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Civility and Collegiality—Unreasonable Judicial Expectations for Lawyers as Officers of the Court?

Lonnie T. Brown
University of Georgia, LTBrown@uga.edu

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ARTICLE

Lonnie T. Brown, Jr.

Civility and Collegiality—Unreasonable Judicial Expectations for Lawyers As Officers of the Court?

Abstract. It is a well-settled and often-recited fact that lawyers are "officers of the court." That title, however, is notoriously hortatory and devoid of meaning. Nevertheless, the Eleventh Circuit recently took the somewhat unprecedented step of utilizing the officer-of-the-court label to, in effect, sanction an attorney for the purportedly uncivil act of failing to provide defendant attorneys with pre-suit notice. While the author applauds the court's desire to place greater emphasis on lawyer-to-lawyer collegiality as a component of officer-of-the-court status, the uncertainty the decision creates in terms of a lawyer's role will potentially force litigators to compromise important client-centered duties. This Article argues that it would be preferable for courts to define sanctionable officer-of-the-court duties by reference to well-defined, existing procedural and ethical norms, thereby enhancing predictability and imbuing the label with much-needed substance.

Author. Professor of Law and A. Gus Cleveland Distinguished Chair of Legal Ethics and Professionalism, University of Georgia School of Law; J.D., Vanderbilt University; B.A., Emory University. The author is grateful to Professors Donald E. Campbell, C. Ronald Ellington, and Eugene R. Gaetke for helpful comments on earlier drafts of this Article. The author also thanks Micah Engler and Amanda Powell for invaluable editorial and research assistance. Finally, the author, most importantly, thanks his wife Kim for her steadfast encouragement and perceptive observations throughout this Article's development.

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I. INTRODUCTION

> We believe and defend the idea that maintaining a bar that promotes civility and collegiality is in *the public interest* and greatly advances judicial efficiency: better "to secure the just, speedy[,] and inexpensive determination of every action and proceeding," as Rule 1 demands.[1]

Incivility and discourtesy among lawyers—litigators in particular—have become perhaps the most popular sources of complaint and dissatisfaction for members of the bar.[2] Indeed, hardball strategies and unpalatable theatrics are increasingly viewed as the norm rather than the exception.[3] Furthermore, while lawyers who engage in such behavior no doubt believe

1. Sahyers v. Prugh, Holliday & Karatinos, P.L. (*Sahyers I*), 560 F.3d 1241, 1244 n.5 (11th Cir. 2009) (quoting FED. R. CIV. P. 1), *cert. denied*, 131 S. Ct. 415 (2010). The author of this quote, Judge Edmondson, also saw fit to include it in his opinion accompanying the denial of a request for rehearing en banc in the case. Sahyers v. Prugh, Holliday & Karatinos, P.L. (*Sahyers II*), 603 F.3d 888, 891 (11th Cir. 2010) (en banc) (Edmondson, J., concurring).

2. *See* Chevron Chem. Co. v. Deloitte & Touche, 501 N.W.2d 15, 19–20 (Wis. 1993) ("There is a perception both inside and outside the legal community that civility, candor, and professionalism are on the decline in the legal profession and that unethical, win-at-all-costs, scorched-earth tactics are on the rise."); INTERIM REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, 143 F.R.D. 371, 375 (1991) ("We learned there is widespread dissatisfaction among judges and lawyers at the gradual changing of the practice of law from an occupation characterized by congenial professional relationships to one of abrasive confrontations."); NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW 58 (2010) (remarking that one of the largest sources of discontent for lawyers is the incivility of other lawyers because the practice is rampant); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 11 (2000) (observing that "[m]ost practitioners are unhappy with regulatory structures and with the incivility, hucksterism, and other misconduct that they seem powerless to prevent"); Donald E. Campbell, *Raise Your Right Hand and Swear to be Civil: Defining Civility As an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 100 (2011/2012) (maintaining that "the need to reclaim 'civility' in the practice of law has become a rallying cry in the profession"); Amy R. Mashburn, *Making Civility Democratic*, 47 HOUS. L. REV. 1147, 1157 (2011) (noting the litigation climate "is perceived by most commentators to have continued to worsen, and lawyers and judges continue to complain of growing incivility").

3. *See* NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW 59 (2010) (discussing two polls indicating that "69[%] of lawyers thought that civility in the profession had declined over time, and 80[%] of judges had observed uncivil attorney conduct in their courtrooms"). In a recent article, Susan Daicoff stated:

> The vast majority of commentators generally agree that the level of "professionalism" displayed by attorneys has declined dramatically in the last twenty-five years . . . [as evidenced by] a decline in civility and courteous conduct between lawyers, an increase in unethical or uncivil behavior among lawyers and judges, frequent lapses of appropriate ethical and professional conduct, and increasingly aggressive, competitive, and money-oriented legal battles, fought with a "win at all costs" approach . . . .

Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1344 (1997).

that their "Rambo" tactics are effective for and desired by their clients,[4] the resulting negative impact on judicial efficiency is undeniable.[5] Consequently, the active promotion of the contrary ideals of civility and collegiality should be a welcomed initiative, right?

In the abstract, the answer is surely "yes." However, when one considers the source of the statement of principle quoted above,[6] as well as the specific circumstances that underlie its pronouncement, wholehearted endorsement becomes a more complicated proposition. The quote is from *Sahyers v. Prugh, Holliday & Karatinos, P.L.*,[7] in which the Eleventh Circuit affirmed a district court's refusal to award a plaintiff mandatory attorney's fees. Specifically, the court found that the district court had properly exercised its inherent authority because plaintiff's counsel had "made absolutely no effort . . . to inform [defendants] of [p]laintiff's impending claim much less to resolve [the] dispute before filing suit."[8] The genesis of this obligation in *Sahyers* was ostensibly a concern for "lawyer-to-lawyer collegiality and civility."[9] In particular, the defendants happened to be lawyers, and in the court's view, suing fellow members of the bar without first affording them notice and an opportunity to respond

4. *See* NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW 59 (2010) (observing that "[s]ome lawyers perceive that playing hardball brings a strategic advantage"); Bronson D. Bills, *To Be or Not to Be: Civility and the Young Lawyer*, 5 CONN. PUB. INT. L.J. 31, 35–36 (2005) ("[T]oday many [lawyers] avow that civility is anachronistic or incompatible with the modern day practice of law . . . . Some equate acting civilly with being a 'push over,' being 'faint of heart,' and 'weak,' while others proclaim that the only way to successfully litigate is through the use of aggressive and belligerent tactics." (footnotes omitted)); Shawn Collins, *Be Civil? I'm a Litigator!*, NAT'L L.J., Sept. 20, 1999, at 21, 21 (arguing that being an effective advocate requires the opposite of civility).

5. *See* FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, 143 F.R.D. 441, 445 (1992) (observing that "[a] lack of civility can escalate clients' litigation costs while failing to advance their interests or bring them closer to their ultimate goal of ending disputes. Time expended in 'Rambo'-style discovery can hinder or prevent litigation parties from getting to the heart of the important contested issues."); Marvin E. Aspen, *Be Careful How You Tread*, NAT'L L.J., Nov. 15, 1999, at 16, 16 (asserting that "[c]onduct that may be characterized as uncivil, abrasive, abusive, hostile or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully[,] and efficiently"); *see also* Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637, 637 (1990) (remarking that experienced lawyers generally agree that use of Rambo tactics should be discouraged).

6. *See Sahyers I*, 560 F.3d at 1244 n.5 ("We believe and defend the idea that maintaining a bar that promotes civility and collegiality is in *the public interest* and greatly advances judicial efficiency: better to 'secure the just, speedy[,] and inexpensive determination of every action and proceeding,' as Rule 1 demands." (quoting FED. R. CIV. P. 1)).

7. Sahyers v. Prugh, Holliday & Karatinos, P.L. (*Sahyers I*), 560 F.3d 1241 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 415 (2010).

8. *Id.* at 1245.

9. *Id.*

was neither collegial nor civil. To make matters worse, plaintiff's counsel's lack of civility was not simply deemed an affront to his colleagues within the bar, as the court also stated that it "caused . . . the judiciary to waste significant time and resources on unnecessary litigation and *stood in stark contrast to the behavior expected of an officer of the court*."[10]

While *Sahyers* was undoubtedly intended to send a strong professionalism message to plaintiff's counsel individually,[11] the decision's underlying reasoning cannot be so easily quarantined. Rather, it is readily transferable to other litigation scenarios, which, at a minimum, creates the lingering possibility that pre-suit notice, or some other court-created obligation, could conceivably be required in all manner of cases. As a result, *Sahyers* might very well be a harbinger for enhanced use of the officer-of-the-court mantra in the name of civility, collegiality, and judicial efficiency.[12]

Admittedly, greater emphasis on attorneys' professional obligations as officers of the court should redound to the collective benefit of the legal system and the profession. The problem with such a strategy, however, is the uncertain and malleable nature of these obligations.[13] More precisely, the officer-of-the-court label is frequently summoned by courts when they perceive that something more should be expected of an attorney than the

10. *Id.* (emphasis added).

11. The Eleventh Circuit attempted to circumscribe its decision by stating that the decision was fact-intensive. *See id.* at 1246 ("We strongly caution against inferring too much from our decision today. These kinds of decisions are fact-intensive.").

12. *See infra* Part V.C (describing the effects of utilizing a vague officer-of-the-court standard); *cf.* Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility As an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 101 (2011–12) (discussing *Sahyers* as an example of the "increasing willingness of courts to sanction lawyers based solely on a lack of 'civility'"). Another case in which a court recognized an unwritten and unforeseeable officer-of-the-court duty seemingly contrary to a lawyer's client-centered obligations is *Smith v. Johnston*. Smith v. Johnston, 711 N.E.2d 1259, 1263–64 (Ind. 1999) (holding that lawyers' duties arise not only out of ethical rules but also from the fact that every lawyer is an officer of the court).

13. *See* George A. Riemer, *Officers of the Court: What Does it Mean?*, OR. ST. B. BULL., Aug.–Sept. 2001, at 27, 27 (contending that the officer-of-the-court label "is very ambiguous in meaning and gets in the way of understanding the source and scope of the ethical duties of lawyers" (citing 37 Or. Op. Att'y Gen. 1251 (1976))); *infra* Part V.B (discussing various perspectives on the meaning of officer of the court); *see also* Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 77 (1989) (observing that the conflict between a lawyer's role as an officer of the court and the more definitive zealous advocacy duty "creates confusion and cynicism within the bar" (citing Heinz & Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111, 1140 (1978); E. Wayne Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession*, 1976 UTAH L. REV. 95, 100)). *See generally* James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court"*, 48 BUFF. L. REV. 349 (2000) (providing a thoughtful critique on the confusion generated by the officer-of-the-court title).

behavior exhibited, and as *Sahyers* vividly indicates, judicial perceptions in this regard can vary depending upon the disposition of the decision-maker.[14]

Although creating and enforcing professional duties in an ad hoc fashion might serve to keep lawyers on their ethical toes, the lack of predictability would, in the long run, unduly hamstring their ability to fulfill legitimate duties owed to clients. Accordingly, this Article proposes a compromise that can achieve the intangible benefits that flow from an aspirational officer-of-the-court standard without the debilitating unpredictability. Namely, courts should exalt lawyers to live up to their higher, officer-of-the-court calling at appropriate times. But to be valid, those instances should be directly traceable to well-defined, existing procedural or ethical norms.

Part II lays the foundation for this proposal through a detailed analysis of the three stages of the *Sahyers* litigation: (1) the trial court's initial decision;[15] (2) the affirmance on appeal by the three-judge panel of the Eleventh Circuit;[16] and (3) the denial of plaintiff's request for a rehearing en banc.[17] Each phase of the case exposes varying perspectives on the significance of the officer-of-the-court aspect of a lawyer's role and its relationship to client-centered obligations.

Part III then closely explores the Eleventh Circuit panel's tenuous legal reasoning and reveals that it may portend far wider application than the court contemplated. Specifically, the broad tenets of civility, judicial economy, and officer-of-the-court status transcend all litigation settings. Therefore, that professional station can be invoked by courts at-will, in the exercise of their inherent authority, to create pre-suit notice or other

14. *See* Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility As an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 142 (2011–12) ("The legal profession is not well-served if civility continues to be a term whose meaning exists only in the eye of the beholder or whose tenets create obligations that are inconsistent with a lawyer's preexisting professional obligations."); *infra* Part II.C (discussing the concurring and dissenting opinions of *Sahyers II*). *Compare Smith*, 711 N.E.2d at 1261–62 (setting aside a default judgment based on plaintiff's counsel's failure to provide defense counsel with advance notice), *with* Sprung v. Negwer Materials, Inc., 775 S.W.2d 97, 100–01, 109 (Mo. 1989) (refusing to set aside a default judgment based on plaintiff's counsel's failure to advise defense counsel of the entry of a default judgment during the time within which that judgment would likely have been set aside as a matter of course), *superseded by* MO. R. CIV. P. 74.05, *as recognized in* Cont'l Basketball Ass'n v. Harrisburg Prof'l Sports Inc., 947 S.W.2d 471 (Mo. Ct. App. 1997).

15. Sahyers v. Prugh, Holliday & Karatinos, P.L., No. 8:07-cv-52-T-30MAP, 2008 U.S. Dist. LEXIS 112849 (M.D. Fla. Feb. 1, 2008).

16. *Sahyers I*, 560 F.3d at 1246.

17. *Sahyers II*, 603 F.3d 888, 889 (11th Cir. 2009) (en banc) (Edmondson, J., concurring).

unwritten duties.[18]

Part IV proceeds to test the validity of the rationale underlying the Eleventh Circuit's recognition of the notice obligation by comparing it to the bases for the widely-adopted formal pre-suit notice requirement in medical malpractice actions. As Part IV demonstrates, the common foundational thread that runs through both sets of pre-filing notification directives is the desire for enhanced judicial efficiency.[19] While this commonality seemingly bolsters the propriety of the *Sahyers*s pre-suit notice duty, the court's approval of the *ex post* imposition of this requirement still raises unpredictability concerns not present in the clearly articulated medical malpractice notice scheme.

Part V continues with an examination of the origins, evolution, and uncertain meaning of the officer-of-the-court label in America. It then analyzes the potential effects of judges utilizing an imprecise officer-of-the-court model to create and enforce general behavioral norms within the profession and concludes that although some benefits would likely flow from this approach, it is more probable that it will foster over-cautiousness on the part of litigators, chilling even legitimate zealous advocacy.

In light of this, Part VI proposes, as an alternative, that courts place increased emphasis on the procedural and ethical proscriptions that currently exist for constraining excessive zeal and other forms of illegitimate advocacy, and tie those directly to the officer-of-the-court characterization, a tactic that some courts have already employed.[20] Such

18. *But see* Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991) (recognizing the broad inherent authority of federal courts but emphasizing that courts invoking this power must "exercise caution . . . and . . . comply with the mandates of due process").

19. *See, e.g.*, Rabatin v. Kidd, 281 S.W.3d 558, 561 (Tex. App.—El Paso 2008, no pet.) (describing the legislative intent of the notice requirement for medical liability actions as an incentive to reduce litigation costs and encourage settlement (citing State v. Sanchez, 135 S.W.3d 698, 699 (Tex. App.—Dallas 2003), *aff'd*, 138 S.W.3d 324 (Tex. Crim. App. 2004))).

