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Judicial Control Over the Bar Versus Legislative Regulation of Governmental Ethics: The Pennsylvania Approach and a Proposed Alternative

Stephen J. Shapiro*

I. INTRODUCTION—THE CLASH BETWEEN THE PENNSYLVANIA ETHICS LAW AND SUPREME COURT CONTROL OF THE BAR

In a recent series of opinions, Pennsylvania courts have held two sections of the Pennsylvania Ethics Act (Act)¹ unconstitutional as applied to judges and attorneys. The Pennsylvania Supreme Court struck down the post-employment restriction of the Act² as applied to a former judge in Wajert v. State Ethics Commission.³ The restriction was found to be an improper usurpation of the exclusive power of the Supreme Court of Pennsylvania to regulate the practice of law.⁴ The Pennsylvania

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*Assistant Professor of Law, Ohio Northern University College of Law. B.A., Haverford College (1971); J.D., University of Pennsylvania College of Law (1976). Professor Shapiro served as counsel to the Ohio Ethics Commission from 1977 to 1979.

2. PA. STAT. ANN. tit. 65, § 403(e) (Purdon Supp. 1981) provides: "No former official or public employee shall represent a person, with or without compensation, on any matter before the governmental body with which he has been associated for one year after he leaves that body."
4. Id. at 259-60, 420 A.2d at 441. Prior to 1968, the Pennsylvania Constitution did not contain an explicit grant of rulemaking power to the supreme court to regulate the practice of law. Such power is generally recognized as "inherent" in the judicial branch in virtually all American states as an integral part of the tripartite system of government. See R. Dishman, State Constitutions: The Shape of the Document (rev. ed. 1968); Beardsley, The Judicial Claim to Inherent Power over the Bar, 19 A.B.A. J. 509 (1933); Jeffers, Government of the Legal Profession: An Inherent Judicial Power Approach, 9 St. Mary's L.J. 385 (1978); Kalish, The Nebraska Supreme Court, the Practice of Law and the Regulation of Attorneys, 59 Neb. L. Rev. 555 (1980); Robertson & Buehler, The Separation of Powers and the Regulation of the Practice of Law in Oregon, 13 Willamette L.J. 273 (1977); Comment, The Supreme Court's Power over Admission and Disbarments: Inherent or Statutory?, 25 Baylor L. Rev. 368 (1973); Note, Judicial Financial Autonomy and Inherent Power, 57
monwealth Court extended the Wajert holding to attorneys employed by a State administrative agency,⁵ and has similarly dispatched the financial disclosure requirements of the Act⁶ as applied to judges⁷ and as applied to public employees serving as attorneys.⁸

The reasoning behind this line of cases appears to be that legislatively enacted prohibitions and requirements, even if contained in a statute of general applicability, that is, one directed at the public as a whole rather than solely or mainly at attorneys,⁹ cannot be applied to judges or attorneys if the activities in any way concern the practice of law. The Pennsylvania courts have concluded that the regulation of such practice is ex-

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⁶ PA. STAT. ANN. tit. 65, § 404(d) (Purdon Supp. 1981) provides: "No public official shall be allowed to take the oath of office or enter or continue upon his duties, nor shall he receive compensation from public funds, unless he has filed a statement of financial interests with the commission as required by this act." Id. PA. STAT. ANN. tit. 65, § 405 provides:
(a) The statement of financial interests filed pursuant to this act shall be . . . signed under penalty of perjury by the person required to file the statement.
(b) The statement shall include . . . information for the prior calendar year with regard to the person required to file the statement and the members of his immediate family . . .

Id.
⁹ For a discussion of the distinction between general and limited applicability, see text accompanying notes 42 & 43 infra.
clusively within the control of the Pennsylvania Supreme Court, and any statutes affecting conduct in this area are unconstitutional, whether or not they actually conflict with supreme court rules for the governance of the bar.

Although the result in *Wajert* is defensible on public policy grounds, the court's reasoning in reaching the result is contrary to settled principles of separation of powers normally applied in Pennsylvania as well as in other jurisdictions. By striking down portions of the Ethics Act, the courts have excepted members of the judiciary and the bar from the general law applicable to other citizens, and have done so without an examination of whether such an exception is necessary to prevent interference with proper supreme court governance of the bar.

This article will present an alternative approach, consistent with the Pennsylvania Constitution, which allows the Pennsylvania Supreme Court full control over the conduct of members of the bar without needlessly interfering with the legitimate exercise of the legislature's police power in preventing conflicts-of-interest among public employees. Under this approach the supreme court, as a matter of comity, allows application of the Ethics Act to attorneys and judges, except in those cases where the statute actually conflicts with rules promulgated by the court or where the statute has a deleterious effect on the court's view of the proper functioning of the state's legal system.

The proposed approach is applicable in the many states that have both a constitutional grant of authority to a supreme court and recently enacted ethics laws similar to those of Pennsylvania. This restrained approach is necessary to preserve the effectiveness of the important and popularly mandated ethics laws, which might be severely hampered by an extension of the present Pennsylvania ideology into other states.

10. A stringent post-employment restriction may discourage qualified candidates from seeking a judgeship. See text accompanying notes 69-81 infra.
11. See text accompanying notes 36-44 infra.
12. See note 4 supra and note 15 infra.
13. Pennsylvania is the only state in which a provision of the state ethics law has been directly and clearly held unconstitutional as a violation of the separation-of-powers doctrine. The Supreme Judicial Court of Massachusetts upheld, against such a challenge, application of the state's financial disclosure laws to members of the bar. Opinion of the Justices to the Senate, 375 Mass. 795, 376 N.E.2d 810 (1978). The Florida Supreme Court stated, in dicta, that the
II. THE PENNSYLVANIA SUPREME COURT'S APPROACH

A. The Pennsylvania Ethics Act

In 1978, Pennsylvania passed a state ethics act and joined a substantial number of states that, during the 1970's, enacted statutes designed to eliminate conflicts-of-interest involving public officials.\textsuperscript{14} The stated purpose of the Pennsylvania Ethics Act is "to strengthen the faith and confidence of the people of the State in their government" by assuring that "the financial interests of holders of or candidates for public office present neither a conflict nor the appearance of a conflict with the public trust."\textsuperscript{15}

The Pennsylvania Ethics Act is similar in form and substance to most other state ethics laws.\textsuperscript{16} It contains several criminal prohibitions designed to ensure that public employees do not use their positions for personal financial gain,\textsuperscript{17} a post-employment restriction which prohibits certain contacts between former public employees and the governmental bodies with which they served,\textsuperscript{18} and a financial disclosure provision which requires public employees and candidates for public office to file

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\textsuperscript{14} Florida Legislature did not have constitutional power to enact an ethics code to govern the judiciary. \textit{In re The Florida Bar}, 316 So. 2d 45 (Fla. 1975). The actual holding in the case, however, was that members of the bar, when serving "in an administrative or supervisory capacity necessary to operate the Bar and the judicial system," were not "officers or employees of the state" subject to the financial disclosure requirement. \textit{Id.} at 47. A similar issue is presently pending before the Supreme Court of Montana in State Bar of Montana v. Krivec, No. 81-35 (Mont. 1981).

