

## BOOK NOTE

### DEFENDING WHITE-COLLAR CRIME: A GAME WITHOUT RULES

DEFENDING WHITE-COLLAR CRIME. By Kenneth Mann.  
New Haven and London: Yale University Press, 1985.  
Pp. xiii, 280. \$25.00

In 1966 Monroe Freedman<sup>1</sup> identified the "three hardest questions" facing criminal defense lawyers.<sup>2</sup> One of Freedman's questions was whether it is proper for an attorney to give his client legal advice when the attorney has reason to believe the advice will tempt the client to commit perjury.<sup>3</sup> Posing several hypotheticals to illustrate the attorney's ethical dilemma, Freedman answered his inquiry affirmatively.<sup>4</sup> Freedman's view provoked swift and sharp attack.<sup>5</sup> Unresolved, the debate still rages in the 1980s.<sup>6</sup>

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1. In 1966 Mr. Freedman was Professor of Law at George Washington University and Co-Director of the Criminal Trial Institute in Washington, D.C.

2. See Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). See also M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975).

3. Freedman, *supra* note 2, at 1469. Freedman's other two questions were whether it is proper to attempt to discredit a known truthful witness and whether it is proper to put a witness on the stand knowing the witness will commit perjury.

4. *Id.* at 1480-82.

5. Professor Freedman earlier posed his questions in a paper he presented to forty-five lawyers at a Criminal Trial Institute. Judges, who had neither heard nor read the paper, unsuccessfully urged the Committee on Admissions and Grievances of the District Court for the District of Columbia to disbar or suspend Freedman. *Id.* at 1469 n.1. One of the judges who attempted to disbar Freedman was the current Chief Justice, then-Judge Burger. Rotunda, Book Review, 89 HARV. L. REV. 622 n.3 (1976) (reviewing M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* (1975)). See also Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1488 (1966) (criticizing Freedman's resolution of the third question as "brute rationalization") and Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493 (1966) (arguing that "Professor Freedman's views are contrary to the canons of Professional Ethics"). But see Freedman, *supra* note 2, at 1482, 1484 (postscript rebuttal to Noonan's "brute rationalization" argument, asserting that "Noonan does not realistically face up to the lawyer's practical problems in attempting to act ethically" and suggesting, in response to a tax advice hypothetical, "that virtually every tax lawyer in the country would answer the client").

6. Compare M. FRANKEL, *PARTISAN JUSTICE* 12 (1980) (truth is too often sacrificed to inferior values) with Freedman, Book Review, 90 YALE L.J. 1486, 1496 (1981) (reviewing M. FRANKEL, *PARTISAN JUSTICE* (1980) (asserting that Frankel's view would tend to increase misconduct).

Kenneth Mann's *Defending White-Collar Crime*<sup>7</sup> draws upon real cases rather than hypotheticals to illustrate the criminal defense attorney's ethical dilemma. As part of the Yale Students on White-Collar Crime,<sup>8</sup> Mann interviewed defense attorneys handling white-collar cases<sup>9</sup> in the Southern District of New York.<sup>10</sup> *Defending White-Collar Crime* explores a number of ethical issues and provides fascinating insight into the battles in the trenches of our justice system.

What explains the widely held belief that white-collar criminals get off easier than do common criminals?<sup>11</sup> Is this perception closer to myth or reality? Mann examines white-collar defense techniques not commonly available to criminal defendants on the street to evaluate popular perceptions regarding justice and white-collar defendants. But beware. Proponents of the "zealous advocacy" criminal defense model,<sup>12</sup> and indeed white-collar criminals themselves, may embrace Mann's findings. Conversely, believers in a criminal justice system in which the truth prevails and wrongdoers are punished<sup>13</sup> may be disappointed to learn that the white-collar criminal defense process simply does not foster those results.

Mann classifies white-collar criminal defense tactics into three distinct phases. The first phase of white-collar criminal defense work begins with

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7. K. MANN, *DEFENDING WHITE-COLLAR CRIME* (1985).

8. *Id.* at x-xi.

9. Mann defined white-collar crime as including "securities fraud, tax fraud, embezzlement, corruption, bribery, conspiracy to defraud, criminal regulatory violations, antitrust, and bankruptcy fraud." *Id.* at 30. White-collar crime is often referred to as "commercial crime" as distinguished from "street crime." *Id.* at 21 (quoting Annual Report of the United States Attorney, Southern District of New York, 1975 (on file, Yale Law School)).