20. These courts determined that the behavior of the attorneys in question fell below certain defined norms for the profession, categorized as officer-of-the-court duties, namely, the dictates of Federal Rules of Civil Procedure 11, 30, and 37, as well as various standards contained in the governing Rules of Professional Conduct, including Rules 3.2, 3.3, 3.4, 3.5, and 8.4. *See* GMAC Bank v. HTFC Corp., 252 F.R.D. 253, 256–57 (E.D. Pa. 2008) (relying upon the Pennsylvania Rules of Professional Conduct and the Federal Rules of Civil Procedure to sanction a lawyer for abusive behavior); Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No. 98 CIV 10175(JSM), 2002 WL 59434, at *5 (S.D.N.Y. Jan. 16, 2002) (linking Rule 11 with an attorney's officer-of-the-court duties); *see also* Amy R. Mashburn, *Making Civility Democratic*, 47 HOUS. L. REV. 1147, 1163 (2011) (reporting results of an empirical study of cases over a ten-year period addressing uncivil behavior by lawyers, which revealed that "judges and disciplinary tribunals make reference to, and rely upon, a variety of legal provisions as sources of their authority to impose sanctions or penalties for incivility, discourteousness, and disrespect"); *cf. Chambers*, 501 U.S. at 61–72 (Kennedy, J.,

a measured, transparent approach can serve to rein in uncivil and uncollegial behavior,[21] while simultaneously adding important substance to the ill-defined officer-of-the-court ideal, which, in turn, will further the ultimate objective of making attorneys more cognizant of this critically important facet of their professional responsibility.[22]

II. *SAHYERS V. PRUGH, HOLLIDAY & KARATINOS, P.L.*

A. *District Court's Decision*

Plaintiff Christine Sahyers worked as a paralegal for the law firm of Prugh, Holliday & Karatinos.[23] After leaving her position, she retained counsel and filed suit against the firm and its named partners under the Fair Labor Standards Act (FLSA),[24] contending that they had failed to properly compensate her for overtime work in violation of the Act.[25] Specifically, she maintained that defendants did not pay her at least 1.5 times her standard hourly rate for hours worked in excess of her normal forty-hour workweek, as required by the FLSA.[26] Notably, Sahyers's counsel did not make a pre-filing demand on the defendants, nor did he make any attempt to inform them about Sahyers's claim.[27] Sahyers had expressly instructed her counsel simply to file the lawsuit, and he followed her instructions.[28]

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dissenting) (arguing that the lower court's imposition of sanction solely pursuant to its inherent authority was not proper, given the existence of various statutes and rules of procedure that covered the misconduct in question).

21. *See* Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility As an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 145–46 (2011–12) (arguing for the necessity of specificity in identifying particular civility-based obligations).

22. In his comprehensive and authoritative treatment of the subject, Professor Eugene R. Gaetke exposed the definitional and substantive inadequacies of the officer-of-the-court designation. Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 40–48 (1989). His primary mode of analysis consisted of a thoughtful examination of the then extant ethical rules and non-disciplinary obligations that could be categorized as officer-of-the-court duties. *Id.* at 48–76. This analysis led him to conclude that the profession either needed to abandon use of the officer-of-the-court description or else imbue the phrase with true meaning by adopting clear rules of professional conduct that affirmatively subordinate the interests of lawyers and their clients to those of the legal system and the public. *Id.* at 90–91. Adoption of Professor Gaetke's position would enhance the operation of the approach endorsed in this Article by expanding the obligations that are clearly identifiable as falling under the officer-of-the-court rubric.

23. *Sahyers I*, 560 F.3d 1241, 1243 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 415 (2010).

24. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (2006).

25. *Sahyers I*, 560 F.3d at 1243.

26. *Id.*

27. *Id.*

28. *Id.*

The parties' efforts to settle the dispute were unsuccessful, seemingly because Sahyers sought substantial damages but refused to provide the defendants with any proof regarding the amount purportedly owed.[29] Nevertheless, following the close of discovery, defendants made an offer of judgment pursuant to Federal Rule of Civil Procedure 68[30] in the amount of $3,500, which Sahyers accepted.[31]

The trial court entered judgment in Sahyers's favor and granted her leave to file a motion for attorney's fees and costs.[32] Defendants principally argued in response that Sahyers was not a prevailing party in the litigation and, therefore, was not entitled to any award under the FLSA.[33] The district court rejected this contention and, as a result, acknowledged that the Act provided for a mandatory award of reasonable attorney's fees to Sahyers.[34] Despite this concession, the court observed that some cases involve "special circumstances" in which a reasonable fee amounts to "no fee" and concluded that Sahyers's case fell into this category because of her counsel's failure to provide any pre-suit notice to defendants.[35] While the court stopped short of finding that a formal pre-suit demand letter is always required, it emphasized that:

> [T]he [p]laintiff's lawyer did not even make a phone call to try to resolve the issue before filing suit. The [d]efendant is a law firm. Prior to filing suit in

29. *Id.* In addition, it is significant to note that during discovery plaintiff objected to providing defendants with any evidence regarding the total number of excess hours she purportedly worked. *Id.*

30. Rule 68 of the Federal Rules of Civil Procedure provides, in pertinent part, that:

> At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

FED. R. CIV. P. 68(a).

31. *Sahyers I*, 560 F.3d at 1243. Besides the $3,500, defendants' offer of judgment also included any attorney's fees and costs to which the court deemed that plaintiff was entitled. *Id.*

32. *Id.* In her motion, Sahyers requested $13,800 in fees and $1,840.70 in costs. *Id.*; *see* 29 U.S.C. § 216(b) (2006) (setting forth standards to determine award of attorney's fees and costs in an FLSA action).

33. Sahyers v. Prugh, Holliday & Karatinos, P.L., No. 8:07-cv-52-T-30MAP, 2008 U.S. Dist. LEXIS 112849, at *2 (M.D. Fla. Feb. 1, 2008). Specifically, defendants contended that their inclusion of a nonliability term in the offer of judgment, which Sahyers accepted, effectively amounted to an agreement that defendants were not liable for any wrongdoing. *Id.* Along the same lines, defendants maintained that the judgment entered by the district court was not on the merits and, hence, the legal relationship between the parties remained unchanged—i.e., there was no prevailing party. *Id.*

34. *Id.* at *4.

35. *Id.* at *4–5.

> this local area, it is still reasonable to pick up the phone and call another lawyer so it won't be necessary to file suit.[36]

Though the court may have been somewhat concerned with enforcing common courtesy amongst members of the bar,[37] it is apparent that the court's primary distress related to conservation of judicial time and resources.[38] In the court's view, pre-suit notice, under circumstances such as those involved here, might have completely obviated the need for a lawsuit.[39] It is possible, the court remarked, that a defendant could unknowingly fail to compensate an employee for overtime and without a pre-action demand, would be denied the opportunity to voluntarily make restitution outside of litigation.[40] The fact that defendants in this case were lawyers may have had some bearing on the court's decision, but this seemed far less important than the judicial economy concern.[41] In short, the court viewed an award of fees and expenses in the context of this case as tantamount to rewarding what it considered to have been "unnecessary litigation."[42]

Interestingly, Sahyers's counsel's only explanation for his failure to make the desired pre-suit demand was that "his client did not want him to."[43] In response, the court pointedly reminded him that "the lawyer is the *officer of the [c]ourt, not the client*."[44]

B. *Decision on Appeal*

On appeal, the Eleventh Circuit made it evident from the very first sentence that the case was "about the power of a district court to supervise the work of the lawyers who practice before it."[45] *Sahyers I* characterized the district court's decision as having recognized an exception to the

36. *Id.* at *5.

37. *See id.* (observing that Sahyers's attorney "did not even make a phone call" or any other reasonable effort to work with defendant's counsel before initiating suit).

38. *See id.* at *6 ("This [c]ourt refuses to reward unnecessary litigation.").

39. *See id.* (opining that pre-suit notice would have afforded the defendant an opportunity to pay the overtime shortage outside of litigation and to show "its good faith desire to . . . compensate the employee").

40. *Id.*

41. *See id.* at *5–6 (observing that failure to afford the defendant a pre-suit opportunity to resolve the action subjects the defendant to additional costs and attorney's fees and results in the devotion of judicial resources to unnecessary litigation).

42. *Id.* at *6.

43. *Id.* at *7.

44. *Id.* (emphasis added). The court added that it would "not permit lawyers to file unnecessary litigation and palm it off on their clients." *Id.*

45. *Sahyers I*, 560 F.3d 1241, 1243 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 415 (2010).

general rule under the FLSA, which mandates the award of reasonable attorney's fees and expenses to prevailing plaintiffs.[46] The basis for this exception, according to the court, was the trial court's "inherent powers to supervise the conduct of the lawyers who come before it and to keep in proper condition the legal community of which the courts are a leading part."[47]

The court further maintained that these inherent powers "derive[] from a lawyer's role as an officer of the court" and include "the authority to police lawyer conduct and to guard and to promote civility and collegiality among the members of its bar."[48] This forthright nod to the cultivation of behavioral norms ultimately proved pivotal to the court's analysis, as it found plaintiff's counsel's failure to provide pre-suit notice to defendants to be contrary to these ideals.[49]

Critical to this assessment was the fact that defendants were attorneys. In the court's view, it was the height of incivility for plaintiff's counsel to sue fellow members of the bar without affording them some type of forewarning and opportunity to respond.[50] The court stated that:

> Plaintiff's lawyer slavishly followed his client's instructions and—without a word to [d]efendants in advance—just sued his fellow lawyers. As the district court saw it, this conscious disregard for lawyer-to-lawyer collegiality and civility caused (among other things) the judiciary to waste significant time and resources on unnecessary litigation and stood in stark contrast to the behavior expected of an officer of the court.[51]

As if this indictment of counsel's behavior were not enough, the court also went so far as to deem his lack of pre-suit notice, under the circumstances, as rising to the level of bad faith.[52] The court concluded that the trial court's refusal to award any attorney's fees or costs to plaintiff constituted a legitimate refusal "to reward—and thereby to encourage—

46. *Id.* at 1244 (citing 29 U.S.C. § 216(b) (2006); Dale v. Comcast Corp., 498 F.3d 1216, 1223 n.12 (11th Cir. 2007); Kreager v. Solomon & Flanagan, P.A., 775 F.2d 1541, 1542 (11th Cir. 1985)).

47. *Id.*

48. *Id.* (citing Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991); *In re* Finkelstein, 901 F.2d 1560, 1564 (11th Cir. 1990)).

49. *Id.* at 1245.

50. *See id.* at 1245 n.7 ("Plaintiff's lawyer showed . . . no courtesy to his fellow lawyers.").

51. *Id.* at 1245 (footnote omitted).

52. *See id.* at 1246 n.9 ("[E]ven if bad faith is required, we conclude that the conscious indifference to lawyer-to-lawyer collegiality and civility exhibited by [p]laintiff's lawyer (per his client's request) amounted to harassing [d]efendants' lawyers by causing them unnecessary trouble and expense and satisfied the bad-faith standard.").

uncivil conduct."[53]

After this strong endorsement of the district court's perceived efforts to promote civility and collegiality, the court ended its opinion by ineffectually endeavoring to narrow its holding. The Eleventh Circuit first cautioned against reading too much into the decision and stressed its fact-intensive nature.[54] The court then awkwardly cabined its opinion in the following manner:

> We put aside cases in which lawyers are not parties. We do not say that pre-suit notice is usually required or even often required under the FLSA to receive an award of attorney's fees or costs. Nor do we now recommend that courts use their inherent powers to deny prevailing parties attorney's fees or costs. We declare no judicial duty. We create no presumptions. We conclude only that the district court did not abuse its discretion in declining to award some attorney's fees and costs based on the facts of this case.[55]

Notwithstanding all of these stultifying provisos, once the genie is out of the bottle, it cannot be restrained so easily, as the judges who dissented from the denial of plaintiff's request for a rehearing en banc essentially maintained.[56]

C. *Denial of Request for Rehearing*

Following the Eleventh Circuit panel's decision upholding the denial of attorney's fees and costs, Sahyers requested a rehearing en banc.[57] Though denied, there was significant disagreement among several members of the court.[58] Indeed, the author of the *Sahyers I* opinion, Judge J. L. Edmondson, felt compelled to issue a concurring opinion defending the panel's holding and reasoning.[59]

In responding to concerns that the court had improperly overridden the FLSA's mandatory fee award provision, Judge Edmondson explained that

53. *Id.* at 1245.

54. *Id.* at 1246.

55. *Id.*

56. *See Sahyers II*, 603 F.3d 888, 896 (11th Cir. 2010) (en banc) (Wilson, J., dissenting) (lamenting that *Sahyers*, in effect, created binding precedent that the mandatory attorney's fees requirement under the FLSA is now subject to a discretionary exception).

57. *Id.* at 889 (Edmondson, J., concurring).

58. *Compare id.* at 890–91 (stating that the decision did not create a new rule and was needed to protect civility within the judicial system), *with id.* at 892 (Wilson, J. dissenting) (arguing that the panel's decision created bad precedent and expressing doubts about its reasoning), *and id.* at 891–92 (Barkett, J., dissenting) (opining that the district court exceeded its authority to sanction the attorney and ignored "the express mandate of Congress").

59. *Id.* at 889–91 (Edmondson, J., concurring).

the FLSA was not the exclusive law governing this case.[60] In his view, the court's "inherent powers supplement[] the FLSA statute to make up the whole of the applicable law."[61] According to him:

> When the *outcome* favors the plaintiff, fees shall be awarded *unless* the [d]istrict [c]ourt, in the reasonable exercise of its power to supervise lawyers in their practice in cases before the [c]ourt, determines that an award of fees (given the specific circumstances of a particular case) is not right—not right directly because of lawyer *conduct* related to the specific case.[62]

Judge Edmondson went on to laud the importance of this inherent authority and to contend that courts should be reluctant to permit its dilution by the legislative branch.[63] Although he somewhat grudgingly admitted that Congress could abrogate the court's power to supervise lawyers, he maintained that it would have to do so "specifically, explicitly, and directly."[64]

Judge Edmondson, however, was quick to reiterate the narrowness of the court's holding. He stressed that neither the panel's opinion nor the district court's order created a procedural rule requiring pre-suit notice in FLSA cases, even when lawyers are suing individual lawyers.[65] Though this observation may have been technically accurate, it seems relatively obvious that, going forward, a lawyer suing a fellow officer of the court under the FLSA would be foolish not to provide some sort of pre-litigation notification, certainly within the Eleventh Circuit, if not elsewhere.[66]

More importantly, though, Judge Edmondson's restatement of the decision's limited reach does not in any way contract the broad inherent authority and officer-of-the-court monitoring apparatus that he and his fellow panel members endorsed. Indeed, he revisited this foundational reasoning when he framed the district court's decision as involving the supervision of lawyers and the promotion of mutual civility and respect.[67]

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60. *Id.* at 889.

61. *Id.*

62. *Id.* at 889–90.

63. *See id.* at 890 ("Courts ought to be highly reluctant to cede this traditional power dealing with control of lawyer conduct in respect to cases that come before the [c]ourts . . . .").

64. *Id.* Judge Edmondson also averred: "I believe that I am correct to say that Congressional abrogation of the [c]ourt's inherent power to supervise lawyer conduct must be clear and plain, before the [c]ourts let that critical power get away." *Id.*

65. *Id.*

66. *See id.* at 896 (Wilson, J., dissenting) (observing that even though the opinion states it does not intend to create a new rule of pre-suit notice, "*Sahyers* is a published opinion, which makes it binding precedent in [the Eleventh Circuit]").

