South Carolina Law Review

Volume 35 | Issue 4 Article 4

Summer 1984

The Attorney As an Officer of the Court: Time to Take the Gown off the Bar

Robert J. Martineau
University of Cincinnati College of Law

THE ATTORNEY AS AN OFFICER OF THE COURT: TIME TO TAKE THE GOWN OFF THE BAR

ROBERT J. MARTINEAU*

I. INTRODUCTION

Today the legal profession and its members are subject to extensive regulation by the courts. This power can be exercised through judicial rule-making power or by decision in individual cases. The courts dictate the moral, educational and residential qualifications for admission to the bar, and the necessity of taking a bar examination. They have imposed requirements that attorneys belong to a bar organization and participate in continuing legal education programs. They specify the standards for discipline of attorneys, and the procedures and personnel through which the standards are enforced. They have mandated that attorneys provide services not only to the courts but to private individuals. They have even gone so far as to require that attorneys pay for their supervision by the courts.

Courts have stated various grounds for their authority to exercise this pervasive control. Over the past century one of the two most common justifications in support of judicial control has been the concept of attorneys as officers of the courts. The title is used almost as an incantation with little or no analysis of what the title means or why a particular result should flow from it. In most cases, the only logic stated is that because an attorney is an officer of the court, *ipso facto* a certain result follows. This reasoning has the fundamental defect of substituting a label for an analysis. Courts should analyze the role of the attorney in terms of the function of the attorney in the legal system, and determine whether the result purportedly dictated by the label is necessary or appropriate for the proper functioning of

*Professor, University of Cincinnati College of Law. J.D., University of Chicago. The author wishes to express his appreciation to Catherine Fuller and Patricia Davidson for their assistance in the preparation of this Article and to Barbara Glesner for her editorial suggestions.

the legal system. When courts have analyzed the issue, however, the analysis has been limited to an historical examination of the status of English attorneys. Because attorneys in England were considered officers of the court and were subject to regulation by the courts, this type of analysis concludes that attorneys in the United States are also officers of the court and thus are subject to judicial regulation.

Although the title "officer of the court" appears routinely in cases and in court rules concerning the legal profession, there has never been a systematic analysis of the origin and development of the title or of the extent to which that phrase has been used to justify control of the legal profession, to impose duties on attorneys, or to resolve other questions relating to the legal profession.[1] Similarly, there has never been an analysis of whether the concept of "officer of the court" is an appropriate basis for deciding any or all of these questions. These analyses are necessary, however, in view of the pervasiveness of judicial regulation of the legal profession and the frequency with which courts determine the duties of attorneys. If courts are to have the power to regulate the legal profession and determine the duties of attorneys, their decisions should be based on something more substantial than a title with medieval English origins. When these decisions rest only on the historical basis, at best the validity of the result is suspect; at worst, the courts may be using faulty analysis to reach an incorrect result.

This Article has three principal purposes. First, the Article explains how the "officer of the court" title developed in England and how it was used in this country prior to 1870. Second, it demonstrates how the title has been used by American courts during the past century to support judicial control of the legal profession and to impose specific duties upon attorneys. Third, to determine whether there exist more substantial bases for judicial control, this Article examines specific duties imposed by courts employing the "officer of the court" analysis.

---

1. The only authority which has questioned reliance on the title for these purposes is L. PATTERSON & E. CHEATHAM, THE PROFESSION OF LAW 36-37 (1971). The authors maintain, without citing any authority, that the contention that an attorney is an officer of the court is denied as often as it is made and question its use as a basis for determining the duties or privileges of an attorney in any particular case.

II. HISTORICAL DEVELOPMENT

A. England

The significance of the historical development of the "officer of the court" title of attorneys in England cannot be overemphasized. As a result of the reliance placed on the English tradition by American courts, it is reasonable to assume that had the title not developed in England, it never would have developed in the United States.

The division of the English legal profession into two separate professions or two branches of the same profession[2] barristers and solicitors—is more than an historical oddity. The difference between solicitors, and their attorney predecessors, and barristers goes back to the very beginning of the English legal system.[3] For purposes of this study, the most significant differ-

---

2. M. BIRKS, GENTLEMEN OF THE LAW 3 (1960)(two professions). *Contra* 2 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 311-12 (3d ed. 1923)(two branches of the same profession). For a comprehensive discussion, see also 6 *id.* at 432-48 (3d ed. 1927) and 8 *id.* at 222 (3d ed. 1926).

3. The initial distinction was between one who spoke in court on behalf of another and one who, for the purpose of litigation, represented or stood in the place of another. The former was at various times known as pleader, narrator, counteur, serjeant-counteur, serjeant, apprentice, utter barrister and, ultimately, as barrister. The latter was known as responsalis, attorney eo namine, solicitor, attorney and, finally, as solicitor. In the earliest times both the courtroom advocate and the litigation representative were selected from among friends, relatives, or subordinates. A major difference between the two was that while his advocate argued for him the litigant was in court and was free to disavow whatever the advocate said; the advocate's only role was persuasion and he was selected solely on the basis of his skill in oral advocacy. He was not the agent of the litigant. The representative, on the other hand, stood in the place of the litigant and was able to bind the litigant for better or for worse. Early English law required no special permission to use a courtroom advocate, but a representative for litigation could be appointed only with permission of the King. Appearance in person was the rule and appearance by a representative was allowed only in unusual circumstances.

As the amount and complexity of litigation expanded, some persons demonstrating skills as courtroom advocates or litigation representatives began providing these services on a professional basis for a fee. Because the skills were essentially different—the courtroom advocate had to know the substance of the law and had to be an effective persuader while the litigation representative had to know the details of procedure and the mysteries of the writs—some persons performed one type of service and different persons the other. Over the centuries the distinction between the two types of professional persons continued and eventually developed into the two legal professions or two branches of the same profession today—barristers and solicitors. *See* 2 W. HOLDSWORTH, *supra* note 2, at 311-16; 6 *Id.* at 432-48; 8 *Id.* at 222; R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 78-79, 84-85, 98-107 (1953); F. POLLOCK & F. MAITLAND,

ence between barristers and solicitors is that barristers and their predecessors have never been considered officers of the court, while solicitors and their attorney predecessors have been so considered for many centuries.[4] This difference cannot be attributed to any disparity in the relative importance of the two professions because both are essential to the proper functioning of a court. It has been suggested that the difference arises from the fact that barristers and their predecessors were subject to regulation by the Inns of Court and regulation by the courts was therefore unnecessary. In contrast, the solicitor or attorney was not subject to regulation by any similar institution; consequently the courts assumed that task.[5]

Two explanations of the English attorney's special title were commonly accepted. One explanation was that an attorney was subject to court regulation because he was an officer of the court. The other was that an attorney was an officer of the court because he was subject to its regulation. Whatever version was given, no effort was ever made to go behind the statements. The title's accuracy was an accepted truism. The treatment given to the "officer of the court" title by Professor Holdsworth in his monumental treatise on English law is illustrative of the traditional approach.[6] Other authorities make even less effort than

---

THE HISTORY OF ENGLISH LAW 213 (1968); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 216-17 (1956).

4. *See* 3 HALSBURY'S LAWS OF ENGLAND §§ 1113, 1132 (4th ed. 1973); 6 W. HOLDSWORTH, *supra* note 2, at 434.

5. 6 W. HOLDSWORTH, *supra* note 2, at 434-35.

6. In his discussion of the history of the legal profession, Professor Holdsworth refers on several occasions to the evolution of the title of attorneys as officers of the court. The first reference is to the ordinance of Edward I issued in 1292, which directed that the judges of the common law courts provide a certain number of "attorneys and apprentices" from every county to which the courts travelled, and that those chosen "and no others" should follow the court and take part in its business. Holdsworth comments that the ordinance may have resulted in those appointed attorneys' having a practical monopoly in representing litigants in the common law courts. He then goes on to say: "We can see the beginning of the process which will make the attorney for legal business an 'officer of the court' which has appointed him, and separate definitely his sphere of action from that of the pleader." 2 *Id.* at 317-18.

Later, in reciting the history of barristers and the Inns of Court in the fourteenth and fifteenth centuries, Holdsworth describes the classes of members of the Inns. After describing the three main classes—the Benchers and Readers, the Utter-Barristers, and the Inner-Barristers—he comments that some professional attorneys were also members of the Inns of Court.

It is clear that at this period attorneys were rapidly becoming a distinct profes-

Holdsworth to explain the "officer of the court" title.[7]

> sional class. . . . The increase in the number of professional attorneys made the need for regulating them pressing. It is not therefore surprising to find that attorneys for the purposes of legal business were becoming officers of the court and as such subject to the control of the judges.

Id. at 504-05 (footnote omitted).

