

**State of New York**  
**Commission on Judicial Conduct**

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In the Matter of the Proceeding Pursuant to Section 44,  
subdivision 4, of the Judiciary Law in Relation to

**Determination**

**NEIL W. MOYNIHAN,**

**a Judge of the Surrogate's Court,  
Schenectady County.**

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**THE COMMISSION:**

Henry T. Berger, Esq., Chair  
Honorable Myriam J. Altman  
Helaine M. Barnett, Esq.  
Herbert L. Bellamy, Sr.  
Honorable Carmen Beauchamp Ciparick  
E. Garrett Cleary, Esq.  
Dolores Del Bello  
Lawrence S. Goldman, Esq.  
Honorable Eugene W. Salisbury  
John J. Sheehy, Esq.  
Honorable William C. Thompson

**APPEARANCES:**

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the  
Commission

Bartlett, Pontiff, Stewart, Rhodes & Judge, P.C.  
(By Richard J. Bartlett) for Respondent

The respondent, Neil W. Moynihan, a judge of the  
Surrogate's Court, Schenectady County, was served with a Formal  
Written Complaint dated January 3, 1991, alleging that, after he  
became a full-time judge, he continued to act as fiduciary in  
several estates, continued to perform legal services for former  
clients, altered documents in an attempt to deceive Commission

investigators, failed to file reports of his extra-judicial activities and maintained an improper business and financial relationship with a law firm. Respondent filed an answer dated January 28, 1991.

By order dated February 6, 1991, the Commission designated the Honorable Bertram Harnett as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on May 1, 2 and 3, 1991, and the referee filed his report with the Commission on September 17, 1991.

By motion dated October 3, 1991, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on November 27, 1991. The administrator filed a reply dated December 3, 1991.

On December 12, 1991, and February 3, 1992, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

Findings of fact:

1. Respondent has been judge of the Schenectady County Surrogate's Court since July 1, 1987. He was a justice of the Niskayuna Town Court from 1980 to 1987.

2. Before he became a full-time surrogate, respondent practiced trusts and estates law in Schenectady for more than 30 years. His office was at 704 Union Street, Schenectady, in a building that he has owned since 1960.

3. Before July 1, 1987, respondent shared office space with Thomas B. Hayner.

4. On July 1, 1987, Mr. Hayner and respondent's son, Edward C. Moynihan, who lived with respondent until 1990, formed a partnership, Hayner & Moynihan, and rented office space from respondent at 704 Union Street. Respondent's legal secretary, Judy M. Nash, went to work for the new partnership.

As to Charge I of the Formal Written Complaint:

5. In eight estates pending in his court, respondent continued to act as fiduciary after he became a full-time judge, as set forth below. Respondent had acted as attorney and fiduciary for the estates before becoming a full-time judge; Hayner & Moynihan represented the estates after respondent became surrogate. None of the decedents in the eight estates was a close relative of respondent.

6. Respondent continued to act as fiduciary in the Estate of Arthur Schlansker, in which the will was executed on July 1, 1975, until July 1, 1989. Subsequent to July 1, 1987, the following transpired:

a) no substitution of attorneys was filed in the Surrogate's Court;

b) by letter dated July 10, 1987, the court clerk notified Hayner & Moynihan that respondent's letters testamentary were suspended for failure to file an inventory of assets;

c) respondent executed a resignation as executor dated April 3, 1989;

d) on July 1, 1989, respondent, as executor, signed an accounting for the period April 30, 1986, through July 1, 1989;

e) the estate's banking records continued to be sent to respondent at 704 Union Street through November 1989.