\textsuperscript{15} By waiting until 1978, Pennsylvania was a relative latecomer in this area. One commentator has noted:

The movement that has produced an ethics code of some type for public officials and employees in more than 40 states ... was initiated when citizen's councils and organizations proposed reform legislation during the late 1960s. Most such legislation languished until the catalyst of Watergate. In 1973, Ohio's General Assembly passed its ethics law and many other legislatures were pressed for action in 1973 and 1974. Terapak, \textit{Administering Ethics Laws: The Ohio Experience}, 68 NATL CIV. REV. 82, 82 (1979)[hereinafter cited as Terapak]. Also in 1978, Congress passed the Ethics in Government Act. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified at 2 U.S.C. § 701 (Supp. II 1978)).


\textsuperscript{17} For an excellent review of the provisions of many state ethics laws, see R. VAUGHN, PRINCIPLES OF CIVIL SERVICE LAW § 8.5(5) (1976).

\textsuperscript{18} PA. STAT. ANN. tit. 65, §§ 403(a)-(c), (h) (Purdon Supp. 1981).
statements listing certain personal financial interests which might conflict with their public duties.\textsuperscript{19} A state ethics commission was created to administer the Act and to investigate complaints against officials for violations of the substantive prohibitions.\textsuperscript{20}

B. The Challenge—Wajert v. State Ethics Commission

Pennsylvania judges and attorneys have challenged both the post-employment restriction and the financial disclosure requirement, claiming that these portions of the Act cannot constitutionally be applied to them.\textsuperscript{21} The first of the challenges, \textit{Wajert v. State Ethics Commission},\textsuperscript{22} was brought by a trial court judge questioning the applicability of the post-employment restriction, section 3(e) of the Act, to him. Section 3(e) of the Ethics Act prohibits any former public official from representing a person on any matter before the governmental body with which he was associated for a period of one year after leaving that body.\textsuperscript{23}

Responding to a request for an advisory opinion from John M. Wajert, Judge of the Court of Common Pleas of Chester County, the State Ethics Commission determined that "a Common Pleas Judge is barred by section 3(e) of the Act from representing any person before the Court with which he was associated for a period of one year following resignation or retirement."\textsuperscript{24}

Thereupon, Judge Wajert filed a petition for a declaratory

\textsuperscript{21} Various provisions of the Ethics Act have survived challenges on other grounds, including claims that the Act was so vague as to deny due process; unconstitutionally infringed the right of privacy; violated the state constitutional provision pertaining to the appointing power of the governor; violated the right to a republican form of government; unconstitutionally discriminated against local officials; unconstitutionally delegated legislative authority; and violated the state equal rights amendment. Snider v. Thornburgh, 436 A.2d 593 (Pa. 1981); Pennsylvania State Ass'n of Twp. Supvrs v. Thornburgh, 437 A.2d 1 (Pa. 1981). The only constitutional infirmity found by the court in these two cases was that the exclusion of appointed, noncompensated officials from the definition of "public official" violated the equal protection clause of the United States Constitution.
\textsuperscript{22} 491 Pa. 255, 420 A.2d 439 (1980).
\textsuperscript{24} 491 Pa. at 258, 420 A.2d at 440 (quoting Advisory Opinion 1978-5 (May 11, 1979)).
judgment in the commonwealth court, seeking to have the Ethics Act declared unconstitutional in its application to judges and justices of the Commonwealth of Pennsylvania. The commonwealth court held the post-employment restriction inapplicable to former judges, concluding that the term "governmental body" was not meant to include a court of law. The court so construed the provision because it believed a contrary construction might render it unconstitutional as "a direct restriction upon the practice of law" and a "usurpation of the exclusive power of the Supreme Court of Pennsylvania to regulate the practice of law."

C. The Supreme Court's Resolution—Exclusive Supreme Court Control

On appeal, the Pennsylvania Supreme Court focused on the constitutional issue. Holding first that the term "governmental body" includes courts of law, and that the prohibition was therefore intended to apply to Judge Wajert, the court went on to declare the statute an unconstitutional "infringement on the Supreme Court's inherent and exclusive power to govern the conduct of those privileged to practice law in this Commonwealth."

Relying on its inherent power, reaffirmed in section 10(c) of the 1968 Pennsylvania Constitution, the court stated that the

26. Id. at 107, 407 A.2d at 130.
28. Id. at 262, 420 A.2d at 442.
29. The argument over whether the Pennsylvania Supreme Court's power to regulate court procedure and the practice of law was inherent in the constitution or was granted by the legislature, see note 4 supra, was laid to rest by article V, section 10(c) of the constitution of 1968, which provides:

The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor
professional conduct of all persons engaged in the practice of law, including former judges, was to be exclusively regulated by the Pennsylvania Rules of Disciplinary Enforcement and the Pennsylvania Code of Professional Responsibility, as adopted by the supreme court. The rules were to "supersede all other court rules and statutes pertaining to disciplinary enforcement heretofore promulgated." The court pointed out that in adopting Disciplinary Rule 9-101(A) of the Code of Professional Responsibility, which prohibits a lawyer from accepting private employment in a matter upon the merits of which he acted in a judicial capacity, the court has already exercised its inherent power "to modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

PA. CONST. art. V, § 10(c). While this section does not use the word "exclusive," the supreme court has, on several occasions, determined that the grant of power to control court procedure and the conduct of the bar was exclusive: "%here is simply no substantial support for the proposition that the grant of authority in Article V, § 10(c) is anything other than exclusive." In re Pa. C. S. § 1703, 482 Pa. 522, 529, 394 A.2d 444, 448 (1978). Accord, Garrett v. Bamford, 582 F.2d 810 (3d Cir. 1978); Commonwealth v. Sutley, 474 Pa. 256, 378 A.2d 780 (1977).

30. PA. R.D.E. The Rules of Disciplinary Enforcement do not contain a substantive code of behavior, but provide the procedural mechanism used to discipline an attorney for violation of the disciplinary rules contained in the Code of Professional Responsibility. PA. R.D.E. 103 reads:

The Supreme Court declares that it has inherent and exclusive power to supervise the conduct of attorneys who are its officers (which power is reasserted in Section 10(c) of Article V of the Constitution of Pennsylvania) and in furtherance thereof promulgates these rules which shall supersede all other court rules and statutes pertaining to disciplinary enforcement heretofore promulgated.

Id.

31. By its order of February 27, 1974, the Pennsylvania Supreme Court adopted the ABA Code of Professional Responsibility (adopted August 12, 1969 and amended February 27, 1970) as the standard of conduct for attorneys of all the courts of the commonwealth. The Code contains Ethical Considerations, which "represent the objectives toward which every member of the profession should strive," and Disciplinary Rules, which "unlike the Ethical Considerations are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." PA. CODE OF PROFESSIONAL RESPONSIBILITY, PRELIMINARY STATEMENT.

32. 491 Pa. at 262, 420 A.2d at 442 (quoting PA. R.D.E. 103).
deal with the mischief" the Ethics Act attempts to address. The court limited the holding to former judges and specifically declined to decide whether the statute is unconstitutional when applied to other attorneys. The court recognized, however, that the language of its opinion seems to indicate its applicability to all attorneys practicing in Pennsylvania, because it speaks of exclusive supreme court control of the conduct of attorneys, rather than only judges or the court system.