At another point in his work, Holdsworth again distinguished between the attorney for litigation and the pleader and traces the long-term effect of the distinction on the English legal profession. Referring to the fourteenth century, he notes the greater freedom with which litigants were permitted to appoint attorneys. He then states: "At the same time legislation was separating the attorney for purposes of litigation from other attorneys. The former was becoming subject to the control of the courts, and was beginning to be regarded as an officer of the courts." 6 *Id.* at 432-33 (footnote omitted).

Holdsworth notes that the difference between the two branches of the legal profession deepened during this period, but for reasons different from those that gave rise to the original distinction. "The new reasons turned upon differences in the mode of appointment, the discipline, the personnel, the education, and the work of the two classes of legal practitioners." 6 *Id.* at 433. As to appointment, the judges delegated the power to admit barristers to the Inns of Court, while attorneys were admitted directly by the judges of the court. Medieval statutes gave judges control over attorneys and this control was exercised directly by orders of the court, although statutes continued to be passed by Parliament on related subjects. Holdsworth concludes:

> The attorney was never allowed to forget that he was an officer of the court and subject to its discipline. The barrister, on the other hand, was in no sense an officer of the court, and was much less directly under its control.
>
> . . .
>
> The attorneys, being officers of the court, were closely connected by their method of appointment, by their privileges, and by their business, with the other members of clerical staff of the courts. . . . No doubt the same persons often acted as attorneys both in the Common Pleas and in the King's Bench. . . . But it is obvious that the necessity for separate admission in each court emphasized the fact that the attorneys were the officers of that court; and the same fact was still further emphasized by orders for their constant attendance in their respective courts, and by their possession of the same privileges of exemption from public service, and immunity from suit, except in their own court, as the other officials of the various courts enjoyed.

6 *Id.* at 434-36 (footnotes omitted).

Holdsworth does point out substantial differences between the development of attorneys in the common law courts and of solicitors in the Court of Chancery, Court of Requests, and Star Chamber. For present purposes, the principal difference is that in the common law courts the litigants could employ any person admitted to practice by the court to act as attorney for litigation in that court, whereas in the other courts only persons on the clerical staffs of the courts could act as attorneys. Because of this limitation, another profession—that of the solicitor—developed to aid litigants in those courts. Eventually solicitors supplanted the court staff in rendering services performed by attorneys in the common law courts. Holdsworth denies, however, that the "officer of the court" status of modern solicitors is attributable to the requirement in the Court of Chancery and other noncommon law courts that litigants employ only members of the clerical staffs of those courts as attorneys. 2 *Id.* at 314-18, 504-05; 6 *Id.* at 432-36, 454-56.

7. Blackstone, in his Commentaries, after referring to the change in English procedure by which litigants were freely permitted to be represented by attorneys, states:

The only author who has attempted to explore in depth the "officer of the court" designation of English attorneys and solicitors is Michael Birks in *Gentlemen of the Law*, published in 1960.[8] Birks' explanation of how attorneys acquired the title of

---

> These attorneys are now more formed into a regular corps; they are admitted to the execution of their office by the superior courts of Westminster-Hall; and are in all points officers of the respective courts in which they are admitted: and, as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges.

3 W. BLACKSTONE, COMMENTARIES 26. With the one major exception noted *infra* note 8, the other English authorities on the development of the English legal profession either make no mention of the "officer of the court" status or they use the phrase only in a descriptive manner with no attempt to explain its historical development or legal significance.

8. M. BIRKS, *supra* note 2. This work represents the only effort to explain the development of the professional attorney in practical terms from the standpoint of the litigant and the conditions existing in the courts in medieval England. The book is significant in showing how and why the attorney and the solicitor acquired the status of officer of the court, and it thereby provides a basis for analysis of the effect of that status upon the legal profession in this country.

Birks begins his analysis by depicting the problems faced by the ordinary person who sought a writ to initiate a lawsuit or who had been served with a writ and who had to defend the action. The officials the ordinary litigant was most likely to know were the under-sheriffs, who served the writs as well as collected the taxes, and the clerks who worked in the courts. Either of these types of officials was likely to be knowledgeable about proceedings in the court and was available for a fee to perform services for litigants. Birks notes that under feudalism, public office was granted in exchange for services. The office was for life, provided the services were performed. Public office was a form of property which the owner could use as he saw fit. Birks comments:

> For a long time attorneyship was little more than a service which the court clerks and those connected with the sheriff's office were, by reason of their experience, well qualified to perform. In the course of time the demand for such services reached a point where a few men found it worth while to devote themselves entirely to this task.

Id. at 32. Birks proceeds to describe the situation in the early fourteenth century, at the end of the reign of Edward I:

> By the same period attorneyship was becoming a recognized way of earning money if not yet a source of livelihood on its own. It was thus a natural transition for the sheriff's office, who was prepared to act as attorney, to become the attorney who was willing to perform the duties of under-sheriff.

Id. at 35. Birks notes that beginning with the late fourteenth century and continuing to the present time, under-sheriffs have been selected from the ranks of attorneys and solicitors.

Court clerks were an even more abundant source of supply for attorneys. Birks states that in the fifteenth century filacers and protonotaries and the clerks of the latter were the officials usually found to be acting as attorneys.

> By the seventeenth century, attorneys were associated exclusively with the protonotaries offices and every attorney was attached to the office of one particular protonotary into whose office the attorney had to bring all his business. Even as late as the eighteenth century the attorneys of the Court of Common

officer of the court is quite different from the traditional one given by Holdsworth[9] and by the courts in this country.[10] He explains that attorneys were treated as officers of the court because most of them initially had some independent official status, such as that of a clerk of the court or an under-sheriff. That status not only made them subject to regulation by the court but also gave them certain privileges: freedom from other public service and being subject to suit only in their own courts, both very important privileges in medieval England, not to mention the privilege of wearing court gowns. It was a natural development that when persons who did not have one of these official court positions began to function as professional attorneys, they sought to obtain the same title and attendant privileges of the attorneys who were court officers.[11] It soon became commonplace to refer to all professional attorneys as officers of the court whether or not they held any other official court position. The fact that in the Court of Chancery and several other noncommon law courts only clerks of the court could appear as attorneys[12]

Pleas were sometimes referred to as entering clerks.

Id. at 37.

Birks describes several paintings of the royal courts in about 1450, which include depictions of the gowns of the judges, the serjeants, the protonotaries, the clerks, and the attorneys. The attorney's gown was similar to those of the clerks. Birks notes that gowns were strictly regulated by the sumptuary laws, and that wearing a court gown was a right accorded to attorneys as officers of the courts. *Id.* at 37. (Hence the title of this Article.)

9. *See supra* note 6.

10. *See infra* text accompanying notes 16-44.

11. M. BIRKS, *supra* note 2, at 37-38. The heart of Birks' explanation of the development is set forth in the following terms:

> The present-day status of the solicitor as an officer of the court undoubtedly originated in the early association of attorneyship with the court clerks. An ordinance of Edward I and a statute of 1402 . . . are usually put forward as the first steps in this direction. The basis for this proposition seems to be that in making attorneys officers of the court the judges were able to exercise control over them. But the attorney standing in the shoes of his client was as much a party to the proceedings as the client, and no one has ever suggested that the courts had no control over the behaviour of litigants; indeed, such control is essential to the administration of justice. The more likely explanation is that the professional attorneys who were not royal clerks (and for the greater part of the thirteenth century they were in the minority) wished to be treated on the same footing as the attorneys who were clerks. There were various privileges which clerks in the service of the Crown enjoyed, the most important being exemption from military and civil duties and the right to be sued only in their own court.

Id.

12. 9 W. HOLDSWORTH, *supra* note 2, at 369-70. Holdsworth also suggests that only

supports Birks' thesis. His theory also provides an explanation for the fact that barristers and their predecessors were never considered officers of the court even though their principal activity consisted of representing litigants before the court. The usual explanation given for the difference in status—that the barristers were subject to regulation by the Inns of Court and attorneys were not[13] — ignores the fact that attorneys were, until the sixteenth century, permitted to be members of the Inns of Court[14] and that for a time the Inns of Chancery were to attorneys what the Inns of Court were to barristers.[15]

B. United States

The history of the legal profession in America prior to the Revolution does not reflect any awareness of or reliance on the "officer of the court" title of attorneys.[16] Powers of admission to practice in the colonies were exercised by governors, legislative bodies, or courts prior to the Revolution.[17] No published reports exist of disputes between these governmental authorities over who had the power to admit attorneys and regulate the legal

---

court officials could serve as attorneys in the three common law courts. 2 *Id.* at 317. If that were true, it would provide additional support for tracing the "officer of the court" title of solicitors to the official position held by those who served as attorneys.

13. *See supra* note 5 and accompanying text.

14. 6 W. HOLDSWORTH, *supra* note 2, at 441.

