

GEORGIA'S NEW LAW OFFICE SEARCH STATUTE

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"The idea of a law office search is startling. It cannot be denied, however, that extensive law office searches have occurred and will continue to occur." Note, *The Assault on the Citadel of Privilege Proceeds Apace: The Unreasonableness of Law Office Searches*, 49 Fordham L. Rev. 708, 744 (1981).

Introduction

On Wednesday, April 19, 1989, Gov. Harris signed into law a new statute which for the first time in the history of this state provides special regulations governing police searches of the offices of nonsuspect lawyers for documentary evidence. See Lundy, "New Law Curbs Office Searches," *Fulton County Daily Report*, p. 2 (Apr. 21, 1989). The new statute, 1989 Ga. Laws 1687, was introduced by State Reps. William C. Randall of the 101st district (Macon) and Jim Martin of the 36th district (Atlanta), who deserve enormous credit for drafting the statute as passed and for obtaining its passage by large majorities in both houses of the General Assembly. The new statute places Georgia in the vanguard of the handful of states that have passed legislation to curb abuses associated with the growing problem of police searches of law offices.

The new statute has two sections. Section 1, the heart of the new statute, adds § 17-5-32 to the Official Code of Georgia Annotated. Section 2 of the new statute merely repeals any conflicting laws. The new law office search statute takes effect on July 1, 1989. See OCGA § 1-3-4 (effective date of statutes signed between January 1 and July 1 is July 1).

The new law office search statute makes three basic changes in the law. First, it statutorily establishes the subpoena preference rule in Georgia with respect to the obtaining of documentary evidence from nonsuspect lawyers' offices. If the police seek documentary evidence from the office of an attorney who is not a criminal suspect, they must proceed by subpoena unless the document would be destroyed if a warrant does not issue.

Second, the new statute requires certain special procedures to be followed in issuing or executing a search warrant to search a nonsuspect lawyer's office for documentary evidence. These procedures, many of which are already in effect in California, are designed to minimize the intrusiveness of law office searches and thereby to protect the right to counsel, the attorney-client privilege, the work-product doctrine, and the privacy of the files of lawyers' clients.

Third, the new act establishes a statutory exclusionary rule forbidding use of evidence seized in violation of § 17-5-32. Violations of § 17-5-32 would appear to fall into two categories: (1) violations of the subpoena preference rule, and (2) issuing or executing a search warrant to

search a nonsuspect lawyer's office without complying with the special procedural requirements contained in § 17-5-32(c). The statutory exclusionary rule for suppression of evidence obtained in violation of the statute is in addition to, not in lieu of, the exclusionary rule independently available under the fourth amendment.

Background of the New Law Office Search Act

Georgia is the third state to enact a statute specifically dealing with the growing problem of police searches of law offices. The first state to enact such a statute was California, in 1979. See Act of Sept. 26, 1979, ch. 1034, 1979 Calif. Stat. 3572; now codified at Calif. Penal Code §§ 1524, 1525 (West 1987). The second state to pass such a statute was Massachusetts, in 1987. See Act of Jan. 7, 1987, ch. 691, 1986 Mass. Acts 1262; now codified at Mass. Gen. Stat. Ann., ch. 276, § 1. Many provisions of Georgia's new law are borrowed from the California and Massachusetts statutes. Other provisions in the new statute are based on proposals for reform legislation made by leading authorities in the scholarly literature.

Over the past fifteen years there has been a dramatic leap in the number of cases where a search warrant is used by police or prosecutors to search the office of licensed attorneys. "The law office search, once rarely used by police as a means of obtaining evidence, has become an increasingly utilized tool over the past few years." Comment, *Colorado's Approach to Searches and Seizures in Law Offices*, 54 U. Colo. L. Rev. 571, 571 (1983). See also Bloom, *The Law Office Search: An Emerging Problem and Some Suggested Solutions*, 69 Geo. L. J. 1, 7 (1980) (examining "the sudden and recent emergence of the law office search"); see also Note, *The Assault on the Citadel of Privilege Proceeds Apace: The Unreasonableness of Law Office Searches*, 49 Fordham L. Rev. 708 (1981); Jones, *The Aftermath of Zurcher v. Stanford Daily: The Need for Legislation to Prohibit Third Party Search Warrants for Lawyers' Files*, Ariz. B. J. 11 (Feb. 1980).

