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Strategies To Limit Inherent Damage Of Multidefendant Trials

By **Kenneth Notter** (May 13, 2025, 2:53 PM EDT)


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No criminal trial is easy. Defense lawyers have almost none of the tools prosecutors do — vast investigative resources, the power to offer witnesses plea deals, and advanced access to critical evidence. Plus, many jurors instinctively trust prosecutors over the defense.

But multidefendant criminal trials are even harder, as shown by the recent trial of Charlie Javice and Olivier Amar in the U.S. District Court for the Southern District of New York. Javice founded, and Amar was an executive at, the now-shuttered education startup Frank. In U.S. v. Javice, prosecutors accused the pair of fraud and conspiracy for supplying misleading data to induce JPMorgan Chase & Co. to buy Frank for $175 million.

During summation in late March, Amar's counsel hammered the lack of evidence tying Amar personally to any fraud. He called out the government for "lump[ing Amar and Javice] together as if they are the same person." But, counsel argued, there was no evidence that Amar participated in any fraud or even lied at all.

Nevertheless, the jury convicted both Javice and Amar on all counts.

The case is yet another reminder of the unique challenges that defense counsel face in multidefendant criminal trials. In fact, the difficulties are so numerous that there are no "good" strategies. But there are steps counsel can take to mitigate at least some of the damage.

The Law of Joint Trials

American criminal law has traditionally gone to great lengths "to individualize each defendant," as articulated by the U.S. Supreme Court in its 1946 decision in Kotteakos v. U.S.[1] With rare exceptions, no one may be indicted for someone else's acts. And each person convicted of a crime must receive a sentence specific to them.

But the Federal Rules of Criminal Procedure specifically allow joint trials of defendants who are alleged to have jointly participated in an act or series of acts "constituting an offense."[2] Even when defendants are not — but could have been — charged jointly, the rules allow a court to order those separate cases to be tried jointly.[3]

There is no limit to how many defendants can be tried together. Some trials, particularly conspiracy or fraud cases, can have as many as 20 or even 30 defendants in a single trial.[4]

Though defendants can move for a separate trial, courts rarely grant those motions.[5] For example, it is not enough to show that a jury would be more likely to convict a defendant in a joint trial than if the defendant were tried separately.[6] Rather, courts will order separate trials only if counsel proves, in effect, that the defendant would be denied a fair trial if tried jointly.[7]

As a result, a joint trial — once set — is all but inevitable.

Obstacles for Defendants Facing a Joint Trial

The downsides for defendants in joint trials are well documented.[8]

The inference of guilt by association is the most serious risk. As Justice Robert Jackson put it, concurring in the Supreme Court's 1949 Krulewitch v. U.S. decision, "[t]here generally will be evidence of wrongdoing by somebody."[9]

And, he continued, "[i]t is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."[10] Instead, jurors convinced of one defendant's guilt may simply assume that another defendant must also be guilty.

Even when jurors do not assume guilt by association, chances are that jurors will be unable to prevent evidence about one defendant from influencing their views of another defendant. In fact, research shows that jurors find it extremely challenging to compartmentalize evidence that way.[11]

Rather, most jurors comprehend evidence as part of a single narrative, without distinguishing among defendants.[12] As a result, incriminating evidence against one defendant generally bolsters the government's case — the prosecution's story — against all defendants.

That is particularly true where one defendant has confessed. A confession is perhaps the single most powerful evidence a prosecutor can offer. And Supreme Court precedent allows a prosecutor to use one defendant's confession, with some precautions, as evidence in a joint trial even if the other defendants cannot challenge the confession by cross-examining the confessing defendant.[13]

There is no good solution for defendants. Pointing out the lack of evidence against one defendant often ends, as Justice Jackson wrote in Krulewitch, with the defendants "accusing or contradicting each other," which all but guarantees across-the-board guilty verdicts.[14] But not doing so risks encouraging jurors to think of the defendants as a unit, rather than as individuals entitled to separate consideration.

The difficulties don't end there. Particularly in conspiracy or fraud cases, the mere image of multiple defendants sitting near each other at trial can subliminally reinforce the government's narrative that the defendants were members of the same conspiracy or scheme.

A multidefendant trial also suggests more extensive or more serious crimes, which may make some jurors more likely to convict, regardless of the strength of the evidence.[15]

Defense Strategies

No strategy can undo the potential harms that result from a joint trial, but there are steps defense counsel can take to limit the harm.

Establish a common-interest agreement.

Step 1 is to consider establishing a common-interest agreement to ensure that otherwise privileged information remains privileged when shared with counsel for a co-defendant. In most cases, the benefits — i.e., more information — of a common-interest agreement outweigh the downsides, i.e., educating a co-defendant or losing control of valuable information.