67. *Id.* at 890–91 (Edmondson, J., concurring). Notably, to support the propriety of this approach, Judge Edmondson cited to a portion of the nonbinding Preamble to the Rules Regulating

Judge Edmondson concluded with the same quote that begins this Article,[68] underscoring the centrality for the public and the judicial system of "maintaining a bar that promotes civility and collegiality."[69]

Judge Edmondson's efforts to constrain *Sahyers*, if anything, rendered the decision even more ominous. Because rather than having a bright-line rule in the future to govern one's behavior, lawyers are left to speculate as to whether other slightly different factual circumstances may give rise to a similar pre-suit notice obligation or some other type of unarticulated civility-based procedural requirement.[70] The upshot is that litigators—at least within the Eleventh Circuit—must now contend with the looming prospect of being blindsided by the ad hoc recognition of officer-of-the-court duties that may conflict with obligations owed to their clients.

In fact, that is precisely what happened to plaintiff's counsel in this case, and what comprised the principal bone of contention for Judge Rosemary Barkett's dissent from the rehearing denial. In particular, given the panel's characterization of the trial court's denial of fees and costs as an "informal sanction,"[71] Judge Barkett maintained that plaintiff's counsel was entitled to some type of prior notice regarding the requirement of which he ran afoul.[72] In Judge Barkett's opinion, "[b]ecause Sahyers'[s] attorney was given no *actual notice*, the district court had no authority to sanction him for failing to contact the defendants or their lawyers before filing suit."[73] Moreover, this lack of notice, in her view, was exacerbated by the fact that the district court's exercise of inherent authority was in direct contravention of the FLSA's mandatory fees and costs language,[74] and

the Florida Bar that encourages lawyers to demonstrate respect toward one another. *Id.* at 890 (citing *Preamble*, RULES REGULATING THE FLORIDA BAR (1992)).

68. *See Sahyers I*, 560 F.3d 1241, 1244 n.5 (11th Cir. 2009) ("We believe and defend the idea that maintaining a bar that promotes civility and collegiality is in *the public interest* and greatly advances judicial efficiency: better 'to secure the just, speedy[,] and inexpensive determination of every action and proceeding,' as Rule 1 demands." (quoting FED. R. CIV. P. 1)), *cert. denied*, 131 S. Ct. 415 (2010).

69. *Sahyers II*, 603 F.3d at 891 (Edmondson, J., concurring).

70. *Cf. id.* at 894–95 (Wilson, J., dissenting) (maintaining that the court imposed a notice requirement contrary to the express language of the statute and failed to cite any rule to support its decision).

71. *Id.* at 891 (Barkett, J., dissenting).

72. *See id.* ("District courts do not have the authority to sanction lawyers for conduct not proscribed by law or rule—which is the case here—without first providing them with notice that their conduct may warrant sanctions." (citing FED. R. CIV. P. 83(b))).

73. *Id.* (citing *In re* Mroz, 65 F.3d 1567, 1575 (11th Cir. 1995)).

74. *See id.* (noting that "there is no dispute that the language of the statute is mandatory" (citing 29 U.S.C. § 216(b) (2006))); *see also* 29 U.S.C. § 216(b) (2006) ("The court in such action

thus, was "contrary to settled . . . Supreme Court precedent providing that the use of a district court's inherent supervisory powers is invalid when it conflicts with a statutory command."[75]

The other dissenter, Judge Charles Wilson, was even more pointed in his criticism. Judge Wilson's main concern was with what he considered to be the dangerous and insupportable precedent that the court's opinion established—that "it is now within the inherent authority and discretion of the district courts in our Circuit to hold that no attorney's fee is a reasonable fee when no pre-suit notice is extended to defendants who are lawyers."[76] Similar to Judge Barkett, Judge Wilson contended that the district court's denial of attorney's fees and costs was invalid because it conflicted with the FLSA's mandate.[77] The panel had, according to him, essentially read a pre-suit notice requirement into the terms of the FLSA, at least when an attorney or a law firm is the target of the action.[78] Though he acknowledged that "it is desirable to encourage lawyer collegiality and to discourage unnecessary litigation," Judge Wilson deemed it inappropriate for the court to revise mandatory legislation to further these policy objectives.[79]

More significantly, however, Judge Wilson expressed grave reservations about the out-of-the-blue manner in which the panel recognized the pre-suit notice duty. Specifically, the panel "failed to cite any statute, rule, local rule, or case from [the Eleventh] Circuit, the Middle District of Florida, or elsewhere that even arguably imposes a duty on an attorney to contact prospective opposing counsel where that counsel represents a law firm or a lawyer."[80] He also correctly noted the absence of any rule of professional conduct that would alert counsel to the necessity of providing soon-to-be lawyer-defendants with the "courtesy of advance notice."[81]

shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." (emphasis added)).

75. *Sahyers II*, 603 F.3d at 891 (Barkett, J., dissenting) (citing Bank of Nova Scotia v. United States, 487 U.S. 250, 284 (1988); Thomas v. Arn, 474 U.S. 140, 148 (1985)); *accord id.* at 892 (Wilson, J., dissenting) ("Although well-intentioned, I doubt that the federal courts have the inherent authority to ignore and override a statutory mandate in the interest of promoting a professional courtesy.").

76. *Id.* at 892. Judge Wilson later stated that the "*Sahyers* opinion provides binding precedent for a district court to ignore a clear Congressional mandate from a federal statute based on its 'inherent powers.'" *Id.* at 894.

77. *Id.*

78. *Id.*

79. *Id.* (citing Reeves v. Astrue, 526 F.3d 732, 738 (11th Cir. 2008)).

80. *Id.* at 894–95.

81. *Id.* at 895.

The sole basis for recognition of this obligation was the court's subjective assessment of what is required of attorneys as officers of the court, something that plaintiff's counsel could not possibly have predicted.

Even more troubling for Judge Wilson was the fact that this manufactured duty was given priority over plaintiff's counsel's duties to his client. While he conceded that certain duties owed to the court by counsel properly take precedence over client-centered responsibilities, the pre-suit notice requirement in the context of this case was not one of them.[82] Moreover, under the circumstances presented, Judge Wilson concluded that there was nothing unlawful or unethical concerning plaintiff's counsel being instructed by his client to just file suit.[83] Consequently, he was actually ethically bound to do so.[84] Given this, to subject plaintiff's counsel to what amounted to a sanction for his failure to comport with a conflicting duty about which he had no prior notice—even in the interest of promoting civility, collegiality, and judicial efficiency—seems to have been unreasonable, at best.[85]

While Judges Wilson's and Barkett's disapproval of and reservations about the panel's decision are well-justified, the implications of *Sahyers* for litigators, in reality, may be more significant and potentially far-reaching than either of them contemplated. Part III elaborates upon these conceivable consequences.

III. IMPLICATIONS OF AN OFFICER-OF-THE-COURT-BASED PRE-SUIT NOTICE REQUIREMENT

Even if one accepts the proposition that *Sahyers* is limited to the narrow circumstances presented, serious concerns accompany the Eleventh

82. *See id.* (noting that "while counsel owes a duty to the court, *context matters*"). Judge Wilson also took issue with the court's broad pronouncement that lawyers' officer-of-the-court duties generally take priority over duties owed to clients. *Id.* at 894; *see In re* Abbott, 925 A.2d 482, 487–88 (Del. 2007) (per curiam) (remarking that attorneys, as officers of the court, owe a greater duty to the court to act within ethical boundaries than to the client's interests).

83. *Sahyers II*, 603 F.3d at 895 (Wilson, J., dissenting).

84. *See id* (observing that "not only is there no rule requiring plaintiff's counsel to give pre-suit notice to his fellow lawyers, plaintiff's counsel had an ethical duty to follow his client's instructions"); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002) (requiring that attorneys abide by clients' instructions "concerning the objectives of representation").

85. Judge Wilson closed his dissent by reiterating his misgivings about the precedent that the panel created, and observed that courts both within and outside of the Eleventh Circuit had begun to recognize "the proposition that no fee can be a reasonable fee under the FLSA when a plaintiff fails to give pre-suit notice to a lawyer-defendant." *Sahyers II*, 603 F.3d at 896 (Wilson, J., dissenting) (citing Roldan v. Pure Air Solutions, Inc., No. 07-22203-Civ, 2010 WL 410571, at *3 (S.D. Fla. Jan. 29, 2010)).

Circuit's recognition of the pre-suit notice obligation. At a minimum, the decision appears to open the door for district courts to exercise their inherent authority over officers of the court to deny attorney's fees in FLSA lawsuits against lawyers when plaintiffs' counsel fail to notify them of an impending action prior to filing.[86] More broadly, however, the decision potentially empowers courts—in the ephemeral interest of "maintaining a bar that promotes civility and collegiality"[87]—to recognize heretofore unarticulated duties through the exercise of their inherent authority.

Under *Sahyers*, it seems possible for district courts to punish whatever attorney behavior they subjectively consider to be inconsistent with proper litigation decorum because the panel's reasoning is readily transferable to virtually any lawsuit.[88] Convincing support for this contention flows directly from the two foundational pieces of the *Sahyers* courts' pre-suit notice duty—(1) the promotion of civility and collegiality;[89] and (2) the interest in judicial economy.[90]

A. *The Promotion of Civility and Collegiality Within the Bar*

The panel's opinion in *Sahyers* placed substantial importance on the maintenance of "a bar that promotes civility and collegiality," and noted that a federal court's inherent power to control attorneys who practice before it includes this authority.[91] As officers of the court, lawyers are beholden to this oversight and are bound to conform their behavior to procedural and ethical standards reasonably established by courts.[92]

86. *See id.* (observing that "[i]t is now within the discretion of district courts in our [c]ircuit to deny attorney's fees to lawyers who fail to extend professional courtesies to lawyer-defendants in FLSA and (presumably other) civil rights cases").

87. *Id.* at 891 (Edmondson, J., concurring).

88. *See id.* at 894 (Wilson, J., dissenting) (arguing that the opinion reads a requirement of pre-suit notice into the FLSA, at least where a lawyer or law firm is the defendant, thus giving itself the discretion to disregard the limits of the law it is charged with enforcing). Given the narrow scope of the opinion, it admittedly may be more plausible that courts will limit their utilization of the *Sahyers* blueprint to recognition of pre-suit notice obligations, but its underlying reasoning clearly allows for potentially wider use. *See id.* at 891 (Edmondson, J., concurring) (stating that one of the purposes of *Sahyers* was to promote collegiality in the judicial system).

89. *Id.*

90. *See Sahyers I*, 560 F.3d 1241, 1245 (11th Cir. 2009) (stating that the plaintiff's lawyer's actions caused the district court "to waste significant time and resources on unnecessary litigation"), *cert. denied*, 131 S. Ct. 415 (2010).

91. *Id.* at 1244 & n.5.

92. *See In re* Abbott, 925 A.2d 482, 487–88 (Del. 2007) (per curiam) (stating that a lawyer's obligation to follow a court's ethical requirements exceeds the duty to further a client's interests); State *ex rel.* Foster v. City of Kansas City, 350 P.2d 37, 43–44 (Kan. 1960) (concluding that when

As a general matter, there is certainly nothing objectionable about such a framework. Be that as it may, what qualifies as incivility will undoubtedly vary depending upon the circumstances involved and the presiding judge.[93] Indeed, under the very facts of *Sahyers*, it would have been entirely plausible for a different court to have found nothing offensive about a lawyer obediently filing a lawsuit on behalf of a client who had a factually and legally supportable claim, as did the plaintiff in that case.[94] In *Sahyers*, however, plaintiff's counsel's blind adherence to his client's instructions, combined with defendants' status as attorneys, rendered the absence of notice peculiarly repugnant,[95] and even led the panel to conclude that he had acted in bad faith.[96]

In addition, Judge Edmondson enhanced the troubling likelihood that courts may reach disparate conclusions in assessing attorney deportment by tying the inherent authority to recognize and enforce civility-based officer-of-the-court duties to local customs and practices.[97] More precisely, he observed for the panel that "[t]he customs of professional courtesy were important to the district court."[98] He further sharpened this characterization in his concurrence accompanying the denial of a rehearing en banc, maintaining that "[t]he District Judge specifically tied his decision to the local practices,"[99] and acknowledging that "judges in other areas of [the Eleventh] Circuit may have different views based upon

the state attorney general enters the court in his executive capacity, he becomes an officer of the court subject to the ethics code); *see also* Leimer v. Hulse, 178 S.W.2d 335, 339 (Mo. 1944) (stating that for a lawyer "[t]o properly do his part as an officer of the court in the administration of justice, his conduct must conform to a high standard of ethics").

93. *See, e.g.*, Donald E. Campbell, *Raise Your Right Hand and Swear to be Civil: Defining Civility As an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 141 (2011–12) (noting that "[i]n attempting a definition [of civility], one author went so far as to suggest that the best that can be said . . . is, like Justice Stewart's assessment of pornography, that 'you know it when you see it'" (footnote omitted) (citing Robert N. Sayler, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1988, at 79, 79)).

94. *See Sahyers II*, 603 F.3d 888, 895 (11th Cir. 2010) (en banc) (Wilson, J., dissenting) (observing that "plaintiff merely instructed her counsel to file a lawsuit, which—considering the fact that defendants filed an answer as opposed to a motion to dismiss and ultimately offered judgment—appeared to have at least, *some* merit").

95. *See Sahyers I*, 560 F.3d at 1245 (observing that "[p]laintiff's lawyer slavishly followed his client's instructions and—without a word to [d]efendants in advance—just sued his fellow lawyers"). In a similar vein, the panel also observed that "[p]laintiff's lawyer showed little concern for the district court's time and energy and no courtesy to his fellow lawyers." *Id.* at 1245 n.7.

96. *Id.* at 1246 n.9.

97. *See id.* at 1245 n.8 (noting that the customs of professional conduct were influential to the district court's judgment).

98. *Id.*

99. *Sahyers II*, 603 F.3d at 891 (Edmondson, J., concurring).

different local circumstances."[100] Moreover, the Eleventh Circuit panel made matters worse by wedding these provincial notions of civility and collegiality to the equally pliable interest in judicial efficiency.[101]

B. *The Interest in Judicial Efficiency*

Rule 1 of the Federal Rules of Civil Procedure supplies the guiding principle by which the succeeding rules are to be interpreted and applied—"[t]hey should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[102] The latter statement embodies the concept of judicial efficiency, which is ever in the forefront of most federal judges' minds, not just with regard to the administration of procedural rules, but also in connection with all other aspects of the litigation process.[103] Indeed, in 1993, the words "and

100. *Id.* Interestingly, Judge Barkett, in her dissent, took issue with Judge Edmondson's position regarding the significance of local attorney etiquette to recognition of the pre-suit notice obligation. *See id.* (Barkett, J., dissenting) (disagreeing that the basis for the district court's decision was on local customs). Rather than basing its decision on local customs and practices, she contends that all the district court really did was express its view that it is "reasonable" to contact another lawyer before filing suit. *Id.* *But see* Sahyers v. Prugh, Holliday & Karatinos, P.L., No. 8:07-cv-52-T-30MAP, 2008 U.S. Dist. LEXIS 112849, at *5 (M.D. Fla. Feb. 1, 2008) ("Prior to filing suit in this local area, it is still reasonable to pick up the phone and call another lawyer so it won't be necessary to file suit."). As noted, the focus of her dissent was on the inequity of imposing a pre-suit notice requirement on plaintiff's counsel in the absence of any prior warning, and her assessment of the manner in which the trial judge reached his decision strengthens her position. *See Sahyers II*, 603 F.3d at 891–92 (Barkett, J., dissenting) (opining that because the district court's decision was not based on any law, rule, or local custom, plaintiff's attorney should have been afforded notice before the sanction). In other words, the fact that the judge did not base his recognition of the duty on the existence of an identifiable local custom renders his determination all the more unpredictable. Judge Wilson, in his dissent, failed to even acknowledge the ostensible "local custom" aspect of the trial court's decision. For him, the absence of an articulated statute or rule that created the pre-suit notice obligation was the real problem. *See id.* at 895–96 (Wilson, J., dissenting) (arguing that the district court's decision was not based on any existing rule and its reliance upon a Second Circuit case was misplaced (citing Litton Sys., Inc. v. Am. Tel. & Tel. Co., 700 F.2d 785 (2d Cir. 1983))).

