BOOK REVIEWS

Defending White-Collar Crime: A Portrait of Attorneys at Work, KENNETH MANN, Yale University Press, New Haven, Connecticut, 1985, pp. 280.

In *Defending White-Collar Crime: A Portrait of Attorneys at Work*, Kenneth Mann, a sociologist and a lawyer, attempts to portray what lawyers who specialize in defending white-collar criminals do to represent their clients. Mr. Mann's book is an enlightening and important study of lawyers at work. It is a refreshing escape from both the self-promotional memoirs and the book-length analyses of appellate opinions that form the bulk of legal literature. His central theme is that the white-collar defense lawyer's major professional chore is information control. It is persuasively presented and contains insights into the lawyer's role in the litigation process beyond the professional subset that is the subject of the book.

Mann centers on Federal prosecution of white-collar crime. His primary source of information is interviews with New York City attorneys practicing in the white-collar defense area.[1] Generalizations are followed by anecdotal material supporting the point. The anecdotal material is often helpful, but it is used too frequently and weakens the book.

Mr. Mann was initially presented with two problems: defining white-collar crime, and identifying those attorneys who specialize in defending clients accused of committing it. For purposes of his research, he defined white-collar crime as "securities fraud, tax fraud, embezzlement, corruption, bribery, conspiracy to defraud, criminal regulatory violations, antitrust, and bankruptcy fraud."[2] He concentrated his research on the Southern District of New York for several reasons. First, as the nation's financial center, it was a natural area for there to be a concerted government effort to investigate and prosecute economic crimes. Second, it was one of the few geographic areas with an identifiable "white-collar crime" bar. Third, the region was convenient for the author.[3]

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[1] *See* K. MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 31-34 (1985). Mr. Mann also spent 18 months working as an associate at a prestigious white-collar defense firm in Manhattan. The firm knew that Mr. Mann was there for purposes of gathering material for his study. *See id.* at 34.

[2] *Id.* at 30.

[3] *Id.* at 31.

The development of a speciality in "white-collar defense," apart from the more traditional practices of criminal defense and trial advocacy, is a recent phenomenon.[4] Mann presents a model of the white-collar defense lawyer as an information control specialist. Information control—i.e., gathering all relevant facts, preventing the other party from learning all harmful facts, and attempting to discover what the other party knows—is a lawyer's task that is inherent in both litigation and negotiation.[5] Knowledge of the applicable rules, means, and strategies of control in a particular area, however, is what gives rise to a specialist.

According to the lawyers Mann interviewed, a white-collar defense attorney's functions in information control are the following: learning the applicable facts from his client; determining what knowledge the government has; and obtaining the silence not only of his clients, but also of third party witnesses, or, at the very least, ensuring that any disclosures they make to the government will present his client in the best light. Effective information control has two alternative goals—that an indictment will be avoided, or, if an indictment is filed, that it will contain the narrowest possible charge. The ability to effect either of these depends on several factors beyond the attorney's control. These factors include the stage of the investigation at which the client has contacted the attorney, the number of sources that have inculpatory information concerning the client, and the client's ability to control these possibly inculpatory sources.[6]

Mann makes telling points on the inappropriateness of the nonadversarial plea bargaining model, which is used as a descriptive device for white-collar prosecutions in most academic literature on the criminal justice system. Mann finds that several factors allow white-collar defense lawyers to be more adversarial than lawyers representing street criminals.[7] One of the most obvious of these factors is the resources of the respective group's clients. For instance, the more money you pay a lawyer, the more time he will spend on your case; the more time he spends on your case, the more motions he can make, the more meetings he can have with the prosecutor, and the more investigating he can do.[8]

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[4] *Id.* at 23-26.

[5] *Id.* at 242-43; *cf.* Freund, *Lying in Negotiation Process Can Be Perilous*, Legal Times of N.Y., July, 1985, at 20, col. 1 (admonishing that the truth should generally be adhered to in all phases of negotiation and litigation).

[6] *See* K. MANN, *supra* note 1, at 231-36.

[7] *See id.* at 4-5.

[8] *See id.* at 235-36.

