

# 1st Circ. Unsure If Texts In Pot Bribe Case Crossed State Lines

By **Brian Dowling**

Law360 (September 4, 2024, 4:28 PM EDT) -- A First Circuit panel on Wednesday expressed skepticism that the simple sending of an iMessage through an Apple cellphone satisfies the element of wire fraud requiring interstate communication, entertaining a Massachusetts attorney's challenge to his convictions for seeking to bribe a police chief to win a local marijuana license.

The three-judge panel weighed arguments by former Somerville alderman Sean O'Donovan that the government failed to prove that the cellphone communications underlying the honest services wire fraud charges had crossed state lines.

The jury convicted O'Donovan in October 2023 of attempting to bribe a police chief in Medford with payments to the official's brother in exchange for the chief giving O'Donovan's retail client a good ranking in a competition for an operating license.

One of O'Donovan's primary appellate attacks on the convictions stem from witnesses called late in O'Donovan's trial, seeking to establish that the attorney's messages traveled from his phone in Massachusetts to the recipient's phone — also in Massachusetts — through the internet and likely across state lines.

Testimony from the government's first witness to set that fact in stone for the jury came from a local Apple Store employee. U.S. District Judge William G. Young struck the testimony after the witness failed to show he had personal knowledge of Apple's servers' location but relied on information he learned from others.

An FBI forensic witness testified the next day that iMessage communications travel over the internet — a fact he learned during government training provided by an unnamed instructor. The judge denied O'Donovan's request to strike that testimony from the record, a decision O'Donovan has challenged as an error.

The panel at oral arguments appeared frustrated with how to handle the dispute, which could unwind O'Donovan's wire fraud convictions but not his federal programs bribery conviction.

"I'm a little bit puzzled," Chief U.S. Circuit Judge David J. Barron said. "I confess: To say I don't know the answer is an understatement."

The government contends that the FBI witness's testimony is enough for the jury to find the messages traveled using the internet — a fact that the First Circuit has said establishes the interstate jurisdictional element in five published cases.

Setting aside what precedent the court may or may not be forced to accept, Circuit Judge William J. Kayatta Jr. expressed difficulty understanding how a jury could find that the text went outside of Massachusetts if, for example, Apple had a server in Massachusetts that handled such messages.

"We don't even know what that would mean," Judge Kayatta said. "So it sounds like a prior panel knew a lot more about the internet than we do."

U.S. Circuit Judge Seth R. Aframe pressed the government on whether the prior cases that linked internet use to interstate communication involved proprietary systems like Apple's iMessage.

The government's David M. Lieberman of the U.S. Department of Justice said the jury could credit the FBI witness's testimony that iMessages travel over the internet.

O'Donovan, represented by Martin G. Weinberg, also argued that Judge Young was wrong to deny his request for an entrapment instruction because the evidence showed the chief's brother, who was working with federal agents, fed O'Donovan lies about the chief's interest in the scheme, including that the application was at serious risk. Those lies are what induced O'Donovan to make the payments to the brother, he argued.

Judge Aframe resisted the idea that the government's nudging of O'Donovan amounted to a "plus" factor that induced him to commit the bribery.

"There's not going after someone's family," the judge said. "This is not attacking a drug addiction. This is basically like, 'Hey, the deal is going down. Do you want it, or do you not?' And he says, 'Yes, I do.' Why is that inducement? I don't see that."

Weinberg said the "escalating, aggregate set of lies" that the chief's brother told O'Donovan is what induced him to move forward with the scheme.

The brother warned O'Donovan about a past wage and hour infraction the company dealt with, told the attorney that a local former mayor was helping a competitor cannabis operation to get the license, and said the chief didn't rank O'Donovan's client in the top three but would change his evaluation for a payment, Weinberg said.

"This is a kind of escalating aggregate set of lies that changes Mr. O'Donovan from somebody that wanted to stay on the lobbying side of the line between advocacy and crime," Weinberg said. "But he's pushed over by the set of inducements, and the FBI shouldn't be able to do that."

The government responded that O'Donovan's claim to an entrapment defense withers because the evidence showed he was predisposed to go forward with the deal months before the brother delivered the federal agent's lies to up the pressure on O'Donovan.

The panel took the matter under advisement.

The First Circuit in June stayed the two-year prison sentence that Judge Young imposed on O'Donovan while the appeal is argued.

O'Donovan had argued it would be unfair to serve his sentence while his appeal is pending given the length of time — on average, about 17 months — it takes for appeals to process and the potential that his convictions could be vacated after he had spent a significant amount of time in custody.

Chief U.S. Circuit Judge David J. Barron and U.S. Circuit Judges William J. Kayatta Jr. and Seth Aframe sat on the panel for the First Circuit.

O'Donovan is represented by Martin G. Weinberg of Martin G. Weinberg PC, Michael Pabian of Michael Pabian Law Office LLP and Timothy R. Flaherty.

The government is represented by David M. Lieberman of the U.S. Department of Justice and Kristina Barclay of the U.S. Attorney's Office for the District of Massachusetts.

The case is U.S. v. O'Donovan, case number 24-1200, in the U.S. Court of Appeals for the First Circuit.

--Additional reporting by Julie Manganis. Editing by Vaqas Asghar.