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> is hardly conducive to the soundest employment of the judicial process.[95]

And at another time he said:

> It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the other hand, it cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole. The dangers are not fanciful.[96]

5. THE CONSPIRACY CHARGE AS A WEAPON AGAINST ORGANIZED CRIME*

*Milton R. Wessel***

The conspiracy charge is certainly a key weapon in the prosecution's arsenal against organized crime. In fact, in a very real sense, all aspects of this organized crime symposium come to focus on it. On the one hand, unless the prosecution can win its conspiracy cases at the trial level *and* make the victories stand up on appeal, its enforcement effort cannot be completely successful. But on the other hand, unless defendants receive due process on this field of battle, civil rights furnish little real protection.

The criminal conspiracy trial involving many defendants — the so-called "mass conspiracy trial" — poses extremely difficult problems for all parties. By sometimes resulting in a denial of due process, these problems threaten to make the conspiracy weapon far less useful. It is surprising, therefore, that so little attention has been devoted by Bench and Bar to developing the procedural safeguards which would provide many of the solutions.

It is the purpose of this paper to suggest that mass conspiracy prosecutions be recognized as difficult and highly specialized matters, requiring trial judge, prosecutor and defense counsel to cooperate to develop particular procedures tailored to the requirements of each case.

Although legal theory will not be considered in any detail, a brief summary is necessary to focus on the resulting procedural problems. Federal criminal law will be described because it furnishes a nationwide point of reference, and because federal prosecutions of this kind are increasing more rapidly than any others.

95 On Lee v. United States, 343 U.S. 747, 758 (1952).
96 Harris v. United States, 331 U.S. 145, 173 (1947).

* This paper is taken in large part from "Procedural Safeguards for the Mass Conspiracy Trial," an article by the same author appearing at 48 Journal of the American Bar Association pp. 628-633 (July, 1962).

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Causes of Mass Trial Problems

Many of the problems of the mass conspiracy case are created simply by the length of the trial, which frequently lasts for months. In large part, however, the difficulties are created by the broad nature of the substantive law of conspiracy and the extremely liberal rules of evidence which apply.

Joint Guilt. Speaking generally, an unlawful conspiracy is simply an agreement to commit a crime, plus (usually) an overt act. Every party to the agreement is guilty of the crime, whether or not he personally performs an overt act, and even if no substantive crime has been committed. Such joint guilt is the basis of mass (joint) trial.

In the large commercial crime, such as the crime syndicate's narcotics or gambling conspiracy, there may be a great number of parties to the unlawful agreement. Conflicts in interest between them give rise to many of the problems of the joint trial. For example, one defendant with a constitutional right to call a co-defendant as an important trial witness, may be blocked in the joint trial by the equally basic right of the co-defendant not to be called.

Receipt of Evidence "Subject to Connection." The broad kinds of evidence admitted to prove conspiracy are a major source of mass conspiracy trial problems. Under conspiracy law, with proper foundation the declarations and actions of any conspirator in furtherance of the conspiracy are attributable to and admissible against all the conspirators. This is true whether or not the conspirator making the statement or performing the act is actually on trial. He may be unavailable (even dead), thereby depriving the defendants of an opportunity for cross-examination; yet what he said and did may be used against all of them.

This evidentiary difficulty is further aggravated by the rule permitting receipt of such evidence "subject to connection." This means that an alleged conspirator's acts and statements will be admitted in evidence before he has been found to be a conspirator, and before the conspiracy has been proved, subject to being stricken later if the essential foundation is not supplied.

Taking evidence subject to connection in the mass trial requires meticulous indexing and other administrative control, so that when the weeks or months of trial are concluded the court can determine whether the promised "connections" have been furnished, and everyone can know what evidence was received against which defendants, and on what charges. This is a burden which few trial counsel relish.

Criminal Intent. Criminal intent is frequently a key issue in the commercial conspiracy case. But its proof presents problems of a somewhat different character from those discussed above.