Another important factor allowing a white-collar defense lawyer to be more adversarial than other criminal defense attorneys is the government's investigative procedures. In an ordinary street crime, the defendant does not meet his lawyer until he has been arrested and charged. At that point, there is not much a lawyer can do except ascertain the strength of the prosecutor's case and then either plea bargain or go to trial. On the other hand, a white-collar target normally learns about the investigation from subpoenas issued to himself or to third parties. If he contacts an attorney at this stage, the defense attorney has entered the case early in the investigation, prior to any charges having been issued, or prior to any charging decisions having been made. He has the opportunity to attempt both to limit the government's access to information and to persuade the government not to bring charges.[9]

The ability of a white-collar defense lawyer to take adversarial positions is reflected in the available options he has when responding to subpoenas. An important decision for the white-collar defense attorney is determining what documents are responsive to grand jury subpoenas. In an enlightening anecdote, one of Mann's interviewees recalled a situation where a damaging document was not clearly called for by the grand jury subpoena. The subpoena could be interpreted broadly to include the document, or narrowly to exclude it. One of the alternatives suggested by the client's civil attorneys was to bury the damaging document in a large production on the assumption that it would not be found. The defense attorney, however, elected not to produce it. He reasoned that the question would probably never be litigated because the government did not know of the existence of the document. When asked, the custodian of records for the company would state that all responsive documents had been produced. The government would not know of the decision to withhold, nor would it know of the internal debates over what was responsive. If, however, the question of its nonproduction ever arose, the attorney could argue that it was outside the scope of the demanded documents.[10]

To avoid such unknown restrictions on the material produced, the government often will draft document subpoenas broadly. This in turn allows the defense attorney to threaten to challenge the subpoenas on the grounds that they are overly

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9 *See generally id.* at 238 (method of government investigation).

10 *See id.* at 142-46.

broad or unduly burdensome. In addition, the defense attorney may raise dubious claims of privilege with respect to some of the documents sought.

The defense attorney's aggressive advocacy may result in victories without litigation. Mann indicates that to avoid the expenditure of time and other limited resources, the government frequently will attempt to reach a compromise with the defense attorney and narrow the scope of the subpoena rather than litigate.[11] Indeed, the ability and willingness of the prosecutor's office to spend extensive resources on a complex investigation in the face of extensive preindictment litigation may have more influence over the outcome of a case than any steps the defense lawyer might take.[12]

In addition, there are other areas for argument available to the white-collar specialist that are often unavailable to the street crime defense attorney. The statutes resorted to in Federal white-collar prosecutions are broad in scope, creating some ambiguities with regard to the conduct covered.[13] Furthermore, the underlying facts of a white-collar crime are often complicated. This marriage of statutory ambiguity and factual complexity allows the defense attorney to argue that the conduct was not criminal, or if it was criminal, that his client was not on notice of its criminality or did not believe his conduct was criminal.[14]

It is difficult to argue that an armed bank robber, a heroin dealer, or a burglar was unaware his conduct was criminal. Obviously, this is less true in a complex tax or securities case.[15] When the crime at issue is securities trading on inside information, or a series of complex bank transactions, the arena for precharge advocacy is widened.

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[11] *See id.* at 142-43.

[12] *See* Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1542-43 (1981).

[13] *See, e.g.*, 18 U.S.C. § 1341 (1982) (mail fraud statute); *see also* Coffee, *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983); Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423 (1983).

[14] *See* K. MANN, *supra* note 1, at 234-35. For a discussion of the relationship between criminal intent and lack of notice, see generally Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation In Criminal Law*, 97 HARV. L. REV. 625, 662-64 (1984). For a case that raised the arguments of noncriminal conduct, lack of notice, and lack of intent in a securities fraud action, see United States v. Winans, 612 F. Supp. 827 (S.D.N.Y. 1985).

[15] *See, e.g.*, United States v. Ingredient Technology Corp., 698 F.2d 88 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983); United States v. Dahlstrom, 713 F.2d 1423 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 2363 (1984).