7. Respondent continued to act as fiduciary in the Estate of Catherine Jessen, in which the will was executed in 1985, until April 24, 1989. Subsequent to July 1, 1987, the following transpired:

a) no substitution of attorneys was filed in the Surrogate's Court;

b) respondent provided information to assist in the preparation of and signed, on September 12, 1988, a petition for a final accounting in the estate; it was filed in court on November 21, 1988;

c) respondent wrote checks and made deposits on the estate bank account until April 24, 1989;

d) on August 6, 1987, an inventory of assets was filed in the court, and the law office copy of the first page of the inventory bears the notation in respondent's handwriting "8-6-87 to Sur. Ct"; the law office copy of a letter from the court calling for the inventory also bears the notation in respondent's handwriting "8-6-87 to Court";

e) respondent signed a 1987 federal Fiduciary Income Tax Return dated July 15, 1988, as executor of the estate; it was also signed by Mr. Hayner as preparer;

f) on October 22, 1987, respondent received a message at court that an employee of the Internal Revenue Service had called concerning the estate; in November 1987, the IRS mailed to respondent at 704 Union Street a form for claiming Ms. Jessen's income tax refund for 1986; respondent filled out and signed the form as executor and dated it August 3, 1988; the law office file contains a note in respondent's handwriting indicating that he had received a telephone message on August 15, 1988, from an IRS employee who said that the refund would be mailed to respondent in four or five weeks;

g) a receipt dated November 21, 1988, for the state transfer and estate tax was sent to respondent at 704 Union Street;

h) a proposed order, which was partially prepared by respondent in June 1987, fixing the estate tax was signed by Clifford T. Harrigan as acting surrogate on November 3, 1988, and lists respondent as attorney for the estate;

i) the decree settling the account of the executor of the estate was signed by Judge Harrigan on November 21, 1988; it shows that respondent's fiduciary commission was \$17,288.89; it was paid by an estate check dated December 29, 1988, which was filled out and signed by respondent; a check for \$127.34, dated

March 6, 1989, was filled out and signed by respondent for payment to him for disbursements in connection with the estate;

j) respondent signed federal and state Fiduciary Income Tax Returns for the estate, dated February 25, 1989, as executor; Mr. Hayner signed as attorney;

k) on December 29, 1988, the law firm paid respondent \$12,750 for legal services that he provided to the estate before becoming surrogate.

8. Respondent continued to act as fiduciary in the Estate of Evelyn S. King, in which the will was executed on October 31, 1985, until March 6, 1989. Subsequent to July 1, 1987, the following transpired:

a) respondent and his former secretary, Judy Nash, continued to write checks for disbursements in connection with the estate on respondent's checking account entitled "Neil W. Moynihan, Attorney, Office Account";

b) respondent wrote seven checks pertaining to the estate on his account entitled "Neil W. Moynihan, Attorney At Law"; the checks were to Ms. Nash and respondent's daughter, Margaret M. Howard, in payment for their help with work on the estate and other estates;

c) respondent continued to write checks and make deposits on the estate checking account until March 6, 1989;

d) on August 21, 1987, the court issued certificates of letters testamentary, and respondent wrote a note to this effect on the law office file jacket;

e) in August and September 1987, respondent signed required authorizations for the redemption of various securities held by the estate as co-executor;

f) respondent continued to receive and deposit dividends into the estate's checking account through October 1987;

g) in September 1987, respondent signed checks in payment of medical bills on behalf of the decedent and asked that receipts be sent to "Neil W. Moynihan, Esq., 704 Union Street, Schenectady, New York 12305";

h) in July and October 1987, respondent filled out and signed checks for payment of estate taxes;

i) on March 31, 1988, respondent signed a release of part of mortgaged premises held by the estate;

j) on June 30, 1988, respondent signed an amended federal estate tax return as co-executor; a petition to determine estate tax was signed by respondent as executor and dated July 1, 1988; on August 23, 1988, Judge Harrigan fixed the estate tax in accordance with respondent's petition;

k) an accounting for the period October 9, 1986, through June 15, 1988, containing respondent's signature and those of his co-executors, was filed in court by Mr. Hayner;

l) on July 28, 1988, respondent filled in the amount on a check on the Hayner & Moynihan law office account for a disbursement to Schenectady County in connection with the estate; the check had been signed by Mr. Hayner;

m) on July 26, 1988, respondent wrote a check for \$21,744.64 on the estate account in payment of his executor's commission; respondent deposited the check in his "Attorney At Law" account on December 20, 1988;

n) on March 6, 1989, respondent received a check for a state income tax refund and deposited it into the estate checking account.