III. AN ALTERNATIVE APPROACH TO THE WAJERT PROBLEM

A. The Scope of Legislative Power over the Bar

It is abundantly clear that the Supreme Court of Pennsylvania has paramount control over the practice of law in the state. The


35. The court stated:

   We are not unmindful that the reasons set forth infra for our ruling strongly suggest the statute is also unconstitutional in application to attorneys who seek to practice in Pennsylvania's courts. We need not now so rule and explicitly refrain from doing so, but feel compelled to point out our conscious consideration of the possible breadth of our ruling.

   491 Pa. at 261 n.5, 420 A.2d at 442 n.5.

36. In many states, this power is considered inherent in the supreme court
court develops the substantive requirements and procedures for admission to the bar and ultimately determines a candidate’s admissibility. The supreme court also imposes ethical standards for the practice of law, establishes procedures for administering noncriminal disciplinary action for violation of the ethical standards, and again ultimately determines when and against whom such sanctions are to be applied.

The exclusive power of the supreme court to govern the con-

by virtue of constitutional language that vests judicial power in the supreme court. See note 4 supra. In Pennsylvania, this power was explicitly granted by the constitution of 1968. See note 29 supra. The separation of powers in most states differs somewhat from that of the federal system because Congress has considerably more control over the judicial system than do most state legislatures. Congress’s power derives from its constitutional authority “[t]o constitute Tribunals inferior to the Supreme Court.” U.S. Const. art. I, § 8, cl. 9. The power to control federal judicial procedure has, to a great extent, however, been delegated by Congress to the federal courts. 28 U.S.C. § 2071 (1976).

Therefore, although the judicial financial disclosure requirements of the Ethics in Government Act of 1978, see note 14 supra, were challenged by federal judges, Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979), cert. denied, 449 U.S. 1076 (1981), the discussion proceeded along somewhat different lines. The plaintiff judges could not argue, as did Judge Wajert, that the legislature had no power to control the conduct of the judiciary. The Duplantier decision takes this as given. The only question was whether the statute unduly impeded “the operation of a coordinate branch of government.” 606 F.2d at 667.

Indeed, Congress is manifestly empowered to declare that a judge be disqualified “in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). If Congress has the constitutional authority to require a judge to disqualify himself from adjudicating certain issues on the ground of financial interest, 28 U.S.C. § 455(b)(4), mandating a judge to disclose his personal financial interests is a fortiori an objective within the constitutional authority of Congress.

The intrusion upon the constitutionally assigned functions of the judiciary made by the Act is justified by the promotion of important objectives within the constitutional authority of Congress. The Act, therefore, does not violate the doctrine of separation of powers.

Id. at 668. Although the reasoning used by the Duplantier court in upholding the federal ethics law proceeded along the lines advocated in this article, the decision is not direct authority for using such an approach in Pennsylvania or other states where the legislatures have less control over the conduct of the judiciary.

38. PA. B.A.R. 222.
39. CODE OF PROFESSIONAL RESPONSIBILITY. See note 31 supra.
40. PENNSYLVANIA RULES OF DISCIPLINARY ENFORCEMENT. See note 30 supra.
41. PA. R.D.E. 208(e).
duct of the judiciary and the bar does not inherently render a statute touching upon the professional activities of a judge or an attorney unconstitutional. A distinction must be drawn between a statute directed only at attorneys and a statute directed at some larger class of the public, some of whom might be attorneys. Consider, for example, a statute requiring all attorneys to pay a fee of two and one quarter percent of the income from their practice in order to remain members of the bar. Given the exclusive power of the supreme court to set the fees required to practice law in Pennsylvania, such a statute would surely be unconstitutional. Yet, few would argue that the requirement that all Pennsylvanians, including attorneys, pay a tax of two and one quarter percent of their income is anything but a legitimate exercise of the legislative taxing power.

The Pennsylvania Ethics Act is directed at public officials and employees and seeks to diminish the evils that might flow from conflicts-of-interest among those persons. Some of the public officials and employees covered are attorneys; many are not. The mere fact that a public official is also an attorney, or that a person's law practice might incidentally be affected by the statute is not, of itself, sufficient justification for holding the statute unconstitutional.

42. To defray the costs of disciplinary enforcement, the Pennsylvania Rules of Disciplinary Enforcement require payment of an annual fee of forty dollars by every attorney admitted to practice before the Pennsylvania courts. Pa. R.D.E. 219.


44. Even in the area of the most direct control on the practice of law—qualifications and procedures for admission to the bar—some states have allocated part of the role to the legislature, by allowing it to prescribe standards and procedures for admission to the bar, while leaving to the supreme court the actual decision about who shall be admitted and who shall be disbarred. Hanson v. Grattan, 84 Kan. 843, 115 P. 646 (1911); In re Greathouse, 189 Minn. 51, 248 N.W. 735 (1933); State v. Cannon, 196 Wis. 534, 221 N.W. 603 (1928). This is certainly a minority view today, and is not now and never has been the law in Pennsylvania.

It is not a purpose of this article to suggest that the Pennsylvania Legislature has or should have the power to prescribe rules for the governance of the bar. Such power has been granted to the supreme court by article V, section 10(c) of the constitution and "a power does not inhere to the legislature if it specifically has been withheld or entrusted to another co-equal branch of government." Commonwealth v. Sutley, 474 Pa. 256, 273, 378 A.2d 780, 788 (1977). But as noted in the text, although it might incidentally affect the prac-
B. The Overlap of Judicial and Legislative Power

Although the Wajert court is not explicit as to the scope of the supreme court's exclusive power to govern the conduct of the bench and the bar, the court seems to limit the power to the professional activities of attorneys and judges. Yet, even this limited interpretation of the court's power has never been the law in Pennsylvania. Many criminal statutes of general applicability are routinely applied to attorneys even when the proscription involves their professional conduct. For example, Pennsylvania has defined tampering with witnesses as a criminal offense. The application of the statute to an attorney involved in a court case certainly involves "governing the professional conduct" of an attorney, yet the constitutionality of the statute as applied to a practicing attorney cannot be doubted.

Alternatively, consider the application of a criminal bribery statute to a state court judge. A statute making it a crime for a public official to accept a pecuniary benefit in exchange for official action, applied to a judge, constitutes direct control of the judge's judicial behavior. It is unlikely, however, that the supreme court would view the bribery statute as an infringement of its exclusive power to govern the conduct of the judiciary in the pursuit of their professional activities.

45. 491 Pa. at 262, 420 A.2d at 442. At four points in its opinion the court declares its "exclusive power to govern the conduct of those privileged to practice law in this Commonwealth," id. at 260, 262, 420 A.2d at 441, 442, without any express limitation as to the scope of that power. The Code of Professional Responsibility and the rules arising thereunder, however, are described by the court as "standards governing the professional conduct of those engaged in the practice of law." Id. at 262, 420 A.2d at 442. It seems unlikely that the court views its exclusive authority as being without limitation. See text accompanying notes 46-48 infra.


47. 18 PA. CONS. STAT. ANN. § 4701 (Purdon 1973).