In addition to ambiguity and lack of notice, the white-collar defense attorney has his client to sell. In contrast to many street crime offenders, this client will not have a prior record. Indeed, he may be a person of substance who is active in community affairs. The attorney will attempt to present the alleged misconduct both as aberrational and negligible.

Moreover, as Mann notes, there are forums for precharge advocacy in white-collar cases that may not exist for street crime.[16] Some are formally institutionalized, such as the review by the tax division of the Department of Justice or the Internal Revenue Service in Federal criminal tax cases.[17] In those cases, a conference with a review attorney is set up, and the target offender's attorney is allowed an opportunity to express his views as to the appropriate governmental action and the relevant facts in his client's case. The growing connection between white-collar crime and regulatory offenses inevitably increases the available forums in which any attorney can argue that a prosecution is inappropriate. This increase is achieved by providing the defense attorney with an opportunity at the agency to argue that criminal referral is unsuitable. More informal forums are also available, such as the opportunities granted in most United States Attorneys' offices for a conference with the line assistant and his supervisor prior to the seeking of an indictment.[18] In addition to providing an opportunity for presentment of his legal arguments, these conferences afford the defense attorney an opportunity to discover what the prosecutor knows.

In his analysis, Mann focuses on two steps in the representation of a client—precharge advocacy and presentence advocacy. He does not focus on the trial process. This makes great sense because the trial of a white-collar crime is not very different from any other trial.[19] The rules of evidence govern the presentation of the information to the trier of fact. The attorney's skills needed for presentation and persuasion are the same in any trial.

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16 *Compare* K. MANN, *supra* note 1, at 183-201 (discussing precharge substantive defenses in white-collar cases) *with* Vorenberg, *supra* note 12, at 1556 (discussing lack of opportunities at the precharge stage for other criminal offenses). Precharge advocacy presents a difficult situation for a defense attorney. He does not want to reveal any information unknown to the government, but he realizes he must do so for the government to take his presentation seriously. *See* K. MANN, *supra* note 1, at 183-84.

17 *See generally* K. MANN, *supra* note 1, at 184-85.

18 *See generally id.* at 192-200, 237.

19 *See id.* at 11. *But see* S. WISHMAN, CONFESSIONS OF A CRIMINAL LAWYER 55-56 (1981) (criminal trial much different from civil trial).

In an important and murky area, Mann effectively illuminates the ethical dilemmas practicing attorneys face during preindictment representation of clients. He also reveals the complicated strategies and general precepts that white-collar defense attorneys rely on to resolve these problems. The main precepts are the directives set forth in the Code of Professional Responsibility of the American Bar Association—that the client is entitled to a zealous advocate and that all doubts must be resolved in the client's favor.[20]

One strategy for avoiding difficult ethical decisions is for the attorney to insulate himself from information that his client may have that would make the attorney's continued representation impossible.[21] For example, Mann concludes that white-collar attorneys have developed techniques that enable them to insulate themselves from learning of continuing client wrongdoing.[22] Such knowledge would place them in difficult ethical situations. To avoid this, an attorney may, through lightly veiled messages, convey to the client the importance of withholding from the attorney certain types of information concerning ongoing wrongdoing—including even knowledge of criminal conduct designed to obstruct the government's investigation.[23]

Ethical problems also are raised with another type of veiled communication. Mann contends that his research shows that it is a common defense tactic to coach a witness indirectly into obstruction of the investigation through destruction or nonproduction of subpoenaed documents. This is accomplished by telling the client specifically what the government is seeking and what is necessary for the government to discover to make its case. The client is then instructed to return to his company and gather the necessary documents responsive to the subpoena. The attorneys Mann interviewed admitted that many relevant documents are not produced because a "smart" client will not give them to his attorney after such legal instruction.[24] Nevertheless, because the attorney has not suggested illegal conduct, and the client will not

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20 *See* K. MANN, *supra* note 1, at 247.

21 *Id.* at 245.

22 *See generally id.* at 103-17 (discussing techniques for avoidance of damaging information).

23 *See generally* Note, *The Attorney's Duty to Reveal a Client's Intended Future Criminal Conduct*, 1984 DUKE L.J. 582 (discussion of ethical problems of attorney who learns of client's ongoing or future criminality).