15. M. BIRKS, *supra* note 2, at 111. It is particularly ironic that during the late nineteenth century and early twentieth century, when the courts in this country were relying on the historical title of attorneys and solicitors as officers of the courts to justify regulation of the legal profession by the courts, control over solicitors in England was being transferred by legislation from the courts to the Law Society, the solicitors present counterpart to the Inns of Court. In 1888 the Law Society was given authority to investigate complaints against solicitors and in 1919 it was given authority to discipline its members. B. ABEL-SMITH & R. STEVENS, LAWYERS AND THEIR WORK 188-190 (1965). The Law Society has similarly been given authority to set the educational requirements for solicitors' admission to practice, again by legislation. 15 W. HOLDSWORTH, *supra* note 2, at 231-32, 239-40; Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK 470 (1967). Thus, although solicitors today have the formal status of officers of the court, regulation over them is little different from that over barristers who have never been considered officers of the court: both barristers and solicitors are regulated by self-governing organizations of their peers. In England today, consequently, the status of solicitors as officers of the court is an historical oddity and is no longer the basis for judicial control over those practicing as solicitors.

16. *See generally* R. POUND, *supra* note 3; C. WARREN, A HISTORY OF THE AMERICAN BAR (1911).

17. R. POUND, *supra* note 3, at 144-56.

profession. In some colonies legislative bodies expressly granted this power to the courts.[18] After the Revolution, the situation did not change substantially, except that the New York Constitution of 1777 expressly granted the courts power to admit persons to the practice of law, a power previously exercised by the governor.[19] It is also significant that in most colonies and states no division between barristers and attorneys or solicitors developed.[20]

Leigh's Case, decided by the Supreme Court of Virginia in 1810, appears to be the first case in this country in which the "officer of the court" title of an attorney was discussed.[21] In deciding that an attorney was not a civil or military officer, Judge Roane commented that an attorney's position is similar to that of a juror, who also has responsibilities and duties to execute faithfully. The "office" held meant nothing more than the duties owed by the person to the court arising out of the person's relationship to it.[22] He explained that it was not necessary to consider whether and to what degree attorneys in this country were considered officers of their respective courts as they were in England. He recognized that, unlike their American counterparts, English attorneys had many privileges which could account for their special status.[23] Thus in 1810 Judge Roane took the same view that Birks would take 150 years later: that the evidence of privileges, and not the fact of court regulation or the duties of attorneys, was the basis of the title and status of officer of the court.

In another early case, *Byrne v. Stewart*,[24] decided in 1812,

---

18. For example, in 1712 South Carolina adopted the English Statute of Henry IV, thus giving the South Carolina Supreme Court authority to examine, swear-in, and enroll attorneys. *Id.* at 153.

19. *Id.* at 151; 2 A. CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 36 (1965).

20. M. BIRKS, *supra* note 2, at 257; 2 A. CHROUST, *supra* note 19, at 227-28; Q. JOHNSTONE & D. HOPSON, *supra* note 15, at 357-58. However, in several colonies and states, including New Jersey and Massachusetts, distinctions were made for some time. *Id.* In New Jersey, the distinction lasted until 1958. Consalus, *New Jersey's Bifurcated Bar*, 12 SETON HALL L. REV. 242, 250 (1982).

21. 15 Va. (1 Munf.) 468 (1810). The case involved the question of whether an attorney had to take an oath regarding dueling which was required of every civil or military officer of the commonwealth.

22. *Id.* at 481-82.

23. *Id.* at 482.

24. 3 S.C. Eq. (3 Des.) 466 (1812).

Chancellor Waite of South Carolina held that the office of solicitor "is no more a public one than would be any other profession or trade which the legislature might choose to subject to similar regulations. . . ."[25] A third early case, decided in 1835 by the Pennsylvania Supreme Court, held that an attorney as an officer of the court possessed an office that could not be summarily revoked by a court. In support of its conclusion the court cited the oath taken by the attorney and a constitutional provision that referred to an attorney as holding an office.[26]

Beginning in the mid 1800's, references to attorneys as officers of the court began to appear more often in judicial opinions. The oldest case commonly cited is *Ex parte Secombe*,[27] decided in 1856 by the United States Supreme Court. The Court relied on the "officer of the court" title to conclude that the disbarment of an attorney was a matter of discretion and could not be reviewed by mandamus. There was, unfortunately, no citation of authority nor any discussion of the origin or significance of the "officer of the court" title.

The next widely cited opinion which refers to attorneys as officers of the court is *In re Cooper*,[28] an 1860 decision of the

---

25. *Id.* at 477.

26. Austin's Case, 5 Rawle 191, 203 (Pa. 1835). The significance of the oath taken by an attorney is stressed in J. BENTON, THE LAWYER'S OFFICIAL OATH AND OFFICE 3-4 (1909). The significance of the oath has been rejected by other courts. Leigh's Case, 15 Va. (1 Munf.) 468, 481-83 (1810)(attorneys are engaged in a profession, not a public office; lawyers are not appointed or elected; while attorneys may be in "some sense and in some degree, officers of their several Courts . . .[,] they are not officers under the government of the Commonwealth"); Sowers v. Wells, 150 Kan. 630, 635, 95 P.2d 281, 284 (1939)("[a]n attorney is an officer of the court, but he is not an officer of the state, and the admission of a person to practice as an attorney is not an appointment to public office"); *Ex parte* Galusha, 184 Cal. 697, 698, 195 P. 406, 406 (1921)("[w]hile attorneys are, in one sense, officers of the court, they are in no sense officers of the state nor do they hold a 'public' trust").

27. 60 U.S. 9 (1856). In an opinion by Chief Justice Taney, the Court held that it could not review by mandamus a disbarment of an attorney by the Supreme Court of the Territory of Minnesota, the act being judicial, and within the discretion of the court. The opinion, in referring to an unreported case decided earlier the same year involving a disbarment by a district court of the United States, stated that the relationship between a court and those who practice before it and their rights and duties are regulated by common law. "And it has been well settled, by the rules and practice of common law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed." *Id.* at 13.

28. 22 N.Y. 67 (1860). In that case, the court upheld a statute providing that graduates of the Columbia College Law School were qualified to be admitted to the bar. The

New York Court of Appeals. In an opinion which has been rejected by most states,[29] the court held that the power to admit attorneys to the practice of law was not inherently judicial. In deciding that the act of admission was, nonetheless, a judicial act, the court stated that an attorney was an officer of the court.[30] During the same period the United States Supreme Court[31] and several state courts[32] held that attorneys were not

---

court rejected an argument that the legislature had unconstitutionally usurped the power of the courts over admission to the bar.

29. Degnon, *Admission to the Bar and the Separation of Powers*, 7 UTAH L. REV. 82, 87 (1960); Green, *The Court's Power Over Admission and Disbarment*, 4 TEX. L. REV. 1, 10 n.24 (1925).

30. The opinion referred to an earlier case holding that, when a statute authorized a court to appoint commissioners to open streets, the power of appointment was considered to be a judicial act because the commissioners became officers of the court and thus proceedings involving the commissioners were judicial proceedings. 22 N.Y. at 83. The *Cooper* court then went on to say:

> This is an argument which applies with far greater force to the present case. Attorneys and counsellors are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. And hence their appointment may with propriety be entrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their appropriate judicial functions.

Id. at 84.

The court, in rejecting English practice as precedent for arguing that the power to admit persons to practice law was part of the inherent power of the court, pointed out that barristers in England were not admitted by the courts. It then noted that "[t]he power of the court to appoint attorneys *as a class of public officers* was conferred originally, and has been from time to time regulated and controlled in England, by statute." *Id.* at 90 (emphasis added).

In further support of its position the court quoted a provision in the 1846 New York Constitution that directed that judges "shall not exercise any power of appointment to public office." *Id.* at 92. The court stated: "The object of this provision is plain. Attorneys, solicitors, &c., were public officers; the power of appointing them had previously rested with the judges, and this was the principal appointing power which they possessed." *Id.* Although the correctness of the court's position that attorneys are public officers has been rejected, *see In re* Hathaway, 71 N.Y. 238, 242 (1877)(constitutional bar applies only to public officers, not to officers of the court), its view of the attorney as an officer of the court has been followed in almost every subsequent case in which the issue of legislative control over admission has arisen.

31. The United States Supreme Court again referred to the nature of the office held by attorneys in *Ex parte* Garland, 71 U.S. 333 (1866). This case involved the constitutionality of an act of Congress which required a test oath as a qualification for admission to practice in the United States courts. The Court, in holding that the oath violated the constitutional prohibition of ex post facto laws, discussed whether an attorney as an officer of the court was also an officer of the United States. The Court noted the difference between officers of the United States and officers of the court: the former are elected or appointed under an act of Congress, while the latter are admitted by the Court upon evidence of their qualifications. After reviewing the method of acquiring the evidence,

public officers or court officers and thus were not required to take oaths required of public or court officers; neither were they subject to statutes that barred women from holding public office.