48. Conflict-of-interest statutes are distinguishable from other criminal statutes in that the prohibited activity is not itself morally wrong, but is prohibited in order to prevent placing the official in a situation where he might commit a wrongful act. ASSOCIATION OF THE BAR, supra note 33, at 19; VAUGHN, CONFLICT-OF-INTEREST, supra note 33, at 1; Shapiro, supra note 33, at 913-14. For example, the Pennsylvania post-employment restriction at issue in Wajert prohibited appearances before an official's former agency, not because all such
It is apparent from these examples that the separation of powers between the judicial and the legislative branches is not absolute. Although the supreme court may have inherent power to control the conduct of the bar, the legislature, through the exercise of its police power to provide for an effective government free of bribery and corruption, also has authority to regulate the conduct of public officials and employees. The supreme courts of other states have recognized that an overlap of functions may exist and that it is possible for the judiciary to allow some legislative regulation in this area of overlap without relinquishing ultimate control of the judiciary and the bar.

C. Evaluating Legislation in the Area of Overlap—A Functional Approach

In a case holding that complaints against attorneys received by the state bar association were not exempt from the Inspection of Public Records Law, the Supreme Court of Oregon stated: "The separation of powers principle cannot in practice work absolutely; there is a necessary overlap between the governmental functions. The rule has evolved that legislation can affect the practice of law so long as it does not unduly burden or substantially interfere with the judiciary."

Because the ultimate decision about whether any statute creates an impermissible burden or interference rests with the supreme court, the approach suggested by the Supreme Court of Oregon does not involve any surrender of the court's powers. The Supreme Judicial Court of Maine has aptly considered this an application of comity:

appearances would result in improper influence being exerted, but because such appearances could present the opportunity for improper influence. Exempting attorneys from such a prophylactic statute is not as unseemly as exempting them from a bribery or tampering statute, but such special treatment "would be an exceedingly unpopular action which, in the long run, can only damage public confidence in the legal profession." Brief of Amicus Curiae Montana Commissioner of Political Practices at 4, Ballou v. State Ethics Comm’n, 56 Pa: Commw. Ct. 240, 424 A.2d 968, 436 A.2d 186 (Pa. 1981).

49. See note 13 supra, and notes 50-52 and accompanying text infra.


The fact that the ultimate power to regulate the conduct of attorneys is inherently in the judicial department does not mean that other departments of government cannot also in some respects act in such an area as this. We note, for example, that the Legislature has conferred upon the attorney general authority to prosecute in the Supreme Judicial Court an attorney charged with conducting himself in a manner unworthy of an attorney. 4 M.R.S.A. §§ 851-856. This authority remains an alternative to the adjudication of attorney disciplinary matters pursuant to the Maine Bar Rules.

In addition, the Legislature has enacted certain statutes relating to the admission and reinstatement of attorneys, which statutes the Supreme Judicial Court honors as a matter of comity, but not in surrender of its inherent power.\textsuperscript{52}

The Pennsylvania Constitution recognizes that the legislature is not wholly barred from passing legislation which may impact on areas within the supreme court's control. Article V, section 10 (c), after granting rulemaking power to the supreme court over court procedures and the practice of law, provides that "[a]ll laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions."\textsuperscript{53} The suspension of all laws inconsistent with supreme court rules would seem to indicate by implication that the power exists to legislate in this area, as long as the legislation is not inconsistent with supreme court rules.\textsuperscript{54}

\textsuperscript{52} Board of Overseers of the Bar v. Lee, 422 A.2d 998, 1002-03 (Me. 1980)(footnotes omitted).

\textsuperscript{53} PA. CONST. art. V, § 10(c). See note 29 supra.


We cannot overlook the point that Pa. Const. art. V, § 10(c), as adopted by the citizens of the Commonwealth to invest the Supreme Court with the power of governance over the conduct of all courts, concludes by stating:

All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

That sentence makes clear that legislation relating to judges, as part of the class of all public officials, is not barred except as it may conflict with judicial rules of conduct.

\textit{Id.} at 169, 424 A.2d at 972 (Craig, J., dissenting). The Pennsylvania Supreme Court, however, has given just the opposite interpretation of this sentence: "Moreover, the constitutional provision's explicit statement . . . that court-made rules will prevail against any statutes that might be inconsistent with them would be incongruous with a scheme in which the legislature exercised concurrent rule-making power." \textit{In re} Pa. C. S. § 1703, 482 Pa. 522, 529, 394 A.2d 444, 448 (1978).
The *Wajert* opinion does not discuss whether the post-employment restriction of the Ethics Act is inconsistent with supreme court rules. The court merely mentions that an existing disciplinary rule deals "with the mischief the statute attempts to address." But one need only consider the bribery and witness tampering examples to conclude that legislative enactments are not inconsistent and therefore invalid merely because they impact on the same mischief as a supreme court rule. An attorney’s violation of either of the two criminal statutes constitutes a violation of at least one of the disciplinary rules as well.

That neither the bribery nor the witness tampering statute imposes additional restrictions on the conduct of attorneys not already contained in the disciplinary rules distinguishes the two statutes from the post-employment restriction in *Wajert.* Nonetheless, because the two statutes provide stiffer criminal penalties and an alternative enforcement mechanism, they do represent, at least to some extent, legislative control over the conduct of members of the bar in an area regulated by the disciplinary rules.

Consider for the purpose of comparison legislative enactments that are actually inconsistent with the disciplinary rules. Inconsistent legislation falls into two basic categories: Statutes requiring conduct proscribed by the rules, for example, requiring disclosure of confidential client communication, and statutes

55. 491 Pa. at 262, 420 A.2d at 442. *But see* note 33 *supra.*
56. *See* text accompanying notes 46 & 47 *supra.*
57. Witness tampering constitutes a violation of DR 7-109(B). Bribery constitutes a violation of DR 7-110(A).
58. The statute involved in *Wajert* imposed both a more restrictive prohibition and different penalties than did the applicable disciplinary rule.
59. The existence of criminal penalties and their enforcement by the criminal justice authorities may add to the deterrent effect already provided by the disciplinary rules, making such misconduct less likely. One of the prime reasons for the establishment of state ethics commissions was the public perception that government administrative agencies and self-regulatory bodies such as state and local bar associations were not adequately enforcing existing conflict-of-interest rules. *COMMON CAUSE, SERVING TWO MASTERS: A COMMON CAUSE STUDY OF CONFLICTS-OF-INTERESTS IN THE EXECUTIVE BRANCH* (1976); *Shapiro,* *supra* note 33, at 926 n.54.
60. For example, DR 4-101(B) prohibits an attorney from revealing a client confidence except "when permitted under DR 4-101(C)." Any statute that required an attorney to reveal such a confidence would clearly be inconsistent with the rule.
proscribing conduct specifically required by the rules, for example, requiring that knowledge of another attorney’s misconduct be withheld from the authorities.61

An inconsistent statute, such as that requiring disclosure of confidential client communications, would run afoul of article V, section 10(c) of the constitution62 and would clearly interfere with the supreme court’s view of the proper administration of justice as manifested by the rules. Statutory limitations on the rule requiring confidentiality of client communications restrict the flow of information from client to attorney, thereby lessening the ability of the attorney to adequately represent the client’s interest and the ability of the courts to ascertain the truth. Hence, even if the statute were enacted for a valid legislative purpose and were not directed solely at attorneys, it would constitute an impermissible interference with the judicial function.