In the ordinary "person and property" type of crime, such as murder, robbery or arson, criminal intent is often evidenced primarily by the nature of the unlawful act committed. In the commercial conspiracy crime, however, the only unlawful act is that of agreeing; therefore, criminal intent is not nearly so easy to infer from the defendant's observable conduct.

Indeed, the typical conspiracy is secret, with no witness except the conspirators. The agreement itself need not be in any special form, and in many

commercial cases is evidenced mainly by the acts and declarations of the conspirators. This means that criminal intent may be the final inference in a long chain of circumstantial evidence.

But the defendants do not have all the advantages; in an individual conspiracy trial, the parties may be able to insure that the jury understands all the necessary aspects of the vital issue of criminal intent. But with many defendants on trial, each sometimes offering the same explanation of individually motivated rather than joint action, there is danger that the jury will conclude that the defendants' partnership in crime is evidenced by the similarity of their attempted explanations at trial.

Other Special Conspiracy Rules

The foregoing aspects of the crime of conspiracy result in many difficult problems. To these must be added the problems deriving from the many other special rules, such as:

> A defendant joining the conspiracy may be deemed responsible for an act which preceded his entrance, even if he had no knowledge of the act.
>
> All conspirators need not have participated equally in the crime planned or in its anticipated benefits.
>
> The conspirators need not each have known all aspects of the conspiratorial plan.
>
> The conspirators need not all have known each other.
>
> Venue need be proper only as to one conspirator; the rest may be brought from all over the country to the judicial district of trial.

All of these rules obviously give rise to a greater need for more extensive procedural controls than in the "person and property" criminal trial against one defendant.

Who Defends Against The Conspiracy?

At summation time in the mass conspiracy trial, one may hear brilliant and impassioned pleas by defense counsel in succession, each seeking to demonstrate why his own client could not be a party to the conspiracy charged, *if* one ever existed. Frequently, little more than this kind of hypothetical and passing reference is made to the over-all conspiracy.

Then government counsel rises, and one wonders whether he is talking about the same case. For the first time, the jury hears argument joining the pieces of the conspiracy jigsaw puzzle, scattered over weeks or months of trial. Part of an exhibit introduced early in the trial is joined with part of an exhibit introduced at the end; a bit of testimony introduced on the first day is placed in juxtaposition with testimony introduced on the last. Only after the over-all conspiracy has been thus summarized is the participation by each defendant described.

This not uncommon experience typifies one basic but rarely articulated procedural problem in every mass conspiracy trial — everyone defends his own client, but who defends against the conspiracy charge?

Of course, the trial judge must see to it that there is sufficient evidence to permit the conspiracy charge to go to the jury, but the judge cannot be an advocate in our adversary system and state the case for the defense.

Nor, in the ordinary case, does the individual defense lawyer always consider it his best course to defend against the whole conspiracy. Why take on the United States Government or the sovereign state, if all that is needed is vindication of one's own client? It might even be the best defense to join with the prosecution in condemning co-defendants, saying, in effect, "It's true the rest of these defendants are guilty, but my client is not." Moreover, the expense and burden of purchasing copies of all transcripts and exhibits, of conducting investigations and of offering evidence about all aspects of the case can be astronomical.

Under these circumstances, court and prosecution must exercise every effort to make the defendants appreciate the need to defend against the over-all conspiracy charge. Thus, for example, notice of every step in the proceeding should be given to all; the common fiction that certain evidence relates only to certain of the defendants should be avoided, for *every* item of evidence in a conspiracy case relates to *every* defendant.

In addition, defendants should take positive steps to insure a proper defense to the over-all charge. Having a single counsel for all defendants would furnish one solution, but might create other far more serious problems. Common counsel, of course, cannot represent defendants with conflicting interests. Moreover, with common counsel each defendant loses his individuality — common control of all matters in open court makes it appear to the jury that all defendants are in fact joined in a single purpose.