9. Respondent continued to act as fiduciary for the Estate of Thomas Uniacke, in which the will was executed in 1980, until February 25, 1989. Subsequent to July 1, 1987, the following transpired:

a) respondent continued to write checks and make deposits on the estate checking account through November 1988;

b) on August 17, 1987, respondent noted that he had received a refund check for Mr. Uniacke's federal income tax returns for 1986; the check was deposited the following day;

c) on August 18, 1987, respondent signed a check on the estate account to pay for a grave marker;

d) on August 28, 1987, respondent paid \$200 to his daughter for her help on the Uniacke and another estate;

e) respondent signed as executor Mr. Uniacke's 1987 federal and state tax returns on April 15, 1988; respondent entered the name of the Hayner & Moynihan law firm as preparer of the returns;



f) in May 1988, Edward Moynihan used certificates of respondent's appointment as executor of the estate in applying for death benefits;

g) in May 1988, respondent paid a medical bill for the estate;

h) on July 1, 1988, respondent deposited into his "Office Account" checking account \$475.37 for disbursements made on behalf of the estate;

i) on July 29, 1988, respondent paid himself his executor's commission of \$4,140.20 and deposited the estate's check into his "Attorney At Law" account on August 2, 1988; on November 14, 1988, respondent redeposited this amount into the estate account;

j) on August 29, 1988, the court clerk wrote to Edward Moynihan that respondent's letters testamentary were suspended for failure to file an inventory of assets;

k) on June 10, 1988, respondent signed a Resident Affidavit which was filed by Mr. Hayner with the state Department of Taxation and Finance in October 1988;

l) a petition for an accounting in the estate was signed by respondent and dated June 14, 1988, and was filed in the court on September 20, 1988;

m) on December 29, 1988, respondent withdrew \$8,930.63 from the estate checking account in order to close it and turned the money over to Hayner & Moynihan; the same day, the firm paid respondent \$7,212.13 for his legal services for work that he had

performed before becoming surrogate, for his executor's commission and for disbursements that he had made on behalf of the estate;

n) respondent compiled data, filled out in their entirety and signed as executor the 1988 federal and state Fiduciary Income Tax Returns, dated February 24, 1989; respondent wrote a note on the law office file copy of the returns that they were mailed on February 25, 1989; Mr. Hayner signed as preparer.

10. Respondent continued to act as fiduciary for the Estate of Edith Uniacke, in which the will was executed in 1980, until December 29, 1988. Subsequent to July 1, 1987, the following transpired:

a) respondent filed a petition for administration of the estate on July 1, 1987, the day he became surrogate, and he was handed his certificate of voluntary administration by the court clerk on the first day he presided as a judge;

b) respondent continued to write checks and make deposits on the estate account through December 1988;

c) on July 11, 1987, respondent signed an application for benefits due Ms. Uniacke from the Social Security Administration; Mr. Hayner made the application;

d) respondent compiled information and filled out in their entirety Ms. Uniacke's 1987 federal and state Income Tax Returns, dated April 15, 1988; Hayner & Moynihan was listed as preparer;

e) respondent's handwritten notes on a check for life insurance proceeds paid to the estate by a beneficiary of the Thomas Uniacke estate indicate that these proceeds and other insurance funds were deposited in July 1988;

f) respondent made the distribution of the estate in December 1988;

g) in December 1988, respondent signed a report and account settling the estate, which was filed in court on December 13, 1988, in which he was listed as attorney;

h) on December 9, 1988, respondent signed as voluntary administrator a check on the estate account to the beneficiary of the estate for the balance of the bequest;

i) on December 29, 1988, respondent filled out and signed a check on the estate account payable to Hayner & Moynihan for \$525 in legal fees and disbursements.

11. Respondent continued to act as fiduciary in the Estate of Nellie Anderson, in which the will was executed in 1985, until January 29, 1988. Subsequent to July 1, 1987, the following transpired:

a) respondent continued to sign checks on the estate account through January 25, 1988;

b) on October 19, 1987, the court clerk wrote to Edward Moynihan that respondent's letters in the estate were suspended for failure to file an inventory of assets; no substitution of attorneys had been filed;

c) in October 1987, respondent paid the decedent's homeowner's policy bill, which had been sent to him at 704 Union Street;

d) on January 25, 1988, respondent paid a utility bill on estate property;

e) on January 29, 1988, respondent signed a renunciation as executor of the estate which was filed in the court on February 25, 1988;

f) in October 1988, investment fund statements were sent to respondent at 704 Union Street.

