

# Court asked to void DiMasi conviction

By Milton J. Valencia | GLOBE STAFF    FEBRUARY 05, 2013

Lawyers for former House speaker Salvatore F. DiMasi and a former lobbyist urged a federal appeals court panel Tuesday to overturn their political corruption convictions, maintaining that a jury was wrong to convict them of a kickback scheme to help a software company win state contracts.

The lawyers argued that the federal judge who oversaw their clients' trial in 2011 failed to correctly instruct jurors on laws relating to lobbying and the standards under which lobbyists can work in Massachusetts. The lawyers said that what DiMasi and his associates were accused of constituted lawful lobbying in the state.

"There was a complete failure to instruct on what constitutes lobbying," said lawyer Martin Weinberg, who represents Richard McDonough, a lobbyist and friend of DiMasi's who was convicted with DiMasi in the kickback scheme. Weinberg also represented a third man who was acquitted.

Thomas Kiley, a lawyer for DiMasi, added, "One has to focus on what could be permitted in the workplace."

But John-Alex Romano, an assistant US attorney, told the panel of judges for the First US Circuit Court of Appeals in Boston that US District Court Chief Judge Mark L. Wolf gave the correct jury instructions.



AP/FILE

**Salvatore DiMasi's lawyers fault the judge's instructions to the jury.**

“There’s nothing in Massachusetts law that purports to accept bribery, or extortion, or the ability to engage in those crimes,” he said.

The panel of three judges, including retired US Supreme Court Justice David Souter, took the matter under advisement. The judges seemed to focus on whether Wolf was - required to provide an instruction on lobbying in Massachusetts. But the judges also seemed to agree that Wolf had the discretion not to.

“What you wanted as an instruction might be more feasible for you, but that doesn’t mean it was legally required,” Judge Kermit V. Lipez told Weinberg.

McDonough and DiMasi, both in their late 60s, were convicted of honest services fraud in a scheme to funnel \$65,000 to DiMasi in exchange for his help securing state contracts for a Burlington software company, Cognos. DiMasi was also convicted of extortion.

A third man, DiMasi friend and financial adviser Richard Vitale, was acquitted. A former Cognos salesman, Joseph P. Lally Jr., pleaded guilty in a deal with prosecutors and testified that he helped orchestrate the scheme and funneled money to DiMasi in exchange for his help with the Cognos contracts.

This is how the scheme was carried out: Lally and McDonough, who was also being paid by Cognos, provided DiMasi’s former law partner with a Cognos contract and paid him a retainer, though he never performed any work for the company. The law partner, Steven Topazio paid DiMasi referral fees, totaling \$65,000.

At the center of the appeal is whether DiMasi was guilty of taking a bribe under new legal standards set by the US Supreme Court in a 2010 decision, *Skilling v. United States*, in which the high court narrowed the scope of evidence that would constitute a federal crime of bribery by requiring that prosecutors prove there was an agreement to have a public figure take an official action for the public figure’s benefit. A mere failure to disclose a conflict of interest could not constitute bribery.

While Wolf knew about *Skilling* and based his jury instructions in large part on the new decision, the defense lawyers argued that the issue has not been fully fleshed out in the appellate courts.

Prosecutors argued in the trial, and Romano maintained Tuesday, that jurors had enough evidence even under the new standard, to believe that DiMasi knew of the

scheme.

He cited Lally's own testimony, in which the salesman testified that DiMasi once told him, "Let's make as much hay as possible. . . . I'm only going to be speaker for so long."

But lawyers for DiMasi and McDonough argued that jurors were given little to differentiate on their own between a bribe and lawful lobbying. While Wolf was clear in instructing jurors on the definition of a bribe, Weinberg said, the judge failed to instruct jurors on what was not a bribe under law.

Weinberg said at trial that lobbying may have a "toxic" image, but that it is still legal.

"There was simply not any instruction to address the lawfulness of legal lobbying," he told the panel Tuesday

*Milton J. Valencia can be reached at [mvalencia@globe.com](mailto:mvalencia@globe.com). Follow him on Twitter [@miltonvalencia](https://twitter.com/miltonvalencia).*