I believe a partial answer to this mass trial problem is the designation by defendants of a "senior" or "coordinating" defense counsel to act as advisory attorney with respect to those areas in which the interests of all defendants are the same. This can usually be done even though there are conflicts between defendants rendering them otherwise incapable of working together, unless one or more of the defendants feels it essential to his own case to prove the conspiracy and the guilt of some or all of the others on trial.

In order to avoid misinterpretation of necessary joint trial tactics, coordinating counsel's assignment to act on behalf of all defendants should not be made known to the jury. Perhaps theoretically his assignment should be entirely independent of any other representation in the case; practically, however, he will usually represent one or more of the individual defendants on trial, thereby limiting expenses as well as giving him standing to appear in court.

Coordinating counsel should have primary responsibility to prepare those defenses which relate to the over-all charge. Thus, he should arrange for industry-wide technical analyses. He should maintain a careful evidence index, to insure that general subject matter and chronological control of all pieces of the conspiracy jigsaw puzzle are maintained. He should supervise the establishing of other administrative procedures designed to preserve the identity of each defendant and avoid confusion of evidence as among the many parties, such as by insisting on reasonably fixed seating locations and orders of speaking so that the judge and jury will soon recognize each defendant and his counsel. He should supervise the preparation of legal argument and summation with respect to the over-all or general conspiracy charge (as distinguished

from the case with respect to each defendant), to be delivered by one or more of the individual trial counsel, and should advise and guide on such other necessarily common problems as the order of openings and summations, the order (and limitation) of cross-examinations, and the exercise of joint jury challenges. He should be the conduit through which all defendants share the cost of purchasing copies of exhibits and transcripts and of obtaining evidence favorable to all.

Of course, each individual defendant and his lawyer will retain a power of veto, but it should be rarely necessary to exercise this right where coordinating counsel truly reflects the interests of all, and does not extend his coordinating function to include matters in which the interest of any single defendant is in conflict with that of any other.

Limiting Prejudicial Public Comment

In any criminal case the prosecution must avoid being the source of improper public comment. I believe it should assume the added responsibility in the mass trial to take positive steps to limit improper public comment by outsiders.

Television, radio, newspapers and other media of communication are always eager for news, and the modern commercial conspiracy, frequently involving many defendants of reputation and wealth, offers choice material; the more defendants, the greater the danger of prejudicial public comment and unwarranted interference with the defendants' financial interests. Under present law, the prosecution cannot control comment by the press, but it can use its prestige and influence to obtain voluntary cooperation. Having chosen mass trial, the Government should assume a burden to limit avoidable prejudice to defendants.

The possibility of prejudicial public comment during trial posed a serious threat in *United States v. Bufalino,*† the Apalachin conspiracy prosecution, in which twenty defendants were on trial charged with having conspired to commit perjury and obstruct justice in connection with the Apalachin "crime convention" of November 14, 1957. To avoid this threat, the court and all counsel worked closely together. All were alert to the areas of danger, and any possible indicators thereof were immediately communicated to the prosecution.

Shortly before trial, instructions were issued requesting agencies and officials of government to avoid comment during trial, related criminal and civil proceedings were adjourned, arrangements were made to conduct arguments in private, or as it is called *in camera,* before other courts, and certain indictments and other quasi-criminal proceedings were held up until verdict. State and local prosecutors and officials cooperated in the effort.

Perhaps of greatest importance, however, was the prosecution's request that the newspapers and the television and radio stations in the Southern District of New York avoid comment about matters not actually received in evidence. This

† 285 F.2d 408 (2d Cir. 1960). The convictions were reversed on evidentiary grounds only; the procedural matters relating to prejudicial publicity, conflicts between defendants and documentary controls discussed herein were not considered by the Court of Appeals, directly or indirectly. See Judge Irving R. Kaufman's article, describing some of the pre-trial steps employed in the case, 44 J. Am. Jud. Soc'y 53 (1960).