12. Respondent continued to act as fiduciary for the Estate of Pauline A. Brown, in which the will was executed on March 14, 1975, until February 8, 1989. Subsequent to July 1, 1987, the following transpired:

a) respondent continued to write checks and make deposits on the estate accounts through February 8, 1989, when he closed out the accounts to make final distributions to the beneficiaries;

b) respondent compiled data, filled out in their entirety and signed as fiduciary the 1987 federal and state Fiduciary Income Tax Returns, dated April 7, 1988; Edward Moynihan signed as preparer;

c) respondent signed a petition and an accounting as executor, dated November 30, 1988, settling his account as executor;

d) respondent also signed a petition and an accounting as trustee, dated November 30, 1988;

e) on November 30 and December 16, 1988, respondent signed waivers relating to the accounting in the estate;

f) no substitution of attorneys was filed in the estate;

g) on January 25, 1989, respondent deposited in his "Attorney At Law" account \$9,883.52, which he had withdrawn from various accounts of the estate and related accounts; the money was for payment for services rendered before he became surrogate; respondent also received \$3,740.88 in trustee's commissions;

h) respondent compiled data, filled out in its entirety and signed as fiduciary the 1988 federal Fiduciary Income Tax Return for the estate, dated January 30, 1989; Edward Moynihan signed as preparer; the state Fiduciary Return was prepared by Edward Moynihan and signed by respondent;

i) respondent received \$6,700 in executor's commissions.

13. Respondent continued to act as fiduciary in the Estate of James Garvin, in which the will was executed on March 21, 1983, until September 19, 1988. Subsequent to July 1, 1987, the following transpired:

a) respondent continued to fill out and co-sign checks and to make deposits in the checking and money market accounts of the estate through March 6, 1989;

b) on September 23, 1987, respondent deposited the proceeds of the sale of property held by the estate into the money market account;

c) no substitution of attorneys was filed in the court;

d) an Inventory of Assets, dated November 27, 1987, entirely in respondent's handwriting but signed by Edward Moynihan, was filed in respondent's court;

e) respondent compiled data and filled out in their entirety Mr. Garvin's 1987 federal and state Individual Income Tax Returns, dated April 4, 1988; Edward Moynihan signed as preparer;

f) respondent also compiled data and filled out in their entirety the 1987 federal and state Fiduciary Income Tax Returns, dated April 4, 1988; these returns were also signed by Edward Moynihan as preparer;

g) respondent signed a resignation as trustee on July 20, 1988, which was filed in his court on September 27, 1988;

h) on July 28, 1988, respondent wrote a check on his office account to Hayner & Moynihan for copies in connection with the Garvin and one other estate;

i) on July 29, 1988, respondent wrote a check on his office account for postage in the same estates, and he wrote a check to Ms. Nash for her help on these estates;

j) on September 14, 1988, respondent filled out a check on the Garvin estate checking account, payable to Hayner & Moynihan, for legal fees and disbursements of \$14,211; the check had been signed in advance by the executrix;

k) on September 21, 1988, respondent received a check from Hayner & Moynihan for \$11,000 in payment for legal fees performed before he became surrogate;

l) respondent provided information to assist in the preparation of an accounting of the estate which was filed by Hayner & Moynihan in respondent's court on September 27, 1988.

14. The allegations concerning the estates of Garrett R. Jessen, Anita Dixon and Stanley Burton are not sustained and are, therefore, dismissed.

As to Charge II of the Formal Written Complaint:

15. After he became a full-time judge on July 1, 1987, respondent continued to perform business or legal services for 11 individuals and five estates, as set forth below. Respondent had represented these clients before becoming surrogate. Hayner & Moynihan represented them after July 1, 1987, and billed them for legal services, some of which were performed by respondent.