10. *Id.* at 30. Mann selected the attorneys he interviewed based upon a broad survey that determined the most widely recognized white-collar criminal defense attorneys practicing in the Southern District of New York. *Id.* at 30, 252-53, 255-56. Mann selected forty-four attorneys to interview. Not surprisingly, over eighty percent were graduates of eastern law schools. Perhaps less predictably, many were graduates of elite law schools: Harvard (13.5%), Yale (11.4%), and University of Chicago (4.6%). *Id.* at 257.

11. See Mackenzie, *Where Scales of Justice Tilt*, N.Y. Times, Oct. 11, 1985, at 30, col. 1 (referring to "the historic double standard" evinced by white-collar crime and affluence, and arguing that "[v]iolent crimes and nonviolent money crimes have always been treated differently . . . mainly because violence scares more people").

12. See Noonan, *supra* note 5, at 1486 (referring to Charles Curtis' view "that a trial is an irrational process—a substitute for trial by battle which gives the litigant the satisfaction of having 'his day in court' " and citing CURTIS, *IT'S YOUR LAW* 17-21 (1954)).

13. See Noonan, *supra* note 5, at 1487 (referring to the view, endorsed in 1958 by the Joint Conference on Professional Responsibility of the Association of American Law Schools and the American Bar Association, that "[a] trial is . . . a process 'within which man's capacity for impartial judgment can attain its fullest realization'" and citing *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1160-61 (1958)).

the attorney obtaining access to information needed to determine what crime, if any, the client committed. This first phase is the product of the white-collar criminal defendant's frequent practice of engaging a defense attorney before law enforcement authorities have charged the client with committing a crime. At the time of initial engagement, the client may suspect that he is the target of an investigation, but may not know what substantive crime he is suspected of committing. Moreover, even sophisticated clients, unfamiliar with nuances of antitrust, securities, tax, and other commercial laws, may not know if they have committed a crime.

Mann identifies three general sources for obtaining information.<sup>14</sup> The client himself is the first and most logical information source for the attorney. The client's version of the facts, however, may be far from accurate. Because white-collar criminal defense work has become highly specialized, white-collar defendants often employ a specialist attorney rather than the attorney with whom they have an on-going relationship. The lack of trust inherent in a newly-formed attorney/client relationship often leads to a lack of candor by the client. Also contributing to a client's reticence may be embarrassment and psychologically induced self-denial. Accordingly, the attorney must seek other sources during the information obtaining phase.

The second pool of information available to the white-collar criminal defense attorney includes documents and persons under the client's control.<sup>15</sup> For example, the client's individual tax returns or personal diary may bear upon an investigation into whether the client participated in an illegal price-fixing and kickback scheme. Similarly, the client's subordinates may willingly provide information to the attorney.

Finally, Mann identifies adverse parties and documents under their control as a third potential information source.<sup>16</sup> Adverse parties include individuals conducting government investigations, codefendants, and attorneys representing codefendants or defendants in matters related to the client's case. Documents available to the attorney during information gathering include records made by government agencies not investigating the client's criminal case, and records, such as depositions, from parallel civil proceedings.

The second major phase of white-collar criminal defense work is *con-*

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14. MANN, *supra* note 7, at 37-100.

15. *Id.* at 56-74.

16. *Id.* at 75-100.

*trolling* information.<sup>17</sup> Somewhat surprisingly, this phase begins with the attorney exerting control over client disclosures to the defense attorney himself.<sup>18</sup> Attorneys informed Mann of their concern that certain client-supplied information might foreclose or limit the attorney's later ability to assert certain defenses. For example, if scienter is an element of the crime, the attorney may face an ethical dilemma if the client tells the attorney that he acted intentionally or knowingly and the attorney seeks to assert lack of scienter as a defense. Accordingly, the attorney may discourage the client from disclosing facts that would foreclose a lack of scienter defense. By avoiding knowledge, the attorney apparently eliminates the ethical dilemma of arguing the client's lack of scienter.

Mann identifies several methods attorneys use to discourage their clients from revealing damaging information that the client might otherwise provide. These methods include: 1) avoiding unnecessary attorney probing; 2) asking leading questions; 3) limiting questioning to a particular time frame; 4) telling the client that certain information would be damaging *if it exists*; 5) bluntly telling the client, "Stop, I don't want to hear about that;"<sup>19</sup> and 6) simply hoping that the "client [is] savvy enough not to tell you about that payoff."<sup>20</sup>

The information control phase also involves the attorney's role in controlling client disclosures to third parties. The third parties to which Mann refers are principally government investigators but they also include the client's accountant, spouse, friends, and business associates.<sup>21</sup> In addition, attorneys often affirmatively use accountants to control information. Through the use of a "*Kovel*" accountant, the attorney may insulate the client's financial information from government access.<sup>22</sup> Or the attorney may use an accountant to meet with government investigators to conceal attorney involvement, thereby creating the false impression of minimum client illegality. This is a form of bluffing, which Mann asserts "involves at least some misrepresentation by the attorney to the

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17. *Id.* at 103-80.

