



1986

Quis custodiet ipsos custodes?

Geoffrey C. Hazard Jr.

Follow this and additional works at: <https://digitalcommons.law.yale.edu/ylj>

Recommended Citation

Geoffrey C. Hazard Jr., *Quis custodiet ipsos custodes?*, 95 *YALE L.J.* (1986).
Available at: <https://digitalcommons.law.yale.edu/ylj/vol95/iss7/13>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in *Yale Law Journal* by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Book Reviews

Quis custodiet ipsos custodes?

Defending White Collar Crime. By Kenneth Mann.* *New Haven and London: Yale University Press, 1985. Pp. 280. \$25.00.*

Geoffrey C. Hazard, Jr.†

Kenneth Mann's *Defending White Collar Crime*¹ treats an aspect of law practice that every lawyer knows about, but many may fear to question—the concealing and distorting of facts so that a client avoids his just deserts under the law. This important book puts this issue in the complex context of actual practice, where such misconduct cannot be clearly distinguished, empirically or morally, from lawful tactics of the advocate. Anyone who has supposed that the solution to this problem is easy will have to think again in the light of Dr. Mann's fascinating study.

Dr. Kenneth Mann is a sociologist and a lawyer. As a sociologist he is trained in observation of human group behavior; as a lawyer he is trained in law and in the legal ethics of the adversary system of trial. His study addresses how lawyers represent persons accused of white-collar crime, a task which often involves severe moral conflict. Dr. Mann's findings suggest that, in general, lawyers do an honorable job, but that in marginal situations they sometimes resort to deception—sometimes of others, sometimes of themselves.

Defending White Collar Crime reveals that Dr. Mann is not only technically well-equipped for his study, but that he is a fair and generally sympathetic reporter. Indeed, in reporting his findings, Dr. Mann seems barely to intrude as author. The events that he reports are largely verbal—things said and pointedly left unsaid; for the work of the lawyer

* Professor of Law, Tel Aviv University.

† Nathan Baker Professor of Law, Yale Law School.

1. K. MANN, *DEFENDING WHITE COLLAR CRIME* (1985) [hereinafter cited by page number only].

consists essentially of fashioning words and phrases. It is these words and phrases that Dr. Mann reports, supplementing them only with his own spare and matter-of-fact descriptions of context. The verbal facts literally speak for themselves.

The relevant ethical rules are that a lawyer must be loyal to a client within the bounds of the law,² and, as a corollary, that a lawyer must keep in confidence information about the client, again within the bounds of the law.³ The lawyers studied were all New York City practitioners, most of whom were either solo practitioners or members of firms of the size in which most American lawyers practice, i.e., firms having not more than 20 lawyers.⁴ Allowing for the fact that all the lawyers were from the New York region, I surmise that they are fairly typical in such standard demographics as education, age, and ethnic identity, although these vital statistics are not given, possibly to help prevent disclosure of the lawyers' identities. Interestingly, as compared with the bar generally, a disproportionate number attended elite law schools. Also, as a whole they were relatively young, reflecting the fact that trial work requires the stamina of relative youth. My inference is that none of the lawyers were women or Blacks and that most of them were either Jewish or Catholic, which may or may not be relevant.⁵ In any event, the focal point of this study is not who these defense lawyers are, but what they do.

The distinctive characteristic of the lawyers studied is that they were all specialists in criminal defense practice, specifically in defense of white collar crimes. Most of them had been assistant prosecutors at an earlier stage in their professional careers, a credential that is typical of private practitioners who specialize in criminal defense work. Unlike the clients of most criminal defense lawyers, however, the clients represented by these lawyers were from the middle class. A correlate of this fact is that the clients had at least modest financial resources, so their lawyers usually had the means as well as the direct incentives to do the best possible job. The offenses involved are classic white-collar crimes: tax fraud, securities fraud, bribery. These crimes are committed not by means of physical force or threat of violence, but by dishonest statements and documents. The accused is not an underclass hooligan or thief, but a nice family man. (Like the lawyers, the clients studied all appear to have been men.)

2. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A) (1981).

3. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C); DR 7-102(B) (1981).

4. See CURRAN, THE LAWYER STATISTICAL REPORT 14 (1985) (73.9% of American lawyers in private practice are in firms having fewer than 21 lawyers).

5. See HEINZ & LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982).

Quis custodiet ipsos custodes?