16. After July 1, 1987, respondent performed services for Mary F. Brown, a client of many years for whom respondent held a general power of attorney, in that:

a) on September 1, 1987, he prepared a check, signed by Ms. Brown as beneficiary of the Estate of Charles Brown, and on September 2, 1987, he prepared a deposit ticket and deposited the check into Ms. Brown's account;

b) in April 1988, respondent obtained a key to Ms. Brown's safe deposit box and removed certain stock certificates; he then went to Ms. Brown's home and helped her fill out a stock transfer form; respondent then wrote a check, dated April 20, 1988, on his "Office Account" to pay for mailing of the transfer form and the stock certificates;

c) respondent compiled data and filled out in their entirety Ms. Brown's federal and state Individual Income Tax Returns for 1987 which Ms. Brown signed on April 15, 1988, and which Edward Moynihan signed as preparer on April 8, 1988; a note in respondent's handwriting on the law office copies of the returns indicates that they were mailed on April 15, 1988;

d) Hayner & Moynihan billed Ms. Brown \$1,200 for preparation of the returns; on April 15, 1988, respondent transferred funds from Ms. Brown's savings to her checking account and filled out a check on her account, which was signed by Ms. Brown, to pay the fee.

17. After July 1, 1987, respondent performed services for Lucie Wilkes, whom he had represented as executrix of her husband's estate, in that:



a) respondent compiled data and filled out in their entirety Ms. Wilkes's 1987 federal and state Individual Income Tax Returns in April 1988; Hayner & Moynihan was listed as preparer; a note in respondent's handwriting on the law office copy of the federal return indicates that it was mailed on April 15, 1988;

b) on June 15, 1988, respondent wrote a check on his "Office Account" for postage and mailed stock that belonged to Ms. Wilkes's late husband so that the stock could be transferred in her name.

18. After July 1, 1987, respondent performed services for Vivian Verchereau, a client of many years for whom he held a general power of attorney, in that:

a) through September 15, 1988, respondent continued to sign checks on Ms. Verchereau's account, even though his son had also obtained a power of attorney on June 24, 1987;

b) respondent made deposits into Ms. Verchereau's checking account through May 8, 1989;

c) respondent's name, as well as that of his son, continued to be listed on bank statements for Ms. Verchereau's account until January 1990;

d) in January 1988, respondent assisted in the surrender of certain of Ms. Verchereau's stock by obtaining the stock certificates from her safe deposit box and mailing them with a letter of transmittal completed and signed by him; on January 20, 1988, respondent wrote a check on his "Office Account" for the mailing of the stocks; on January 29, 1988,

respondent deposited the proceeds of the stock transaction into Ms. Verchereau's account;

e) respondent compiled data and filled out in their entirety Ms. Verchereau's 1987 federal and state Individual Income Tax Returns, dated April 15, 1988, and signed them for Ms. Verchereau; Edward Moynihan signed as preparer; Hayner & Moynihan billed Ms. Verchereau for the service; respondent filled out and signed a check on Ms. Verchereau's account, dated January 8, 1988, in payment;

f) respondent compiled data and filled out in their entirety Ms. Verchereau's 1988 federal and state Individual Income Tax Returns, dated April 15, 1989; Edward Moynihan signed as preparer; Hayner & Moynihan billed Ms. Verchereau for these services.

19. After July 1, 1987, respondent performed services for William E.B. Vincent, a client of many years for whom respondent held a general power of attorney, in that:

a) through February 1989, respondent continued to serve as trustee of a bank account for William Vincent;

b) respondent compiled data and filled out in their entirety the 1987 federal and state Individual Income Tax Returns for William Vincent and his wife, dated April 9 and 11, 1988, respectively; the returns were signed by Edward Moynihan as preparer; Hayner & Moynihan billed William Vincent for preparation of the returns and were paid by check dated January 20, 1989, which was filled out and signed by respondent.

