

UPPING THE ANTE



Those at the top of law firms say they like their odds for 2005. Are they holding all the aces or bluffing?

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JUSTICE WATCH

Local lawyers work on ABA response to Patriot Act

Three South Florida lawyers are at the center of an American Bar Association drive to reform a controversial provision of the USA Patriot Act that gives law enforcement expanded authority to use "sneak and peek" warrants.



Dan Christensen

Those secret warrants, also known as delayed-notice warrants, allow police to covertly search homes and businesses, and seize property, without immediately notifying occupants.

In August, the ABA's criminal justice section passed a resolution to place certain limitations on the Patriot Act, including the sneak and peek statute. The ABA House of Delegates is expected to adopt the resolution as ABA policy in February.

Influential members of Congress from both parties also would like to roll back some provisions of the Patriot Act, including the delayed-notice warrants. But one of the Bush administration's top legislative priorities next year is to persuade Congress to stand firm behind the law, which was passed in the wake of the Sept. 11 terrorist attacks.

The administration wants to renew about a dozen of its key provisions that are set to expire in October. It also wants to head off passage of the bipartisan Security and Freedom Ensured bill. SAFE, among other things, would tighten the standards for issuing sneak and peek warrants, which are not scheduled to sunset.

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Fort Lauderdale defense attorneys Jon May and Robert Buschel are on the ABA defense function committee that is identifying problems and developing legal arguments for use in the upcoming battle over proposed changes to the Patriot Act. May and Buschel were recruited for that assignment by Miami attorney Michael S. Pasano, president-elect of the ABA's criminal justice section.

May is the committee chair and a partner at May & Cohen. Buschel is a partner at Buschel Carter Schwartzreich & Yates. Pasano, who will become section president in August, is a partner at Zuckerman Spaeder.

"What I think has not been felt strongly enough by the American public is the erosion of personal liberties that's been the ancillary effect of the fight against terrorism," Pasano said. "But you've got to start somewhere, and sneak and peek just seems wrong."

More room for delay

The Patriot Act weakened court oversight of both searches and seizures and electronic surveillance. It gave law enforcement the power to delay — potentially without limit — providing notice of searches and seizures. And at the same time, critics say, it undercut existing notice protections to the subjects of electronic surveillance, opening the door to possibly long-term secret wiretapping.

Sneak and peek warrants, which have been used for years in limited circumstances against targets such as violent drug gangs, turn that requirement inside out. Until the Patriot Act, however, there was no statutory authority to delay notice to those who'd been subjected to government searches or seizures.

By making it law, the act made "an exception to the rule itself," May wrote in an eight-page memo that represents the consensus of the half-dozen ABA committee members who studied the issue.

SAFE was introduced last year by U.S. Sen. Larry E. Craig, R-Idaho, and U.S. Sen. Richard Durbin, D-Ill., in the wake of a jogger's vote in the House of Representatives to repeal Patriot Act authority for sneak and peek searches. SAFE seeks to roll back a number of alleged excesses. One of the most prominently discussed would block federal agents from searching library records unless there is suspicion that an individual is involved with a foreign power.

U.S. Rep. Butch Otter, R-Idaho, has introduced a companion bill in the House. Outside Congress, supporters of limiting sneak and peek searches range from the American Civil Liberties Union to former U.S. Rep. Bob Barr, a prominent conservative Republican from Georgia.

Tipping off suspects

In anticipation of the coming congressional fight over the Patriot Act, Assistant U.S. Attorney General William E. Moschella wrote to House Speaker J. Dennis Hastert, R-Ill., in September in support of delayed-

notice search warrants. He cited the importance of not tipping off suspects, including terrorists, to the existence of an investigation.

"A delayed-notice warrant is exactly like an ordinary search warrant in every respect except that law enforcement agents are authorized by a judge to temporarily delay giving notice that the search has been conducted," Moschella wrote. "The USA Patriot Act established a uniform nationwide standard for use of delayed-notice warrants to ensure an even-handed application of constitutional safeguards to all Americans."

A spokesman for the Justice Department reiterated that statement. When asked for statistical information about how often the government uses delayed-notice warrants, the spokesman said, "We don't have a total number on how the often they're used."

But in an interview, May said the government's argument misses the mark. "All the letter to Hastert does is talk about how useful and important is the ability to delay notice, but that's not the question," he said. "The question is not whether it is a legitimate technique. The question is over-

sight." The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers and effects" from unreasonable searches and seizures. Warrants cannot be issued without probable cause and a description of the place to be searched and the persons or things to be seized.

The federal rules of criminal procedure generally require police to give the subject of a search a copy of the warrant and a receipt for any seized



Miami lawyer Michael S. Pasano is president-elect of the ABA's criminal justice section.

Still, it was a general practice of the courts to grant delays upon a showing of "good reason" by law enforcement, May said. Such reasons could include danger to life or safety, preservation of evidence, witness intimidation or the prevention of flight from prosecution. Those justifications for delay were broadened by the Patriot Act, which allowed judges to authorize secret search warrants on the word of agents that notice to subjects would "jeopardize" a probe or "delay" a trial.

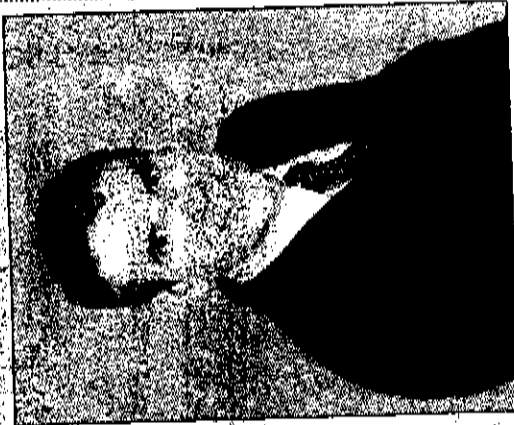
JUSTICE WATCH

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property. If no one is present at the time, copies are to be left at the scene.

The government doesn't talk about it, May said, but until the Patriot Act it was believed that most federal judges required prosecutors, including those in the U.S. attorney's office in Miami, to seek reauthorization every seven days while search warrant notification was delayed. What's happened since, however, is anybody's guess, because the USA Patriot Act contains no limit on delayed notification.

"The huge problem with sneak and peek, more than anything else, is that by eliminating any time limit, it allows judges to simply delay notice until trial, or perhaps not at all if there is no trial," May said. "Today, the courts are told they don't have to supervise delayed notification. We have no



Fort Lauderdale lawyer Robert Buschel is working on legal arguments for the battle over proposed changes to the Patriot Act.

idea if the courts are requiring any level of supervision either for search warrants or electronic surveillance."

To make matters worse, May said, that provision of the Patriot Act also can be used by law enforcement to nullify the traditional 90-day limit on delaying notification to persons whose conversations are secretly monitored by federal agents. That limit, including a provision for possible extensions, is contained in the federal wiretap statute.

"We don't know if that's occurred because it's all secret," May said. "People could be wiretapped all over the country and have no notice of it."

Such concerns are what prompted Mike Pasano to ask May, Buschel and others to construct the ABA's legal attack on the sneak and peek statute. ♦

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Education has been named education director at the Historical Museum of Southern Florida. Zapata will oversee the development and implementation of youth and adult programs. Zapata worked with the Miami-Dade County public schools as an elementary school teacher, mathematics and science consultant, and most recently as a curriculum specialist.

Denise M. Korniewicz, senior associate dean at the University of Miami School of Nursing, has been named as recipient of the 2004 Pinnacle Mentorship Award by Sigma Theta Tau, the international honor society of nursing. The award was given to Korniewicz for young professionals and

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