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SJC upholds investigative e-mail searches

Says privilege of lawyer, client will be protected

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The state's highest court Monday ruled that prosecutors may scour the e-mails of defendants but also supported safeguards designed to protect the privacy privilege long granted lawyers and their clients.

The Supreme Judicial Court's ruling, a victory for Attorney General Martha Coakley, upheld the right of state prosecutors to search the e-mail of a Brookline doctor after he was indicted in 2011 on charges of defrauding Medicaid of millions of dollars.

"This ruling upholds the investigatory power of our office to examine e-mails for evidence of criminal conduct while using a court-approved process to sort out any e-mails that may involve attorney-client communication," said Brad Puffer, spokesman for Coakley.

But some lawyers voiced concern that if the protocols laid out by the courts are not followed precisely, access to a defendant's e-mail could disturb the delicate balance between a prosecutor's responsibility to conduct a thorough criminal investigation and a defendant's constitutional rights.

"I fully support Attorney General Coakley's efforts to protect our citizens, but we must be careful about going down a slippery slope where the government can become privy to confidential conversation," said Douglas Sheff, incoming president of the Massachusetts Bar Association and senior partner at Sheff Law. "An attorney-client discussion is sacrosanct, and listening in would be the equivalent of letting someone into the confessional booth."

Sheff said he is also worried that defendants may not be fully truthful with their lawyers if they fear their e-mail would be seized. "And that in fact could send innocent people to jail," he said.

A spokesman for the American Civil Liberties Union of Massachusetts said the group was reviewing the ruling and had no comment.

In its ruling, the high court affirmed a specific process for reviewing a defendant's e-mails after an indictment, by supporting the state's use of what has been called a "taint team." The team, made up of prosecutors not directly involved in the case, separates defendant e-mails protected by attorney-client privilege from those that could be used in a case.

Some lawyers said approving that protocol provided guidance for handling the enormous volume of e-mail communication that is now part of criminal trials.

"This is a very important ruling in this electronic era where our inboxes are flooded every day," said Joshua Levy, a partner at Ropes & Gray and a former federal prosecutor. "Essentially the Supreme Judicial Court is blessing the concept of using taint teams for electronic records as they've been used for paper documents."

Monday's ruling stems from a 2011 case brought by the state against physician Punyamurtula Kishore, 63, who has been charged with running a kickback scheme that cheated MassHealth, the state's health insurance program for low-income residents, out of nearly \$3.8 million in medical reimbursements.

From 2006 to 2010, prosecutors contend, Kishore paid owners of Boston "sober homes" to send recovering drug addicts to his private treatment center for unnecessary urine screens.

Such tests, which are billed at a price of \$100 or \$200, can be billed to the state for Medicaid-eligible patients.

Kishore pleaded not guilty and remains free on bail. His business, Preventive Medicine Associates, which once had as many as 30 locations in Greater Boston, is now closed. His attorneys could not be reached Monday.

Lawrence Friedman, a professor at New England School of Law and a longtime attorney, noted that while the ruling provides new guidance, the handling of e-mail may differ from case to case. And though precedent setting, the ruling may not resolve all concerns.

"The Supreme Judicial Court has proven itself quite willing to revisit rulings that prove to be inadequate in practice," he said. "Given the changing nature of digital technology, perhaps this ruling will be another instance like that."

Sheff said the ruling "is a first step in a delicate balancing act."

"Going forward we will have to balance the freedoms of prosecutors like Coakley who keep us safe while we protect people's constitutional rights and make sure their attorneys can properly represent them," he said.