The Wajert rationale provides no mechanism for distinguishing between bribery and witness tampering statutes on the one hand and post-employment restrictions on the other. The court’s broad assertion of exclusive control over the professional conduct of attorneys must be reconsidered in light of the absence of absolute separation of legislative and judicial powers. A functional analysis, based upon the extent to which the legislation encroaches upon the realm of supreme court control, can be applied by the court to refine its definition of exclusive power without relinquishing ultimate control. This functional analysis asks two questions: First, to what extent is the statute’s requirement inconsistent with supreme court rules; second, to what extent will application of the statute impede the supreme court’s reasoned view of the proper functioning of the system of administering justice in the state.

IV. APPLYING THE FUNCTIONAL APPROACH TO THE WAJERT CASE

The statute under consideration in Wajert fell somewhere be-

61. For example, DR 1-103 requires that an attorney with knowledge of another attorney’s misconduct “shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such a violation.” A statute that would prohibit such a report would be inconsistent with the rule.
62. See note 29 supra.
between the two above-mentioned examples. Although it did prohibit some conduct not prohibited by the disciplinary rules, the additional prohibition did not involve conduct specifically required by the rules.\(^3\)

A. Is the Statute Inconsistent with Supreme Court Rules?

One could argue that any time a statute proscribes activity not prohibited by the rules, the statute is inconsistent with the rules. The proper inquiry, however, should focus on the extent to which the lack of a prohibition in the rules constitutes passive approval of the behavior in question, or a desire that the behavior should continue, or both. There are many reasons why rulemaking bodies,\(^6\) including courts, do not prohibit certain conduct, not all of which reasons indicate approval of, or much less a desire for, the conduct in question. A court may never have considered whether the conduct was proper and useful, or whether it was improper and harmful.\(^6\) Or the court, although disapprov-

63. The two applicable sections of the Code of Professional Responsibility prohibit private employment by a former public employee only in matters in which he participated while a public employee. DR 9-101(A) provides: "A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity." DR 9-101(B) provides: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." The post-employment restriction of the Ethics Act prohibits representation before the former agency for one year on any matter, whether or not the former employee participated as a public employee. PA. STAT. ANN. tit. 65, § 403(e) (Purdon Supp. 1981). Therefore, a former judge appearing before a court on which he had served six months earlier, representing a client on an entirely new case, constitutes an example of conduct prohibited by the statute, which conduct was neither prohibited nor required by the disciplinary rules.

64. "Rulemaking bodies" in this context is meant to include any agency, whether normally considered a part of the legislative, judicial, or executive branch, when that agency performs the function of establishing substantive standards of conduct for those under its control.

65. This article and the opinions of Pennsylvania courts denote the Pennsylvania Supreme Court as the "rulemaking body" in this area. However, the actual language of the Code of Professional Responsibility was drafted by various committees of the American Bar Association (ABA). See Armstrong, Codes of Professional Responsibility, in AMERICAN BAR ASSOCIATION, PROFESSIONAL RESPONSIBILITY: A GUIDE FOR ATTORNEYS 2-6 (1978). Therefore, much of the actual decision making about what conduct should be prohibited was done by the ABA, and not by the court itself, which adopted, on February 27, 1974, the entire Code of Professional Responsibility as it had been adopted by the ABA on August 12, 1969, and amended on February 27, 1970. Although certain
ing of the conduct, may have determined that it was not worth the effort to promulgate and enforce a ban on the activity. In either case, a prohibition passed by another governmental agency is not necessarily inconsistent with the court's rules.

On the other hand, rules such as Disciplinary Rule 9-101(A) and (B), prohibiting certain attorney conduct by former judges and government employees, may represent a carefully drawn line, indicating that conduct not falling on the prohibited side of the line should be allowed. Disciplinary Rule 9-101(A) and (B) are more narrowly drawn restrictions than the post-employment restriction of the Pennsylvania Ethics Act, because they prohibit employment only in those matters in which the former official has acted in an official capacity. Although there is some evidence that these rules were passed with the expectation that post-employment conduct not covered would be allowed, there is also some indication that the problem to which the broader Ethics Act restriction is addressed—undue influence with former colleagues—was never considered when the disciplinary rules were formulated. It is not entirely clear, therefore, whether section 3(e) of the Ethics Act is actually inconsistent with the disciplinary rules.

provisions of the Pennsylvania Code of Professional Responsibility have since been amended by the supreme court, DR 9-101(A) and (B) remain as originally adopted in both the ABA and Pennsylvania Codes.

66. See note 63 supra.

67. The predecessor of DR 9-101(B), Canon 36 of the ABA Canons of Professional Ethics, was somewhat stricter than the present provision. Canon 36 prohibited a former public official from accepting employment "in connection with any matter which he has investigated or passed upon while in such office or employ." ABA CANONS OF PROFESSIONAL ETHICS No. 36. When the Canons of Professional Ethics were replaced by the Code of Professional Responsibility in 1970, the prohibition was narrowed to apply only to those matters "in which he had substantial responsibility while he was a public employee." DR 9-101(B) (emphasis added). One of the purposes of this change was to allow employment in those cases in which the employee's participation had been minimal or pro forma:

But, "passed upon" proved to be too broadly encompassing; for example, it was held under Canon 36 that a lawyer could not accept employment in connection with a land title which he had passed upon in a perfunctory manner, the title having been before him for consideration only because title reports were made in his name as assistant chief title examiner or in the name of the chief title examiner. ABA OPINION 342, supra note 33, at 519 (citing ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 37 (1931)).

68. See note 33 supra. A guide for attorneys published by the ABA, when listing the objectives of restraining former government officials, does not in-
B. What is the Impact on the Judicial System?

What motivated the supreme court to strike down section 3(e) as applied to former judges remains unstated by the court, with the exception, perhaps, of a seemingly off-point footnote in the opinion. What properly should have concerned the supreme court was the possible deleterious effects of the statute on the Pennsylvania justice system.

All post-employment restrictions make government service somewhat less attractive by decreasing employment opportunities available after leaving government service. The broader the post-employment restriction, the greater is the disincentive toward public office. Disciplinary Rule 9-101(A), which prohibits a former judge from accepting employment only in those matters in which he has acted upon the merits in his judicial capacity, has little effect on the law practice of a former judge and therefore provides little, if any, disincentive to include the possibility of undue influence with the former agency. Jordan, Ethical Issues Arising from Present or Past Government Service, in American Bar Association, Professional Responsibility: A Guide for Attorneys 189 (1978) [hereinafter cited as Jordan].


70. One author stated:

The cost, it is alleged, of . . . more extensive post-employment limitations is substantial. One cost is a reduction in the ability of government agencies to recruit highly qualified personnel . . . .

The concern regarding recruitment is premised on the belief that a substantial number of talented people enter government service with the intent to serve in government for awhile, gain experience and expertise, and then leave to seek more lucrative employment in the private sector . . . .

A person who considers employment may well consider the future options that a position provides. This may be the case if the employee intends to remain in the position. A position that automatically reduces employment options is thereby not as attractive as a fundamentally equal position that does not.

