

9-1-1989

## CRIMINAL PROCEDURE Searches and Seizures: Regulate Law Office Searches

S. Brannan

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>

 Part of the [Law Commons](#)

---

### Recommended Citation

S. Brannan, *CRIMINAL PROCEDURE Searches and Seizures: Regulate Law Office Searches*, 6 GA. ST. U. L. REV. (1989).  
Available at: <https://readingroom.law.gsu.edu/gsulr/vol6/iss1/34>

This Peach Sheet is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact [mbutler@gsu.edu](mailto:mbutler@gsu.edu).

## CRIMINAL PROCEDURE

### *Searches and Seizures: Regulate Law Office Searches*

CODE SECTION: O.C.G.A. § 17-5-32 (new)  
BILL NUMBER: HB 356  
ACT NUMBER: 680  
SUMMARY: The Act prohibits the issuance and execution of a search warrant for documents in an attorney's possession absent a showing of probable cause that the attorney committed a crime, or that the attorney has possession of the place to be searched and the documents will be hidden or destroyed. The Act also prohibits warrantless law office searches and provides procedural protections which regulate the search and the disposition of potentially privileged documents.  
EFFECTIVE DATE: July 1, 1989

#### *History*

It used to be the custom in Georgia and other states that a nonsuspect attorney's law office was protected from search and seizure of documents because a subpoena duces tecum provided a reasonable way to obtain such evidence.<sup>1</sup> In recent years, however, the increasing practice of bypassing a subpoena in favor of a search warrant has caused the Savannah Bar Association and the Georgia Criminal Defense Association to recognize such law office searches as a growing problem.<sup>2</sup> One case in particular prompted the concern which led to the Act.<sup>3</sup>

In *Nathan v. Lawton*,<sup>4</sup> the United States District Court for the Southern District of Georgia found that a warranted search of a nonsuspect plaintiff's law office for unprivileged, documentary evidence of a crime was unreasonable under the fourth amendment because the

---

1. Telephone interview with Representative Jim Martin, House District No. 26 (Mar. 3, 1989) [hereinafter Martin Interview].

2. *Id.*

3. *Id.*

4. No. 487-223 (S.D. Ga. Jan. 18, 1989) (LEXIS, Genfed library, Dist file).

warrant failed to describe with particularity the place to be searched.<sup>5</sup> The plaintiff, Mr. Nathan, a Savannah criminal defense attorney, had been appointed to represent a suspected cocaine trafficker.<sup>6</sup> The case arose out of a bond hearing for the trafficker at which time Nathan waved some yellow papers, and hinted that they comprised a letter from an alleged accomplice which exonerated his client.<sup>7</sup> After the bond hearing, the Assistant District Attorney (ADA) requested a copy of the yellow papers in order to use them as evidence of the writer's participation in cocaine trafficking.<sup>8</sup> Nathan refused, whereupon the ADA sought and received a warrant to search Nathan's law office and seize the yellow papers.<sup>9</sup>

The court found that the description of the yellow papers did not cure the failure to describe with particularity the place where the yellow papers would be found.<sup>10</sup> The warrant would have allowed the officers to rifle every file and read every yellow paper in the office to determine whether it was the letter sought in the warrant.<sup>11</sup> The danger that the court saw was not that privileged documents would be seized, but that police officers and prosecutors would see, remember, and use

---

5. Nathan v. Lawton, No. 487-223 (S.D. Ga. Jan. 18, 1989) (LEXIS, Genfed library, Dist file). If the place to be searched had been described with sufficient particularity, this law office search would have been reasonable under the fourth amendment. The district court found that the warrant was issued with probable cause by a neutral and detached magistrate, and that the object to be seized was sufficiently particularized in the warrant. The search warrant authorized the defendants:

to search the premises known as: the law offices of Attorney Mark Nathan located at 2423-B Abercorn Street, Savannah, Chatham County, Georgia for: evidence of a crime, to wit: violations of the Georgia Controlled Substances Act, said crimes having been committed by Mr. Lafayette Wright in January, 1987, said evidence being yellow papers being a letter written by Chatham County Jail inmate Lafayette Wright to Attorney Mark Nathan . . . .