24 *See* K. MANN, *supra* note 1, at 246-47. Instructing the client as to the legal rules and then interviewing him regarding what happened is a well-known method of allowing the client to shape his story. This practice is not as blatant as telling a

tell him what was done, the attorney believes that he has not committed any misconduct and is "unaware" that his client has destroyed evidence.[25] In sum, the attorney refuses to foresee the actions his advice has caused. As Mann phrases it, "[t]he attorney is morally knowledgeable, which may disturb him, but he is instrumentally ignorant."[26]

Mr. Mann offers some suggestions to strengthen the current ethical restrictions, including imputing knowledge to defense attorneys in situations where they consciously avoid knowledge of client actions resulting from the attorney's advice. He readily admits, however, that his suggestions, being unenforceable, are ineffective.[27]

Perhaps the most difficult task the defense attorney faces in his efforts to manage information flow is the control of third party witnesses.[28] Indeed, the difficulties inherent in this task are increased by the thin line between effective advocacy and criminal conduct in this area. An attorney commits a Federal felony when he advises a nonclient to assert his fifth amendment privilege against self-incrimination in order to protect the client.[29] According to Mann's interviewees, social and economic pressures are the most effective devices for keeping a witness in the defense camp. For example, a lawyer may encourage his client during the investigation to grant employees bonuses and raises that are not tied to business productivity, but are given to ensure loyalty and silence. Although not told the reason for the bonus, the employees will infer it and, perhaps out of purchased loyalty, they will develop additional reluctance to assist the government.[30] Direct inducements to silence are clearly illegal, but this type of indirect inducement is not.

Mann conveys the impression that the white-collar defense practice is one of communication by winks. Literal compliance with all rules prevails, but the forbidden message is in the subtext for the intelligent client or witness to interpret. The defense attorney feels secure from an ethical violation because he has no

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client what to say, but it can achieve the same result. *See, e.g.*, S. WISHMAN, *supra* note 19, at 52, 164-66.

25 *See* K. MANN, *supra* note 1, at 244-48.

26 *Id.* at 246.

27 *Id.* at 247-48.

28 *See id.* at 157.

29 *See* United States v. Fayer, 523 F.2d 661, 663 (2d Cir. 1975) (citations omitted).

30 *See* K. MANN, *supra* note 1, at 158-59.

actual knowledge that the improper message was received and acted on.[31]

One of the most intriguing aspects of the white-collar defense practice that Mann touches upon is the effect of economics on representation. As noted above, the most obvious effect is that the more money you pay a lawyer, the more time and resources he will devote to the matter. The question that arises is what quality of representation can an attorney provide for a client of limited resources. What steps are omitted? What avenues of defense are not pursued? Unfortunately, Mann does not discuss this subject in any great detail. He does suggest, however, that a client's affluence is related to how aggressive the attorney will be in his willingness to litigate marginal claims of privilege.[32] In addition, client affluence will affect the scope of defense strategies at sentencing. The attorney's thinking on what to omit or curtail is not discussed.[33]

A more subtle effect of economics is the one on the independent representation of a client by white-collar defense lawyers who are members of small firms dependent on referrals from larger corporate law firms. Typically, in a situation involving a grand jury investigation into alleged illegal corporate activity, the large firm will represent the corporation and the chief executive officer, and farm out the representation of other corporate officers and employees to white-collar defense lawyers in smaller firms. The corporation pays all the legal fees.

These smaller defense firms may be dependent on larger firms for referrals that generate a good portion of their income. Complete cooperation with the government may ensure that the lower level executive they represent will not be indicted, but it may result in the indictment of the higher-ranking officer. Such a result may not be in the interest of the fee-paying corporation and its lawyers who made the referral. Although a stonewall defense may keep everyone from being indicted, if shattered, it might result in the lower level executive facing charges he would

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[31] Mann's anecdotal material provides several examples of such veiled communications. One of the most disturbing is where an attorney, fearing a witness will testify against his client, implicitly instructs the witness to assert the privilege against self-incrimination. *See* K. MANN, *supra* note 1, at 164-65. In this situation, the attorney's conduct may indeed be criminal because by persuading the nonclient witness to assert the Constitutional privilege, the attorney intended to protect the client and obstruct the government's investigation. *See, e.g.*, United States v. Fayer, 523 F.2d 661 (2d Cir. 1975).