III. Judicial Control of the Legal Profession

When the issue before the courts changed from whether attorneys were public officers to whether the courts or the legislature had the power to control the legal profession and particularly admission to the bar, the significance of the title of attorneys as officers of the court increased dramatically. The first case to cite the "officer of the court" title in the context of bar admission was *In re Mosness*,[33] decided in 1876 by the Wisconsin Supreme Court. The court struck down a statute requir-

---

the Court remarked that the order of admission is "the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein." *Id.* at 378. The language used by the Court, *id.* at 378-79, has been quoted in almost every subsequent case dealing with the officer of the court issue. The Court concluded that the order confers a right on the attorney that cannot be revoked except for moral or professional delinquincy.

32. The Tennessee Supreme Court, construing an 1868 statute requiring courts to have their officers take an oath every two years concerning Ku Klux Klan activities, held that the act did not apply to attorneys.

> Although, in one sense, an attorney is an officer of the court, yet, that he does not belong to the class of officers referred to in this section, is too clear to admit of discussion. . . . The language of the Act plainly indicates that it was intended . . . to apply only to those persons who held offices, and who were subject to the orders of the Court, but not to attorneys, who hold no office, and who are not subject to the order of the Court, except in well defined instances.

Ingersoll v. Howard, 48 Tenn. (1 Heisk) 247, 254-55 (1870).

The Colorado Supreme Court, in holding that women were not prohibited from being admitted to practice law, was even more blunt in finding no special significance in the officer of the court label. The court noted that although the term is accurate in that the attorney holds an important office and performs a "quasi public duty," an attorney advances private interests. *In re* Thomas, 16 Colo. 441, 446, 27 P. 707, 708 (1891).

The same result was reached in *In re* Ricker, 66 N.H. 207, 29 A. 559 (1890). In this case, the New Hampshire Supreme Court considered a woman's petition for admission to the bar. After a lengthy discussion of the status of English and American attorneys and of the attributes of public office, the court held that attorneys as officers of the court were not public officials. Thus, women were not barred from the profession by common law rule which barred women from public office. More recently, Virgin Islands Bar Assoc. v. Dench, 124 F. Supp. 257 (D.V.I. 1953), held that because a person could not be a public officer of two states and the practice of law is a public office, an attorney could not be admitted simultaneously in two states. The position that an attorney holds a public office was rejected most recently by the United States Supreme Court in *In re* Griffiths, 413 U.S. 717 (1973).

33. 39 Wis. 509 (1876).

ing the admission in Wisconsin of any person admitted to practice in Illinois. In so doing, the court relied primarily on the fact that,

> [t]he bar is no unimportant part of the court; and its members are officers of the court . . . [a]nd if officers of the court, certainly, in some sense, officers of the state for which the court acts . . . . [A]ttorneys and counsellors of a court, though not properly *public* officers, are *quasi* officers of the state whose justice is administered by the court.[34]

The opinion noted the importance of judicial control over its officers, and found that residence in the state was essential to that control.

In re Day,[35] decided in 1899 by the Illinois Supreme Court, also rejected legislative control over bar admission. In an oft-cited opinion that set the pattern for later decisions, the court held unconstitutional a statute mandating admission to the bar of all law school graduates who had begun law school before the effective date of a supreme court rule on admission.[36] The court first stated that the English precedent on legislative control of the bar was not relevant because the power of Parliament was far greater than the power of a state legislature. It went on to say, nevertheless, that rather than supporting legislative control over admission of attorneys, the English practice actually refuted it. The court reviewed English history and concluded that power over admission of attorneys was vested in the courts by the 1292 ordinance of Edward I, and that no later legislature ever attempted to take away that power. The court made only two brief references to the attorney as an officer of the court, both to support its conclusion on court control over admission.[37]

---

34. *Id.* at 510 (emphasis by the court).

35. 181 Ill. 73, 54 N.E. 646 (1899).

36. *Id.*

37. After citing cases which held that a court had the inherent power to control its own courtroom, including the janitor, the court stated, "It would be strange, indeed, if the court can control its own court room, and even its own janitor, but that is not within its power to inquire into the ability of the persons who assist in the administration of justice as its officers." *Id.* at 95, 54 N.E. at 652. It further added that "[t]he function of determining whether one who seeks to become an officer of the courts [is qualified] pertains to the courts themselves." *Id.* at 96, 54 N.E. at 653. Distinguishing attorneys from other occupations regulated by statute, the court noted that the attorney is a necessary part of the judicial system. *Id.* at 97, 54 N.E. at 653.

Over the next several decades supreme courts in other states confronted legislative efforts to control admission, disbarment or suspension.[38] By 1925 sixteen state courts followed the *In re Day* approach.[39] The majority of these courts referred to attorneys as officers of the courts as part of their rationale for judicial rather than legislative control over the legal profession.[40]

Another major use of the "officer of the court" title of attorneys has been to justify the requirement imposed by courts that attorneys belong to a state bar association. An early expression of this rationale, followed by courts in other states, came in 1937 from the Nebraska Supreme Court.[41] Concluding that it had the power to mandate membership in the state bar, the court reasoned that because the duty of the courts is the efficient administration of justice and because attorneys as officers of these courts must assist in this goal, the practice of law is so intimately related to the exercise of a court's power that the courts "naturally and logically" have the right to regulate the bar.[42]

The phrase "officer of the court" has also been employed to justify investigations of improper conduct by attorneys. The most famous of these cases is *People ex rel Karlin v. Culkin*,[43] a decision of the New York Court of Appeals written by Chief Judge Cardozo. In that case, the immediate issue was whether an attorney could be punished for refusing to testify before a judge empowered by a state appellate court to conduct an inves-

---

38. Green, *supra* note 29, at 12-15 n.35.

39. *Id.* (quoting from opinions of the supreme courts of Arizona, Colorado, Connecticut, Kentucky, Massachusetts, Missouri, New Mexico, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, and Virginia, and listing cases from Arkansas, West Virginia, and Wisconsin).

40. *Id.*

41. *In re* Integration of the Nebraska State Bar Ass'n, 133 Neb. 83, 275 N.W. 265 (1937).

42. *Id.* at 289, 275 N.W. at 268. Judge Carter explained:

> The primary duty of courts is the proper and efficient administration of justice. Attorneys are officers of the court and the authorities holding them to be such are legion. They are in effect an important part of the judicial system of this state. It is their duty honestly and ably to aid courts in securing an efficient administration of justice. The practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our state government.

Id. The courts which have taken the same position on mandatory state bar membership have similarly used this rationale. Degnon, *supra* note 29, at 87.

43. 248 N.Y. 465, 162 N.E. 487 (1928).

tigation. The court held that courts could make a general inquiry into the conduct of its officers—the members of the bar—and compel one of its officers—an attorney—to testify.[44] The court's entire analysis was based on the status of the attorney as an officer of the court, relying on the English precedent and the English courts' power to conduct similar investigations.[45]

The foregoing makes it clear that the courts of this country have relied to a substantial degree upon the "officer of the court" title to justify their control over the legal profession, and in so doing have placed substantial reliance upon the status of the English attorney as an officer of the court. The logic used by the courts has been summarized in the following terms:

> Advocates of judicial supremacy rely primarily upon the argument . . . that the power to set standards of admission to practice is necessary for the exercise of the judicial office. This argument points out that attorneys are officers and assistants of the court. And, if the court is to have reliable and competent assistants it must be able to insure a supply of trustworthy and competent attorneys. Without such assistants the court would be unable properly to acquit itself of the judicial task imposed by the state constitution on it alone. Hence, while the setting of standards of admission and exclusion is not claimed to be judicial, abstractly considered, nevertheless it is a means so necessary to the end of adequate control that it is considered "inherent" or "implied" in the judicial office itself.[46]

Further analysis, however, shows that the title "officer of the court" is not necessary to support judicial control of the bar. It has been stated that power to regulate the bar belongs to the judiciary for two reasons: "(1) the power is judicial because it is usually exercised by the courts, [and] (2) the power is judicial because history shows that the courts *need* that power."[47] It is then stated that the latter rationale is also based on the "officer of the court" status.[48] But these two arguments do not, in fact, depend upon the use of the "officer of the court" description.

---

44. *Id.* at 470, 162 N.E. at 489.
45. *Id.* at 471-77, 162 N.E. at 489-93.
46. Degnon, *supra* note 29, at 86 (footnotes omitted).
47. *Id.* at 90.
48. *Id.*

The first—that the power is usually exercised by the courts—is merely an argument based on historical precedent. This argument is not totally persuasive because in both England and the United States, until the end of the nineteenth century, legislative regulation of the bar was fairly extensive. Far more important, however, is the second argument that judicial control of the bar is necessary for the proper functioning of the courts. This latter argument is the classic one of inherent or implied powers—that a branch of government has all those powers necessary for it to perform its constitutional function. This same theory has been used by the courts to give them control over their personnel, facilities, and funding.[49] Courts have long asserted that a bar is essential to their proper functioning.[50] It thus follows that the courts can regulate the bar. This power to regulate depends, consequently, on the court's perceived necessity for it, and not on the title of the attorney as an officer of the court.