101. *See Sahyers I*, 560 F.3d at 1245 (ruling that the district court was correct in deciding that the "conscious disregard for lawyer-to-lawyer collegiality and civility caused (among other things) the judiciary to waste significant time and resources on unnecessary litigation and stood in stark contrast to the behavior expected of an officer of the court").

102. FED. R. CIV. P. 1.

103. *See* Thomas v. Independence Twp., 463 F.3d 285, 301–02 (3d Cir. 2006) (affirming district court's discretion to order a more definite statement of pleadings "to avoid a waste of judicial resources"); Gulf Grp. Holdings, Inc. v. Coast Asset Mgmt. Corp., 516 F. Supp. 2d 1253, 1265 (S.D. Fla. 2007) ("Procedural rules are designed to assist in case management and to prevent prejudice to litigants, not to provide avenues for a litigant to escape liability on the basis of opposing counsel's technical misstep."); Berube v. Great Atl. & Pac. Tea Co., No. 3:06cv197 (PCD), 2006 WL 3826702, at *5 (D. Conn. Nov. 30, 2006) (emphasizing the need to adhere to discovery deadlines because to do otherwise would embrace a "chaotic system" making it "impossible for cases to be resolved in a 'just, speedy, and inexpensive' manner contemplated by Rule 1" (quoting Billups

administered" were added to the rule for the express purpose of emphasizing the "*affirmative duty* of the court to exercise the authority conferred by [the Federal Rules of Civil Procedure] to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay."[104]

In *Sahyers*, the Eleventh Circuit emphasized the importance of inherent authority to federal courts' strong interest in procedural efficiency and proclaimed that adherence to the ideals of civility and collegiality within the profession meaningfully advances that objective.[105] In other words, by working together in a courteous and cooperative fashion, lawyers enhance the likelihood that justice will be obtained inexpensively and expeditiously.[106] Had Sahyers's counsel acted with the requisite professional courtesy by providing the defendants with pre-suit notice of Sahyers's claim, the court suggests that the dispute would have been resolved without resort to litigation, thereby avoiding the unnecessary expenditure of time and effort by the trial court.[107]

Significantly, the Eleventh Circuit linked the systemic obligation to assist in the maintenance of an efficient judicial process to Sahyers's counsel's status as an officer of the court.[108] While that phrase is admittedly somewhat confusing and subject to varying interpretations,[109]

v. West, No. 95 Civ. 1146 (KMW)(HBP), 1997 WL 100798, at *2 (S.D.N.Y. Mar. 6, 1997))); Enright v. Auto-Owners Ins. Co., 2 F. Supp. 2d 1072, 1072 (N.D. Ind. 1998) (invoking authority under Rule 1 and other judicial economy-related rules to impose a thirty-hour limitation for trial "to ensure the interests of justice and to most effectively utilize the court's resources"); Jackson v. Cnty. of Sacramento, 175 F.R.D. 653, 658 (E.D. Cal. 1997) (limiting discovery to avoid undue expense in accordance with Rule 1 (citing Herbert v. Lando, 441 U.S. 153, 175 (1979))).

104. FED. R. CIV. P. 1 advisory committee's note to 1993 amendment (emphasis added).

105. *Sahyers I*, 560 F.3d at 1244–45.

106. *See id.* at 1244 n.5 (declaring that "maintaining a bar that promotes civility and collegiality is in *the public interest* and greatly advances judicial efficiency").

107. *See id.* at 1245 (contending that plaintiff's uncivil behavior "caused . . . the judiciary to waste significant time and resources on unnecessary litigation").

108. *See id.* (stating that the waste of judicial resources by uncivil behavior "stood in stark contrast to the behavior expected of an officer of the court").

109. *See infra* Part V.B (discussing various perspectives on the meaning of officer of the court); *see also* Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 77 (1989) (observing that the conflict between a lawyer's role as an officer of the court and the more definitive zealous advocacy duty "creates confusion and cynicism within the bar" (citing Heinz & Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111, 1140 (1978); E. Wayne Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession*, 1976 UTAH L. REV. 95, 100)); George A. Riemer, *Officers of the Court: What Does it Mean?*, OR. ST. B. BULL., Aug.-Sept. 2001, at 27, 27 (contending that the officer of the court label "is very ambiguous in meaning and gets in the way of understanding the source and scope of the ethical duties of lawyers" (citing 37 Or. Op. Att'y Gen. 1251 (1976))). *See generally* James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the*

it is frequently associated with a lawyer's perceived role as an actual agent of the court in regard to the administration of justice.[110] Utilizing this conception of the standard, the Eleventh Circuit deemed it incumbent upon Sahyers's attorney to act essentially as a judicial gatekeeper, protecting the legal system from needless expense and effort.[111]

It is undeniable that the officer-of-the-court and judicial efficiency components of *Sahyers*'s pre-suit notice duty cannot be restricted solely to the facts and circumstances presented. Lawyers are officers of the court no matter what the litigation context,[112] and presumably their related responsibility to safeguard the process goes hand-in-hand with that legal station. Hence, it was, at best, naïve for the Eleventh Circuit to aver that its decision did not establish precedent for recognition of pre-suit notice

Court", 48 BUFF. L. REV. 349, 387–408 (2000) (providing a thoughtful critique of the confusion caused by the officer-of-the-court title with regard to a lawyer's proper role).

110. *See* FED. R. CIV. P. 1 advisory committee's note to 1993 amendment (observing that "as officers of the court, attorneys share [the court's] responsibility" to ensure the fair and efficient resolution of civil litigation); *see also* Minority Police Officers Ass'n of S. Bend v. City of S. Bend, Ind., 721 F.2d 197, 199 (7th Cir. 1983) (noting that because subject-matter jurisdiction cannot be created through consent of the parties, federal courts "have an independent obligation to police the constitutional and statutory limitations on [their] jurisdiction, and . . . counsel, as officers of the court, have a professional obligation to assist . . . in this task"); Consumer Crusade, Inc. v. Pub. Tel. Corp. of Am., No. 05-cv-00208-MSK-CBS, 2006 WL 2434081, at *7 (D. Colo. Aug. 21, 2006) (maintaining that while "[e]very party has the right to zealously pursue all legal relief to which they may be entitled, . . . counsel have a concomitant obligation as officers of the court and stewards of the process to discourage the pursuit of . . . frivolous, inconsequential, or ineffective remedies"); People *ex rel.* Karlin v. Culkin, 162 N.E. 487, 489 (N.Y. 1928) (stating that a lawyer, once admitted to the bar, becomes an officer of the court); Langen v. Borkowski, 206 N.W. 181, 190 (Wis. 1925) (remarking that a lawyer "occupies what may be termed a quasi[-]judicial office"); *infra* Part V.B (discussing how courts use the officer-of-the-court label to emphasize the "higher calling" aspect of a lawyer's role).

111. Other courts have embraced similar conceptions of what is required of their legal "officers." *See* Cicero v. Borg-Warner Auto., Inc., 163 F. Supp. 2d 743, 750 (E.D. Mich. 2001) ("As officers of the court, attorneys have obligations not just to their clients, but also to the court, their opponents, and society at large, to refrain not only from filing meritless lawsuits, but to refrain from prosecuting them once it becomes clear that they are without merit."); *infra* Part V.B (arguing that courts sometimes adopt a "gatekeeper" view of a lawyer's officer-of-the-court duties as seen in *Cicero*); *cf.* Chi. Title & Trust Co. v. Verona Sports Inc., 11 F.3d 678, 679 (7th Cir. 1993) (observing in the appellate context that "[c]ounsel, as an officer of the court, has a special responsibility to avoid needless expenditure of judicial resources by addressing the issue of settlement, when appropriate, at a point in the preparation of the appeal that does not place needless strain upon the court").

112. *See* FED. R. CIV. P. 1 advisory committee's note to 1993 amendment (discussing that attorneys, acting as officers of the court, are entrusted with responsibility to promote the fair and efficient resolution in civil litigation); *Culkin*, 162 N.E. at 489 (stating that a lawyer becomes an officer of the court following admission to the bar); *see also* Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 48 (1989) (explaining that as officers of the court, lawyers must assume a quasi-judicial role which may force the subordination of client interests to serve the interests of the public and judicial system).

obligations in other settings.[113]

As further support for this proposition, it is instructive to examine the purpose underlying the widely-adopted pre-suit notice requirement in medical malpractice cases. Part IV demonstrates that the basis for mandating pre-filing notification in such cases mirrors the Eleventh Circuit's principal rationale in *Sahyers*.

IV. PRE-SUIT NOTICE IN MEDICAL MALPRACTICE ACTIONS

A common requirement in medical malpractice cases is that plaintiffs formally notify defendants of their intent to sue prior to instituting an action. In Texas, for example, Section 74.051(a) of the Civil Practices and Remedies Code provides that:

> Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim.[114]

Florida has a similar provision that imposes a ninety-day waiting period following the mailing of the required notice[115] and mandates, as a prerequisite, pre-suit investigation.[116]

There are two related purposes for such provisions, both of which center around a concern for judicial efficiency. The first is to promote settlement

113. *See Sahyers I*, 560 F.3d at 1246 (stating that *Sahyers* did not establish precedent and is limited to its facts).

114. TEX. CIV. PRAC. & REM. CODE ANN. § 74.051(a) (West 2011).

115. *See* FLA. STAT. ANN. § 766.106(3)(a) (West Supp. 2012) ("No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant.").

116. *See id.* § 766.106(2)(a) ("After completion of pre[-]suit investigation pursuant to § 766.203(2) and prior to filing a complaint for medical negligence, a claimant shall notify each prospective defendant by certified mail, return receipt requested, of intent to initiate litigation for medical negligence."); *see also* CAL. CIV. PROC. CODE § 364(a) (Deering 2005) ("No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action."); D.C. CODE § 16-2802(a) (LexisNexis 2001) ("Any person who intends to file an action in the court alleging medical malpractice against a healthcare provider shall notify the intended defendant of his or her action not less than 90 days prior to filing the action."); MICH. COMP. LAWS SERV. § 600.2912b(1) (LexisNexis 2004) ("[A] person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced."); UTAH CODE ANN. § 78B-3-412(1)(a) (LexisNexis 2008) ("A malpractice action against a health care provider may not be initiated unless and until the plaintiff gives the prospective defendant or his executor or successor, at least 90 days' prior notice of intent to commence an action.").

without the necessity of an actual lawsuit.[117] Specifically, pre-suit notice is believed to open the line of communication between opposing counsel before the respective parties expend substantial time and money on the dispute and almost invariably become entrenched in their adversarial positions.[118]

The second function served by the medical malpractice notice obligation is to weed out frivolous claims. Though this purpose is more closely tied to the merits-related certification requirements that typically accompany such provisions,[119] notice itself also undeniably plays a role here. In particular, it forces plaintiffs to reflect upon and perhaps reconsider their contentions before proceeding and gives defendants the chance to respond, possibly in a fashion that alerts plaintiffs to the potentially meritless nature of their proposed actions.[120]

It is interesting to note that encouraging settlement and deterring frivolous litigation are the only rationales offered for pre-suit notice in the

117. *See* Rabatin v. Kidd, 281 S.W.3d 558, 562 (Tex. App.—El Paso 2008, no pet.) (observing that "[t]he [l]egislature's purpose in requiring notice in a medical liability suit is to encourage pre-suit negotiations, settlement, and reduce litigation costs" (citing Hill v. Russell, 247 S.W.3d 356, 360 (Tex. App.—Austin 2008, no pet.))); *see also* Largie v. Gregorian, 913 So. 2d 635, 638 (Fla. Dist. Ct. App. 2005) (proclaiming that Florida's medical malpractice pre-suit procedures "establish[] a process intended to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding" (alteration in original) (citations omitted)).

118. *See, e.g.*, Rhoades v. Sw. Fla. Reg'l Med. Ctr., 554 So. 2d 1188, 1190 (Fla. Dist. Ct. App. 1990) (observing that the medical malpractice pre-suit notification and investigation provisions "evidence a clear legislative intent to discourage costly and time-consuming medical malpractice litigation, to promote the culling of meritless claims, and to encourage settlement of meritorious claims").

119. Most medical malpractice pre-suit notice provisions also require that plaintiffs certify, in some manner, the validity of their claims, usually by way of an expert affidavit or other formal verification. *See* IND. CODE ANN. § 34-18-8-4 (LexisNexis 2008) ("[A]n action against a health care provider may not be commenced in a court in Indiana before: (1) the claimant's proposed complaint has been presented to a medical review panel established under IC 34-18-10 . . . and (2) an opinion is given by the panel."); N.M. STAT. ANN. § 41-5-15(A) (LexisNexis 2004) ("No malpractice action may be filed in any court against a qualifying health care provider before application is made to the medical review commission and its decision is rendered."); S.C. CODE ANN. § 15-79-125(A) (Supp. 2011) (requiring pre-filing notice, as well as an affidavit of an expert witness).

120. *See* Slaughter v. United States, No. 5:08-1016, 2010 WL 1380009, at *7 (S.D. W. Va. Feb. 3, 2010) (restating the West Virginia Supreme Court's position that "the purposes of requiring a pre-suit notice of claim and screening certificate of merit are (1) to prevent the making and filing of frivolous medical malpractice claims and lawsuits; and (2) to promote the pre-suit resolution of non-frivolous medical malpractice claims" (quoting Hichman v. Gillette, 618 S.E.2d 387, 394 (W. Va. 2005)) (internal quotation marks omitted)); Univ. of Miami v. Wilson, 948 So. 2d 774, 777 (Fla. Dist. Ct. App. 2006) ("The policy underlying the medical malpractice statutory scheme is to require the parties to engage in meaningful pre[-]suit investigation, discovery, and negotiations, thereby screening out frivolous lawsuits and defenses and encouraging the early determination and prompt resolution of claims." (citing Kukral v. Mekras, 679 So. 2d 278, 284 (Fla. 1996))).

medical malpractice context. Unlike the *Sahyers* notice requirement,[121] there is no mention of any desire to promote civility or collegiality within the bar, nor is the obligation characterized as emanating from a lawyer's role as an officer of the court. The most telling distinction, however, is the bright-line statutory codification of the notice duty for malpractice cases.

