic, political, educational, or scientific value.

(b) ‘Prurient Interest’ means a shameful or morbid interest in nudity, sex or excretion and is reflective of an arousal of lewd and lascivious desires and thoughts.

(c) ‘Patently Offensive’ means obviously and clearly disagreeable, objectionable, repugnant, displeading, distasteful, or obnoxious to contemporary standards of decency and propriety within the community.

(d) ‘Sexual Conduct’ means the depiction, display, description, exhibition or representation of:

(1) Ultimate sexual acts, normal or perverted, actual, actual or simulated, whether between human beings, animals, or a combination thereof:

(4) Actual or simulated touching, caressing or fondling of, or other similar physical contact with, the covered or exposed genitals, public or anal regions, or female breast nipple, whether alone or between humans, animals or a human and an animal, of the same or opposite sex, in an act of apparent sexual stimulation or gratification.

(f) 'Person' means any individual, corporation, partnership, association, firm, club or other legal or commercial entity.

(g) 'Knowingly' means having knowledge of the content of the subject material or performance, or failing after reasonable opportunity to exercise reasonable inspection which would have disclosed the character of such material or performance.

*2 (i) 'Performance' means any preview, play, show, skit, film, dance or other exhibition performed for an audience.

(j) 'Disseminate' means:

(1) Sells, delivers, promotes, or provides or offers, or agrees to sell, deliver, promote, or provide any writing, picture, record or other representation or embodiment;

(2) Presents, promotes, or directs a play, dance, or other performance or participates directly in that portion thereof;

(3) Publishes, exhibits, or otherwise makes available;

(k) 'Promote' means to cause, permit, procure, counsel, or assist.

(l) 'Available to the Public' means that the material or performance may be purchased, viewed or attended on a subscription basis, on a membership fee arrangement, for a separate fee for each item or performance, or obtained through the purchase, lease, or rental of other goods, services, or facilities.

(n) 'Sexually Oriented' means that the material or performance contains in whole or in part depictions, descriptions, or representations of nudity or sexual conduct and is considered harmful to minors.

(o) 'Nudity' means a state of undress so as to expose the human male or female genitals, public area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering any portion at or below the areola thereof.

(p) 'Harmful to Minors' means that quality of any sexually oriented material or performance, when it (1) is taken as a whole appeals to the prurient interest of minors; (2) is patently offensive to prevailing adult community standards with respect to what is suitable for minors and (3) lacks serious literary, artistic, political, educational, or scientific value for minors.

Under the aforementioned statutory provision the conduct of nude males stripping at Beethovens nightclub may fall within the purview of the statutory definition of obscenity. That determination would have to be made by you and the trier of facts, applying the statute to the particular facts of the case.

The procedure for such a determination is embodied within [Section 16-15-270, Code of Laws of South Carolina \(1976\)](#). The Section provides that:

(a) The purpose of this section is to provide a judicial determination of the question of whether books, magazine, motion pictures or other materials are obscene prior to their seizure or prior to a criminal prosecution relating to such materials.

(b) The public policy of this State requires that all proceedings prescribed in this section shall be examined, heard, and disposed of with the maximum promptness and dispatch commensurate with the Constitution of the United States and the Constitution of this State.

(c) Whenever any law enforcement officer has reasonable cause to believe that any person is engaged in the sale, display, distribution or dissemination in a public place of any books, magazines, motion pictures or other materials which are obscene within the meaning of § 16–15–260, he shall, without seizing such material, notify the solicitor for the judicial circuit in which such material is so believed to be offered. Upon receiving such notification the solicitor for such judicial circuit shall investigate the law enforcement officer's report to determine whether or not sufficient cause exists to seek warrants of search and seizure. If the solicitor determines that sufficient cause does exist, he shall apply to a circuit judge sitting in the judicial circuit where the allegedly obscene material is located for warrants.

*3 (d) A circuit judge may issue warrants for search and seizure to authorize seizure of single copies of suspect material in order to preserve evidence, but only after he has determined the existence of probable cause based upon a viewing of the allegedly obscene material itself or upon examination of factual allegations contained in any affidavit in support of such warrant.

(e) Any warrant or order of seizure shall describe with particularity, the premises to be searched and identify the material to be seized by name, title or fair description. Execution and return thereon shall be in accordance with the provisions of § 17–13–140.

(f) A circuit judge may issue, concurrently with warrants for search and seizure, a temporary restraining order prohibiting the owner or manager of the premises to be searched from removing, causing or permitting to be removed the material which is alleged to be obscene within the meaning of § 16–15–260; provided, however, that such temporary restraining order shall not be construed as prohibiting the owner or manager of the premises from conducting sales in the normal course of business.

(g) Nothing contained in this section shall prevent the obtaining of material by purchase or by production under the provisions of § 16–15–270.

(h) Warrants or orders authorizing seizures of multiple copies of obscene material for the purpose of suppression may only issue after a trial court's determination of obscenity. Such warrants or orders may only be directed against material within the claimed ownership, possession, custody or control of a convicted defendant or agent or employee thereof.

(i) Any person who violates the provisions of any orders or warrants issued pursuant to this section shall be subject to punishment by the court as for contempt.

[Section 16–15–280, Code of Laws of South Carolina \(1976\)](#) discusses matters which may be submitted into evidence during the course of any prosecution for an offense involving the dissemination of obscenity. The following shall be admissible into evidence:

- (1) The character of the audience for which the material was designed or to which it was directed;
- (2) Whether the material is published in such a manner that an unwilling person could not escape it;
- (3) Whether the material is exploited so as to amount to pandering;
- (4) What the predominant appeal of the material would be for ordinary adults or a special audience and what effect, if any, it would probably have on the behavior of such people;
- (5) Literary, artistic, political, educational, scientific or other social value, if any, of the material;
- (6) The degree of public acceptance of the material throughout the State;
- (7) Appeal to prurient interest, or absence thereof, in advertising or in the promotion of the material;

Expert testimony and testimony of the editor, creator or publisher relating to factors entering into the determination of the issue of obscenity shall also be admissible.

*4 The statutory provision most applicable to any obscenity offense which may have been committed by any St. Andrew's nightclub would be [Section 16-15-310, Code of Laws of South Carolina \(1976\)](#). The statute provides that:

No person shall intentionally disseminate in any public place any motion picture which he knows or reasonably should know to be obscene within the meaning of [§ 16-15-260](#); nor shall any person intentionally post any placards, writings, pictures, or drawings, which he knows or reasonably should know to be obscene within the meaning of [§ 16-15-260](#) on walls, fences, billboards or other public places; nor shall any person intentionally permit any exhibition or show which he knows or reasonably should know to be obscene within the meaning of [§ 16-15-260](#); to be conducted in any public place owned or controlled by him. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be punished as provided in [§ 16-15-440](#).

It is therefore the Opinion of this Office that the conduct of male stripping in the St. Andrews area may be obscene conduct, in violation of [Sections 16-15-310 and 16-15-260 of the Code of Laws of South Carolina](#). Such a determination would have to be made by you and the judicial process, applying the aforementioned statutory provisions to the facts of the particular case.

Very truly yours,

Wayne G. Carter, Jr.
Staff Attorney

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