Perhaps the most rational approach to the officer of the court status and its relationship to the power of the courts over the legal profession was stated by the Supreme Court of Wisconsin when it considered whether to require that all attorneys belong to the state bar association:

> We must reiterate, the primary duty of the courts as the judicial branch of our government is the proper and efficient administration of justice. Members of the legal profession by their admission to the Bar become an important part of that process and this relationship is characterized by the statement that members of the Bar are officers of the court. An independent, active and intelligent Bar is necessary to the efficient administration of justice by the courts. The labor of the courts is lightened, the competency of their personnel and the scholarship of their decisions are increased by the ability and the learning of the Bar. The practice of law in the broad sense, both in and out of the courts, is such a necessary part of and is so inexorably connected with the exercise of the judicial power that this court should continue to exercise its supervisory control of the practice of the law.[51]

---

49. *See generally* Note, *The Court's Inherent Power to Compel Legislative Funding of Judicial Functions*, 81 MICH. L. REV. 1687 (1983) and authorities cited therein.

50. *See* Green, *supra* note 29; Degnon, *supra* note 29, and the cases cited therein.

51. *In re* Integration of the Bar, 5 Wis.2d 618, 622, 93 N.W.2d 601, 603. The Wisconsin Supreme Court has recently adopted new rules governing the State Bar of Wis-

The court here does not rely on the "officer of the court" title as the basis for court regulation of the legal profession. Rather, the power is based upon the dependence of the courts upon the bar. The opinion recognizes that attorneys are an essential part of the administration of justice "and this relationship is characterized by the statement that members of the Bar are officers of the court."[52] Thus, the court does not treat the "officer of the court" title as a legal status from which the power to regulate flows; rather, it employs the term as a convenient way to describe the important role that attorneys play in the judicial process. The significance of this difference is more than semantic. It is the difference between relying on a label and relying on an analysis of function and necessity to justify a claim of judicial supremacy in regulation of the bar.

The weakness of the historical basis of the "officer of the court" title of attorneys has been demonstrated. If this title were the only basis for judicial control over the bar, that control would be subject to serious question. The real basis for control is the courts' practical need for a qualified bar. That practical need is obscured, however, when the "officer of the court" title is used to justify judicial control of the bar. As with all other professions, the power of regulation is in the legislature as part of the police power of the state. Judicial control of the legal profession is an exception to the usual separation of powers between the legislative and judicial branches of government. The best reasoned opinions recognize that judicial control can be justified only because of the dependence of the courts upon a qualified bar. Without that dependence, the basis for judicial control is removed. The title of officer of the court is consequently irrelevant to the issue of whether the legislature or the courts should regulate the bar.

IV. The Duties of Attorneys as Officers of the Court

The American cases decided after 1870, discussed in Section III, dealt primarily with the "officer of the court" title in the

---

consin. The basis for the court's adoption of the rules is given as "the court's inherent authority over members of the legal profession as *officers of the court.*" Wis. Sup. Ct. R. 10.02 (1980)(emphasis added).

52. 5 Wis. 2d at 622, 93 N.W.2d at 603.

context of judicial versus legislative power over regulation of the bar. The focus of these opinions, consequently, has been upon separation of powers and the institutional needs of the judicial branch of government. The other major use of the "officer of the court" title has been in defining the obligations of individual attorneys.[53] This section of the Article will classify the various du-

---

53. Notwithstanding the significance of the privileges accorded officers of the court to the development of the status for English attorneys, courts in this country have not made much use of the title in defining the privileges of attorneys. The Wisconsin Supreme Court has said that one of the privileges of an attorney as an officer of the court is to invoke the jurisdiction of the court on behalf of another. State v. Cannon, 196 Wis. 534, 539, 221 N.W.2d 603, 604 (1928). Much earlier, the New Hampshire Supreme Court said: "The powers of an attorney, as an officer of the court, are very extensive. He may waive objections to evidence, make admissions in pleading or by parol, enter nonsuits and defaults, and make any disposition of the suit and any admission of facts that the party himself could make." Bryant's Case, 24 N.H. 149, 153 (1851). Essentially, the privilege of the attorney as an officer of the court is to represent others in litigation, to act on behalf of and to bind the client through his acts and his omissions. *Ex rel* Davis, 28 Utah 2d 423, 429-30, 503 P.2d 1206, 1207 (1972)("[a]n attorney, in his function as an officer of the court, may stipulate for and bind the party he represents on any matter of proper concern in the proceeding"); Sinnott v. Porter, 57 Wis. 2d 462, 466, 204 N.W.2d 449, 451 (1973)("[b]ut, as such court officer, he is not to be directed to sign a document in the name of his client where the client does not want him to do so. . ."). The Wisconsin Supreme Court has held that because an attorney is an officer of the court he holds a quasi-judicial office and is, consequently, entitled to immunity from suit for the discharge of his professional duties in the same manner as are judicial officers. Laagen v. Borkowski, 188 Wis. 277, 301, 206 N.W. 181, 190 (1925).

The various privileges of an attorney attributable to his status as an officer of the court are important ones without which it would be impossible to practice law. The question that must be asked, however, is whether the privileges actually arise from the officer of the court status or flow from something else.

The first and most basic privilege—that of representing others in court—clearly arises from being admitted to practice law and not from any status that may accompany admission. The fact that English barristers represent others in court but are not officers of the court clearly demonstrates that the two functions are not necessarily related. The most that can be said is that if an attorney is an officer of the court, that status itself flows from the act of admission to the Bar. Take away that status, and the act of admission still carries with it the privilege of representing others in court.

The difference between the two functions is highlighted by the historical change in the effect of admission by a state's highest court. In England, in most colonies at the time of the revolution, and in most states thereafter, each individual court admitted attorneys separately, and admission in one court did not entitle an attorney to practice in any other court. R. POUND, *supra* note 3, at 145-96. The separate admission was one of the factors that gave rise to the concept that an attorney was an officer of the court in which he was admitted. M. BIRKS, *supra* note 2, at 38. The procedure gradually developed in this country that admission to practice in the highest court of the state automatically qualified the person to practice in any court in the state and that separate admission to each trial or appellate court in the state was not necessary. R. POUND, *supra* note 3, at 147-56. Applying the original theory that admission makes an attorney an officer of

ties of attorneys which courts have said flow from the title "officer of the court."[54] These duties will then be analyzed to determine whether the "officer of the court" title is necessary or appropriate in defining these obligations, and whether the duties are better supported by a functional analysis of the needs of the courts and the relationship of the attorney to those needs. A functional analysis is necessary to ensure that any specific duty imposed upon attorneys is in fact necessary for the proper operation of the courts and is not a result of a misapprehension of the duties of an English attorney or simply an arbitrary imposition by the court.

A. Duty to Provide Services to the Court

Many courts have relied on the "officer of the court" title to impose on attorneys the duty to represent indigent clients either with or without compensation. The United States Supreme Court stated in *Powell v. Alabama* that "[a]ttorneys are officers of the court, and are bound to render service when required by such an appointment."[55] The United States Court of Appeals for the Ninth Circuit has noted that

> [a]n applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order.[56]

The United States Court of Appeals for the Eighth Circuit has commented that "[t]he source of this duty [to represent indigents] is a lawyer's status as an officer of the court."[57]

---

the admitting court, the attorney would be an officer only of the state supreme court and not of the other courts of the state in which the attorney is most likely to practice.

54. The duties of solicitors as officers of the court are set forth in 36 HALSBURY'S LAWS OF ENGLAND 192-208 (3d ed. 1961). They include liability on undertakings, for costs, losses from his conduct, for client's money, to turn over client's papers, and to attachment.

55. 287 U.S. 45, 73 (1932).

56. United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). See the appendix to the opinion for the history of the obligation. *Id.* at 636-38.