By affording lawyers advance warning of their responsibility to notify the opposition prior to filing an action, legislatures have eased the potential tension that could exist between plaintiffs' counsel endeavoring to fulfill their duties as loyal, zealous client advocates while simultaneously living up to their obligations as officers of the court. In other words, counsel has no choice regarding whether to apprise a prospective adversary of an impending action.[122] If a plaintiff, as in *Sahyers*, demands that his or her attorney file suit immediately without first contacting the defendants or their counsel, the attorney would be legally unable to follow those instructions. In fact, not only would it be improper to do so, it would also, at a minimum, result in potentially prejudicial delay of the plaintiff's action,[123] a fact that competent counsel would undoubtedly explain to a recalcitrant client.[124]

The medical malpractice example plainly demonstrates that there is nothing intrinsically wrong with a pre-suit notice duty. In fact, it seems like an eminently reasonable requirement with various salutary benefits, the most significant of which is enhanced judicial efficiency.[125] Furthermore, even though the officer-of-the-court tag is not overtly utilized as a justification for the obligation by legislatures, it is clear that

121. *Sahyers I*, 560 F.3d 1241, 1245–46 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 415 (2010).

122. *See* CAL. CIV. PROC. CODE § 364(a) (Deering 2005) (requiring notice before a medical malpractice suit can be initiated); FLA. STAT. ANN. § 766.106(3)(a) (West Supp. 2012) (same); MICH. COMP. LAWS SERV. § 600.2912b(1) (LexisNexis 2004) (same); TEX. CIV. PRAC. & REM. CODE ANN. § 74.051(a) (West 2011) (same).

123. *See* Hooper v. Sanford, 968 S.W.2d 392, 393 (Tex. App.—Tyler 1997, no pet.) (observing that "[i]t is well-settled law in Texas that a plaintiff's failure to give sixty days notice to defendants should result in abatement").

124. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2002) (providing that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

125. *See Slaughter*, 2010 WL 1380009, at *7 (emphasizing that pre-suit notice in medical malpractice is designed to discourage frivolous claims and lawsuits as well as to encourage the resolution prima facie malpractice claims before suit); *Wilson*, 948 So. 2d at 777 (explaining that the medical malpractice statutes are intended to influence counsel to engage in pre-suit discovery, thereby identifying frivolous claims and leading to the expeditious resolution of disputes); Rabatin v Kidd, 281 S.W.3d 558, 562 (Tex. App.—El Paso 2008, no pet.) (discussing that the notice requirement in medical practice cases is intended to promote pre-suit negotiations and settlements out of court).

this concept is likely lurking somewhere in the background.[126] As a result, notwithstanding its analytical flaws, the basis for *Sahyers*'s holding appears sound at its core. Lawyers, as officers of the court, owe it to the judiciary, the profession, and the public to treat one another in a civil and respectful manner, which will reliably lead to enhanced judicial efficiency.[127] That is the central message of *Sahyers*, and one would be hard-pressed to rationally disagree with its logic.

The problem, however, stems from the *ex post*, ad hoc approach employed by the court. *Sahyers*'s result would have been more palatable if, as in the medical malpractice setting, plaintiff's counsel had advance awareness of the pre-suit notice duty. He then could have explained to his client why it was not appropriate to file suit without first contacting the defendants. Generally, such a bright-line rule would simplify the lawyer's world and enable him or her to readily reconcile this particular officer-of-the-court duty with obligations owed to the client.[128] While uncomplicating the potential ethical dilemma for counsel in this fashion would be helpful, it could detract from the principal objective of promoting civility and collegiality more broadly in the public interest.

As a result, it is important to examine more deeply the potential effects of courts' utilization of looming, unarticulated officer-of-the-court responsibilities to achieve enhanced civility and collegiality. After elaborating upon the evolution and meaning of the officer-of-the-court label, Part V analyzes these effects.

126. Medical malpractice statutory objectives (i.e., preventing costly litigation and encouraging settlement) are similar to the goals espoused in *Sahyers* for the officer-of-the-court duties recognized. *Compare* Rhoades v. Sw. Fla. Reg'l Med. Ctr., 554 So. 2d 1188, 1190 (Fla. Dist. Ct. App. 1990) (same), *and Rabatin*, 281 S.W.3d at 562 (listing avoiding costly litigation and encouraging settlement as two goals of medical malpractice statutes), *with Sahyers I*, 560 F.3d at 1245 (remarking that it is the duty of an officer of the court to avoid causing "the judiciary to waste significant time and resources on unnecessary litigation").

127. *See* Cicero v. Borg-Warner Auto., Inc., 163 F. Supp. 2d 742, 750 (E.D. Mich. 2001) (stating that lawyers, under the officer-of-the-court label, have duties to their clients, opponents, and society to refrain from pursuing meritless lawsuits as well as refrain from continuing to pursue lawsuits upon the realization that they lack merit); *see also* Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 43 (1989) (explaining that the officer-of–the-court label suggests "lawyers owe a special duty to the judicial system or, perhaps, to the public that other participants in the legal process do not owe").

128. *Cf.* George A. Riemer, *Officers of the Court: What Does it Mean?*, OR. ST. B. BULL., Aug.-Sept. 2001, at 27, 27 (observing that the officer-of-the-court requirement is perplexing as a result of its ambiguity and often interferes with a lawyer's understanding of his or her ethical duties).

V. OFFICER-OF-THE-COURT STATUS AS A VEHICLE FOR PROMOTING CIVILITY AND COLLEGIALITY

A. *"Officer of the Court" Defined*

Black's Law Dictionary defines an officer of the court as one "who is charged with upholding the law and administering the judicial system."[129] While this description can be interpreted to encompass lawyers, *Black's* explains that the title is normally used in reference to judges, clerks, sheriffs, and other individuals commonly thought of as court officials in a strict governmental sense.[130] Nevertheless, the dictionary definition acknowledges that the officer-of-the-court label also applies to lawyers, albeit in a more limited fashion.[131] In particular, it suggests that two components of a lawyer's role justify "officer of the court" status: (1) the obligation to obey court rules; and (2) the duty of candor owed to the court.[132]

This definitional circumscription seems eminently logical in light of the more accepted usage of the officer-of-the-court designation. Specifically, for the judicial system to operate properly, the participants must fulfill certain roles. Judges, clerks, bailiffs, and sheriffs all have official responsibilities that facilitate the adjudicative process.[133] Although attorneys are typically private employees who represent nongovernmental interests, they are, nonetheless, integral pieces of the juridical puzzle.[134] As such, they must act not only to champion the private interests that they serve but also to assist in the fair and efficient administration of the process.[135] The lawyerly duties that attach to this latter facet of the

129. BLACK'S LAW DICTIONARY 1195 (9th ed. 2009).

130. *Id.*; *accord In re* Griffiths, 413 U.S. 717, 728 (1973) (noting that attorneys' status as officers of the court does not place them in the "same category as marshals, bailiffs, court clerks[,] or judges").

131. BLACK'S LAW DICTIONARY 1195 (9th ed. 2009).

132. *Id.*

133. *See* Petition of Mone, 719 A.2d 626, 633 (N.H. 1998) (describing the role of bailiffs as guarding juries and relaying messages to the judge); Langen v. Borkowski, 206 N.W. 181, 190 (Wis. 1925) (explaining "[t]he duties of the clerk of the court[]").

134. *See, e.g.*, *In re* Sawyer, 360 U.S. 622, 668 (1959) (Frankfurter, J., dissenting) (describing a lawyer as "an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense").

135. *See* FED. R. CIV. P. 1 advisory committee's note to 1993 amendment ("The purpose of this revision . . . is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned."); *see also* Minority Police Officers Ass'n of S. Bend v. City of S. Bend, Ind., 721 F.2d 197, 199 (7th Cir. 1983) (explaining that attorneys also have an obligation to assist the court in policing its jurisdiction); Consumer Crusade, Inc. v. Pub. Tel. Corp. of Am., No. 05-cv-00208-MSK-CBS,

attorney's role are delineated in *Black's*—adherence to rules that govern judicial proceedings and the all-important obligation to be forthright and honest with the court.[136]

The *Black's* definition, in effect, restricts attorneys' officer-of-the-court duties by linking them directly to readily cognizable legal standards. For example, if a lawyer disobeys a concrete rule of procedure or fails to disclose to the court controlling contrary authority not cited by the opposition,[137] under the *Black's* formulation, the lawyer has contravened his or her role as an officer of the court and should rightly be subject to appropriate consequences.[138] In the author's opinion, this approach embodies the better view in terms of defining the scope of a lawyer's officer-of-the-court responsibilities. Unfortunately, it is not representative of the philosophy that courts have traditionally embraced. Indeed, there is no single, clear definition for officer of the court as it pertains to lawyers, a fact that has historically created confusion.[139]

2006 WL 2434081, at *7 (D. Colo. Aug. 21, 2006) (stating that an attorney, "as an officer of the court," is obligated to not create unnecessary delay in litigation); People *ex rel.* Karlin v. Culkin, 162 N.E. 487, 489 (N.Y. 1928) (emphasizing the fact that attorneys, as officers of the court, are required to "advance the ends of justice"); *Langen*, 206 N.W. at 190 ("An attorney at law is an officer of the court. The nature of his obligations is both public and private. His public duty consists in his obligation to aid the administration of justice; his private duty, to faithfully, honestly, and conscientiously represent the interests of his client.").

136. *See* BLACK'S LAW DICTIONARY 1195 (9th ed. 2009) (explaining that the term "officer of the court . . . applies to a lawyer, who is obliged to obey court rules and who owes a duty of candor to the court").

137. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2002) ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . .").

138. *See* BLACK'S LAW DICTIONARY 1195 (9th ed. 2009) (stating that as officers of the court, lawyers must obey court rules).

139. *See* Cammer v. United States, 350 U.S. 399, 405 n.3 (1956) (citing to various cases that illustrate "confusion and difficulty of courts in explaining what is meant when a lawyer is called an officer of the court" (citations omitted)); *supra* Part III.B (noting that the officer-of-the-court label is confusing and subject to varying interpretations); *see also* Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 77 (1989) (observing that the conflict between a lawyer's role as an officer of the court and the more definitive zealous advocacy duty "creates confusion and cynicism within the bar" (citing Heinz & Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111, 1140 (1978); E. Wayne Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession*, 1976 UTAH L. REV. 95, 100))); George A. Riemer, *Officers of the Court: What Does it Mean?*, OR. ST. B. BULL., Aug.-Sept. 2001, at 27, 27 (contending that the officer-of-the-court label "is very ambiguous in meaning and gets in the way of understanding the source and scope of the ethical duties of lawyers").

B. *Varying Perspectives on the Meaning of Officer of the Court*

Although the genesis of officers of the court as a title for lawyers is not entirely clear,[140] its pedigree can be traced to England.[141] Specifically, English courts used to require that litigants "appear in court in company with an official court retainer"[142]—they literally had to retain a "court official" in addition to their privately retained solicitor.[143] It should also be noted that the first licensed legal professionals in England were actually "officers of the Crown and, therefore, of its court as well,"[144] and were apparently referred to as "[s]ervants at law of our lord, the King."[145]

Notwithstanding this technical, common law ancestry, officer of the court has never really been employed quite so literally in reference to private attorneys in America.[146] Rather, the phrase was originally used "to signal the close working relationship between courts and the lawyers appearing before them, and also that courts are the front-line regulators of lawyer conduct."[147] While this initial formulation seems somewhat akin to the stance proffered in *Black's*,[148] over time, the American usage took

140. *See* Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 42 (1989) (observing that "the origin of the characterization is murky") (citation omitted); *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 1.6 (1986) (noting that the "origins of the 'officer[-]of[-]the[-]court' title are obscure").

141. *See In re* Griffiths, 413 U.S. 717, 732 (1973) (Burger, C.J., dissenting) ("The role of a lawyer as an officer of the court predates the Constitution; it was carried over from the English system and became firmly embedded in our tradition."); Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1546 (11th Cir. 1993) (observing that the "concept is as old as the common law jurisprudence itself"); RUDOLPH J. GERBER, LAWYERS, COURTS, AND PROFESSIONALISM: THE AGENDA FOR REFORM 120 (1989) (noting that "[t]he term 'officer of the court' was once an integral part of the English system when lawyers were directly amenable to the king as parts of the royal judicial system"); 1 GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 1.8 (3d ed. Supp. 2011) (maintaining that American courts borrowed the notion of lawyers as officers of the court from the English); *see also* Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 42 (1989) (stating that many commentators have contended that "officer of the court" has its origins in England, where nonparty participants in the legal system were the Crown's officers and, therefore, also officers of the court (citing GEORGE WARVELLE, ESSAYS IN LEGAL ETHICS 29–31 (2d ed. 1920))).

142. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 1.6 (1986).

143. *Id.*

144. Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 42 (1989).

145. *Malautea*, 987 F.2d at 1546 (quoting GEORGE WARVELLE, ESSAYS IN LEGAL ETHICS 30 (1902)) (internal quotation marks omitted).

146. *See* 1 GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 1.8 (3d ed. Supp. 2011) (observing that "[a]lthough there is some evidence that at common law this literally meant that lawyers were considered to be *judicial* officers, and thus *members* of the court, that was never the American tradition").

147. *Id.*

148. *See* BLACK'S LAW DICTIONARY 1195 (9th ed. 2009) (defining officer of the court as one "who is charged with upholding the law and administering the judicial system"); *supra* Part V.A

on a decidedly less definite and more pretentious air[149] in an apparent effort to distinguish "true" lawyer professionals from those of the so-called "hired-gun" variety.[150]

Courts frequently carted out the label to emphasize the higher-calling aspect of a lawyer's role. For instance, in his oft-cited description of the expectations that flow from membership in the legal profession, Justice Benjamin Cardozo[151] loftily sermonized about a lawyer's rarified standing as an officer of the court: "Membership in the bar is a privilege burdened with conditions. [A lawyer is] received into that ancient fellowship for something more than private gain. He [becomes] an *officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice*."[152] The Wisconsin Supreme Court espoused a similarly laudatory equation of officer-of-the-court status with a judge's role in *Langen v. Borkowski*.[153] There, after acknowledging both the public and private aspects of a lawyer's responsibilities, the court appeared to go even farther than Justice Cardozo in linking the duties of judge and attorney:

> In every case that comes to him in his professional capacity, he must determine wherein lies his obligations of the public and his obligations to his client, and to discharge this duty properly requires the exercise of a keen discrimination, and wherever the duties to his client conflict with those he owes to the public as an officer of the court in the administration of justice, the former must yield to the latter. He therefore occupies what may be

(discussing the *Black's* definition).

149. *See* James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court,"* 48 BUFF. L. REV. 349, 349 (2000) (maintaining that the officer-of-the-court phrase "has surprisingly little content [and] is mostly rhetoric, caused by self-love and self-promotion"); Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 39 (1989) (describing the officer-of-the-court characterization as "vacuous and unduly self-laudatory").

150. 1 GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 1.8 (3d ed. Supp. 2011); *accord In re* Griffiths, 413 U.S. 717, 732 (1973) (Burger, C.J., dissenting) (contending that "[w]hatever the erosion of the officer-of-the-court role, the overwhelming proportion of the legal profession rejects both the denigrated role of the advocate and counselor that renders him a lackey to the client and the alien idea that he is an agent of government" (citing AM. BAR ASS'N, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 1.1 (Approved Draft 1971))).