20. After July 1, 1987, respondent performed services for Robert Vincent, a client of many years, in that:

a) through December 7, 1988, using a power of attorney, respondent signed checks and made deposits on one of Robert Vincent's checking accounts; bank statements continued to be sent to respondent at 704 Union Street through November 1989;

b) respondent compiled data and filled out in their entirety Robert Vincent's 1987 federal and state Individual Income Tax Returns, which were signed by Edward Moynihan as preparer on April 11, 1988; a note in respondent's handwriting on the law office copy of the federal return indicates that it was mailed on April 15, 1988;

c) Hayner & Moynihan billed Robert Vincent for a yearly retainer, including preparation of the 1987 returns and 1988 estimated returns, and respondent signed the check, dated June 10, 1988, on Robert Vincent's account in payment.

21. After July 1, 1987, respondent performed services for Mary Marone, a client of many years for whom respondent had held a power of attorney since 1980, in that:

a) respondent continued to write checks and make deposits on her account through October 12, 1988; respondent's name continued to be listed on bank statements through December 1988, even though Edward Moynihan had been given a general power of attorney on June 24, 1987;

b) respondent compiled data and filled out in their entirety Ms. Marone's 1987 and 1988 federal and state Individual Income Tax Returns and signed the 1987 return as power of attorney; Edward Moynihan signed as preparer; Hayner & Moynihan billed for preparation of the returns and were paid by check dated May 2, 1989, which listed respondent's name as power of attorney.

22. After July 1, 1987, respondent performed services for Rose Cook, a client of many years for whom respondent had held a power of attorney since January 10, 1986, in that:

a) respondent continued to sign checks on Ms. Cook's accounts and make deposits until November 11, 1988; through December 1988, bank statements continued to be sent to respondent at 704 Union Street;

b) until Ms. Cook's home was sold on December 16, 1988, respondent signed checks for taxes, heating oil, utilities and insurance;

c) in March 1989, Hayner & Moynihan billed Ms. Cook and were paid for, inter alia, banking matters handled between January 1, 1986, and March 1989.

23. After July 1, 1987, respondent performed services for Inez McCormack in that he compiled data and filled out in their entirety Ms. McCormack's 1987 federal and state Individual Income Tax Returns, dated April 9, 1988; Edward Moynihan signed as preparer; a note in respondent's handwriting on the law office copy of the federal return indicates that it was mailed by him on

April 15, 1988; Hayner & Moynihan billed and were paid for preparation of the returns.

24. After July 1, 1987, respondent performed services for Betty Lou Scanlon in that he compiled data and filled out in their entirety her 1987 federal and state Individual Income Tax Returns, dated March 19 and 20, 1988, respectively; Hayner & Moynihan was listed as preparer; the law firm billed and was paid for preparation of the returns.

25. After July 1, 1987, respondent performed services for Cynthia Robinson in that he compiled data and filled out in their entirety her 1987 federal and state Individual Income Tax Returns, dated March 28 and 29, 1988, respectively; Edward Moynihan signed as preparer; Hayner & Moynihan billed and were paid for preparation of the returns.

26. After July 1, 1987, respondent performed services for Stan Dombowski, a client of many years, in that respondent compiled data and filled out in their entirety Mr. Dombowski's 1987 federal and state Individual Income Tax Returns, dated March 8, 1988; Edward Moynihan signed as preparer; Hayner & Moynihan billed and were paid for preparation of the returns.

27. After July 1, 1987, respondent performed services for the Estate of James Garvin in that he continued to handle banking matters for the estate through March 6, 1989, even though he had resigned as trustee of the estate on July 20, 1988.

28. After July 1, 1987, respondent performed services for the Estate of Leola Travins, for which he had served as attorney before becoming surrogate, in that:

a) respondent compiled data and filled out in their entirety the 1987 federal and state Fiduciary Income Tax Returns, dated March 5, 1988, for the executor of the estate; Mr. Hayner signed as preparer; a note in respondent's handwriting on the law office copy of the federal return indicates that the returns were mailed by him for signature on March 5, 1988;

b) respondent handled the estate checking account through February 19, 1988; through July 1990, bank statements were sent to the executor in care of respondent at 704 Union Street;

c) on March 1, 1988, respondent filled out and signed a check on his "Special Account," which had been his client escrow account, payable to the state Department of Taxation and Finance for a late filing fee and interest on the estate tax; respondent deducted the interest amount on his personal income tax return for 1988 as a business expense;

d) Hayner & Moynihan billed the estate for all legal services rendered to it and were paid in May 1990.