57. Williamson v. Vardeman, 674 F.2d 1211, 1215 (8th Cir. 1982). The court held, however, that the attorney could not be compelled to pay the expenses of defense. Notwithstanding the attorney's obligation, as an officer of the court, to represent indigent

As officers of the court, attorneys have been held to have a duty to testify in an investigation of lawyer misconduct.[58] It has also been held that when present in court, the attorney has a duty to testify as to the value of the services rendered by another attorney without being entitled to an expert witness fee.[59]

Although the duties of representing indigents and testifying are said to flow from the "officer of the court" title, it seems more reasonable to identify the source of these obligations as the monopoly to practice in the courts granted to attorneys by the courts.[60] This monopoly can be traced to the ordinance of Edward I in 1292, when the power of the courts to regulate admission to the bar was formally recognized for the first time.[61] In exchange for this monopoly, the courts may reasonably require attorneys to represent indigents who have a constitutional right

---

criminal defendants, the Supreme Court held recently that a court-appointed attorney is not immune from liability in the performance of his duties as are other court officers or other federal officials. Ferri v. Ackerman, 444 U.S. 193 (1979). The Court stated that "the primary office performed by appointed counsel parallels the office of privately retained counsel." *Id.* at 204. The Court quoted with approval Justice Black's statement in Cammer v. United States, 350 U.S. 399 (1956) that distinguished between attorneys and court officers:

> It has been stated many times that lawyers are "officers of the court." One of the most frequently repeated statements to this effect appears in *Ex Parte* Garland, 71 U.S. (4 Wall.) 333, 378 (1866). The Court pointed out there, however, that an attorney was not an "officer" within the ordinary meaning of that term. Certainly nothing that was said in *Ex parte* Garland or in any other case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks, or judges. Unlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word "officer" as it has always been applied to lawyers conveys quite a different meaning from the word "officer" as applied to people serving as officers within the conventional meaning of that term.

Id. at 202-03 n.19.

58. People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928). Attorneys in disciplinary proceedings have, however, been held to be entitled to claim the privilege against self incrimination. Spevack v. Klien, 385 U.S. 511 (1967). *Spevack* overruled Cohen v. Hurley, 366 U.S. 117 (1961) which had relied on *Culkin.*

59. Nugent v. Downs, 230 So.2d 597 (La. App. 1970)(relying on Roy O. Martin Lumber Co. v. Sinclair, 222 La. 226, 56 So.2d 240 (1951), which held that because attorneys are officers of the court they must offer their services as witnesses on the value of services rendered by another attorney).

60. *See In re* Brose, 51 U.S.L.W. 3898, 3899 (U.S. June 20, 1983)(unpublished)("[a]n attorney is an officer of the court with a monopoly power to appear in the court and as such is bound to refrain from pursuing vexatious and abusive litigation")(Burger, C.J., dissenting).

61. 2 W. HOLDSWORTH, *supra* note 2, at 317.

to the assistance of an attorney. The courts can not ask anyone else to render the service because the courts permit only attorneys to practice law. Therefore, these services may be demanded from those given the monopoly, and the courts have always done so.[62] By the same token, if only an attorney can be an expert on the services of another attorney by virtue of the monopoly granted by the courts, the courts should be able to demand that attorneys testify on the value of legal services—the one subject on which the court has made them experts, to the exclusion of all others. The "officer of the court" title would be relevant to this issue only if attorneys, by virtue of that title, become public officers who may be compelled to render services without compensation.[63] It is generally accepted, however, that the "officer of the court" title of attorneys does not make them public officers.[64] Attorneys' duty to render services to the court arises, then, not from their title as officers of the court but from their court-granted monopoly.

Further, the duty to testify in an investigation of lawyer misconduct is no special obligation of an attorney. A court can compel testimony of anyone, attorney or layperson, in aid of its disciplinary authority over attorneys.[65]

B. Duty to Obey the Law

One of the earliest cases to find a duty to obey the law arising out of the "officer of the court" status of attorneys was *Ex parte Wall*[66] decided in 1883. In that case the Court upheld the

62. For a review of the tradition, dating back to the fifteenth century, of requiring attorneys to provide representation, see the appendix to United States v. Dillon, 346 F.2d 633, 636 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966), where most of the historical references are to barristers being required to represent indigents. As indicated *supra* note 4, however, barristers have never been considered officers of the court. The requirement that barristers represent indigents could not, consequently, have been based upon any officer of the court status.

63. 63A AM. JUR. 2D, *Public Officers and Employees* § 5 (1984); 15A AM. JUR. 2D *Clerks of Court* § 11 (1976).

64. *See supra* text accompanying notes 21-26; *see also* cases cited *supra* note 32.

65. AMERICAN BAR ASSOCATION, STANDARDS FOR LAWYER DISCIPLINARY AND DISABILITY PROCEEDINGS § 8.34 (tentative draft 1978)(parties in lawyer disciplinary proceedings have right to subpoena witnesses). An attorney is obligated to provide information to the bar disciplinary authorities under MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(B).

66. 107 U.S. 265 (1883).

disbarment of an attorney who had led a lynch mob in sight of the court.[67]

More recently the Supreme Court of South Dakota upheld the disbarment of an attorney for a felony conviction, commenting: "As officers of this court, attorneys are charged with the obedience of the laws of this state and the United States. The intentional violation of those laws . . . by a lawyer tend[s] to lessen public confidence in the legal profession."[68]

Several courts have placed the obligation to abide by court orders upon attorneys' "officer of the court" title. The United States Court of Appeals for the Eighth Circuit cautioned counsel that "although each may be an adversary with regard to opposing parties, all serve as officers of the court and all are bound to respect and follow the law as laid down by a final appellate judgment in this case."[69] A New York appellate court reprimanded an attorney for a plaintiff in a default divorce action for refusing to file the signed decree until he had been paid for his services.[70] The court stated that the attorney as an officer of the court had an obligation to comply with the court's directive, and that it was improper for him to refuse to file the decree without first obtaining the permission of the court to withdraw as attorney.[71]

Courts have based the duty to obey statutes and court orders upon the attorney's status as an officer of the court, without explaining why the duty flows from the status. The duty has, in fact, no relation to the "officer of the court" title.

One of the universally recognized requirements for admission to and continued membership in the bar is good moral character. Courts look to convictions of crimes involving moral turpitude as reflecting on moral character.[72] The requirement that an attorney obey the law is thus related to the requirement of good moral character, and exists independently of the officer

---

67. The Court stated: "What sentiments ought such a spectacle to arouse in the breast of any upright judge, when informed that one of the officers of his own court was a leader in the perpetration of such an outrage?" *Id.* at 274.

68. Matter of Looby, 297 N.W.2d 487, 488 (S.D. 1980)(quoting Matter of Parker, 269 N.W.2d 779, 780 (S.D. 1978)).

69. Reserve Mining Co. v. EPA, 514 F.2d 492, 541-42 (8th Cir. 1975).

70. Kennedy v. Macaluso, 86 A.D.2d 775, 448 N.Y.S.2d 276 (1982).

71. *Id.* at 775, 448 N.Y.S.2d at 277.

72. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(3)(1980); PATTERSON & CHEATHAM, *supra* note 1, at 290-93.

of the court status. The only two cases which assert a duty to obey the law arising from the officer of the court status involved conduct that was both felonious and involved moral turpitude. Similarly, the duty to comply with court orders is an ethical obligation of the attorney.[73] In addition, a litigant is under the same obligation to comply with court orders, and the attorney as agent for the client is similarly bound.[74] This obligation is also imposed upon attorneys by the Code of Professional Responsibility.[75] The duty to obey the law is not a special duty dependent on the "officer of the court" title of the attorney; rather, it is an obligation that flows through the client to the attorney or is imposed by independent ethical standards.

C. Duty to Preserve Professional Integrity

One court, in holding that an attorney should be disqualified for conflict of interest in consecutive representation of opposing parties in the same litigation, noted that "as an officer of the court, an attorney is bound by the highest possible standards and as such carries the burden of avoiding the appearance of evil."[76] The duty of an attorney to preserve his professional integrity by avoiding conflicts of interest and other appearances of evil is expressly imposed by the Code of Professional Responsibility.[77] This duty springs from the relationship between the proper conduct of attorneys and public confidence in the legal system. Many courts have enforced this obligation without finding it necessary to rely on the "officer of the court" title of the attorney.[78] It is the necessity of maintaining public confidence in the legal system, not the status of attorneys as officers of the court, that has justified the courts' regulation of the conduct of attorneys.

---

73. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(A), EC 7-22 (1980).

74. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183 (1971).

75. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(3), EC 1-5 (1980); PATTERSON & CHEATHAM, *supra* note 1, at 290-93 (1971). The Model Code of Professional Responsibility does not state that any of the obligations it imposes are premised on the officer of the court status. The preamble of the Code states, rather, that it is based upon the vital role attorneys play in the legal system.

76. Northeastern Oklahoma Community Dev. Corp. v. Adams, 510 P.2d 939, 939-41 (Okla. 1973).

77. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105, DR 9-101 (1980).

78. PATTERSON & CHEATHAM, *supra* note 1, at 236-37.

D. *Duty to Preserve the Integrity and Dignity of the Legal System*

Courts have relied on the "officer of the court" title to impose upon attorneys a duty to uphold the integrity and dignity of the legal system. In finding an attorney in contempt of court for saying in open court, "This is a farce," a federal district court commented: "Respondent's status as an officer of the Court is not to be overlooked; as such he has a higher duty to assist in maintaining the dignity of the Court than the ordinary citizen."[79] A Florida appellate court chastised a defense attorney for alleging in a petition that the witnesses for the state had been bribed and that the appellate court had been pressured to affirm the conviction: "[T]he attorney would have been well advised to consider his obligation, as a member of the bar and officer of the court, to protect and defend the court and its judges against unwarranted, irresponsible, and inexact aspersions . . . ."[80]

As with the duty to preserve the attorney's professional integrity, the duty to preserve the integrity and dignity of the legal system is found in the Code of Professional Responsibility,[81] which in turn is based upon the necessity of preserving confidence in the legal system.[82] It would exist whether or not attorneys were considered officers of the court.