I. DEFENDING THE GUILTY

In all likelihood, the client in each instance in fact committed the crime under investigation, or some offense close to it. In this respect, white collar crime defendants are similar to other criminal defendants, almost all of whom also have in fact committed something close to the offense charged. The supposition that a criminal accused is likely to be guilty in fact is not an *a priori* antilibertarian prejudice or a preoccupation with statistical evidence. It is an *a posteriori* consequence of the process by which people are chosen for prosecution. The authorities generally do not wish to prosecute people who are not guilty, or to waste their time on cases that cannot be proved in court if necessary. Hence, the cases that reach the defense lawyers are primarily the product of a rational winnowing process that seeks to identify only those whose guilt can probably be established beyond a reasonable doubt. There should be no caviling over this premise. The clients of criminal defense lawyers are (almost always) guilty of something serious. Criminal defense lawyers themselves do not dispute the proposition, except when speaking in public or for attribution.

But any given client's guilt is a matter only of high probability, not certainty. In the process by which cases are selected for prosecution, the prosecutorial process suffers mistakes, failures, and perversions. Even well-oiled bureaucratic machines break down sometimes, and criminal investigation and prosecution by its nature is not a simple mechanical process. Hence, it is possible to say with assurance only that "almost all" of the clients are guilty.

It follows that an indeterminate few of the clients are not guilty. The judicial process lacks the perspective of an omniscient observer, so that it cannot tell which ones constitute these few. Indeed, the judicial process is denied much of the knowledge available to the investigating authorities, to the accused, and to the lawyer representing the accused. The law does not permit the court the leap of inference that would be virtually conclusive from a layman's viewpoint. Who else but a crook makes large business payments in cash? Who else but a crook would consign the accounting of important transactions to himself or to a single bookkeeper? Who else but a crook would be totally unforthcoming with the authorities when questioned about questionable transactions? Under our law the court is not even allowed to presume that only dishonest businessmen conduct business in an unbusiness-like way. On the contrary, prosecution under our law must be predicated on the squinted picture of reality that will be presented to the court under the rules of evidence. In the eyes of science, common sense, social morality, and public policy, only an accidental few among this clientele are innocent in the matters of which they are suspect.

In the eyes of the law they are, nevertheless, all innocent until proven guilty or pleaded guilty.

As Dr. Mann demonstrates, defense of white collar crime involves a somewhat different game from that of defending "ordinary" crime, i.e., crimes such as homicide, assault, rape, robbery, and burglary. Dr. Mann concisely and accurately describes the differences between the defense lawyer's situation in white-collar crime and in "ordinary" crime. An "ordinary" crime typically involves a bodily act that occurs suddenly in the presence of the victim—on the street, in a bar, within the family. There is overt evidence of the crime's commission and an immediate "fight or flight" reaction by the victim or bystanders, who may call the police, who in turn try to respond quickly in order to gather the evidence while it is fresh. The transaction is usually compact in time, space, and action, and has barely ended when the police arrive. If there ever will be sufficient evidence to convict, that evidence exists at the scene when the police arrive, in the victim's condition and in the testimony of the victim and bystanders.⁶ Only later will defense counsel be brought in. If the police have done their job, the prosecutor will from the start have a pretty good hand to play. On the other side, the game to be played by defense counsel in the ordinary crime involves picking up a hand in which most of the cards are already face up.

The typical situation of defense counsel in white-collar crime is quite different, Dr. Mann explains.⁷ White-collar crimes are frauds whose very design seeks to leave no traces. The existence of the crime can be established only by a prosecutorial investigation that puts together bits and pieces of evidence that are hidden, dispersed or seemingly innocuous. Documents typically have to be ferreted out from diverse places, many of them private files whose contents or existence the investigators can only surmise. Witnesses—the bookkeeper, the secretary, the deliveryman, the office manager—often know only fragments of the story. Their willingness to cooperate with the investigation is often ambivalent at best, owing to the fact that they themselves are suspect, or that they are friends, relatives or employees of the prime suspect. In this game, the prosecutor is not dealt the hand of events familiar to the police in "ordinary" crimes. Instead, the prosecution, or other investigating authority such as the Internal Revenue Service, the Securities and Exchange Commission, or the State Tax Commission, must gropingly assemble its case. The investigating au-

6. This is usually not true of burglary or of "victimless crimes" such as dealing in narcotics. As far as the detection process is concerned, these offenses resemble white-collar crime rather than violent offenses such as assault or purse-snatching. That is, they usually are uncovered only by working up a file through persistent investigation.