Some of these searches involved lawyers who are reasonably suspected of criminal activity. See, e.g., *Andresen v. Maryland*, 427 U. S. 463 (1976); *In re Impounded Case (Law Firm)*, 840 F. 2d 196 (3rd Cir. 1988); *DeMassa v. Nunez*, 747 F. 2d 1283 (9th Cir. 1985); *Klitzman & Gallagher v. Krut*, 744 F. 2d 955 (3rd Cir. 1984); *In re United States*, 723 F. 2d 1022 (1st Cir. 1983); *National City Trading Corp. v. United States*, 635 F. 2d 1020 (2nd Cir. 1980); *Burrows v. Superior Court*, 13 Cal. 3d 238, 529 P. 2d 590, 118 Cal. Rptr. 166 (1974). Others involve third party searches, where the lawyer is not a suspect and the search is directed at documentary evidence incriminating someone other than the lawyer--often the lawyer's client. See, e.g., *O'Connor v. Johnson*, 287 N. W. 2d 400 (Minn. 1979).

Some of the searches of lawyers's offices have occurred here in Georgia. On Dec. 4, 1981, for example, federal law enforcement agents from the DEA and IRS, with a federal search warrant, raided an attorney's office in Savannah, holding the attorney and the attorney's employees in the back room, forbidding use of the telephone, locking the doors, and shoving a visitor into the street. See *Savannah Lawyer Files Lawsuit Against Federal Agents for Raid*, Atlanta Journal-Constitution, Dec. 4, 1983, p. 6C, col. 1; see also *IRS Agents are Cleared in Lawyer's Office Raid*, Atlanta Journal-Constitution, p. 5B, col. 5 (Apr. 20, 1985).

On Mar. 2, 1987, again in Savannah, Georgia law enforcement officials obtained a state search warrant to search the office of a criminal defense attorney for a document that exculpated the attorney's client but incriminated another defendant. The attorney surrendered the document under protest when six agents showed up at his office with the search warrant, which authorized them to search for "yellow papers." See Wood, *Search of Lawyer's Office Ruled Illegal*, *Fulton County Daily Report*, p. 4 (Feb. 3, 1989). In a civil rights action the attorney later brought in federal court, Judge Anthony Alaimo of the Southern District held that the warrant violated the fourth amendment because it failed to specify the places to be searched, although the defendant prosecuting attorneys were held immune from civil liability. Judge Alaimo also found that there was "no evidence" that the prosecuting attorney's belief that the document sought might be destroyed if a subpoena was used instead of a search warrant "was a reasonable belief." See *Nathan v. Lawton*, No. CV487-223 (S. D. Ga.) (Order of Jan. 16, 1989).

In his Jan. 16, 1989 order, Judge Alaimo also expressed strong concern about the dangers to the attorney-client relationship created by law office searches and noted that the Mar. 2, 1987 search had induced the Savannah bar to form a committee to investigate and make recommendations concerning the use of search warrants to search law offices.

In retrospect, these two law offices search incidents, together with several other such incidents in Georgia in the 1980's, appear to have sparked enactment of the new law office search act. The new statute arises not simply from a generalized concern about the recent growth of law office searches across the nation, but also from actual experience with such searches in Georgia.

Legal Developments Contributing to the Rising

Number of Law Office Searches

Prior to the 1970's police use of search warrants to search for documents in the offices of nonsuspect lawyers was practically unheard of. See generally Mandel, *Law Enforcement Searches of Law Firm Offices*, 51 Okla. B. J. 707, 707-08 (1980); see *O'Connor v. Johnson*, 287 N. W. 2d 400, 405 (Minn. 1979) (noting that the "very dearth of reported cases from other jurisdictions regarding the seizure by warrant of client's files from an attorney's office indicates" that the subpoena procedure, rather than the search warrant process, "is used elsewhere with satisfactory results" for nonsuspect lawyers); Note, *Constitutional Law--Search of an Attorney's Office Held Unreasonable under the Minnesota Constitution--O'Connor v. Johnson*, 287 N. W. 2d 400 (Minn. 1979), 7 Wm. Mitchell L. Rev. 253 (1981).

If police wanted documents from a nonsuspect lawyer and the lawyer would not voluntarily turn them over, the standard practice prior to the 1970's was to obtain the documents by subpoena rather than by search warrant. Subpoenas were sometimes even used to obtain documents from suspect attorneys. While search warrants could issue to search the office of a lawyer for contraband or the fruits or instrumentalities of crime, searches of attorneys's offices for mere documentary evidence did not exist. At that time the fourth amendment was construed to bar seizure of "mere evidence," *Gouled v. United States*, 255 U. S. 298 (1921), and also to bar seizure of the private papers of the accused, *Boyd v. United States*, 116 U. S. 616 (1886). Search warrants for documents in the office of a lawyer not suspected of criminal activity were neither

sought nor issued. Third party search warrants for documents in the office of a lawyer not suspected of criminal activity were, that is, unknown. Since warrantless searches of places such as law offices were also prohibited by traditional fourth amendment principles, there was little realistic threat that police searches-with or without a warrant-would interfere with the privacy of clients' files in the office of nonsuspect attorneys.