*Id.*

6. *Id.*

7. *Id.* The charges against Nathan's client were dropped at the bond hearing. *Id.*

8. *Id.* The yellow papers were not privileged because Nathan was not the writer's attorney. *Id.*

9. *Id.* The reason given for avoiding the subpoena was that Nathan had failed to cooperate with the ADA's request for the letter. Nathan said the request was improper and that he did not take it seriously. The ADA conferred with District Attorney Lawton, who considered but decided against issuing a subpoena for the letter. Instead, the ADA, acting upon Lawton's suggestion, approached a detective of the Chatham County Metro Drug Squad and suggested that the detective apply for a search warrant. The ADA helped the detective complete the affidavit and accompanied the detective to the courthouse to obtain the warrant. Subsequently, the ADA accompanied five Metro Drug Squad officers to the plaintiff's law office to execute the search warrant. No actual searching took place in the law office, however, because Nathan surrendered the letter under protest after the ADA specified what he wanted and guessed its location. *Id.*

10. *Id.*

11. *Id.*

the privileged information.<sup>12</sup> The *Nathan* court failed to specify how the place could be particularized in a way to eliminate disclosure of privileged materials.

A more exacting description of the place to be searched probably would not eliminate the danger of compromising client confidences and secrets.<sup>13</sup> In a law office where most documents contain privileged information, even a search for a particular, unprivileged document in a particular drawer or file could expose confidential material.<sup>14</sup> Compromising client confidences could destroy faith in the adversary system of justice.<sup>15</sup> Therefore, acting at the request of the Savannah Bar Association and the Georgia Criminal Defense Association, the sponsors introduced HB 356 to address these concerns by strictly regulating when and how law office searches may be conducted.<sup>16</sup>

### HB 356

O.C.G.A. § 17-5-32(a) defines documentary evidence broadly to include media of "any type or description."<sup>17</sup> The bill underwent only one minor

12. *Id.* The danger was compounded since Nathan shared his office with another attorney. *Id.* Nathan also claimed that the yellow papers were "private papers" protected by O.C.G.A. § 17-5-21. The statute provides: "[a] judicial officer . . . may issue a search warrant for the following: . . . Any item, substance, object, thing, or matter, *other than the private papers of any person*, which is tangible evidence of the . . . crime for which probable cause is shown." O.C.G.A. § 17-5-21(a)(5) (1982) (emphasis added). The plaintiff contended that the violation of the statutory private papers exception rendered the warrant unreasonable under the fourth amendment. The defendants countered that the papers were no longer private because Nathan had already revealed their contents. The district court declined to rule on the private papers issue on grounds of comity and discretion because Georgia courts have not defined "private papers." *Nathan v. Lawton*, No. 487-223 (S.D. Ga. Jan. 18, 1989) (LEXIS, Genfed library, Dist file).

13. Martin Interview, *supra* note 1.

14. *Id.*

15. *Id.*

16. *Id.* The sponsors of the bill were Representative William C. Randall, House Dist. No. 101 and Representative Jim Martin. *Id.* Senator Kenneth C. Fuller, Senate Dist. No. 52, sponsored the bill in the Senate. *Id.* University of Georgia School of Law Professor Donald E. Wilkes conducted an analysis of the response of other states to the problem of law office searches, and drafted a bill to control law office searches based upon his research. Professor Wilkes submitted to Representatives Martin and Randall his analysis and proposal in an unpublished paper dated May 1, 1988. *Id.*; see D. Wilkes, Analysis of Proposed Georgia Statute for the Control of Law Office Searches (May 1, 1988) (unpublished manuscript) (available in Georgia State University College of Law Library) [hereinafter Wilkes Analysis].