[32] K. MANN, *supra* note 1, at 142.

[33] *Id.* at 219.

otherwise have been immunized from.[34]

The course of conduct the client chooses may be influenced by a variety of factors, including loyalty to his employer and fear of ostracism as a "stoolie" in the industry. His conduct will also be influenced, however, by how his corporate-paid-and-selected lawyer chooses to present the options to his client. The lawyer will probably never represent this client again, but he hopes the corporate law firm will be a source of future referrals.

All of the attorneys interviewed maintained that they could vigorously and independently represent their employee-clients in such situations.[35] Nevertheless, if attorneys are essentially coaching their clients with respect to what documents to destroy, even in allegedly neutral presentations, the temptation to attorneys is even greater to shape the presentation of options to their clients in order to encourage selection of the choice that favors the attorney's economic interest.[36]

Mann recognizes that there is little research in this area. Unfortunately, he did not interview clients who had their lawyers selected and legal fees paid for by their companies to determine if these individuals believed their lawyers were serving their interests or that of their employers. Indeed, interviews with clients and government officials on this and other topics would have strengthened the book.

The weakest area of the book is the section discussing presentencing advocacy. Mann elucidates how successful information control efforts will have an impact at this stage because attorneys often argue the facts at the time of sentencing in order to narrow the charge, or urge that the conduct at issue is of borderline criminality.[37] The attorney realizes the danger that arguing the conduct was not criminal will be interpreted by the judge as a lack of remorse and may lead to an increased sentence.[38] It is a strategic decision the lawyer must make; the more effective his ability to prevent the prosecutor from discovering the full scope of his client's criminal conduct, the better the basis for arguing the borderline nature of the criminal conduct for which the client

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34 *See generally id.* at 174-80 (discussing effects of third parties being represented by attorneys associated with primary defendant's attorney).

35 *See id.* at 178-80.

36 *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-21 to 5-24 (1980) (providing that when attorney's fee is paid by nonclient third party, attorney owes duty to client and not payor).

37 *See* K. MANN, *supra* note 1, at 226-28.

38 *See id.* at 218-19, 271 n.4.

is being sentenced. Mann's presentation of this material is tediously interrupted, however, by long excerpts from actual sentencing arguments. This is an instance where the reader would best have been spared the particulars and left with a satisfactory general description of the types of arguments presented.

As a result of his research, Mann reaches an intriguing conclusion concerning the balance of power in the battle over information between the white-collar defense attorney and the government. Prior to indictment, the government has the ability to subpoena both persons and documents before the grand jury. In appropriate cases, the government may also use search warrants, mail covers, and electronic surveillance to gather information. There are no formal precharge discovery procedures for the defense. Instead, formal defense discovery is strictly limited after indictment.[39] This would appear to give an enormous advantage to the government. Mann's analysis, however, leads him to conclude that the advantage in gathering and controlling the information lies with the defense in the white-collar crime case.[40] To offset the defense's advantage, Mann suggests that the government use search warrants when possible because they minimize the ability of attorneys to narrow the responses to subpoenas and delay production through litigation. In addition, search warrants limit the ability of clients to destroy evidence.[41] Indeed, the use of search warrants in white-collar cases has increased greatly[42] since the Supreme Court's opinion in *Andresen v. Maryland*.[43]

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39 *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963); United States v. LeRoy, 687 F.2d 610 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983); 18 U.S.C. § 3500 (1982); FED. R. CRIM. P. 16, 17, 26.2; Obermaier, *Special Aspects of Litigating White-Collar Criminal Cases*, 6 LITIGATION 12 (1980).

40 *See* K. MANN, *supra* note 1, at 248-50.