E. *Duty to Promote Fair Administration of Justice*

Several courts have found that an attorney as an officer of the court has a duty to promote the administration of justice.[83] This can be a negative duty to avoid abuses of court processes such as "harassing [persons,] . . . recklessly invoking court action in frivolous cases," making frivolous appeals, or seeking to

---

79. *In re* Cohen, 370 F. Supp. 1166, 1174 (S.D.N.Y. 1973).

80. Cayson v. State, 139 So. 2d 719, 721 (Fla. Dist. Ct. App.), *appeal dismissed*, 146 So. 2d 749 (Fla. 1962).

81. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-1, EC 9-2, EC 9-6 (1980).

82. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble (1980).

83. Gullo v. Hirst, 332 F.2d 178, 179 (4th Cir. 1964); *see also* WSM, Inc. v. Tennessee Sales Co., 709 F.2d 1084, 1088 (6th Cir. 1983); United States v. Rodriguez, 556 F.2d 638, 642 (2d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978); Warren Transport v. United States, 525 F.2d 148, 151 (8th Cir. 1975).

deny or postpone the enjoyment of unquestioned rights.[84] The duty can also be stated positively as a duty to aid in the administration of justice by cooperating with a court in the investigation of a lawyer's misconduct[85] or assuring that the party he represents receives a fair trial.[86] Another duty tied to the "officer of the court" title is to avoid public debate that will work to the detriment of the accused or that will obstruct the fair administration of justice.[87]

Attorneys as officers of the court must also cooperate with the court "to preserve and promote the efficient operation of our system of justice."[88] In litigation the attorney's "officer of the court" title has been used to mandate that he cooperate in discovery and appear for trial at the scheduled time.[89]

Specific duties, such as refraining from abuse of process or attempting to influence the jury, apply to the litigant, the news media, and the public in general as well as to attorneys, and thus are not dependent upon the "officer of the court" title. They are also found in the Code of Professional Responsibility.[90]Avoiding public debate that will have an adverse effect upon an accused or a litigant flows from the duty of the courts to protect the due process rights of litigants.[91] More general statements of the duty to aid or not obstruct the administration of justice are so broad as to state nothing more than platitudes, and do not rise to the level of an enforceable duty.

F. Duty to be Truthful

The duty of the attorney to be truthful in dealing with the court has been tied to the officer of the court title. The United

---

84. People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928).

85. United States v. Rogers, 289 F. Supp. 726 (D. Conn. 1968); Burkett v. Crulo Trucking Co., 171 Ind. App. 166, 355 N.E.2d 253 (1976).

86. Bullock v. Branch, 130 So. 2d 74, 76 (Fla. Dist. Ct. App. 1961).

87. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 601 n.27 (1976)(Brennan, J., concurring).

88. Chapman v. Pacific Tel., 613 F.2d 193, 197 (9th Cir. 1979).

89. Canella v. Bryant, 235 So. 2d 328 (Fla. App. 1970); *In re* Henry, 25 Mich. App. 45, 181 N.W.2d 64 (1970); Medic Ambulance Serv. v. McAdams, 216 Tenn. 304, 392 S.W.2d 103 (1965).

90. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102, DR 7-106, DR 7-107, DR 7-108 (1980).

91. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

States Court of Appeals for the Tenth Circuit has said that "[a]s an officer of the court an attorney may not knowingly make a false statement to the court or fail to disclose what he is required by law to reveal."[92] In Oregon, where a statute imposed the duty on attorneys "never to seek to mislead the court or jury by any artifice or false statement of law or fact," the state supreme court attributed the duty to the attorney's title as an officer of the court, even though the statute made no mention of it.[93] The United States Court of Appeals for the Sixth Circuit has said that "[s]ince attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court."[94]

The existence of an obligation to be truthful independent of the officer of the court title is demonstrated by its inclusion in the Code of Professional Responsibility.[95] This obligation is also imposed on anyone dealing with the court, through perjury statutes.

G. Duty to Know the Law

An attorney as an officer of the court has been charged with knowledge of the law and of the effect of failure to comply with it.[96] These obligations do not, however, place the attorney in any different position than the litigant or the average citizen. In the two cases that have adopted this principle, the first involved an attempt to enforce a contract found to be against public policy. Any person, whether or not an attorney, who attempts to enforce such a contract will be unable to do so.[97] In the second case, an attorney was simply held to know the effect of his client's failure to comply with discovery rules.[98] In that case the penalty would fall on the client, not on the attorney. In neither case was the "officer of the court" title relevant to the decision.

---

92. United States v. Perez-Gomez, 638 F.2d 215, 217 (10th Cir. 1981).

93. *In re* Hubert, 265 Or. 27, 28-29, 507 P.2d 1141, 1141 (1973).

94. H.K. Porter Co. v. Goodyear, 536 F.2d 1115, 1119 (6th Cir. 1976).

95. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980).

96. Brown v. Gesellschaft Fur Drahtlose, 104 F.2d 227, 229 (D.C. Cir.), *cert. denied*, 307 U.S. 640 (1939); Suritz v. Kelner, 155 So. 2d 831, 833 (Fla. Dist. Ct. App. 1963).

97. RESTATEMENT (SECOND) OF CONTRACTS §§ 178-185 (1981).

98. FED. R. CIV. P. 37(b).

H. Duty to Inform the Court of the Law and the Facts

Several courts have used the "officer of the court" title to find an obligaton of the attorney to bring to the court's attention relevant facts and law. Such items have included proposing jury instructions[99] and informing the court of new developments in relevant but not controlling case law,[100] of the fact that counsel in the pending case had in another case made an argument similar to that espoused by the opposing party,[101] of confusion in the plea made by the defendant,[102] and that the witness in a retrial had recanted testimony given in the initial trial.[103]

The duty to inform the court of the law and the facts is essentially the duty not to mislead the court and reflects the attorney's more general duty to be candid in dealings with the court. These duties can be fairly ascribed to the practical necessity of the court's relying on attorneys to present matters to it.[104] To the extent that the attorney is not restricted by the concomitant duties to the client, the court is entitled to rely on the attorney in performing its functions. Because the court must rely on the attorney, the court insists upon candor; its right to do so is based upon its needs, however, and not upon the attorney's classification as an officer of the court. The Model Rules of Professional Conduct expressly recognize an attorney's duty to be candid before the court.[105]

I. Duty to Inform the Client

In addition to finding an obligation to inform the court of certain legal and factual matters, the courts have also held that the attorney, as an officer of the court, has a similar obligation toward the client. These duties include informing the client of the dangers of mutliple-client representation by an attorney,[106]

---

99. Rago v. Nelson, 194 Pa. Super. 317, 166 A.2d 88 (1960).

100. Miller v. AAAcon Auto Transport, 447 F. Supp. 1201, 1206 (S.D. Fla. 1978).

101. Pittway Corp. v. Lockheed Aircraft, 641 F.2d 524 (7th Cir. 1981).

102. Lucero v. Texas, 502 S.W.2d 750 (Tex. Crim. App. 1973).

103. United States v. Grasso, 413 F. Supp. 166, 171 (D. Conn. 1976), *aff'd*, 552 F.2d 46 (2d Cir. 1977), *vacated on other grounds*, 438 U.S. 901 (1978).

104. *See supra* text accompanying notes 49-52.

105. MODEL CODE OF PROFESSIONAL RESPONSBILITY DR 7-102 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983).

106. United States v. Kidding, 560 F.2d 1303 (7th Cir.), *cert. denied, sub nom.*,

instructing the client to be present on the scheduled trial date,[107] and giving the client instructions as to the terms of bail.[108] In the latter two cases, testimony of the attorney concerning the advice given to the client was held not to violate the attorney-client privilege because of the attorney's duty as an officer of the court to give the advice to the client.[109]

Although the duty to inform and advise a client of the legal implications of certain matters has been attributed to the attorney's "officer of the court" status, informing the client of these matters would appear to be simply a part of the duty of the attorney in representing his client, and would exist independently of the fact that he is considered an officer of the court.[110]

V. Other Uses of the Officer of the Court Status

In addition to using the officer of the court status as a basis for various duties of attorneys, there have also been attempts to use it for other purposes. The State of Connecticut argued in *In re Griffiths*[111] that because an attorney was considered to be an officer of the court, the state could prevent a resident alien from becoming an attorney. This argument was rejected by the Supreme Court of the United States. It concluded that an attorney does not perform any governmental function and thus an individual could not be barred from being an attorney on that basis alone.[112]

In many other contexts courts have held that the attorneys' title of officer of the court did not make them officers of the government.[113] The early cases concerned whether an attorney was required to take a certain type of oath[114] or whether women could be attorneys.[115] The issue has also arisen in interpreting statutes that give courts power to hold their officers in con-

---

Brown v. United States, 434 U.S. 872 (1977).