7. Pp. 9-13.

Quis custodiet ipsos custodes?

thority tries to conceal its gropings, but sooner or later the search gives off signals, and the prospective client begins to suspect that he is a suspect. Then—for him the earlier the better—the prudent suspect will consult counsel.

At this stage, when the prosecutor's investigation is still going on, the defense lawyer's game is information control—a game with various and conflicting goals. As Dr. Mann says, “[t]he first goal is to obtain adequate information about the situation being investigated.”⁸ Pursuit of this goal is legally and morally legitimate, indeed obligatory in the “zealous representation” of the client. Lawyers' work in pursuing this goal is shrouded in secrecy. The *raison d'être* of the attorney-client privilege is to facilitate the lawyer's covert pursuit of relevant information, with the goal of finding legally exculpatory or mitigating evidence.⁹ This aspect of the criminal defense lawyer's work is lawful and honorable, and indeed indispensable to the rule of law. If prosecution cannot be defeated by the defense lawyer's work, by what mechanism could it be defeated? And prosecutions must be defeated sometimes, otherwise they become infallible.

II. INNOCENT IGNORANCE

The morality of a seriously moral person includes concern for the truth of the matter in things of consequence. The advocate, however, must be concerned with presentation to others of evidence that will be taken as the equivalent of truth. Every trial advocate who is a seriously moral person has to be concerned with this ambiguity.

As Dr. Mann says: “The second goal, which can exist only in conjunction with the first, is to keep the client from communicating too much information to the attorney, information that would interfere with his building a strong defense.”¹⁰ Lawyers do not commonly acknowledge that they do not wish always to gather all relevant information concerning a client's matter.¹¹ To acknowledge that avoiding certain information may be a goal in the attorney-client relationship contradicts the premises of the adversary system and the conventional theory of the attorney-client privi-

8. P. 103.

9. See *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981).

10. P. 103.

11. The most concisely explicated recognition of the “need not to know” is by Richard “Racehorse” Haynes, the highly successful Texas trial lawyer. Speaking at a continuing legal education program for criminal defense lawyers, Mr. Haynes said:

“I never ask the client what it is that he contends are the facts from his point of view in the initial interview”. . . in order to avoid being “compromised” in deciding whether to put him on the witness stand. The thing to do is to ask him “what he suspects the other side might claim.”

A lawyer who puts on the stand a client or witness he knows will lie under oath might get himself into trouble, and Mr. Haynes was apparently suggesting that it is better not to know. See *N.Y. Times*, Aug. 1, 1981, at 16, col. 5.

lege. Whoever heard of the attorney-client privilege being justified on the ground that it allows the lawyer merely to gather some information about the client? Dr. Mann describes the deeper reason why the lawyer may want to avoid certain information:

Some attorneys, for instance, discourage the disclosure of facts that would negate a defense of lack of knowledge. They would not want to find out that a client actually had knowledge of a fact that would prove criminal intent. . . . The attorney can then more forcefully argue that the client did not know of the report or action. . . . The deeper moral dilemma . . . is the question of what it means to devote oneself to defending persons who commit white-collar crimes¹²

The lawyer's avoidance of clearly incriminating evidence provides him with an answer to the lay person's classic question—How can you defend a guilty person? Part of the answer turns out to be: "As a general practice I make sure that I don't really know whether the client is guilty."

Dr. Mann suggests that many defense counsel are people often morally troubled in their vocation, who seek refuge from torturing knowledge in the soothing folds of cognitive dissonance. This assessment corresponds to my own observation. The retreat from awareness and the moral responsibility that goes with it may merit the scorn often heaped upon lawyers. But what are the alternatives in the real and imperfect world? To have defense counsel so cognitively obtuse that they cannot recognize guilt-proving evidence when they see it? To have defense counsel so morally obtuse that they are not troubled by their work, and need no refuge? To build a system around the appointment of amateurs who are innocent of what they are doing because they do not know what they are doing? To abolish the right to counsel in any criminal case where the prosecution has evidence that any sensible person would recognize as convincing?

A moralist who indulges in damning the vocation of the criminal defense lawyer, but who pretends to be seriously concerned with the problem at issue, has an obligation to address these necessarily entailed issues. Dr. Mann, manifesting the seriousness of his own moral concern, displays both understanding of the dilemma and sympathy for the lawyers who confront it.