41 The advantages of a search warrant are readily apparent. For example, in one case the government had immediate access to documents seized, but had to wait months after a subpoena return date for a marginal claim of privilege to be fully litigated before other documents were made available. *Compare In re* Sentinel Gov't Sec., 530 F. Supp. 793 (S.D.N.Y. 1982) (motion requesting return of documents seized under search warrant denied) *with In re* Sentinel Fin. Instruments, 553 F. Supp. 71 (S.D.N.Y.) (motion requesting subpoena requiring production of business documents to be quashed denied), *aff'd mem.*, 714 F.2d 113 (2d Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983).

42 *See, e.g.*, United States v. Offices Known as 50 State Distrib. Co., 708 F.2d 1371 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1272 (1984); National City Trading Corp. v. United States, 635 F.2d 1020 (2d Cir. 1980).

43 427 U.S. 463 (1976). *Andresen* involved a search warrant for documents, but the records desired could not be specified in great detail. The Court rejected a general warrant argument, holding that the warrant in question was based on prob-

There is substantial merit to Mann's suggestions. The major obstacles, however, to the government's ability to gather information in white-collar cases are not unethical lawyers or the disadvantages inherent in subpoenaing documents. They are the constitutional privilege against self-incrimination and the common law attorney-client privilege. These privileges come strongly into play in the corporate setting, where the government does not usually have the advantage of electronic surveillance, confessions, or informants. The targets normally have retained counsel during the investigation, and the privileges are extensively asserted.

The Supreme Court has recently decided cases in both areas that significantly affect white-collar crime investigations. The holding in *Upjohn Co. v. United States*[44]—a corporation's attorney-client privilege applies to communications of all employees with the attorneys and not just those in a control group[45]—has placed valuable information outside of the government's reach. In *United States v. Doe*,[46] the Supreme Court ruled that the fifth amendment privilege against self-incrimination might not apply to the contents of business documents in certain instances, but would protect the act of production.[47]

The full scope of either of these decisions has not yet been settled.[48] Until that time, these will be ripe areas for preindictment litigation. The ability to litigate these issues adds not only to the difficulties of investigation for the prosecution, but also to the opportunities available for the white-collar defense lawyer to engage in adversarial conduct.

Mann's book is an exciting and fascinating attempt to present a systematic analysis of the job tasks of a distinct group of legal specialists. The book is valuable not only to prosecutors and white-collar defense attorneys, but also to other attorneys and law students. The concept of a litigator, or even a negotiator, as an information control specialist is one that is certainly applicable outside of the white-collar defense bar. Mann's breakdown of the functions and strategies involved in information con-

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able cause and had defined the material to be seized as reasonably as possible under the circumstances. *See id.* at 480 n.10, 481-82.

44 449 U.S. 383 (1981).

45 *Id.* at 391, 397.

46 104 S. Ct. 1237 (1984).

47 *Id.* at 1245.

48 *See* Gergacz, *Attorney-Corporate Client Privilege: Cases Applying* Upjohn, *Waiver, Crime-Fraud Exception, and Related Issues*, 38 BUS. LAW. 1653 (1983).

trol crystallizes what many practitioners actually do, even though most practitioners do not openly admit these practices. Self-awareness may lead to improved skills.

Furthermore, the discussion of the ethical questions that arise daily in a white-collar criminal defense practice is also of great benefit. Actual attorney methods for struggling with recurring ethical problems are more instructive and provocative than hypothetical discussions. Unfortunately, as Mann points out, both the legal and ethical precepts on conflicts in representation and client counseling do not provide sufficient guidance for attorneys. Without some bright line guidance, defense lawyers behave as the Code instructs and resolve all doubts in their clients' favor. Thus, Mann demonstrates that while certain conduct appears ethically questionable and raises difficult issues in the abstract, there is really no gray area of ethical conduct for many practitioners. The only conduct considered prohibited is that which is expressly forbidden; everything else is justified as zealous advocacy. This is an unsettling conclusion.

In *Defending White-Collar Crime*, Mann has brought the problems of white-collar representation out of the academic arena and has focused instead on what lawyers do and how they justify their conduct. Mann's work clearly evidences that it is time a serious attempt is made to promulgate rules that provide concrete guidance for the white-collar defense practitioner.

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