107. United States v. Bourassa, 411 F.2d 69 (10th Cir.), *cert. denied*, 396 U.S. 915 (1969).

108. United States v. Hall, 346 F.2d 875 (2d Cir.), *cert. denied*, 382 U.S. 910 (1965).

109. *Id.* at 882; 411 F.2d at 74.

110. Model Rules of Professional Conduct Rule 1.4 (1983).

111. 413 U.S. 717 (1973).

112. *Id.* at 729.

113. *See supra* text accompanying notes 21-26; *see also* cases cited *supra* note 32.

114. *See supra* note 26.

115. *See supra* note 32.

tempt. The case most often cited is *Cammer v. United States*[116] in which Justice Black's opinion for the Supreme Court held that for the purposes of the federal contempt statute, an attorney was not an officer of the court, distinguishing him from clerks, marshals, and bailiffs. The opinion did not specify what status an attorney occupies as an officer of the court; it was clear, however, that the attorney is not an officer of the court in the usual sense of the term.[117] Michigan, on the other hand, has a supreme court rule that expressly provides that "[a]ttorneys and counselors are officers of the courts of this state and as such are subject to the summary jurisdiction of such courts."[118] The rule goes on to provide jurisdiction over any complaint filed by a client against an attorney, including fee disputes.

The attorney's status as an officer of the court has also been used to authorize control by the court over the amount of fees charged, even without a statute such as in Michigan. The Minnesota Supreme Court has stated: "In fixing such fees, the attorney's role as an officer of the court, as distinguished from his purely private relationship to his client, must be borne in mind. This status necessarily imposes upon the court supervisory control of the amount of fees allowed."[119]

A similar position was taken in a Maryland case which stated that the basis for the court's supervision of contracts between attorneys and clients "exists only because of the attorney's status as an officer of the court."[120] An Ohio court, in ruling upon an appeal from a judgment in favor of an attorney suing for a fee, stated that "an attorney, as an officer of the court and subservient to its canons, cannot call upon the courts to enforce a contract, although not fraudulent, which is over-

116. 350 U.S. 399 (1956).

117. *Id.* at 405.

118. MICH. G.C.R. § 908 (1963), quoted in Maljack v. Murphy, 385 Mich. 210, 215 n.5, 188 N.W.2d 539, 541 n.5 (1971). Michigan also has a statute which created the State Bar of Michigan and provides that members of the State Bar are officers of the court with the exclusive right to designate themselves as attorneys and counselors, attorneys at law, or lawyers. MICH. COMP. LAWS ANN. § 600.901 (1981)(MICH. STAT. ANN. § 27A.901 (1976)).

119. Peterson v. Peterson, 274 Minn. 568, 571, 144 N.W.2d 597, 600 (1966); *contra* U.S. v. Vague, 697 F.2d 805 (7th Cir. 1983).

120. Gladding v. Langrall, Muir & Noppinger, 285 Md. 210, 215 n.5, 401 A.2d 662, 665 n.5 (1974).

reaching, unconscionable, unreasonable or unfair."[121]

Courts have become so accustomed to relying on the "officer of the court" title as a catchall for justifying their actions with respect to attorneys that they have even applied it to persons who are neither attorneys nor court officials or employees. In a North Dakota case,[122] the court held that several *pro se* litigants were officers of the court. The trial court found that the litigants had committed a fraud upon the court. In rejecting an argument made by the litigants that they were not officers of the court and therefore could not commit a fraud upon the court, the Supreme Court of North Dakota stated: "We do not agree . . . . A *pro se* litigant is as much an officer of the court as a licensed attorney, and misconduct by either can be fraud on the court."[123] Law students have also been given the same title in a case involving access to a law library. The United States Court of Appeals for the Sixth Circuit, in upholding a rule that denied a nonlawyer access to a law library but permitted access by attorneys and law students, characterized both of the latter as officers of the court, thereby justifying their different treatment.[124]

Of the cases set forth in this section, several assert that courts have authority over certain matters involving attorneys based upon the "officer of the court" title. In these cases, the courts reviewed fee arrangements between attorneys and clients. Other courts have, however, exercised the same authority, relying upon either their control over the bar[125] or the Code of Professional Responsibility,[126] without mentioning the "officer of the court" title. That title is not, consequently, a prerequisite for the exercise of the authority.

VI. CONCLUSION

The title of attorneys as officers of the court has both an ancient tradition and a contemporary significance. The title has been recognized in England for several centuries and in this

121. Jacobs v. Holston, 70 Ohio App. 2d 55, 59, 434 N.E.2d 738, 741 (1980).

122. Gajewski v. Bratcher, 240 N.W.2d 871 (N.D. 1976).

123. *Id.* at 893.

124. Stacey v. Greer, 647 F.2d 166 (6th Cir. 1981).

125. American Trial Lawyers Ass'n v. New Jersey Supreme Court, 66 N.J. 258, 330 A.2d 350 (1974).

126. Florida Bar v. Moriber, 314 So. 2d 145 (Fla. 1975).

country since the middle of the nineteenth century. It has been used for a multitude of purposes, from justifying court control of the legal profession to providing a basis for compelling an attorney to testify without payment of an expert witness fee. It has been demonstrated that the assumed historical relationship between the "officer of the court" title and judicial regulation of the bar is neither historically accurate nor the actual basis for control by the courts. It has also been demonstrated that the use of the "officer of the court" title as the basis for defining the obligations of attorneys is unnecessary and has been accompanied by little or no analysis of the title and its relationship to the specific privilege or duty. For every application of these obligations in terms of "officers of the court," there is a superior alternative rationale based upon the needs of the courts and the role attorneys play in the legal process.

Little would be lost if the title "officer of the court" were never again used, and much would be gained if courts would forego the easy reliance on the "officer of the court" title and instead make a functional analysis to determine the necessity of the duty. Here, as elsewhere in legal thought, a label is never a satisfactory substitute for disciplined and thoughtful analysis. This is particularly true when the issue is whether the legislature or the courts have the final word on control of the legal profession, an important separation of powers question.

Several courts have suggested an appropriate use of the "officer of the court" title of attorneys. The Wisconsin Supreme Court has referred to the "officer of the court" title as simply characterizing the close relationship among attorneys, the courts, and the administration of justice.[127] Two judges of the United States Court of Appeals for the First Circuit have stated that "officer of the court" refers not to an official status but rather to the fact the lawyers are "closely associated with, and have important responsibilities within the court system."[128] Five

127. *See supra* text accompanying notes 51-52.

128. Piper v. Supreme Court of New Hampshire, 723 F.2d 110, 120 (1st Cir. 1983)(opinion of Campbell, C.J., and Breyer, J.), *prob. juris. noted*, 104 S. Ct. 2149 (1984). In this case an equally divided court affirmed the district court's ruling that New Hampshire's residency requirement for bar admission violated the privileges and immunities clause. In Lowrie v. Goldenhersh, 716 F.2d 401 (7th Cir. 1983), the court, rejecting an attack on Illinois' requirement that an attorney admitted in another state must take the Illinois bar examination to be admitted in Illinois, used the title "officers of the

judges of the United States Court of Appeals for the Fifth Circuit stated that attorneys' role in the judicial process is recognized in an informal manner by referring to them as officers of the court.[129] These opinions accept the "officer of the court" title for attorneys, not as a status from which certain duties flow, but simply as a descriptive label that incorporates all of the duties which are otherwise applicable to the attorney. Thus, the title is used on occasion as a shorthand expression designed to convey the unique role that attorneys play in our legal system and the dependence of the courts upon them.

It is clear, however, that the "officer of the court" title should never be used as a substitute for a rigorous analysis to determine the duties of any person who plays a significant role in the legal process. When used loosely, the phrase becomes a crutch for courts seeking to reach a result without developing an acceptable rationale for doing so. Even its use as nothing more than a descriptive label is dangerous because of the difficulty of confining its use to that limited purpose. It is almost inevitable that if the title is used as a descriptive label, the label will soon become a substitute for the necessary functional analysis. The time has come for the title "officer of the court" to go the way of the attorney's court gown, a symbol of that title in medieval England, now nothing more than a part of the fascinating history of the English bar.

---

courts" in quotation marks to indicate the essential role attorneys play in the administration of justice. *Id.* at 414.

129. Fitzgerald v. Estelle, 505 F.2d 1334, 1345 (5th Cir.) (concurring opinion), *cert. denied*, 422 U.S. 1011 (1975).