Vaughn, Conflict-of-Interest, supra note 33, at 85.

71. "[If the rules are Draconian, those leaving the government will be unreasonably restricted in their employment opportunities, and those in private employment will find government service too great a sacrifice." Jordan, supra note 68, at 190.

72. DR 9-101(A) leaves the former judge free to accept employment in any matter in which he did not act on the merits. Even if the judge intended to practice before the court on which he sat, he could represent clients on any pending cases that had been handled by other judges or had not yet been decided on the merits and on any new matters filed after his resignation. In most in-
becoming a judge. Application of section 3(e), however, to most retiring common pleas judges would have a devastating effect on their practice of law. A good trial attorney who is a prospective candidate for a common pleas judgeship might think long and hard about accepting the post if he knew that he could not appear before the common pleas courts of that county for one year after retiring from the bench. Some qualified prospective judges might decline the position because of the existence of this restriction.

This reasoning is applicable not only to judges, but to any employees of the Pennsylvania courts who might wish later to practice before such courts. In fact, the concern about adverse consequences to the Pennsylvania courts is voiced in the Wajert opinion, not in regard to judges, but in regard to law clerks:

"Given our interpretation of the statute and its application to courts of law and its possible application to law clerks, see 65 P.S. § 402, the courts of this Commonwealth might be effectively precluded from employing law school graduates as law clerks because persons would fear such employment would prohibit them from practicing before the court by which they were employed for one year after the termination of their employment."

stances, the percentage of cases in which he would be disqualified would be very small.

73. This is based on the assumption that a retiring trial level judge, when he re-entered practice, would most likely do so as a trial attorney and would most likely practice in the same county in which he sat as a judge. This would be precisely the activity prohibited by section 3(e) of the Ethics Act.

74. This would be especially bothersome to an attorney considering an appointment to a judicial vacancy. Rather than serving the full ten-year term, PA. CONST. art. V, § 15, he would have to run for re-election as early as "the next municipal election more than ten months after the vacancy occurs." PA. CONST. art. V, § 13 (1968, amended 1979). He would thus have to consider the possibility that a judicial tenure of approximately one year could result in a restriction on his practice for a full year thereafter.

75. This negative effect of a post-employment restriction such as section 3(e) has led most state legislatures that have adopted post-employment restrictions to pattern the statutes after the Code of Professional Responsibility, prohibiting employment only in matters in which the employee has participated rather than prohibiting all practice before the former agency. Of the 16 states that have enacted statutory post-employment restrictions, only Rhode Island, R.I. GEN. LAWS § 36-14-4(e)(2)(Supp. 1980), and South Carolina, S.C. CODE § 8-13-490 (1976), have enacted provisions similar to that of Pennsylvania. See Shapiro, supra note 33, at 914, 921.

76. 491 Pa. at 261 n.5, 420 A.2d at 442 n.5. Ironically, by the time Wajert
While the effect on the Pennsylvania courts' ability to hire competent judges would be less severe than on their ability to hire law clerks, the application of section 3(e) to judges would, it seems, lower the quality of the Pennsylvania bench. It is clearly within the constitutional power and duty of the supreme court to declare unconstitutional a statute which, when applied to the judiciary, would have a deleterious effect on the quality of judges and therefore presumably on the quality of justice administered in the Pennsylvania courts.

V. APPLYING THE FUNCTIONAL APPROACH BEYOND WAJERT

A. Former Government Attorneys

The same functional analysis of section 3(e) might lead to a different result in the case of former government attorneys who have not been employed in the judicial branch. The first such case to reach the supreme court will likely be Pennsylvania Public Utility Commission Bar Association v. Thornburgh. In was decided, the Ethics Commission had determined that law clerks were not considered public employees under the Act, and therefore were not subject to the post-employment restriction. 51 PA. CODE § 1.1 (promulgated pursuant to PA. STAT. ANN. tit. 65, § 407(1) (Purdon Supp. 1981)).

77. The position of law clerk to a judge is generally a short-term position of one or two years. It is neither a high-status nor a high-salary position and is almost invariably sought for the experience and the future practice opportunities it presents. Thus, application of the post-employment statute to a law clerk would, to a great extent, nullify the most attractive aspect of the job. Although it might not totally preclude the hiring of a law school graduate for this important position, as feared by the Wajert court, it would at least greatly reduce the quality of those willing to serve. The effect on the quality of those willing to serve as judges would be considerably less, because a judgeship, with higher status and pay, a longer term, and other important benefits would remain attractive to many attorneys in spite of the post-employment restriction.

78. The assumption here is that reducing the number of qualified persons willing to accept the position will normally decrease the quality of those eventually chosen to serve. But see VAUGHN, CONFLICTS-OF-INTEREST, supra note 33, at 86:

No firm conclusions can be drawn regarding the effect on recruitment and retention patterns of more extensive limitations on post-employment activities. . . . If the imposition of such limitations alters recruitment patterns, it is not clear that the alteration of these patterns necessarily will have an adverse effect on the quality of government service. Different people may be attracted to public service, but it is not clear that they will be less qualified.

Id.

that case, the commonwealth court, relying on *Wajert*, held section 3(e) of the Ethics Act unconstitutional as applied to attorneys employed by the Pennsylvania Public Utility Commission, allowing the attorneys to represent clients before the Commission within one year of leaving its employ.\(^8\)

As in the *Wajert* case, the statutory restriction is more stringent than the disciplinary rule, but whether it is inconsistent with the rule is again a difficult question to answer. In this case, however, the effect on the judicial system is considerably less than that in *Wajert*: it is perhaps even nonexistent.

In *Wajert*, the existence of the statute could lead prospective judges to decline the position because of the effect of the post-employment restriction on their practice, thereby reducing the quantity and quality of prospective members of the bench. In the case of the attorneys, the same effect would lead only to a lessening of the number of persons willing to work for the Public Utility Commission. While this might have an adverse effect on the quality of the Commission, it is not a proper concern of the supreme court. The Public Utility Commission is a creation of the legislature\(^8\) and subject to legislative, not judicial, control.\(^2\)

Whether the salutary effects of the post-employment restriction justify any possible adverse side effects on the Commission is purely a question for the legislature to decide.

Although the statute does, to some extent, control the conduct of some members of the Pennsylvania bar, it has this effect not because they are members of the bar, but because they are former employees of an administrative agency. By choosing to accept or continue employment with the Public Utility Commission after January 1, 1979, an employee of the Commission voluntarily subjects himself to a one-year ban on representation before the Commission. The restriction is a control not over attorneys, but over employees of the Commission, and its primary effect is on the Commission, not on the Pennsylvania bar.\(^3\)

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80. *Id.*
81. 66 PA. CONS. STAT. ANN. § 301 (Purdon 1979).
82. This reasoning would be applicable to attorneys employed by any administrative agency established by the legislature and, in fact, to employees of any "governmental body" outside of the judicial branch.
83. The commonwealth court specifically rejected the claim that section 3(e) was not a regulation of the practice of law, but rather a condition of employment with the state:
Therefore, even though the statute, if applied to attorneys employed by administrative agencies, controls the conduct of some attorneys, the supreme court should allow it to stand. The restriction serves a valid legislative purpose, only incidentally affects the conduct of some attorneys, and has virtually no effect on the state judicial system.