151. At the time, Justice Cardozo was the Chief Judge of the New York Court of Appeals.

152. People *ex rel.* Karlin v. Culkin, 162 N.E. 487, 489 (N.Y. 1928) (citation omitted) (emphasis added); *see also* GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 58 (1869) (maintaining in regard to a lawyer's oath that "[i]t is an oath of office, and the practitioner, the incumbent of an office—an office in the administration of justice—held by authority from those who represent in her tribunals the majesty of the commonwealth, a majesty truly more august than that of kings or emperors" (footnote omitted)).

153. Langen v. Borkowski, 206 N.W. 181 (Wis. 1925).

termed a quasi judicial office.[154]

The practice of sanctifying the role of legal professionals was further heightened during the 1970s and 1980s as a response to the organized bar's concern over a perceived escalation in lawyer zeal and decline in civility and collegiality among its members. The principal critic of this changing paradigm was Chief Justice Warren Burger,[155] who led the charge for rekindling what he believed to be a lost sense of professionalism in the bar.[156] As a matter of fact, he was the primary inspiration for the creation of the American Bar Association's Commission on Professionalism,[157] which issued a report in 1986 titled *". . . In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism*.[158]

In keeping with his grand view of the profession, Chief Justice Burger, in a dissenting opinion in *In re Griffiths*,[159] placed lawyers on virtually the same plane as judges in describing their role as officers of the court. In particular, he observed that even though attorneys' specific duties are

154. *Id.* at 190; *accord* Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 43, 48 (1989) (observing that the officer-of-the-court "characterization inherently suggests that lawyers owe a special duty to the judicial system or, perhaps, to the public that other participants in the legal process do not owe" and contending that the officer-of-the-court label "suggest[s] that lawyers sometimes must act in a quasi-judicial or quasi-official capacity despite duties owed to their clients").

155. *See* John Stuart Smith, *Civility in the Courtroom from a Litigator's Perspective*, N.Y. ST. B.J., May/June 1997, at 28, 28 ("Many trace the self-critical effort of the organized bar to determine standards for appropriate professional conduct to the alarm sounded by former Chief Justice Warren Burger in the early seventies."); *see also* William C. McMahon III, Recent Development, *Declining Professionalism in Court: A Comparative Look at the English Barrister*, 19 GEO. J. LEGAL ETHICS 845, 857 (2006) (explaining that Chief Justice Burger praised the integrity of barristers in England and advocated for the establishment of a similar system in America (citing Hugh Maddox, *An Old Tradition with a New Mission: The American Inns of Court*, 54 ALA. LAW. 381, 381 (1993))).

156. *See* John Stuart Smith, *Civility in the Courtroom from a Litigator's Perspective*, N.Y. ST. B.J., May–June 1997, at 28, 28 ("One of Justice Burger's articles paid particular attention to what he viewed as the deterioration in the level of civility displayed by lawyers in their dealings with each other and with courts." (citing Warren Burger, *The Necessity for Civility*, 52 F.R.D. 211, 213 (1971))).

157. *See* THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 19 (2010) (noting that "[m]uch of the current focus on law as a 'professional' function is a legacy of the A.B.A. Commission on Professionalism, created at the urging of Chief Justice Warren Burger in the mid-1980s").

158. AM. BAR ASS'N COMM'N ON PROFESSIONALISM, ". . . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986). Interestingly, the report, among other things, stressed the need for the bar to place "far greater emphasis . . . on the role of the lawyer as both an officer of the court and, more broadly, as an officer of the system of justice." *Id.* at 28. The Commission, however, did little to explain the composition of these official roles, leaving it to others to provide such substance.

159. *In re* Griffiths, 413 U.S. 717 (1973).

different, as officers of the court, they are "part of the official mechanism of justice in the sense of other court officers, including the judge."[160] Chief Justice Burger further noted the critical importance of lawyers' independence from both the government and their individual clients, and he emphasized how this sets the legal profession apart from other occupations—attorneys are called upon, as officers of the court, to exercise independent professional judgment as to which obligations of duty and conscience play significant roles.[161]

Subsequently, in *In re Snyder*,[162] Chief Justice Burger, writing for a unanimous Court, again expressed a characteristically elevated opinion of a lawyer's role as an officer of the court, but this time he described that status in more concrete, functional terms. This case involved attorney Snyder's challenging of a six-month suspension imposed by the Eighth Circuit, stemming from a harsh letter that he sent to a district court judge's secretary criticizing the manner in which the circuit administered the Criminal Justice Act.[163] Specifically, Snyder had accepted an appointment to represent an indigent criminal defendant and encountered frustrating difficulties in his efforts to recover his related attorney's fees and expenses.[164] As a result of the disrespectful tone of this letter, the Eighth

160. *Id.* at 731 (Burger, C.J., dissenting). In *Griffiths*, the Supreme Court held unconstitutional a Connecticut state court rule that required bar applicants to be citizens of the United States. *Id.* at 729 (majority opinion). The appellant was a resident alien, rather than a U.S. citizen, and on that basis alone, she was not permitted to sit for the Connecticut bar exam. *Id.* at 718.

161. *See id.* at 732 (Burger, C.J., dissenting) (observing that "[t]he very independence of the lawyer from the government on the one hand and client on the other is what makes law a profession, something apart from trades and vocations in which obligations of duty and conscience play a lesser part"); *see also* Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 44–45 (1989) (noting that "[b]y asserting that their profession is somehow imbued with a public or judicial element, lawyers distinguish themselves favorably from other occupational groups that serve their own clientele as paid agents, concerned only with their principals' narrow private interests" (footnote omitted)).

162. *In re* Snyder, 472 U.S. 634 (1985).

163. *Id.* at 636–37.

164. *See id.* (describing the lawyer's difficulty in receiving attorney's fees due to insufficient documentation and computer issues). In pertinent part, the attorney's letter provided as follows:

> [N]ot only are we paid an amount of money which does not even cover our overhead, but we have to go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work. We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it.
>
> Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it.

Id. at 637 (internal quotation marks omitted).

Circuit ultimately found that Snyder violated Federal Rule of Appellate Procedure 46 by engaging in "conduct unbecoming a member of the bar,"[165] and thus suspended him from practicing before the circuit for six months.[166]

In determining whether the Eighth Circuit acted properly, Chief Justice Burger observed that when assessing whether an attorney has acted in a manner unbecoming a member of the bar, the court should acknowledge the "complex code of behavior" and dual obligations to the court and client that an attorney is required to follow.[167] He then proceeded to elaborate on a lawyer's role as an officer of the court:

> As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.[168]

Chief Justice Burger concluded, somewhat unhelpfully, that "conduct unbecoming a member of the bar" is behavior inconsistent with professional standards that demonstrates "an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice."[169] According to him, the substance for making a determination as to a violation of this norm had to be ascertained from other sources, namely, case law, court rules, and the "'lore of the profession,' as embodied in codes of professional conduct."[170]

While this functional approach to defining officer-of-the-court duties seems like an improvement, it ultimately fails to inform lawyers of the circumstances under which they would be deemed to have breached these responsibilities. In fact, in concluding that Snyder did not engage in "conduct unbecoming a member of the bar," the Court confusingly emphasized the necessity for civility by attorneys within the judicial

165. FED. R. APP. P. 46(c).

166. *In re Snyder*, 472 U.S. at 640.

167. *Id.* at 644 (quoting *In re* Bithoney, 486 F.2d 319, 324 (1st Cir. 1973)) (internal quotation marks omitted).

168. *Id.* at 644–45.

169. *Id.* at 645.

170. *Id.*

process—a standard to which Snyder admittedly failed to adhere.[171] The Court basically found that his conduct, while perhaps unlawyerly and rude, was not sufficiently egregious by itself to warrant the suspension.[172] The question begged, of course, is: What would be sufficient?

In more contemporary cases, many courts seem to have reverted back to the esoteric, exalted conception of officer-of-the-court status, maintaining that the phrase connotes that lawyers occupy a special place within the judicial process and, accordingly, that there are some things that they simply cannot do. This basically amounts to an "I know it when I see it" model.[173] In *In re Moncier*,[174] for example, the District Court for the Eastern District of Tennessee suspended an attorney from practicing before it for seven years for, among other things, "refus[ing] to obey a court order, threaten[ing] to abandon a client during a court proceeding, and display[ing] disrespectful and contemptuous behavior toward[] the institutional role of the judge."[175] The court judged counsel's actions against the officer-of-the-court standard, which it contended was triggered by the oath that lawyers take when being admitted in federal district court.[176] Specifically, the court indicated that "[u]pon taking [the] oath and being approved for admission, attorneys become officers of the court," which, at a minimum, requires them "to demean themselves as [attorneys] uprightly and according to law."[177] Under this measurement, certain conduct is unacceptable, and lawyers are expected to know this by virtue of their status as officers of the court.[178]

The court did not offer much detail beyond this, although it did pointedly respond to the offending attorney's zealous advocacy defense by proclaiming that "zealousness on the part of attorneys can never super[s]ede their obligation to the profession and the law."[179] Elevating this directive further, the court observed that:

171. *Id.* at 647.

172. *Id.*

173. *Cf.* Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility As an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 141 (2011–12) (noting that "[i]n attempting a definition [of civility], one author went so far as to suggest that the best that can be said . . . is, like Justice Stewart's assessment of pornography, that 'you know it when you see it'").

174. *In re* Moncier, 550 F. Supp. 2d 768 (E.D. Tenn. 2008), *aff'd*, 329 F. App'x 636 (6th Cir. 2009).

175. *Id.* at 770.

176. *Id.* at 769–70.

177. *Id.*

178. *See id.* (stating that lawyers are expected to conduct themselves professionally after they take the oath and become officers of the court).

179. *Id.* at 806.

> The idea that zealousness can be an excuse for unethical and unprofessional behavior is a pernicious disease that threatens to eat away at the *integrity and nobility of the court* as an institution. Zealousness is commendable, but it is not and cannot ever be an acceptable excuse for unprofessional and unethical conduct.[180]

The point seems to be that the court, as an institution, is special, and attorneys, as its officers, are likewise. Appropriate respect for the lofty position of the judiciary is expected, and officers of the court should inherently know the bounds of propriety.[181]

Similarly, in *Rhodes v. MacDonald*,[182] another trial court resorted to the officer-of-the court label in imposing a $20,000 sanction against a plaintiff's attorney under Federal Rule of Civil Procedure 11 for her strident pursuit of a patently frivolous lawsuit.[183] In particular, the action consisted of an effort to prevent the plaintiff's deployment to Afghanistan based on the argument that the deployment orders were invalid because President Obama is not a United States citizen and, therefore, is ineligible to hold office.[184] To make matters worse, plaintiff's counsel had previously filed an action of this nature with the court, which had been dismissed.[185] The attorney's unflinching maintenance of the present lawsuit, including moving for reconsideration of the order of dismissal, led the court to issue the sanction, accompanied by a powerfully scolding opinion.[186]

Although the sanction was grounded in Rule 11, the court spent a significant amount of time emphasizing the inconsistency between plaintiff's counsel's behavior and her role as an officer of the court.[187] In chastising the attorney for utilizing her briefs and motions to engage in unnecessary personal assaults on the court and opposing parties, the court noted that "an attorney, as an officer of the [c]ourt, has an obligation to use legal proceedings for the legitimate purpose of pursuing a lawful cause

180. *Id.*

181. *See id.* at 769–70 (remarking that, upon taking the oath, attorneys are expected to conduct themselves in accordance with professional standards, including "demonstrating respect for the court").

182. Rhodes v. MacDonald, 670 F. Supp. 2d 1363 (M.D. Ga. 2009), *aff'd*, 368 F. App'x 949 (11th Cir. 2010).

183. *Id.* at 1366–68, 1384.

184. *Id.* at 1366.

185. *Id.* at 1366–67. In fact, the attorney had filed similarly frivolous lawsuits in the Middle District of Florida and the Western District of Texas. *Id.* at 1366, 1367 & n.2.

186. *Id.* at 1369–70.

187. *Id.* at 1378–79.

of action."[188] Even more significantly, the court went on to observe that while plaintiff's counsel's ad hominem attacks in the case may have been "good rhetoric to fuel the 'birther agenda,' . . . [they were] *unbecoming of a member of the bar and an officer of the [c]ourt*."[189]

Interestingly, the court's use of the officer-of-the-court standard was not as a substantive behavioral measuring stick but rather as an imprecise, aspirational objective, which plaintiff's counsel unquestionably failed to fulfill.[190] The court's overriding message seems to have been that attorneys' unique status as officers of the court requires strict adherence to unprescribed, innate expectations. It should not be necessary for a court to provide attorneys with a laundry list of officer-of-the-court "dos and don'ts."[191]

Along lines similar to *Rhodes*, other courts have adopted what may be characterized as a gatekeeper viewpoint of lawyers as officers of the court. Specifically, it is a lawyer's obligation to ensure that only meritorious claims or contentions are espoused in a case.[192] Clients may want to pursue a particular tactic no matter what, but, when necessary, it is counsel's duty, as an officer of the court, to prevent this from happening. A prime example of this perspective can be found in *Cicero v. Borg-Warner Automotive, Inc.*[193] In this age discrimination case, the court granted defendant's motion for summary judgment, determining that the action was so lacking in merit that it should have been voluntarily dismissed.[194] Although the court ultimately declined to impose a sanction on plaintiff's

188. *Id.* at 1378.

189. *Id.* at 1378–79 (emphasis added).

190. Indeed, the court expressly delineated that the specific actions engaged in by plaintiff's counsel constituted an abuse of the privilege to practice law. *Id.* at 1365. For example, "[w]hen a lawyer files complaints and motions without a reasonable basis for believing that they are supported by existing law or a modification or extension of existing law, that lawyer abuses her privilege to practice law." *Id.*

191. Relying on Justice Cardozo's famous quote from *Karlin v. Culkin*, the court stated, for example, that: "For justice to be administered efficiently and justly, lawyers must understand the conditions that govern their privilege to practice law. Lawyers who do not understand those conditions are at best woefully unprepared to practice the profession and at worst a menace to it." *Id.*; *see* People *ex rel.* Karlin v. Culkin, 162 N.E. 487, 489 (N.Y. 1928) (stating that membership in the bar makes a lawyer an officer of the court). However, the court fails to articulate what those conditions are, seemingly suggesting that they are simply things that a lawyer should know.

192. *See Rhodes*, 670 F. Supp. 2d at 1365 ("When a lawyer files complaints and motions without a reasonable basis for believing that they are supported by existing law or a modification or extension of existing law, that lawyer abuses her privilege of practicing law."); Cicero v. Borg-Warner Auto., Inc., 163 F. Supp. 2d 743, 750 (E.D. Mich. 2001) (stating that lawyers, as officers of the court, have a duty to refrain from filing frivolous lawsuits).

193. Cicero v. Borg-Warner Auto., Inc., 163 F. Supp. 2d 743 (E.D. Mich. 2001).

194. *Id.* at 758.

lawyers, it nevertheless seized the opportunity to emphasize that: "As *officers of the court*, attorneys have obligations not just to their clients, but also to the court, their opponents, and society at large, to refrain not only from filing meritless lawsuits, but to refrain from prosecuting them once it becomes clear that they are without merit."[195] It is significant to note that the court characterized the officer-of-the-court gatekeeper duties as being owed not just to the court but also to the adversary and the public, adding yet another level of potential confusion to the label.[196]

While there are undoubtedly other viewpoints regarding what it means to be an officer of the court,[197] the various perspectives recounted in this section sufficiently convey the complexity of the issue and establish that there really is no definitive model.[198] A lawyer's role as an officer of the court can vary depending upon the situation involved, as well as the identity of the decision-maker. When attorney conduct is patently egregious, the absence of a well-formed standard is not problematic because officers of the court clearly cannot conduct themselves in such a manner.[199] However, when the behavior in question is on the margins, the lack of a rigid officer-of-the-court model becomes more challenging because of the lack of predictability that it portends. The next section explores the potential negative effects that may flow from the currently ill-defined criterion.