18. *Id.* at 103-23.

19. *Id.* at 108.

20. *Id.* at 106.

21. *Id.* at 124-56.

22. *Id.* at 62, 132-33. A *Kovel* accountant is employed by the defense attorney, rather than by the client. This arrangement brings the accountant under the attorney-client privilege and thus prevents the government from questioning the accountant. See *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (holding attorney-client privilege applies to accountants employed by an attorney).

government.”<sup>23</sup> Mann cites as an example an attorney who employed an accountant in a case in which the attorney did not know whether the Internal Revenue Service (IRS) “agent had the whole picture or whether he had only touched the tip of the iceberg.”<sup>24</sup> Reasoning that IRS “agents are more accustomed to dealing with accountants,” the attorney hoped to deflect IRS attention away from a broader investigation by having the accountant telephone the agent and propose a routine deficiency notice.<sup>25</sup>

The attorney must also control direct disclosures by the client to the government. Often the client must respond to the investigatory inquiries of grand juries, administrative summons, investigative interviews, subpoenas, and depositions.<sup>26</sup> To control this flow of information, the lawyer may advise the client to deny recollection or knowledge, to provide ambiguous responses, or to invoke his fifth amendment privilege against self-incrimination. Moreover, in controlling subpoena inquiries, attorneys have ingeniously utilized semantics to avoid damaging revelations. For example, a grand jury subpoenaed *corporate* records relating to the disposition of corporate funds allegedly used to influence members of Congress.<sup>27</sup> The defense attorneys knew that the corporation had given bonuses to employees who then transferred the bonus money to Congressmen. Because the *corporate* records reflected only payments to employees, the defense attorneys reasoned only the *individual employees’* records would fall within the “influencing . . . any member of Congress” scope of the subpoena. Consequently, the attorneys advised their client to assert that “there are no corporate records as so described in the subpoena.”<sup>28</sup> The attorney later explained to Mann:

Certainly I knew that the government wanted that document, and certainly I knew that the truth would be better reflected if that document were made available to the government . . . . Doing a good job required that I take the view I did on the nature of the transaction. I think it is a perfectly defensible position, *don’t you agree?*<sup>29</sup>

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23. MANN, *supra* note 7, at 134.

24. *Id.* at 132.

25. *Id.*

26. *Id.* at 124-56.

27. *Id.* at 143-46.

28. *Id.* at 144.

29. *Id.* at 146 (emphasis added). Attorneys employed a similar information control technique on behalf of a corporate client accused of criminally concealing negative test results of a product that injured a statistically high portion of users. *Id.* at 153-55. The U.S. Attorney subpoenaed records of testing “done by” or “acted on” by the company. The corporation’s attorneys knew that the corpor-

In addition to attorney control of client disclosures to their own attorneys and to third parties, Mann reveals a third method of information control. Attorneys and their clients are often able to control the flow of information from third parties to government investigators.<sup>30</sup> For example, the president of a company targeted in a bribery investigation told his attorney that certain employees had incriminating information. The president told the attorney that he had "some mild disagreement on salary" with those employees. The attorney replied:

Look, let me put it to you as bluntly as I can. You need all these men on your side. Now is not the time to be concerned about cost efficiency and work productivity. If I were you, I would see to it that the salary issue is resolved and that you are on very good terms with all these people.<sup>31</sup>

In addition to suggesting that their clients influence third parties, defense attorneys also influence third parties directly. During a meeting with a third party who the attorney believed might make an immunity deal, "the attorney straightened his back and, looking like a commanding officer, bluntly hinted . . . that he should invoke the privilege against self-incrimination," unambiguously implying that "[y]ou too have a problem and you'd be better off keeping quiet."<sup>32</sup>

Attorneys use a more complex scheme when multiple defendants possess inculpatory information. In a multiple defendant situation it is advantageous for the attorney defending the main target to also represent

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ation had highly incriminating reports prepared by *independent* laboratories, and that the corporation had marketed the dangerous product with knowledge of the negative product test reports. But, because independent laboratories had prepared the reports, the attorneys reasoned that the reports did not fall within the "done by" prong of the subpoena. The attorneys also interpreted the term "acted on" to exclude the client's *disregard* of the reports, reasoning that because the corporation had ignored rather than "acted on" the reports, the reports also fell outside the "acted on" prong of the subpoena. The attorneys realized the subpoena "would no doubt be interpreted by a court to include all records that in any way related to the safety of the product;" nevertheless, the attorneys advised their client not to provide the incriminating test reports. *Id.* at 154. The client did not submit the test reports and, moreover, in response to the subpoena, declared that "a diligent search for records had been made." *Id.* at 155. Thus, the attorneys concealed not only the incriminating reports, but also their disingenuous and narrow legal interpretation of the subpoena that was essential to conceal the test report. Interestingly, the attorneys in both this concealment example and the one described in the text of this Note realized they were advising their client to disregard the obvious intent of the two respective subpoenas.