B. *Financial Disclosure Requirements*

The reasoning used by the commonwealth court in deciding two recent cases illustrates the differences between the functional approach suggested herein and the position of the Pennsylvania courts. In *Ballou v. State Ethics Commission,* the court, following the supreme court's analysis in *Wajert,* held that the financial disclosure requirements of the State Ethics Act could not constitutionally be applied to an attorney serving as a part-time township solicitor. Citing Disciplinary Rule 5-101 of the Code of Professional Responsibility, which prohibits an attorney from accepting employment if his judgment may be affected by his own financial interest, "except with the consent of his client after full disclosure," the court determined that "the subject of conflict of interest including disclosure of financial interest, has

Initially, we observe that Respondents have not shown us that the pertinent statutory provision is a condition of employment. Certainly the Ethics Act itself contains no language to that effect nor has there been any reference to the terms of any individual contract reciting such terms. More importantly, our case law is that a public employer may not achieve a result through an employment contract which could not be achieved directly as a legislative or executive function. *Sweet v. Pennsylvania Labor Relations Board,* 12 Pa. Commonwealth Ct. 358, 316 A.2d 665, rev'd on other grounds, 457 Pa. 456, 322 A.2d 362 (1974) and *Beckert v. AFSCME, District Council 88,* 425 A.2d 859 (Pa. Commw. Ct. 1981). Since we have already held that Section 3(e) is an impermissible incursion of the legislature into an exclusively judicial function it must follow that the legislature cannot, by labeling Section 3(e) a condition of employment breathe validity into an otherwise invalid legislative effort.


85. DR 5-101(A) provides that: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."
been fully regulated with respect to attorneys by the Supreme Court.\textsuperscript{86}

Judge Craig, in dissent, recognized that there was absolutely no inconsistency between the disciplinary code and the financial disclosure requirements of the Act:

The financial disclosure provisions of the Ethics Act do not conflict with the provisions of the Code of Professional Responsibility which require attorneys to declare and eschew conflicts of interest. The financial disclosure provisions of the statute implement the canons of ethics in a consistent way. Public disclosure of solicitors' interests would serve to inform the public, who have the right to know when bias might sway a solicitor's official advice, the importance of which has been rightly recognized in the majority opinion here.\textsuperscript{87}

In the \textit{Wajert} case there were specific supreme court rules\textsuperscript{88} restricting the practice of law by former judges and public officials. It was at least arguable that the specific restrictions involved a conscious decision that all other legal employment by these former officials should be allowed. The Disciplinary Rules, however, contain no requirement specifically directed at disclosure of financial interests by attorneys who are public officials. Judge Craig is correct in his determination that a law providing for public disclosure of financial interests by public employees is not inconsistent with a disciplinary rule requiring disclosure to a client of any conflicting financial interest.

Moreover, the limited disclosure requirements of Disciplinary Rule 5-101 do not give rise to the implication that further disclosure can never be required of an attorney by a client as a condition of the attorney's employment. The Ethics Act disclosure requirement is not a restriction on the practice of law; it is a requirement by a client, the state, that to be employed as its representative, an attorney must disclose certain financial information to the client. If the attorney does not wish to fulfill the client's requirement, he is still free to practice law before any court or agency on behalf of any other client; he must merely forego employment with that client.

\textsuperscript{86} 56 Pa. Commw. Ct. at 248, 424 A.2d at 987.
\textsuperscript{87} \textit{Id}. at 249, 424 A.2d at 987 (Craig, J., dissenting).
\textsuperscript{88} DR 9-101(A) and DR 9-101(B). \textit{See} note 33 and accompanying text \textit{supra}, and note 63 \textit{supra}.
Thus, the financial disclosure requirement of the Ethics Act does not violate and appears, in fact, to be consistent with supreme court rules.9 As Judge Craig recognized, the last sentence of article V, section 10(c) of the constitution “makes clear that legislation relating to municipal solicitors, as part of the class of public officials, is not barred except as it may conflict with judicial rules of legal ethics.”90 Therefore, “until the Supreme Court makes express provision for financial disclosure by solicitors, the Ethics Act disclosure requirement is not inconsistent and therefore is not ousted by the governing provision of the constitution.”91

Neither should the Act’s financial disclosure requirement be ousted as having a harmful effect on the administration of justice in Pennsylvania. The additional requirement imposed on former judges in Wajert raised the possibility of lower quality judges sitting on the bench.92 Any detrimental effect resulting from the imposition of a financial disclosure requirement on township solicitors will be suffered, if at all, by townships, who may find it difficult to attract qualified solicitors. The negative effect will be on township administration, not on the administration of justice and hence is not a proper consideration for the court.93

Although the Pennsylvania Supreme Court recently decided Ballou on appeal,94 the court avoided the constitutional question discussed in this article. The supreme court held that a part-time township solicitor is not a “public employee” as defined by the Ethics Act, and was therefore not required under the Act to file

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89. One potential inconsistency arises where the financial disclosure requirements force an attorney to reveal “a confidence or secret of his client, including his identity.” DR 4-101(B)(1). See note 60 supra. The Ethics Act requirement that each financial statement contain “[t]he name and address of any person who is the direct or indirect source of income totalling in the aggregate $500 or more,” PA. STAT. ANN. tit. 65, § 405(b)(5) (Purdon Supp. 1981), might require disclosure of clients’ identities. The legislature, cognizant of the problem, qualified the requirement with a proviso to circumvent the inconsistency: “However, this provision shall not be construed to require the divulgence of confidential information protected by statute or existing professional codes of ethics.” Id.
91. Id. at 249, 424 A.2d at 988 (Craig, J., dissenting).
92. See text accompanying notes 73-78 supra.
93. See text accompanying notes 81 & 82 supra.
a financial disclosure statement. The constitutional issue will not disappear, however, because elected officials, such as district attorneys and attorneys employed full-time by state administrative agencies, would still appear to be covered by the Act.

In Kremer v. State Ethics Commission, a companion case to Ballou, the question addressed by the commonwealth court was whether the same financial disclosure requirements of the Ethics Act could be imposed on judges. In this situation, as in Ballou, there is no inconsistency between the statute and the supreme court rules. Contrary to the Ballou result, however, an examination under the Kremer facts of the effect of the statute on the administration of justice may result in a determination that the statute has a detrimental effect. A showing that the financial disclosure requirements discourage qualified candidates from serving as judges and that this negative effect outweighs the benefits flowing from financial disclosure might be sufficient to justify striking down the statute as applied to judges.

95. The Ethics Act defines a public employee as "[a]ny individual employed by the Commonwealth or a political subdivision who is responsible for taking or recommending official action of a nonministerial nature ...." PA. STAT. ANN. tit. 65, § 402 (Purdon Supp. 1981). The supreme court held that "a municipal solicitor, functioning as a legal adviser to the appointing body, closely resembles a consultant who, as defined in the Ethics Act, 'performs professional, scientific, technical or advisory services. . . . [and] receives a fee, honorarium or similar compensation for such service.'" 436 A.2d 186, 189 (Pa. 1981).