C. *Effects of Utilization of an Ill-Defined Officer-of-the-Court Model*

Without question, there is a significant positive component to courts utilizing an indefinite officer-of-the-court model. In particular, the awareness that one's conduct is being judged against a lofty, unarticulated

195. *Id.* at 750 (emphasis added).

196. *Id.*

197. *See generally* James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court"*, 48 BUFF. L. REV. 349, 358–87 (2000) (discussing thoroughly and thoughtfully the substance of the officer-of-the-court label); Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 48–76 (1989) (same).

198. *See, e.g.*, Rhodes v. MacDonald, 670 F. Supp. 2d 1363, 1365 (M.D. Ga. 2009) (requiring attorneys to adhere to unspecified duties as an officer of the court), *aff'd*, 368 F. App'x 949 (11th Cir. 2010); *In re* Moncier, 550 F. Supp. 2d 768, 769–70 (E.D. Tenn. 2008) (stating that lawyers are expected to conduct themselves professionally after they take the oath and become officers of the court), *aff'd*, 329 F. App'x 636 (6th Cir. 2009); *Cicero*, 163 F. Supp. 2d at 750 (holding that lawyers owe their officer-of-the-court obligations not only to the court but also opponents and the public); *see also* Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 76 (1989) (observing that "courts use the [officer-of-the-court] concept in a general and vague manner").

199. *See Rhodes*, 670 F. Supp. 2d at 1384 (ordering sanctions for an attorney's egregious actions in part because "[a] clearer case could not exist").

standard could have the salutary effect of causing lawyers generally to be more mindful and careful about their behavior. More to the point, the uncertainty regarding what actions might run afoul of this measure would likely force attorneys to err on the side of caution, especially when the penalty for a violation is a sanction or some type of disciplinary censure. This mindset could foster a number of positive practices among counsel, such as: (1) more rigid screening of potential claims, contentions, and defenses; (2) increased attention to ensuring the efficient progression of an action; and (3) greater cooperation with and collegiality toward opposing counsel. From a systemic standpoint, lawyers approaching the adversarial process in this manner would be idyllic—creating a veritable utopian judicial system, devoid of frivolity, delay, chicanery, and antagonism.

The problem with such a model, however, is that it fails to accord proper weight to lawyers' client-centered obligations and, as a result, may unduly compromise their ability to advocate zealously and effectively on behalf of clients. Specifically, it is possible that the unpredictability of the indefinite officer-of-the-court approach could cause attorneys to be not just cautious, but overly cautious, elevating their concerns for the court, the system, the public, and themselves over the interests of their clients. In other words, the standard may make counsel second-guess legitimate adversarial strategies out of fear of getting on the wrong side of the court. This situation is exacerbated by the fact that any officer-of-the-court duties recognized by courts will necessarily take priority over client-centered obligations when there is a conflict.[200] An added concern is the prospect for unequal enforcement of the malleable standard. Judges, like all individuals, are susceptible to conscious and unconscious biases, which may find expression in the manner in which they wield the officer-of-the-court label.[201]

200. *See* Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1546 (11th Cir. 1993) ("All attorneys, as 'officers of the court,' owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly."); *In re* Abbott, 925 A.2d 482, 487–88 (Del. 2007) (per curiam) ("This responsibility to the '[c]ourt' takes precedence over the interests of the client because officers of the [c]ourt are obligated to represent these clients zealously *within* the bounds of both the positive law and the rules of ethics." (citing Nix v. Whiteside, 475 U.S. 157, 168 (1986))); Langen v. Borkowski, 206 N.W. 181, 190 (Wis. 1925) (creating a similar officer-of-the-court standard); *see also* Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 48 (1989) (observing that the "primary distinguishing characteristic of the duties making up the officer[-]of[-]the[-]court obligation . . . must be their subordination of the interests of the client and the lawyer to those of the judicial system and the public").

201. *See* Amy R. Mashburn, *Making Civility Democratic*, 47 HOUS. L. REV. 1147, 1153 (2011) (observing that the "refusal to unpack the 'officer of the court' and 'law is not a business' ideals has

In many cases, the possible problems associated with an ill-defined officer-of-the-court model will not be present—namely, those situations where an attorney's conduct is patently inappropriate, like some of the examples discussed in the previous section.[202] There, sanctioning or otherwise censuring a lawyer for failure to live up to his or her role as an officer of the court, in essence, simply states the obvious and highlights the impropriety of what has been done. The lawyers should have known better, and using the label to emphasize this point does not in any way undermine legitimate zealous representation.

The problems will arise in cases where the conduct that purportedly offends the officer-of-the-court standard is comprised of actions that lawyers may legitimately undertake on behalf of a client. *Sahyers* is obviously the quintessential example of this. No lawyer could have predicted that his or her duties as an officer of the court entailed providing lawyer-defendants with pre-suit notice in the interest of civility and collegiality. And the prospect that other courts may see fit to recognize similar unforeseeable court or adversary-centered obligations militates rather strongly against the maintenance of an ill-defined officer-of-the-court model.

A reasonable response may be that *Sahyers* is merely an aberration, and the Eleventh Circuit panel's narrowing gymnastics sufficiently ensure that its example will not be emulated.[203] Unfortunately, as Judge Wilson observed in his dissent from the denial of the rehearing en banc, there is nothing to prevent courts from adopting the specific pre-suit notice duty recognized by the panel, let alone the analytical framework that gave rise to the creation of that obligation.[204] Courts are free to replicate it. Moreover, *Sahyers* is not the lone case to have used an officer-of-the-court

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the effect of allowing the Bar to advocate enforcement of open-ended norms that are not the subject of legislative deliberation or even much informal debate" (citing Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 289 (2006))). Masburn goes on to state that "[t]his is an ideal environment for judges to put into effect, consciously or unconsciously, their expectations about entitlement to deference." *Id.*

202. *See In re Moncier*, 550 F. Supp. 2d at 770 (suspending an attorney for "refus[ing] to obey a court order, threaten[ing] to abandon a client during a court proceeding, and display[ing] disrespectful and contemptuous behavior towards the institutional role of the judge"); *supra* Part V.B (discussing recent cases that have reverted back to the more esoteric conception of officer-of-the-court status).

203. *See Sahyers I*, 560 F.3d 1241, 1246 (11th Cir. 2009) (limiting the reach of *Sahyers* by stating that the decision was fact-intensive), *cert. denied*, 131 S. Ct. 415 (2010).

204. *See Sahyers II*, 603 F.3d 888, 894 (11th Cir. 2010) (en banc) (Wilson, J., dissenting) ("*Sahyers* . . . provides binding precedent for a district court to ignore a clear Congressional mandate from a federal statute based on its 'inherent powers.'").

standard to impose an unwritten and unforeseeable duty that conflicts with a legitimate adversarial position.[205]

In *Smith v. Johnston*,[206] the Supreme Court of Indiana affirmed setting aside a default judgment because plaintiff's counsel was found to have engaged in "conduct . . . prejudicial to the administration of justice,"[207] a standard perhaps even more malleable than the ill-defined officer-of-the-court measure.[208] Specifically, the court found that the lawyer's failure to provide opposing counsel with notice of her intent to pursue a default judgment was prejudicial to the administration of justice and warranted the setting aside of that judgment under Indiana Trial Rule 60(b)(3) for attorney misconduct.[209]

Smith involved a medical malpractice action that required a plaintiff to submit his or her claim to a medical review panel for approval as a prerequisite to filing suit.[210] In connection with this process, plaintiff's counsel became aware that the defendants were represented by counsel.[211] Indeed, following the medical review panel's approval of the claim, plaintiff's counsel sent a written settlement demand to defendants' attorneys, a rejection of which was received on the very day that the suit was filed.[212]

Plaintiff's counsel properly served the defendants with the summons and complaint in the action but did not send copies thereof to the defendants' counsel.[213] The court acknowledged that this approach and the plaintiff's counsel's subsequent failure to provide opposing counsel with notice of the pursuit of a default judgment were in full compliance with the pertinent

205. *See, e.g.*, Smith v. Johnston, 711 N.E.2d 1259, 1263–64 (Ind. 1999) (recognizing unwritten duties inherent in being an officer of the court).

206. Smith v. Johnston, 711 N.E.2d 1259 (Ind. 1999).

207. *Id.* at 1264.

208. *See* 2 GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 65.6 (3d ed. Supp. 2009) (observing that while Rule 8.4(d) largely overlaps with other litigation-oriented Rules of Professional Conduct, "it may signify the existence of *other*, as yet undefined, offenses against a tribunal or against the administration of justice"). "While some flexibility in defining disciplinary offenses is desirable, in order to ensure that novel forms of misconduct do not fall between the cracks, an open-ended rule is dangerous." *Id.* (footnote omitted). Notwithstanding its facial vagueness, Rule 8.4(d) has survived numerous constitutional challenges for vagueness and overbreadth. ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 626 (7th ed. 2011)).

209. *Smith*, 711 N.E.2d at 1260–61.

210. *Id.* at 1261; *see also* IND. CODE ANN. § 34-18-8-4 (Lexis Nexis 2008) ("[A]n action against a health care provider may not be commenced in a court in Indiana before: (1) the claimant's proposed complaint has been presented to a medical review panel established under IC 34-18-10 . . . and (2) an opinion is given by the panel.").

211. *Smith*, 711 N.E.2d at 1261.

212. *Id.*

213. *Id.*

procedural rules of the court.[214] Nonetheless, the court concluded that these rules did not contemplate the possibility of a plaintiff's attorney possessing knowledge of a defendant's representation by counsel, as was the situation here.[215] According to the court, plaintiff's counsel's knowledge gave "rise to a corresponding duty under the Rules of Professional Conduct to provide notice before seeking any relief from the court."[216] Though admittedly not stated in the text of any particular rule, the court emphasized that:

> [L]awyers' duties are found not only in the specific rules of conduct and rules of procedure, but also in courtesy, common sense[,] and the constraints of our judicial system. As an *officer of the [c]ourt*, every lawyer must avoid compromising the integrity of his or her own reputation and that of the legal process itself. These considerations alone demand that [plaintiff's counsel] take the relatively simple step of placing a phone call to [defendant's counsel] before seeking a default judgment.[217]

Despite this statement suggesting that the notification duty somehow arose from the inherent officer-of-the-court responsibilities of a lawyer, the court proceeded to link the obligation to Rule 8.4(d) of Indiana's Rules of Professional Conduct, which states that it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice.[218] Specifically, the court held that "[t]he administration of justice requires that parties and their known lawyers be given notice of a lawsuit prior to seeking a default judgment."[219] Plaintiff's counsel's failure to undertake reasonable steps to notify defendants' counsel, under the circumstances, therefore ran afoul of this rule and warranted the setting aside of the default judgment.[220]

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214. *See id.* at 1263 ("We agree with [plaintiff's counsel] that Trial Rule 4 calls for service of the summons and complaint on the party, not the attorney, to secure jurisdiction. We also agree that Trial Rule 5(B) requires service of subsequent papers only on attorneys who have filed their appearance in the case.").

215. *See id.* (observing that the rules "anticipate that a defendant in a lawsuit may not have retained an attorney at the time suit is filed," and even if that is not the case, the plaintiff may not be aware of this).

216. *Id.*

217. *Id.* at 1263–64 (emphasis added).

218. *Id.* at 1264. The court also made reference to the Preamble to the Rules of Professional Conduct. *See id.* at 1263 (recognizing that "[t]he Rules, do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules." (quoting IND. R. PROF'L CONDUCT pmbl., *available at* http://www.in.gov/judiciary/rules/prof_conduct/#_Toc313019170) (internal quotation marks omitted))).

219. *Id.* at 1264.

220. *Id.*

While the result in *Smith* is certainly understandable—as was true in *Sahyers*—the court's analytical approach is quite troubling. To be sure, it would have been civil or collegial for plaintiff's lawyer to have given defense counsel notice about the filing of the lawsuit and the pursuit of a default judgment.[221] However, the fact that no express rule required such notification definitely put plaintiff's counsel in a precarious position, particularly because she was in full compliance with the pertinent procedural rules.[222] The attorney's legal position, under all available, tangible litigation measures, was legitimate.[223] To penalize her and her client under these circumstances, based on a previously unarticulated duty, seems unfair, at best. Additionally, the court's strained attempt to ground its holding in an actual rule appears intended to address the concern of subjecting counsel to a yet-to-be-recognized professional obligation.[224] The court's effort in this regard, though, falls woefully short in light of its selection of perhaps the vaguest standard contained in the Rules of Professional Conduct as the source for this officer-of-the-court type duty.[225]

Sahyers and *Smith* undoubtedly are not the only cases that involve courts creating new duties out of general conceptions of lawyers' status as officers of the court.[226] But even if they are, their existence alone is enough to establish the looming possibility that other courts may follow suit in the future. As a result, attorneys' ability to advocate zealously and effectively on behalf of their clients may be hindered by undue concern for the interests of the court, the opposition, the public, or even themselves. This

221. *See Sahyers I*, 560 F.3d 1241, 1244–45 (11th Cir. 2009) (requiring pre-suit notice in part because it would promote civility among lawyers (citing Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991); *In re* Finkelstein, 901 F.2d 1560, 1564 (11th Cir. 1990))), *cert. denied*, 131 S. Ct. 415 (2010).

222. *See Smith*, 711 N.E.2d at 1262–64 (recognizing that plaintiff's attorney's conduct was consistent with the pertinent trial rules).

223. *See id.* (recognizing that plaintiff's attorney had complied with the requirements of the applicable trial rules).

224. *See id.* at 1263–64 (using Rule 8.4(d)'s vague "administration of justice" clause to justify the holding).

225. For a case reaching a result contrary to *Smith*, see Sprung v. Negwer Materials, Inc., 775 S.W.2d 97, 100–01 (Mo. 1989) (holding plaintiff's counsel's failure to advise defense counsel of the entry of a default judgment until after it was no longer likely to be set aside as a matter of course to be an invalid basis for setting the judgment aside), *superseded by* MO. R. CIV. P. 74.05, *as recognized in* Cont'l Basketball Ass'n v. Harrisburg Prof'l Sports Inc., 947 S.W.2d 471 (Mo. Ct. App. 1997). *But see id.* at 109–12 (Blackmar, C.J., dissenting) (condemning plaintiff's counsel's conduct in taking advantage of defense counsel's mistaken belief that the case was pending, rather than in default).

226. *Cf.* Dondi Props. Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 288–89 (N.D. Tex. 1988) (per curiam) (adopting standards of litigation conduct for lawyers appearing before the court apart from existing ethical and procedural rules).

potentially serious adverse effect on attorneys' client-centered responsibilities can be significantly mitigated by adopting a model that is wedded to existing, clearly articulated procedural and ethical norms.