request was drafted in such a way as to appeal to the conservatism of the press' legal counsel, as well as to their public spirit. It concluded with a plea that the request itself not be given publicity, so that the attempt to limit public comment would not backfire and actually generate public comment. The request read, in part:

> In any free society there are necessarily times when different freedoms threaten to conflict with each other. The *Marshall* case [360 U. S. 310 (1960)] suggests such a conflict between the freedom of the press guaranty of the First Amendment and the impartial jury trial guaranty of the Sixth Amendment: complete insulation of the jury from outside impact could make fair news comment impossible during a long trial; unlimited and unrestrained public comment could make a fair trial impossible.
>
> Judge Kaufman has already held that there is no other Federal Judicial District where less prejudice exists than in the Southern District of New York; nor is there any reasonably proximate time at which the atmosphere would be more favorable. Resolution of this potential conflict must therefore ultimately depend upon the judgment, discretion and restraint of those involved. Without attempting to define any standard, may I suggest that to the extent you consider such limitation reasonable, fair, and in the total public interest, news comment about the trial be restricted as much as possible to matters actually received in evidence before the Court.
>
> This letter is not confidential in any legal sense. On the other hand, it would be most embarrassing if this attempt to limit unnecessary comment were in fact to be publicized and have the opposite effect. Accordingly, I hope that you will treat this as a private request, not written for publication.

The letter was followed by specific requests to radio and television stations and motion picture exhibitors and distributors, as information was received with respect to particular scheduled presentations. These precautions were effective in limiting public comment during trial to the absolute minimum. Indeed, it was reported that at least one law firm had advised its newspaper-client that the paper might be in contempt of court if it ignored the request.

Obviously, the extensive publicity controls of the *Apalachin* case cannot be applied in every situation. In the ordinary trial, it may be sufficient if the parties simply refrain from the all-too-common litigation press release, or the "tip" or informal conference with reporters. All that is necessary is that the court and counsel take reasonable steps geared to the circumstances of each case.

Evidentiary Problems

Conspiracy cases obviously present difficult evidentiary problems even when only a single defendant is on trial. To the defendant in a mass trial some of these seem insuperable. They include:

> Problems created by one defendant's opening the door to prejudicial evidence, not otherwise admissible against co-defendants.
>
> Problems created by one defendant's offering prejudicial evidence, similarly otherwise inadmissible.
>
> Problems created by the prosecution's offering evidence admissible only against one or a few defendants.

In any trial there are certain kinds of prejudicial evidence which can be admitted only if the defendant opens the door. For example, a defendant's prior criminal record is ordinarily inadmissible, unless he takes the stand or places his reputation in issue.

Offering this kind of evidence involves a known risk which any defendant on trial alone assumes by his own conduct. But what happens when a single defendant in a mass trial opens the door to evidence prejudicial to his co-defendants, which they wish excluded?

A typical example of this kind arose during the *Apalachin* case. The reputation of the Apalachin delegates and the character of the meeting had been the subject of much public comment during the two years before trial. Many reports had described the lengthy criminal records of some of the delegates, had characterized the meeting as a convention of the "Mafia" and had given other lurid details of what had occurred. None of this evidence was considered sufficiently material to the charge to warrant its introduction at trial.

Toward the end of the trial, one of the defendants placed his reputation squarely in issue. He called witnesses who testified to his excellent reputation for truth and veracity at the time of the trial.

Ordinarily it would have been entirely proper to attempt to refute this testimony by cross-examining with reference to the earlier publicity; the defendant himself had elsewhere complained about how much it had hurt his reputation. However, such evidence might have had equally serious adverse effects upon the nineteen co-defendants, who had done nothing to open the door against themselves.

In opening to the jury, the same defendant had asserted unequivocally that he would take the stand in his own defense, whether or not his co-defendants chose to testify. When he changed his mind, the question arose whether the prosecution could comment in summation about his failure to follow through on his promise, because such comment might be construed as also focusing upon the failure of the other defendants to testify. Closing argument of that kind clearly would have been improper under federal law had the door not been opened.