17. O.C.G.A. § 17-5-32(a) (Supp. 1989). The statutory language is derived from Massachusetts law. MASS. GEN. LAWS ANN. ch. 276, § 1 (West 1986); Wilkes Analysis, *supra* note 16, at 16.

change: the house struck the word "film" in the definition section, apparently to exclude pornographic movies from protected material.<sup>18</sup>

O.C.G.A. § 17-5-32(b) expresses the central theme of the Act.<sup>19</sup> The first sentence of subsection (b) prohibits warrantless searches for documentary evidence in the possession of an attorney and restricts the issuance of warrants for such searches.<sup>20</sup> For a warrant to issue, the applicant must show probable cause to believe that the attorney is a criminal suspect, or that the attorney has possession or custody over the place to be searched *and* that the material will be hidden or destroyed.<sup>21</sup> The sponsor's intent is to limit prosecutors to the subpoena process in most cases.<sup>22</sup> The last two sentences of subsection (b) reaffirm that traditional laws govern the issuance of search warrants against suspect attorneys and subpoenas against nonsuspect attorneys.<sup>23</sup>

O.C.G.A. § 17-5-32(c) provides special procedural protections which regulate the manner in which the search may be conducted.<sup>24</sup> O.C.G.A. § 17-5-32(c)(1) requires the issuing court to appoint a special master to accompany the individual who serves the warrant.<sup>25</sup> After serving the warrant, the special master must give the attorney an opportunity to provide the requested items.<sup>26</sup> A search limited to the items and areas particularized in the search warrant will ensue only if the special master determines that the attorney has failed to provide the requested items.<sup>27</sup> O.C.G.A. § 17-5-32(c)(1) also requires that the special master be selected

18. Martin Interview, *supra* note 1. See HB 356 (HFA), 1989 Ga. Gen. Assem. O.C.G.A. § 17-5-32(a) provides: "As used in this Code section, the term 'documentary evidence' includes but is not limited to writings, documents, blueprints, drawings, *photographs*, computer printouts, *microfilms*, *X-rays*, files, diagrams, ledgers, books, tapes, audio and *video recordings*, and papers of any type or description." O.C.G.A. § 17-5-32(a) (Supp. 1989) (emphasis added). The generic word "films" appears to be covered by the more specific language. Martin Interview, *supra* note 1.

19. Wilkes Analysis, *supra* note 16, at 14.

20. O.C.G.A. § 17-5-32(b) (Supp. 1989). The first sentence of O.C.G.A. 17-5-32(b) requires the application to specify that the attorney has possession of the place to be searched, and is derived from a provision in the California Evidence Code. CAL. EVID. CODE § 1525 (West 1987); Wilkes Analysis, *supra* note 16, at 14. The remainder of the first sentence is based on Massachusetts law. MASS. GEN. LAWS ANN. ch. 276, § 1 (West 1987); Wilkes Analysis, *supra* note 16, at 14.

21. O.C.G.A. § 17-5-32(b) (Supp. 1989).

22. Martin Interview, *supra* note 1; Wilkes Analysis, *supra* note 16, at 14.

23. O.C.G.A. § 17-5-32(b) (Supp. 1989).

24. O.C.G.A. § 17-5-32(c) (Supp. 1989). This subsection is derived from a provision in the California Evidence Code. CAL. EVID. CODE §§ 1524, 1525 (West 1987); Wilkes Analysis, *supra* note 16, at 15.

25. O.C.G.A. § 17-5-32(c)(1) (Supp. 1989).

26. *Id.*

27. *Id.* Details of the special master procedure are derived from a section of the California Evidence Code. CAL. EVID. CODE § 1524(c)(1) (West 1987); Wilkes Analysis, *supra* note 16, at 15.

from a list of qualified members in good standing of the State Bar of Georgia.<sup>28</sup>

O.C.G.A. § 17-5-32(c)(2) requires that the special master seal and deliver to the superior court any items which the attorney claims should not be disclosed.<sup>29</sup> After receiving the sealed items, the superior court shall conduct a hearing at which time the lawyer may make a motion to suppress the documents under O.C.G.A. §§ 17-5-32, 17-5-30, or a claim of privilege.<sup>30</sup> Subsection (c)(2) also specifies that the hearing shall be held in superior court.<sup>31</sup>