This may be about the most that can be said concerning the moral issues posed by a defense lawyer's knowledge of his client's guilt. To do his job, the lawyer needs knowledge of facts that fairly indicate his client is guilty. Yet, for the lawyer to have knowledge of such facts in their full

12. Pp. 103-04.

Quis custodiet ipsos custodes?

implication is often unbearable, especially in any situation where satisfactorily doing the job at hand does not require that the lawyer have that knowledge. Hence, the lawyer avoids knowing the facts in their full implication except when it is unavoidably necessary. That comforting ignorance allows the lawyer better to play his role—"to forcefully argue that the client did not know." It also allows the *client* to believe that the lawyer does not know of his guilt. That belief in turn gives the client confidence that the lawyer will be able effectively to play the role of advocate. Why should a client, any more than any other lay person, suppose that a lawyer could effectively defend someone the lawyer knows to be guilty? The lawyer's cognitive dissonance thus serves to strengthen the lawyer-client relationship in both directions.

At this point, of course, serious moralists often protest that the whole criminal justice process is a charade. In some part of his mind, the client knows whether or not he is guilty—at least if he himself is not in a deep state of cognitive dissonance (as clients often are concerning their crimes and misdemeanors). In some part of the lawyer's mind—the part he would use, for example, in selecting a guardian for his own children—he also knows that the client is guilty. The prosecutor knows the client is guilty, for she would not want to waste the taxpayer's money and her own time on a weak case. The judge knows that most of those who are accused are guilty, and has no reason to think that this particular case is exceptional.

But the law as a system does not possess any of this knowledge. The law in a constitutional regime treats the accused as guilty only when guilt is made out beyond a reasonable doubt by lawful evidence adduced by lawful procedure. The law in such a regime limits itself to working on the basis of public knowledge of a special kind—a species of "official knowledge"—and cannot resort to the private knowledge of the prosecutor, the defense lawyer, or anyone else. The law proceeds on what is made to appear according to the rules of the game, not on what "really is." Compared with the process by which we apprehend reality in ordinary life, the law's procedure of cognition is literally a "charade": a guessing game in which each syllable of a word to be found 'guilty' is "represented in riddling verse or by picture, tableau or dramatic action."¹³ Using "dramatic action" to determine the matter "to be found" is the essence of due process.

The defense lawyer's avoidance of knowledge that incriminates his client provides an escape from the contradiction between the cognitive and normative reality of personal knowledge, and the cognitive and normative

13. WEBSTER'S NEW COLLEGIATE DICTIONARY 227 (9th ed. 1983).

tableaus that the law uses as the basis for adjudication. Whatever moral sins the criminal defense lawyer may commit in living this contradiction, they are committed for the sake of due process and therefore for the sake of all of us.

III. GUILTY KNOWLEDGE

The same cannot be said of another goal that criminal defense lawyers sometimes pursue. In any given case, the criminal defense lawyer would very much prefer that the prosecutor not obtain certain relevant documents and testimony from the client or any other source, that is, documents that incriminate and testimony that is adverse. Criminal defense counsel in "ordinary" crimes may hope that opportunities for loss of such evidence will eventuate, but the prosecution's case has usually been made before the defense lawyer becomes involved. For lawyers who defend white-collar crimes, however, opportunities often exist by which to facilitate the suppression of incriminating evidence.

These opportunities are familiar in the lore of advocacy. One is to suggest to the client or to a witness what his testimony might be. Dr. Mann's study includes no observed instances of a lawyer telling a client or witness what his testimony should be. The absence of any direct evidence of such subordination is explicable for both obvious and not so obvious reasons. Obviously, no lawyer, however open he may otherwise be with an outside observer, wants to reveal himself to be engaged in plainly illegal and immoral behavior. Less obviously, all lawyers prefer to avoid illegal and immoral conduct if they can help it. They want to be as law-abiding as possible, in fact as well as in appearance. Moreover, a lawyer generally does not want to inculcate himself in the eyes of the client. For one thing, the client might turn him in to the authorities. A risk of lesser consequence but greater likelihood is that inculcation in the eyes of the client would impair the client's confidence in the lawyer's effectiveness. A client may suppose that a lawyer whom he sees as a crook will also be seen by others as a crook, and as such will be accorded less credibility as a spokesman. For these reasons, it is not surprising that Dr. Mann did not encounter any lawyer directly instructing a client or witness as to what his testimony should be. Indeed, it is probably infrequent that lawyers actually do this.