The decision in the *Apalachin* case (to exclude in both instances) is not important. What is important is how this type of typical mass trial problem was handled.

First, the prosecution furnished written "pre-trial submissions" (and oral submissions during trial) designed to alert defendants to areas of anticipated prejudice, and thereby to avoid at least inadvertent opening of the door. For example, in Pre-trial Submission 2A (sealed and not made available to the press until after trial), the Government specified areas in which cross-examination or other introduction of evidence by defendants would elicit answers or bring into issue defendants' criminal records, their common national origin and international associations, the narcotics investigation out of which the indictment grew, the existence of the "Mafia" or prior claims of fifth amendment privilege.

Second, prosecution and defense counsel alike approached the bench on a

regular and continuing basis and discussed anticipated sensitive matters with the judge, so that the court would not be faced with the necessity of striking and requesting the jury to exclude prejudicial testimony from its consideration.

Largely through the use of these two techniques, backed by careful preparation and warning of prosecution witnesses so that they would not slip, at no time during the trial was there jury reference, inadvertent or otherwise, to the "Mafia," defendants' prior criminal records, or any other such inflammatory subject.

Conflicts Between Co-Defendants

One defendant's opening the door to government evidence prejudicial to a second defendant poses serious enough problems. What about the direct offer by one defendant of evidence objected to by a second defendant?

An attempt by one defendant to cross-examine a government witness in the *Apalachin* case illustrates this kind of conflict. Several allegedly conspiratorial statements by defendants and conspirators to a number of New York City detectives were introduced by the Government, with careful omission of those parts relating to the murder of Albert Anastasia, immediately preceding the Apalachin meeting. This murder had occasioned the interrogations during which these statements were given.

On cross-examination of a detective who had testified to part of a statement by one defendant, counsel for a co-defendant requested leave to bring out the balance of the statement relating to the Anastasia killing, offering to prove that the defendant had lied (individually) to avoid a murder charge, rather than (jointly) as part of the alleged conspiracy to commit perjury and obstruct justice. Although not objecting, government counsel pointed out the effect of such questioning on the other defendants, all of whom thereafter objected.

Judge Irving R. Kaufman was faced with a difficult choice: Should he forbid interrogation by one defendant in an admittedly relevant area? Or should he overrule the objections of nineteen co-defendants to testimony which was clearly prejudicial, and which would have been excluded if offered by the prosecution?

In handling this problem, Judge Kaufman demonstrated that one vital safeguard to procedural due process is wise and constant supervision by an experienced and capable trial judge. He upheld the objections, indicating that he would permit cross-examination of a detective in this area only if sought by a co-defendant whose statement was testified to on direct. As perhaps he suspected, it turned out that no defendant wished to introduce evidence of this kind when it bore directly upon himself, and there was no reference during trial to Anastasia.

Here again, one way to help resolve some of the conflicts between co-defendants is by advance notice of potential areas of conflict to the court and all parties, and by continuous submission of such questions to the trial judge out of the hearing of the jury.

Evidence of Limited Admissibility

Another kind of mass trial evidentiary problem is presented by the offer of evidence which is admissible as to only one or a few of the defendants on trial.

The most typical example is the post-arrest admission or confession, given after the conspiracy has terminated. As in most cases of a mass trial evidentiary problem, the general rule is that evidence of this kind should be limited more and more as the number of defendants and issues increases. Application of the rule in this type of situation, however, requires an added element of self-restraint by the prosecution because the court cannot fully evaluate these potential areas of prejudice until receipt of all the evidence.

The *Apalachin* case also offers an example in this connection. The indictment as returned by the grand jury contained a conspiracy and three perjury counts. Defendants made pretrial motions to sever the perjury counts, which were denied by the court in accordance with well-recognized principles.

As pretrial preparation advanced, however, it became increasingly clear to government trial counsel that the nature of the evidence at trial would be such as to make jury confusion on the perjury counts a real possibility. Accordingly, in another "pretrial submission" the Government voluntarily severed the three perjury counts before trial. In addition, certain post-arrest admissions by defendants were never offered in evidence.