The recent emergence of the problem of police search of law offices for documentary evidence is due in part to Supreme Court doctrinal changes in fourth amendment jurisprudence which have expanded the types of items seizable under the fourth amendment. The key Supreme Court decisions were handed down in 1967, 1976, and 1978.

In 1967 the Supreme Court abolished the "mere evidence" rule and added evidence of crime to the categories of items seizable under the fourth amendment. See *Warden v. Hayden*, 387 U. S. 294 (1967).

In 1976, in *Andresen v. Maryland*, 427 U. S. 63 (1976), the court overturned the "private papers" doctrine--the traditional ban on search and seizure of the private papers of the accused--and affirmed the conviction of a suspect lawyer whose offices had been searched under a search warrant. In 1978, in *Zurcher v. Stanford Daily*, 436 U. S. 547 (1978), the Supreme Court upheld the validity of search warrants to carry out third party searches--that is, searches where there is no probable cause to believe that the owner or possessor of the premises where the seizable items are located is implicated in the crime that occurred or is occurring. The Court in *Zurcher* went further and also held that even newspaper offices may be searched pursuant to a valid search warrant for documentary evidence.

Although the Supreme Court has not specifically ruled on the validity of search warrants to search law offices of nonsuspect attorneys for documentary evidence, the lower federal courts and the state courts are in unanimous agreement that the fourth amendment does not per se bar searches of law offices of either suspect or nonsuspect attorneys, provided the warrant is valid and is properly executed. See, e.g., *In re Impounded Case (Law Firm)*, 840 F. 2d 196 (3rd Cir. 1988); *Burrows v. Superior Court*, 13 Cal. 3d 238, 529 P. 2d 590, 118 Cal. Rptr. 166 (1974); *Deukmejian v. Superior Court*, 162 Cal. App. 3d 253, 162 Cal. Rptr. 857 (1980).

The Supreme Court's abolition of both the "mere evidence" rule and the "private papers" doctrine as limits on seizures of things, and the Court's approval of search warrants of a nonsuspect's premises for mere evidence of crime, have not been the only reasons for the emergence of law office searches in recent years. Since 1972 the Supreme Court has been carrying out a fourth amendment criminal procedure counterrevolution, involving a curtailing of remedies for fourth amendment violations as well as of the substantive protections afforded by the amendment. See, e.g., Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 Am. Crim. L. Rev. 257 (1984); Yackle, *The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 Or. L. Rev. 151 (1979).

Undoubtedly the climate created by the Court's unfriendly attitude toward the fourth amendment values also helped bring about the rise of law office searches. Furthermore, the emergence of law office searches is probably also connected to the overall trend in recent times for prosecutors to

aggressively seek evidence of crime from the files of criminal defense attorneys. See, e.g., Tarlow, *Witness for the Prosecution--A New Role for the Defense Lawyer*, 1 J. Crim. Defense 331 (1975).

The Dangers Posed by the Growth of Law Office Searches

The increasing tendency of police to conduct law office searches pursuant to search warrants for documentary evidence has provoked concern, criticism, and controversy. This is easy to understand. Unannounced visits to law offices by police who, armed with a search warrant, proceed to search the privileged files and documents of any attorney obviously may threaten the privacy and rights of the attorney's clients. In particular, police searches of law offices may endanger (1) the attorney-client privilege, (2) the sixth amendment right of counsel to accused persons, and (3) the work-product doctrine. Therefore, although they are not per se illegal, searches of offices of lawyers, especially nonsuspect ones, require careful regulation and control in order to maintain the integrity of the attorney-client relationship and to prevent improper disclosure of privileged information.

These dangers, and related ones, have been recognized repeatedly by bar associations and legal scholars, and there is no need to recanvass them now. It will suffice to observe that the growing police practice of conducting law office searches "is a matter of serious concern because of the threat it poses to the nature of the attorney-client relationship, the legal devices that have evolved to promote and foster it, and the attorney's role in the administration of justice." Bloom, *The Law Office Search: An Emerging Problem and Some Suggested Solutions*, 69 Geo. L. J. 1, 12 (1980). This is why in recent years numerous proposals for reform legislation have been made by bar committees and scholars to prevent possible abuse of law office searches, and why a total of three states have now passed statutes specifically dealing with law office searches.

An Overview of New OCGA § 17-5-32

As noted above, the first section of the new Georgia law office search act enacts OCGA § 17-5-32 into law. Section 17-5-32 contains four subsections, numbered (a) through (d). The first, § 17-5-32(a), provides a definition for "documentary evidence." The definition, which is borrowed from both the 1979 California and 1987 Massachusetts statutes, is extremely broad, including but "not limited to writings, documents, blue-prints, drawings, photographs, computer printouts, microfilms, X-rays, files, diagrams, ledges, books, tapes, audio and video recordings, and papers of any type or description." However, unlike the California and Massachusetts statutes, § 17-5-32(a) does not include "films" within the statutory definition of documentary evidence.