But what cannot be recommended directly may be suggested indirectly. The chapter in *Anatomy of a Murder*¹⁴ on "the lecture" is the classic explanation of how this is done. Dr. Mann's findings show that "the lecture" is not fictional:

14. J. VOELKER, *ANATOMY OF A MURDER* (1958).

Quis custodiet ipsos custodes?

The attorney accepts that there are certain things he cannot and should not do—such as tell a client to alter his story—but if he explains to a client the legal significance of a particular story, manifestly a legitimate form of counsel, it is permissible even if he could foresee that given the particular client this explanation may result in client improprieties. While the immediate objective is to prevent the client from disclosing information to the attorney, the broader objective is to keep the client from disclosing inculpatory information to the government.¹⁵

A second means of facilitating the suppression of incriminating evidence is to suggest to the client or witness what his testimony should *not* be. The crucial factual element in many cases does not concern those facts of which the client has affirmative recollection, but rather those of which he may lack clear memory. This is particularly true in cases involving mental states such as intention, awareness, or purpose—elements in virtually all white-collar crimes. Wouldn't it be convenient if the client could not remember such and such a conversation? Or could not recall seeing such and such a document? Or could not recollect whether or not so and so was present at a specified meeting? Most white collar defendants can figure out what is convenient not to remember. The defense lawyer must decide whether he should, through probing and memory-stimulating questions, disturb the client's emergent failure to recall.

As the problem was viewed by one of the lawyers:

' . . . I never ask anybody to tell me anything except what they want to tell me. I am not interested in fairy tales, and I am certainly interested in knowing at least what [the clients] have told the investigators. But I think it is absolutely ridiculous for a lawyer to say I can't help you unless I know everything. If a fellow wants to conceal something, that is because if you probe unnecessarily, he is going to tell you what you don't want to hear and it is going to be devastating. Most clients, I think, have enough brains not to tell everything.'¹⁶

A third means is to eliminate discrepancies between the client's testimony and that of others. Up to a certain point, this is a standard and legitimate trial preparation technique. But in any given situation it is often not clear where that stopping point is. Should the lawyer acquiesce when the client is invoking ties of kinship or friendship to a witness in order to eliminate inconsistencies in testimony? Relationships are drawn on in this way every day in ordinary life. What parent will not remember

15. P. 122.

16. P. 105.

or forget according to the interest of a child caught in the toils of the law? But what about relationships in a business or corporate setting? As one of the lawyers in Dr. Mann's study said:

In some cases . . . you can represent a corporation and its president. . . . This gave me a great deal of leverage over most of the managerial staff in the company. They couldn't very well refuse to interview when their boss was telling them to cooperate.¹⁷

The reduction of discrepancy may have been accomplished by a referring lawyer before the case was placed in the specialist's hands:

The client's corporate counsel . . . has brought the defense attorney in because he is required to by a court-enforced and ethical doctrine prohibiting multiple representation of parties whose interests may diverge significantly. . . . It is . . . not unusual that he coaches his client about what information to disclose to the defense attorney¹⁸

Still another means of effecting the suppression of evidence is to indicate to the client the evidentiary significance of potentially incriminating documents. This is a particularly delicate matter. Suggesting the destruction of evidentiary documents is as illegal and unethical as counseling perjury.¹⁹ Moreover, in this era in which any piece of paper may have been photocopied, destruction of documents can be much easier to prove than perjury. For the same reasons that lawyers do not want to be taken as counseling perjury, they do not want to be taken as counseling destruction of documents. The line between opportunity and inhibition is indeed thin.