Mass trial imposes upon the prosecution an extra burden to exercise self-restraint in the framing of issues and the offer of evidence where the prejudicial impact of evidence cannot be fully evaluated by the court or defendants at the time of ruling.

Administrative and Mechanical Problems

The mass conspiracy trial is accompanied by a host of administrative and mechanical problems. These range all the way from having enough copies of documents marked with useful numbers for identification and admission in evidence, to making satisfactory arrangements for the physical location of defendants and counsel in the courtroom, and working out an order of openings, cross-examinations and summations.

Many of these problems can be handled in pretrial proceedings conducted by the court, or through the efforts of a coordinating defense counsel. However, there are limitations upon these procedures in the criminal case. Defendants cannot be compelled to give up any substantive rights. Nor can the judge have access to all the facts necessary to decide questions relating to pretrial disclosure by the prosecution or limitations upon the prosecution's evidence. Voluntary pretrial disclosure of evidence by the Government is a necessary aid to solution of some of the problems.

One of the most difficult administrative problems in the commercial conspiracy case is caused by the massive volume of documentary evidence. Withholding until the latest possible time can create a serious burden. Where this is the practice, even long and complicated documents are submitted to defense counsel only after the related witness testifies; counsel are then given an opportunity to analyze each document and its impact before being required to cross-examine. Where there are many counsel, there may be different approaches, with the necessity for extended adjournments so that they may consult with each other and with their clients.

Compulsory pretrial disclosure is not always the answer. The Jenks statute†† gives the federal government the right to withhold much documentary material until after the related witnesses testify. In addition, and entirely apart from statutory rights, any court is naturally reluctant to require pretrial disclosure where it may endanger the prosecution's evidence.

This problem was partly solved in the *Apalachin* case in a third kind of "pretrial submission," in which the Government voluntarily undertook to produce such documentary materials in a manner designed to avoid delay. In accordance with this submission, two months before trial it produced 4,500 pages of grand jury and other testimony for defendants' inspection, and gave each defendant mimeographed copies of approximately 2,500 pages of the portions which it intended to offer in evidence. Thereafter, it produced all other documents at designated times in advance of the related witness' testimony. The fixing of these times was set so as to give defense counsel as much notice as possible without endangering the Government's evidence. Thus Pretrial Submission No. 1 provided in part in this connection:

> 1. To the maximum extent consistent with the security of witnesses and evidence, the Government will produce documents for defendants' inspection at the following times:
>
> A. *Documents relating to the testimony of federal employees:* At the evening recess one and one-half days before the document is offered or the witness is scheduled to complete his testimony.
>
> B. *Documents relating to the testimony of other public employees:* At the evening recess the day before the document is offered or the witness is scheduled to complete his testimony.
>
> C. *All other documents:* In sufficient time before the document is offered or the witness completes testifying to avoid delay. (Thus, in general, long documents will be produced at an earlier time than short ones; documents relating to the testimony of a short witness may be produced before he testifies, while those relating to a longer witness may be produced at a convenient recess during his testimony. Each instance should turn on its special facts, the general principle throughout being to give counsel for defendants opportunity to inspect documents at a time which will not interfere with the court proceedings, without endangering the Government's evidence. It should be emphasized that the objective of this procedure is to expedite trial, not afford defendants discovery.)

As a result of advance disclosure and waiver of rights, plus the extremely efficient and effective controls exercised by Judge Kaufman during pretrial conferences and throughout the trial, there was only one short trial delay, lasting less than a half-hour, to permit defense counsel to examine a document relating to a key witness whom the Government felt required special protection. Defendants also cooperated by stipulating to the authenticity of a great amount of documentary material. A trial which the judge and others had anticipated would last a minimum of six months, was completed in eight weeks.

†† 18 U.S.C. § 3500 (1958).