30. *Id.* at 157-80.

31. *Id.* at 159.

32. *Id.* at 164-65. An attorney describing joint stonewalling told Mann that the assistant U.S. Attorney prosecuting the case had told the attorney he was acting unfairly and unethically in obstructing the prosecution. The attorney admitted to Mann his belief that "the law is by and large going in my way, but there are some disturbing trends." *Id.* at 172.

all other defendants. Multiple representation facilitates application of the attorney/client privilege to shield discussions among the defendants in the presence of the lawyer. In addition, it is crucial for holding together a joint-stonewalling defense, which would collapse if a single defendant took immunity in exchange for testimony.

The third and final phase of white-collar defense work is the most obvious: substantive legal argument.<sup>33</sup> Unlike street crime defense attorneys, however, white-collar criminal defense attorneys make substantive legal argument during three phases of the proceedings. First, attorneys may have an opportunity to present extensive legal arguments to investigators and prosecutors during investigation and before formal charges. One attorney referred to this as “preindictment intervention.”<sup>34</sup> Another, perhaps more candidly, called his strategy “hiding the ball.”<sup>35</sup> Moreover, in presenting legal arguments to investigators, the defense attorney usually attempts to convince the government that its likelihood of success is so low that the costs of continuing the investigation do not justify the expected benefits. In contrast to white-collar criminal defense attorneys, street crime defense attorneys rarely have an effective opportunity for meaningful preindictment intervention.

If the white-collar criminal defense attorney’s preindictment intervention efforts fail to dissuade the government from prosecuting, and if no plea bargain is reached, then substantive legal argument at trial becomes crucial. This second use of substantive legal argument is not unlike an attorney’s defense of a street crime defendant.

The third phase of substantive legal argument takes place in connection with sentencing. At this stage the attorney may have an additional opportunity to create doubt as to actual guilt, particularly because typical white-collar crime statutes are ambiguous. Consequently, the sentencing process is often intensely adversarial, “much as if a trial were taking place at the sentencing stage and no previous determination of guilt had been made.”<sup>36</sup>

Much of the debate<sup>37</sup> sparked by Monroe Freedman’s questions regarding professional ethics centers around technical and legalistic inter-

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33. *Id.* at 183.

34. *Id.* at 193.

35. *Id.* at 184.

36. *Id.* at 203.

37. *See generally* Rotunda, *supra* note 5.

pretations of the Model Code of Professional Responsibility.<sup>38</sup> *Defending White-Collar Crime* describes in living color how graduates of the nation's most elite law schools have responded. Mann attempts to determine whether the behavior he observed comports with the Model Code and whether the Code offers sufficient guidance to white-collar criminal defense lawyers. Mann concludes that "the well-intentioned attorney is ineffectively guided, the wavering attorney is ineffectively warned, and the cynical devious attorney is provided with excuses."<sup>39</sup> Lo and behold, the ethical code does not foster ethical behavior!

Assuredly, something is lacking if a model code of ethics does not unambiguously tell a lawyer that it is simply *wrong* to act with the hope his client is "smart enough to get rid of" his incriminating diary.<sup>40</sup> It is equally disturbing to realize that lawyers need any code at all to help them distinguish right from wrong.

*Defending White-Collar Crime* perhaps best illustrates that many advocates have lost sight of the view that a lawyer "is also a human being and cannot submerge his humanity by playing a technician's role. . . . Seeking and stating of truth are so necessary to the human personality and so demanded by broad social values that the systematic presentation of falsehood is both personally demeaning and socially frustrating."<sup>41</sup> Mann's book reminds us that the reality of our system is far from ideal.

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38. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT (1980).

39. See MANN, *supra* note 7, at 248. Mann also states that "[i]t would be completely inaccurate to say that the attorneys studied here believe that their work is ethically or morally improper, or that they believe that they are serving incorrect social ends by defending their clients in criminal cases." *Id.* at 120.

40. *Id.* at 118.

41. See Noonan, *supra* note 5, at 1492.