Patterned after the 1987 Massachusetts statute, the first sentence of OCGA § 17-5-32(b) provides that no search for documentary evidence in the possession of a nonsuspect lawyer may be undertaken except pursuant to a search warrant, which can be issued only on the basis of an application which specifies that the place to be searched is in the possession of a lawyer and which also shows that there is probable cause to believe that the documentary evidence will be

destroyed if a search warrant does not issue.

The effect of this first sentence of § 17-5-32(b) is to establish in Georgia, as a matter of statutory law, the subpoena preference rule with respect to efforts to seek documentary evidence from the offices of a nonsuspect lawyer. As of July 1, 1989, law enforcement officials of the State of Georgia ordinarily must proceed by subpoena instead of search warrant to obtain documentary evidence incriminating someone other than the attorney.

However, the second and third sentences of § 17-5-32(b) also specifically state that the power to serve search warrants on suspect attorneys, as well as the power to serve subpoenas on nonsuspect attorneys, is unimpaired by § 17-5-32.

OCGA § 17-5-32(c) regulates the issuance and execution of search warrants to search offices of nonsuspect lawyers for documentary evidence in cases where there is probable cause to believe that the evidence will be destroyed if no warrant should issue. The regulations do not extend to searches of offices of suspect lawyers. Many of the regulations, such as the special master procedure, are derived from §§ 1524 and 1525 of the Calif. Penal Code. A few of the regulations, such as the requirement that the warrant be issued only by a superior court, are based on scholarly proposals such as those in the seminal article by Professor Bloom.

Under § 17-5-32(c)(1), at the time the search warrant is issued the court shall appoint a special master to accompany the person who will serve the warrant. The special master shall be an attorney in good standing of the State Bar of Georgia and shall be selected from a list of qualified attorneys maintained by the State Bar of Georgia. Upon service of the warrant, the special master shall give the party served an opportunity to provide the specific items requested. If the party fails to provide the items requested, the special master shall conduct a search for them in the areas named in the warrant.

Under § 17-5-32(c)(2), if the party served with the warrant states that the items should not be disclosed, the items shall be sealed by the special master and taken to the superior court for hearing. At such hearing, which must be held in the superior court, the party whose premises were searched may file a motion to suppress under § 17-5-30 and also may raise claims that the items are privileged or are inadmissible because they were obtained in violation of § 17-5-32.

Under § 17-5-32(c)(3), the search warrant must be served during normal business hours, whenever practicable. Law enforcement officers may not conduct the search, but may accompany the special master when the special master is conducting the search.

Under § 17-5-32(c)(4), the search warrant must be served upon a party who appears to have possession of the items sought, but if after reasonable efforts that party cannot be located, the special master shall seal and return to the court any items which appear to be privileged.

Under § 17-5-32(c)(5), the search warrant may be issued only by the superior court. At the time of applying for the warrant the official seeking the warrant shall submit a written search plan designed to minimize the intrusiveness of the search. When the warrant is executed, the special master is under a duty to take reasonable efforts to minimize the search.

Finally, OCGA § 17-5-32(d) provides for the suppression of evidence obtained in violation of § 17-5-32. The suppressed evidence shall be inadmissible as substantive evidence or for impeachment purposes. Presumably, evidence would be deemed obtained in violation of § 17-5-32, and hence excludable, if the evidence was seized under a search warrant, and either (1) the search warrant was issued in violation of § 17-5-32(b)'s subpoena preference rule, or (2) the search warrant was not issued and executed in compliance with the special procedural requirements set forth in § 17-5-32(c). Presumably, if the search was conducted without a warrant, the evidence would be subject to suppression if the search violated the provisions of § 17-5-32(b) prohibiting warrantless searches of nonsuspect attorneys for documentary evidence.

Conclusion

Although Georgia is only the third state to enact a statute to control law office searches, the new Georgia statute is modest and limited in scope. In adopting the subpoena preference rule, the statute simply reflects traditional practices in America prior to 1980. The new statute applies only to searches for documentary evidence which is mere evidence of crime; searches of law offices for contraband or the fruits or instrumentalities of crime are untouched by the statute. The new statute leaves intact the traditional ability of grand juries and prosecutors to use subpoenas to obtain evidence from nonsuspect attorneys.

In addition, the new statute governs only searches by Georgia law enforcement agents. The power of federal law enforcement agents to obtain or execute search warrants for lawyers' offices is undisturbed by Georgia's new statute.

Despite its modest scope, the new Georgia law office search statute is a bold step forward in a state that is not known for boldly defending basic rights; and the statute unquestionably is a major victory for the right to counsel which, although under attack of late, remains "the most pervasive" of all constitutional rights.