O.C.G.A. § 17-5-32(c)(3) requires that the warrant be served and executed during normal business hours whenever possible.<sup>32</sup> This subsection also prohibits persons other than the special master from participating in the search.<sup>33</sup>

O.C.G.A. § 17-5-32(c)(4) requires that the person who serves the warrant make a reasonable effort to locate and serve the attorney in apparent possession or control of the things to be seized.<sup>34</sup> If reasonable efforts fail to locate the attorney, the special master must seal any apparently privileged items and deliver them to the court for a determination.<sup>35</sup>

O.C.G.A. § 17-5-32(c)(5) states that the warrant shall issue only through the superior court.<sup>36</sup> This subsection also requires a written search plan to be used in conjunction with reasonable efforts designed to minimize the intrusiveness of the search.<sup>37</sup>

O.C.G.A. § 17-5-32(d) is an exclusionary clause which states that evidence seized in violation of this section "shall be excluded and suppressed from the prosecution's case in chief or in rebuttal, and such

28. O.C.G.A. § 17-5-32(c)(1) (Supp. 1989). The qualifications of the special master are based on a more extensive set of qualifications found in the California Evidence Code. CAL. EVID. CODE § 1524(d) (West 1987); Wilkes Analysis, *supra* note 16, at 15.

29. O.C.G.A. § 17-5-32(c)(2) (Supp. 1989).

30. *Id.*

31. *Id.* Subsection (c)(2) of the Act is based on a section of the California Evidence Code. CAL. EVID. CODE § 1524(c)(2) (West 1987); Wilkes Analysis, *supra* note 16, at 15.

32. O.C.G.A. § 17-5-32(c)(3) (Supp. 1989). The business hours requirement is derived from a subsection of the California Evidence Code. CAL. EVID. CODE § 1524(c)(3) (West 1987); Wilkes Analysis, *supra* note 16, at 15.

33. O.C.G.A. § 17-5-32(c)(3) (Supp. 1989). The exclusive participation provision is based on section 1524(e) of the California Evidence Code. CAL. EVID. CODE § 1524(e) (West 1987); Wilkes Analysis, *supra* note 16, at 15.

34. O.C.G.A. § 17-5-32(c)(4) (Supp. 1989).

35. *Id.* Subsection (c)(4) is based on another section of the California Evidence Code. CAL. EVID. CODE § 1524(c)(3) (West 1987); Wilkes Analysis, *supra* note 16, at 15.

36. O.C.G.A. § 17-5-32(c)(5) (Supp. 1989).

37. *Id.* These requirements are based on proposals found in a Georgetown Law Journal article. Wilkes Analysis, *supra* note 16, at 16 (citing Bloom, *The Law Office Search: An Emerging Problem and Some Suggested Solutions*, 69 GEO. L.J. 1, 64-65, 82-84 (1980)).

evidence shall not be admissible either as substantive evidence or for impeachment purposes.”<sup>38</sup> This exclusionary rule appears to be absolute, since it operates “[n]ot withstanding any provision of law to the contrary.”<sup>39</sup>

The Act attempts to balance the needs of the defense and prosecutorial functions of our system of justice. In combining a subpoena preference rule with procedural safeguards in instances when a law office search is permitted, the Act benefits Georgia defense attorneys and their clients by protecting privileged information from disclosure.<sup>40</sup> The Act respects the truth-seeking aim of justice by permitting law office searches when there is reason to believe unprivileged, documentary evidence of a crime will be lost if the prosecutor is required to seek it by subpoena.<sup>41</sup>

*S. Brannan*

---

38. O.C.G.A. § 17-5-32(d) (Supp. 1989).

39. *Id.*

40. Wilkes Analysis, *supra* note 16, at 13.

41. *Id.*