Notably, in *Sahyers*, Judge Wilson, in his dissent from the request for rehearing en banc, emphasized as problematic the absence of any rule or statute regarding the pre-suit notice duty recognized by the Eleventh Circuit panel.[227] Judge Barkett, in her dissent, raised a similar point, noting that plaintiff's counsel was entitled to some type of prior notice regarding the specific officer-of-the-court requirement which he was deemed to have violated.[228] Part VI takes these critiques to heart and proposes that officer-of-the-court ideals should be emphasized and enforced only through existing procedural and professional constraints on lawyer conduct.

VI. A BETTER APPROACH: DEFINING OFFICER-OF-THE-COURT IDEALS THROUGH EXISTING PROCEDURAL AND PROFESSIONAL CONSTRAINTS

Highlighting the fact that a lawyer is an officer of the court, in addition to being a client's advocate, is important, and courts should continue to remind counsel of this essential component of bar membership, as did the Eleventh Circuit panel in *Sahyers*. It is critical, however, to establish *ex ante* definitional parameters for officer-of-the-court-based duties to avoid unduly hamstringing lawyers' legitimate client-centered advocacy.

Of all the approaches to defining what it means to be an officer of the court, the formulation contained in *Black's Law Dictionary* best captures the essence of what this Article views as the optimal methodology for practically and effectively emphasizing and enforcing officer-of-the-court ideals without compromising a lawyer's ability to pursue legitimate adversarial objectives.[229] In particular, *Black's* ties a lawyer's status as an officer of the court to two related duties: (1) the duty to obey court rules; and (2) the "duty of candor to the court."[230] The only caveat that this

227. *See Sahyers II*, 603 F.3d 888, 894–95 (11th Cir. 2010) (en banc) (Wilson, J., dissenting) (observing that the majority failed to cite any rule that imposes this duty).

228. *See id.* at 891 (Barkett, J., dissenting) ("District courts do not have the authority to sanction lawyers for conduct not proscribed by law or rule—which is the case here—without first providing them with notice that their conduct may warrant sanctions." (citing FED. R. CIV. P. 83(b))).

229. *See* BLACK'S LAW DICTIONARY 1195 (9th ed. 2009) (providing that a lawyer's obligations as an officer of the court are to obey court rules and to provide candor to the court).

230. *Id.* The duty of candor finds content both in Rule 11 of the Federal Rules of Civil Procedure and Rule 3.3 of the Model Rules of Professional Conduct. *See* FED. R. CIV. P. 11 (requiring that attorneys certify that papers presented to the court are nonfrivolous and not

Article would add is that "court rules" should be interpreted to include rules of professional conduct that pertain to the litigation process,[231] as well as applicable rules of procedure.[232] If a duty cannot be linked to such pre-existing, clearly identifiable court rules, then a court should not be permitted to resort to the officer-of-the-court mantra to manufacture it.

One might argue that this would inappropriately circumscribe courts' ability to ensure the efficient administration of the judicial process through the exercise of their time-honored inherent authority to regulate the practice of law.[233] While the approach endorsed here would admittedly restrict courts' ability to utilize purely inherent authority to contend with officer-of-the-court-based attorney misconduct, it should not adversely affect their overall capacity to address such behavior. Indeed, various courts have given content to the officer-of-the-court standard by directly linking it to such provisions as litigation-focused standards contained in the Rules of Professional Conduct and certain Federal Rules of Civil Procedure.[234] In doing so, these courts were still able to respond effectively and fairly to improper attorney conduct.[235]

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interposed for an improper purpose); MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002) (imposing a duty of candor towards tribunals).

231. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2002) ("Meritorious Claims and Contentions"); *id.* R. 3.2 ("Expediting Litigation"); *id.* R. 3.3 ("Candor Toward the Tribunal"); *id.* R. 3.4 ("Fairness to Opposing Party and Counsel"); *id.* R. 3.5 ("Impartiality and Decorum of the Tribunal"); *see also* Amy R. Mashburn, *Making Civility Democratic*, 47 HOUS. L. REV. 1147, 1164–65 (2011) (discussing various rules of professional conduct used by courts to give content to a standard for judging incivility as revealed in empirical study of cases).

232. *See* Four Star Fin. Servs., LLC v. Commonwealth Mgmt. Ass'n, 166 F. Supp. 2d 805, 807 (S.D.N.Y. 2001) (using Federal Rule of Civil Procedure 11 as a point of reference for the substance of the officer-of-the-court label); *see also* Amy R. Mashburn, *Making Civility Democratic*, 47 HOUS. L. REV. 1147, 1163 (2011) (discussing courts' use of Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927 to give content to standard for judging incivility as revealed in empirical study of cases).

233. *See Sahyers I*, 560 F.3d 1241, 1244 (11th Cir. 2009) (maintaining that a court's inherent powers include "the authority to police lawyer conduct and to guard and to promote civility and collegiality among the members of its bar"), *cert. denied*, 131 S. Ct. 415 (2010); *see also* Chambers v. NASCO, Inc., 501 U.S. 32, 35 (1991) (exploring the scope of the court's inherent power to police litigants' conduct).

234. *See, e.g.*, GMAC Bank v. HTFC Corp., 252 F.R.D. 253, 257–58 (E.D. Pa. 2008) (relying upon the Pennsylvania Rules of Professional Conduct and the Federal Rules of Civil Procedure to sanction a lawyer for abusive behavior); Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No. 98 CIV 10175(JSM), 2002 WL 59434, at *5 (S.D.N.Y. Jan. 16, 2002) (linking Rule 11 with an attorney's officer-of-the-court duties), *aff'd*, 317 F.3d 209 (2d Cir. 2003).

235. *See, e.g.*, *GMAC Bank*, 252 F.R.D. at 254 (using existing rules of civil procedure to sanction "outrageous" and "inexcusable" conduct during a deposition (internal quotation marks omitted)); *Patsy's Brand*, 2002 WL 59434, at *4, 5 (utilizing Federal Rule of Civil Procedure 11 to sanction a party for providing false statements via its counsel and fabricating documents).

In *GMAC Bank v. HTFC Corp.*,[236] for example, the court relied, in part, upon Rules 3.2, 3.3, 3.4, 3.5, and 8.4 of the Pennsylvania Rules of Professional Conduct, as well as Rules 30 and 37 of the Federal Rules of Civil Procedure, in sanctioning a defense attorney for failing to take appropriate action to curtail his client's excessively abusive behavior during his deposition.[237] During a telephone conference regarding the matter, the court expressed its concern with counsel's inaction by couching it in terms of his duty as an officer of the court, as defined by the Rules of Professional Conduct.[238] Specifically, the court maintained that "under the Code of Professional Conduct, counsel has certain obligations as an officer of the court which must be harmonized with counsel's obligations to provide zealous representation."[239] The court went on to observe that, by sitting idly by while his client engaged in behavior "designed to obstruct the proceedings," defense counsel may have violated "Rules of Professional Conduct 3.4, 3.5[,] and 8.4."[240] It later expanded the number of rules that counsel may have violated to include Rules 3.2 and 3.3, along with the pertinent procedural rules related to discovery abuse.[241] The sanction, however, was ultimately only tied to the Federal Rules of Civil Procedure—specifically, Rules 30(d)(2) and 37(a)(5)(A).[242]

Interestingly, this particular opinion addressed defense counsel's motion to reconsider the sanction imposed upon him, based primarily on the argument that he had not been given adequate notice that his conduct was being assessed under the procedural rules.[243] It is significant to note that the court acknowledged the requirement in the Third Circuit, and elsewhere, that a "party against whom sanctions are being considered is entitled to notice of the *legal rule on which the sanctions would be based*, the *reasons for the sanctions*, and the *form of the potential sanctions*."[244] What is

236. GMAC Bank v. HTFC Corp., 252 F.R.D. 253 (E.D. Pa. 2008).

237. *Id.* at 257–58.

238. *Id.* at 255.

239. *Id.*

240. *Id.*

241. *Id.* at 257.

242. *Id.* at 258.

243. *Id.* at 254.

244. *Id.* at 259 (quoting *In re* Tutu Wells Contamination Litig., 120 F.3d 368, 380 (3d Cir. 1997), *abrogated on other grounds by* Cunningham v. Hamilton Cnty., Ohio, 527 U.S. 198 (1999)); *see also* Saldana v. Kmart Corp., 260 F.3d 228, 236 (3d Cir. 2001) (observing that "[t]he Due Process Clause of the Fifth Amendment [generally] requires a federal court to provide notice and an opportunity to be heard before sanctions are imposed on a litigant or attorney" (first alteration in original) (quoting Martin v. Brown, 63 F.3d 1252, 1262 (3d Cir. 1995) (internal quotation marks omitted))). The court in *GMAC Bank* ultimately denied defense counsel's motion to reconsider, finding, in part, that he had been provided ample notice of the potential bases for the sanction, thus

most important about this generally accepted requirement for purposes of the proposed approach is that it reflects an expectation that an identifiable rule will provide the basis for a sanction, which necessarily means that attorneys will have advanced notice of whatever duty they are alleged to have breached or, at a minimum, will have the ability to ascertain that duty.

In another case, *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*,[245] a court linked attorneys' officer-of-the-court duties to Federal Rule of Civil Procedure 11.[246] The court concluded that the lawyers violated Rule 11 by permitting their client to submit a false affidavit and in doing so observed that "[f]ew responsibilities of an attorney, as an officer of the court, are more important than the duty to insure that his client does not commit perjury or obstruct justice."[247]

Similarly, in *Four Star Financial Services, LLC v. Commonwealth Management Ass'n*,[248] the court used Rule 11 as a point of reference for the substance of the officer-of-the-court label.[249] In particular, in discussing the Rule 11 standard, the court observed that as officers of the court, attorneys must "properly temper[] enthusiasm for a client's cause with careful regard for the obligations of truth, candor, accuracy, and professional judgment."[250]

Apart from these examples, which suggest that much of the conduct that arguably offends courts' officer-of-the-court sensibilities can be addressed through extant rule-based standards, it is critical to point out that the Supreme Court has essentially already declared that this is the preferred method in federal court. Specifically, in the seminal inherent authority case, *Chambers v. NASCO, Inc.*,[251] the Court held that "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than [its] inherent power."[252] The Court did proceed to note, however, that "if in the informed discretion of the court, neither the

affording him a meaningful opportunity to respond. *GMAC Bank*, 252 F.R.D. at 255.

245. Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No. 98 CIV 10175(JSM), 2002 WL 59434 (S.D.N.Y. Jan. 16, 2002), *aff'd*, 317 F.3d 209 (2d Cir. 2003).

246. *Id.* at *5.

247. *Id.*

248. Four Star Fin. Servs., LLC v. Commonwealth Mgmt. Ass'n, 166 F. Supp. 2d 805 (S.D.N.Y. 2001).

249. *Id.* at 807.

250. *Id.* (quoting Oliveri v. Thompson, 803 F.2d 1265, 1267 (2d Cir. 1986)).

251. Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

252. *Id.* at 50.

statute nor the Rules are up to the task, the court may safely rely on its inherent power."[253] In any event, it is apparent that federal courts are cautioned to exercise their inherent authority sparingly, at most.[254] Hence, defining officer-of-the-court ideals in the manner endorsed here, in reality, should not significantly alter the current sanctioning landscape, at least not in the federal arena.

Moreover, to the extent that certain types of misconduct do not currently fall within existing legal or ethical provisions—and there should not be many—there is certainly nothing that prevents courts from creating a positive rule that covers the situation. In other words, if a duty is of sufficient importance to fall within a lawyer's officer-of-the-court responsibilities, then it should be formally enacted as a court rule to be applied prospectively.[255]

Again, it is important to emphasize that the suggested approach is geared towards circumstances on the margins, in which lawyers' conduct is arguably appropriate under pertinent legal and ethical principles, but nevertheless is deemed by courts to somehow offend their role as officers of the court. In these types of situations, as in *Sahyers* and *Smith*, attorneys, as advocates, are entitled to some sort of concrete notice to enable them to properly calibrate their responsibilities to the court, the opposition, and the system with those owed to their clients.[256] Only in this manner can the officer-of-the-court label be imbued with practical substance, enabling courts to summon it in a professionally constructive and fair fashion.

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253. *Id.*; *see id.* at 64 (Kennedy, J., dissenting) (maintaining that "[i]nherent powers are the exception, not the rule, and their assertion requires special justification in each case").

254. *See id.* at 50 (majority opinion) (recognizing that a court must "exercise caution in invoking its inherent power").

255. It is important to note that the author fully accepts that there may be certain officer-of-the-court situations that nevertheless warrant a court's invocation of its inherent authority. However, those situations, in the words of Justice Kennedy, should be "the exception, not the rule." *Id.* at 64 (Kennedy, J., dissenting). Justice Kennedy went on to observe that "as the number and scope of Rules and statutes governing litigation misconduct increases, the necessity to resort to inherent authority . . . lessens." *Id.* at 70.

256. *See* Saldana v. Kmart Corp., 260 F.3d 228, 236 (3d Cir. 2001) (observing that only with notice and an opportunity to be heard "can a party respond to the court's concerns in an intelligent manner" (quoting *In re* Tutu Wells Contamination Litig., 120 F.3d 368, 379 (3d Cir. 1997), *abrogated on other grounds by* Cunningham v. Hamilton Cnty., Ohio, 527 U.S. 198 (1999))); *see also Sahyers II*, 603 F.3d 888, 891 (11th Cir. 2010) (en banc) (Barkett, J., dissenting) (stating that "district courts do not have the authority to sanction lawyers for conduct not proscribed by law or rule—which is the case here—without first providing them with notice that their conduct may warrant sanctions." (citing FED. R. CIV. P. 83(b))); *Sahyers II*, 603 F.3d 888, 894 (11th Cir. 2010) (en banc) (Wilson, J., dissenting) (arguing against the court's recognition of a new duty after failing to cite any identifiable rule with which this duty could be linked).

VII. CONCLUSION

Most would wholeheartedly agree that the central message of *Sahyers v. Prugh, Holliday & Karatinos, P.L.*, as an ideal, is a sound one—i.e., the profession, the legal system, and the public good are all better served by the exhibition of greater civility and collegiality by lawyers towards one another.[257] Similar support, no doubt, exists for the general proposition that the officer-of-the-court label serves as a laudable reminder that lawyers' professional responsibility encompasses more than myopic adherence to the interests of clients and the zealous pursuit of their adversarial objectives.

Utilization of this standard by courts, however, to qualify yet-to-be-articulated judicial expectations, like in *Sahyers*, is neither sound nor praiseworthy. Rather, its ominous prospect has the potential to unreasonably compromise counsel's ability to fulfill legitimate client-centered obligations. This is certainly not to say, though, that courts should eschew lofty expectations with regard to the manner in which counsel comport themselves. Such expectations, particularly in the areas of civility and collegiality, are a good thing, and courts should continue to utilize and emphasize attorneys' roles as officers of the court as a means of characterizing these ideals.

The only suggestion that this Article makes relates to a preferred methodology for enforcing a court's high expectations.[258] The recommended additional step of identifying a specific ethical or procedural rule as a prerequisite to invocation of the officer-of-the-court standard will ensure that attorneys have a meaningful opportunity, *ex ante*, to balance important client-centered responsibilities against those appropriately owed to the judicial system, the public, and the profession.

257. *See Sahyers I*, 560 F.3d 1241, 1245 n.5 (11th Cir. 2009) (promoting civility and collegiality as a method to advance judicial efficiency and promote the public interest), *cert. denied*, 131 S. Ct. 415 (2010).

258. *See generally supra* Part VI (advocating linking existing rules to officer-of-the-court duties).