96. The supreme court specifically declined to decide this question, however: "Our decision is limited to the application of the Ethics Act to attorneys serving in appellee's capacities. Not presented on this record is the application of the act to any others serving in the public sector as attorneys." 436 A.2d at 187 n.3.


98. Unlike stringent post-employment restrictions, which are generally acknowledged to have some negative effect on recruitment of public officials, see notes 70-75 and accompanying text supra, there is no agreement among experts in the field about whether financial disclosure requirements have such an effect. "[S]ome people, particularly those with substantial business or industry ties or with substantial industrial investments, may be unwilling to seek public employment or appointment to higher public office." VAUGHN, CONFLICT-OF-INTEREST, supra note 33, at 53. But see Terapak, supra note 14, at 82-83:

From the beginning it was feared that financial disclosure might dampen the enthusiasm of those who might otherwise seek office or public service ....
VI. RECONCILING THE FUNCTIONAL APPROACH WITH PRESENT PENNSYLVANIA LAW

A functional approach to evaluating legislation that falls within the area of overlap of legislative and judicial power has been adopted by the supreme courts of several states. In *Sadler v. Oregon State Bar* [99] the Oregon Supreme Court, pursuant to the Inspection of Public Records Law, [100] allowed inspection of records of disciplinary proceedings against an attorney, even though the applicable disciplinary rules provided that such records were to be made public only after a formal complaint had been filed by the state bar association. [101] Recognizing that this statute fell into the area of "overlap of judicial and legislative powers," [102] the court determined that the proper question before it was whether the statute "is an unreasonable encroachment on the judicial function of disciplining attorneys." [103] Deciding that public disclosure of complaints against attorneys would improve public confidence in the bar and that "[t]o strike down the Public Records Law would give special treatment to attorneys and perhaps encourage public belief that a veil of secrecy is hiding professional misconduct," [104] the court allowed the law to stand.

The Supreme Judicial Court of Massachusetts took a similar position in upholding application of the Massachusetts public official financial disclosure law to attorneys and court employees: [105]

While we recognize the importance of observing scrupulously the division of powers of each branch of government, we are also cognizant of the need for some flexibility in the allocations of functions among the three departments. Each branch, to some ex-

Ohio statistics indicate no precipitous significant or even recognizable drop in the "post-74" period. In fact, election officials indicate that there has been an increase in the number of candidates at the state and county levels in the past few years . . . .

Likewise, there have been no mass resignations by appointed public officials due to financial disclosure.

*Id.*

100. OR. REV. STAT. §§ 192.410-.500 (1973).
101. 275 Or. at 283, 550 P.2d at 1220-21.
102. *Id.* at 285, 550 P.2d at 1222.
103. *Id.* at 293, 550 P.2d at 1226.
104. *Id.* at 295, 550 P.2d at 1227.
tent, exercises executive, legislative and judicial powers. The critical inquiry here is whether the requirements which the proposed law would impose on attorneys and employees and officials of the judicial department would interfere with the functions of that branch of government. 106

There is some support in Pennsylvania case law for application of a functional approach when judicial and legislative areas of responsibility overlap. The clearest examples involve fiscal control of the judiciary, 107 probably because it is difficult for the supreme court to deny that the function of allocating public monies to public agencies, including the courts, is a legitimate legislative function. Although the court has not lost sight of the fact that control over the purse strings can mean control over all aspects of the judicial system, it has not claimed the exclusive power to appropriate and allocate funds for the judicial department.

The rule that has developed in this area is that the provision of funds for all government agencies is ordinarily left to the legislature. Although the judiciary possesses "the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities," 108 such power is not to be exercised unless the legislature neglects or refuses "to furnish funds, or sufficient funds, for reasonable judicial functions, and in consequence the efficient administration of the judicial branch of the government is thereby impaired or destroyed." 109

The same approach is taken in the area of setting salary levels for judges. Primary responsibility is allocated to the legislature, to be set aside by the supreme court only if salaries fall below a level which impairs the operation of the judiciary. 110

Another Pennsylvania case recognized, as Wajert did not, that

106. Id. at 813, 376 N.E.2d at 822.
107. See notes 108-10 and accompanying text infra.
109. 442 Pa. at 54, 274 A.2d at 198.
110. In Glancey v. Casey, 447 Pa. 77, 288 A.2d 812 (1972), the court stated: The only limitation on the legislative authority to ... [set judicial compensation]—and that only arises by implication from the tripartite nature of our government and the importance of maintaining the independence of each of the three branches of government—is that such judicial compensa-
there might be an area of overlap of legislative and judicial power, but resolved the issue in favor of the judiciary without use of the functional analysis described herein. In In re 42 Pa. C. S. § 1703,111 the supreme court held the Public Agency Open Meeting Law112 inapplicable to the supreme court's rulemaking deliberations,113 explicitly refusing to examine the effect of such a law on the judicial process: "the practical immediate effect of Section 1703 is far less important than the principle of the separation of powers and the policies that it represents."114

If the supreme court continues to apply the reasoning used in Wajert, the court will likely agree with the commonwealth court's holdings in Ballou and Kremer and find the financial disclosure requirements of the Ethics Act unconstitutional as applied to judges and attorneys. This reasoning will probably also lead it to strike down application of the post-employment restriction of the Act to all former government attorneys.115

There are, however, a few encouraging signs that this continued assault on the Ethics Act is not the only possible scenario. Three factors permit the court the opportunity to uphold portions of the statute without reversing its Wajert holding: (1) the supreme court's refusal to decide whether Wajert should be extended to other attorneys; (2) Judge Craig's insightful dissents in Ballou and Kremer; and (3) the factual distinctions in Pennsylvania Public Utility Commission Bar Association v. Thornburgh.

VII. CONCLUSION

Members of ethics commissions in other states,116 as well as attorneys in those states whose conduct is regulated by governmental ethics laws, are no doubt watching the Pennsylvania...
Ethics Act

The supreme courts of other states should follow the lead of Massachusetts and Oregon, rather than Pennsylvania, and take a more flexible, functional, and restrained approach to this area of overlap of judicial and legislative powers.

Most state supreme courts have the constitutional power to control the conduct of the state bench and bar; also, most state legislatures have the constitutional power to govern the ethics of state public officials. Because some public officials are also attorneys and judges, passage of a state ethics act will necessarily involve some legislative regulation in an area of supreme court control. The validity of the legislation turns on whether the statutes are viewed as a usurpation of supreme court power, or as a proper legislative concern in an area of overlap of judicial and legislative power.

The Pennsylvania courts have adopted the former position, striking down portions of the State Ethics Act as applied to attorneys and judges without examining the practical effects which result from an application of the statute.

This article has proposed an alternative, functional approach to the problem. The functional approach is based on the premise that control over the ethical conduct of public officials who are also attorneys or judges is a matter of concern for both the judicial and the legislative branches. In examining the application of state ethics laws to members of the bench and the bar, the state supreme court should determine whether the statute is inconsistent with supreme court rules for governance of the bar or whether the statute has a deleterious effect on the state judicial system. If the answer to either of these questions is affirmative, the court should hold the statute unconstitutional as applied to attorneys or judges or both; otherwise, the statute should be allowed to stand. The functional approach gives the court the final word on matters relating to the conduct of the bar, but does not needlessly interfere with proper legislative control over the conduct of public officials.