But that is not always true, and counsel should not rush to enter a common-interest agreement without careful consideration.

The exact requirements, such as whether the agreement must be in writing, will vary by jurisdiction, but executing a written agreement is typically the safer course.[16] And the agreement should be sure to prohibit any defendant from sharing information provided under the agreement if that defendant later agrees to cooperate with the government.

Counsel should also label their communications with one another as privileged under the common-interest agreement. Though these labels do not guarantee that a court will treat the information as privileged, the act of labeling itself has a disciplining effect by reminding the drafting lawyer of the need to protect sensitive information.

Prioritize coordination and communication.

With a common-interest agreement in place, counsel for co-defendants must coordinate and communicate. Chances are that each defendant will have valuable information that the others do not. That information may provide invaluable material for cross-examining a witness or reveal holes in a potential trial strategy.

The point is to learn as much as possible as soon as possible, and other defendants, through their counsel, are likely the best source of that information.

It is equally important to ensure consistent and coherent trial strategies. A unified strategy is better than multiple strategies. In fact, research suggests that presenting two equally compelling defense narratives will be less effective than presenting just one of the two narratives.[17]

If nothing else, defense counsel should coordinate to avoid inconsistent or antagonistic defenses. In all but the most extreme situations, undermining a co-defendant's position, even implicitly, is a bad idea. At a minimum, doing so will make the government's single, coherent narrative seem more plausible. But the more likely outcome is that it will affirmatively undermine the credibility of all defendants.

Document the prejudice.

Though motions for separate trials typically fail, counsel should continue to document the prejudice of the joint trial on the record, and renew the motion during trial if needed.

In some cases, doing so can persuade a court that developments at trial have made separate trials necessary.[18]

Contrast with caution.

Because the evidence is typically stronger against one defendant than another, counsel for the less-implicated defendant may be tempted to exploit that disparity. But doing so is risky. Even implicitly highlighting evidence against one defendant can reflect poorly on all defendants.

But if done carefully, highlighting the lack of evidence against one defendant can sometimes benefit all defendants.

For example, investigators typically have a main target, and focus attention on that target to the exclusion of others. When cross-examining a law enforcement witness, counsel for a less-investigated defendant may be able to show that investigators never considered key facts about that defendant, signaling to jurors that the investigation was sloppy or otherwise unreliable.

Call out the government for grouping "the defendants" together.

Before trial, counsel should consider filing a motion in limine to prevent the government from referring generically to "the defendants."

Even if that motion fails, counsel should point out how prosecutors or witnesses have lumped the defendants together, as Amar's lawyer did in the U.S. v. Javice trial.

Most courts will specifically instruct jurors that they must consider each defendant separately, so showing how the government has treated the defendants as a unit may give some jurors pause as to whether the government has truly met its burden for each defendant.

Conclusion

Multidefendant trials present many obstacles. But with planning, defense counsel can limit the harm and maximize the chances of a good outcome.

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[1] Kotteakos v. United States, 328 U.S. 750, 773 (1946).

[2] Fed. R. Crim. P. 8(b).

[3] Fed. R. Crim. P. 13.

[4] E.g., Butler v. United States, 317 F.2d 249, 251 (8th Cir. 1963) (trial with thirty defendants).

[5] Fed. R. Crim. P. 14; see United States v. Chavez, 584 F.3d 1354, 1360 & n.5 (11th Cir. 2009) (noting rarity).

[6] See Zafiro v. United States, 506 U.S. 534, 538-39 (1993).

[7] See 1A Federal Practice and Procedure §224 (5th ed. rev. 2025) (collecting cases).

[8] See generally Robert O. Dawson, Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices, 77 Mich. L. Rev. 1379 (1979).

[9] Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring).

[10] Id.

[11] Dennis J. Devine, Jury Decision Making: The State of the Science 184-85 (2012) (compiling research).

[12] Id.

[13] See Samia v. United States, 599 U.S. 635, 655 (2023).

[14] Krulewitch, 336 U.S. at 454 (Jackson, J., concurring).

[15] See Devine, supra, at 81-82 (noting studies showing positive correlation between perceived seriousness of a charge and likelihood of conviction regardless of evidence).

[16] See Steven F. Molo, Corporate Investigations §§5.05, 5.06 (rev. 2024) (summarizing key considerations for common-interest agreements).

[17] Devine, supra, at 198.

[18] See United States v. McRae, 702 F.3d 806, 828 (5th Cir. 2012) (holding it was error to deny a renewed motion for severance given the "increasingly inflammatory" evidence at trial).