Dr. Mann summarizes how some lawyers viewed the problem:

The person faced with the tragedy of a criminal prosecution should not be told by an attorney how to handle the evidence that can lead to a conviction. As long as the attorney does not involve himself directly, it is the client's choice²⁰

Another lawyer viewed it as follows:

My job is to keep the client out of jail. Some of my clients have ended up in jail not because of the crime for which they were being investigated, but because they lied, or burned documents, or altered them in the course of the investigation. So I tell them right off the

17. P. 71.

18. P. 49.

19. See Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665 (1979).

20. P. 121.

Quis custodiet ipsos custodes?

bat that if they want to stay out of jail, let me know what's there, and keep hands off.²¹

It is viewed yet differently by others:

There are many cases in which one would surmise that documents summoned from the client existed at the time the summons was issued. My function in this procedure is a very limited one. I, of course, do not want the client convicted of [an] obstruction of justice charge, and I do warn him of the dire consequences of such a happening. But in the end it is the client's choice. I have no doubt that clients destroy documents. Have I ever "known" of such an occurrence? No. But you put two and two together. You couldn't convict anyone on such circumstantial evidence, but you can draw your own conclusion.²²

A variation on this means of "encouraging" the disappearance of documents arises when the lawyer has seen the documents or has possession of them, and a *sub poena* demands their production. Here, the lawyer cannot "not know" without himself becoming involved in a legally wrongful misrepresentation. But the lawyer can "not know" that the document must be produced. Among the questions presented in such a situation is whether the description in the *sub poena* covers the documents. If the description does cover the documents, then the client has a duty to produce them; correlatively, the lawyer would be guilty of a professional offense if he counseled or assisted the client to evade the *sub poena*. On the other hand, if the description does not cover the documents, no production need be made, because response is required only within the terms of the *sub poena*. The critical question therefore is the proper interpretation of the *sub poena*.

By way of illustration, Dr. Mann describes a *sub poena* issued by the Federal Trade Commission in a matter in which the issue was whether there had been adverse tests of a product made by the client company. The *sub poena* called for "all and any records" of "tests or opinions" and "any other information" related to "product testing" "done by" or "acted on" by the company. The company's files included reports from an independent testing laboratory on the product in question, showing significantly adverse results. Counsel nevertheless decided that the response to the *sub poena* should be that there were no documents coming within its terms, based on the following reasoning: The reports had not been "done by" the company because they had been prepared by an independent test-

21. *Id.*

22. P. 110.

ing laboratory; at the same time, the reports had not been "acted on" by the company because the company had declined to change its production practices in the face of the adverse results. Hence, the lawyer responded that "a diligent search for records had been made" and that "all records in the possession of the company called for by the *sub poena* had been produced."²³

In the eyes of the law, of course, there rarely is evidence that these various opportunities for suppression of evidence have actually been pursued. As Dr. Mann concludes:

There is really no way of knowing what transpires when a client and attorney conduct secret meetings. The view that I have been able to offer goes well beyond that which is provided to an official body that might be able to mete out disciplinary sanctions²⁴

This is the view of the facts that the legal profession has also generally assumed in its attitude toward the fidelity of lawyers in performance of the advocate's duty to the court and the law. What cannot be proven at law does not exist. But these facts exist in reality and in common knowledge, and now, with Dr. Mann's book, in scholarly documentation. Lawyers know that the suppression of evidence through the techniques revealed by Dr. Mann is not confined to defense of criminal cases.²⁵ Quite the contrary, it is common experience within the trial bar that the same thing is often done in civil cases, and that some lawyers go further by lying to cover up. As in criminal cases, these occurrences cannot legally be proved except in rare instances; they simply are facts.

Suppression of evidence is morally obnoxious. It corrupts the due process of law and perverts the defense counsel's function.²⁶ As a contagion it corrupts the bar, perverts our profession, and subverts the rule of law. It is no more tolerable in the judicial function than ballot fraud is tolerable in the legislative function. It is time we stopped mincing words about the nature of the evil. Dr. Mann's study helps us to that extent.

The next question, of course, is what to do about it. Marvin Frankel was unable to get much support when he raised that question a few years ago.²⁷ But maybe the time will come. When the time does come, one thing will be clear: Lawyers cannot pretend that their duty as advocates to stay "within the bounds of the law" extends only as far as a violation of that

23. Pp. 153-155.

24. P. 248.

25. See Brazil, *Civil Discovery: How Bad Are The Problems?* 67 A.B.A. J. 450 (1981) (surveying attorneys about civil discovery).

26. See *Nix v. Whiteside*, 54 U.S.L.W. 4194 (U.S. Feb. 26, 1986) (No. 84-1321).

27. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

Quis custodiet ipsos custodes?

duty can be proved in court. For if that were taken as the normative and evidentiary standard of determining compliance with the advocate's duty, the lawyer's answerability to the law would be no greater than that of a white collar criminal. The notion of "officer of the court" must have more to it than that.