29. After July 1, 1987, respondent performed services for the Estate of Wilfred Dufresne, for which he had been attorney since 1976, in that:

a) in April 1988, Edward Moynihan petitioned Judge Harrigan for permission to execute the 1987 Fiduciary Income Tax Returns and the necessary checks for taxes; the returns annexed to the application were entirely in respondent's handwriting except for Edward Moynihan's signature;

b) respondent wrote the name of the payee, the Surrogate's Court, on a check, dated April 15, 1988, and related to the estate, drawn on the account of Hayner & Moynihan; the check was signed by Edward Moynihan;

c) in March 1989, Mr. Hayner obtained an order from Judge Harrigan allowing Mr. Hayner to execute the 1988 Fiduciary Income Tax Returns and the checks to pay the taxes; the returns submitted with Mr. Hayner's application were entirely in respondent's handwriting.

30. After July 1, 1987, respondent performed services for the Estate of Beatrice Hawley, in which the will was witnessed by respondent in 1962 and was prepared by an attorney with whom respondent practiced at the time, in that, on August 3, 1988, respondent filled out and signed a check for \$1 on his "Office Account", payable to the estate, and deposited it in the decedent's account to keep it from escheating to the state for lack of activity.

31. After July 1, 1987, respondent performed services for the Estate of Elsie Mader, for which he was attorney before becoming surrogate, in that:

a) respondent continued through September 1989 to receive and make notations on estate bank statements;

b) on April 14, 1988, respondent filled out two checks, which were signed by the executrix of the estate, in payment of the 1987 Fiduciary Income Tax Returns.

As to Charge III of the Formal Written Complaint:

32. On December 11, 1989, respondent furnished to Commission staff certain of his banking records at staff's request. Included were respondent's cancelled checks and check registers for his "Office Account" and his "Attorney At Law" account. At the hearing, respondent testified that changes on the checks and check stubs had been made long before Commission staff requested the records. He denied that any of the changes were made for the purpose of misleading or deceiving the Commission.

33. On his Office Account register, respondent crossed out "Mary F." before the name "Brown" on check stub 3539, dated April 20, 1988. At the hearing, respondent testified that he could not recall why this deletion was made.

34. On check #3527, dated October 1, 1987, drawn on the Office Account, respondent changed "est. E.S. King" to read "West p.s. Bington". Respondent crossed out "Est. Evelyn S. King" on the stub of this check. At the hearing, respondent testified that he made the changes because he determined that the entire check did not pertain to King, but he could not explain the notation "West p.s. Bington."



35. Check #3543, dated July 28, 1988, drawn on the Office Account, contained the words King and Garvin. Respondent altered those words by superimposing the words Post and Office on top of the words King and Garvin. At the hearing, respondent testified that he did not recall why the change had been made.

36. Attorney At Law account check stubs 7973 and 7974, both dated December 23, 1987, were similarly altered. On check stub 7973, respondent superimposed the word clerks over the word clients and "diets" over "clients" on check stub 7974. Respondent used check 7973, as well as cash, to pay for Christmas gifts to former law clients, including Stan Dombowski, Gordon Light and Walter and Charlotte Schlansker. At the hearing, respondent testified that he could give "no specific answer" as to why he changed "clients" to "clerks" and that he changed "clients" to "diets" in order to remind himself to whom he had given diet candies.

37. On his Attorney At Law account, respondent superimposed the word "camping" over "King" on check stub 8055, dated June 17, 1988. The check was a payment to respondent's daughter, Margaret M. Howard, for her help with the final accounting in the Estate of Evelyn S. King. At the hearing, respondent testified that he was disguising a gift to his daughter, who intended to use the money for a camping trip.

38. On his Attorney At Law account, respondent superimposed the words "Peg's King Olds--car reimburse" over "King estate" on check 8063, dated July 29, 1988. The check was

a payment to Ms. Howard for her help in July 1988 in connection with the King estate. At the hearing, respondent testified that he did not recall why the change had been made.

39. On his Attorney At Law account, respondent changed the notation "tax help" to read "Extra help-Eester" [sic] on check stub 8028, dated April 8, 1988. The check was a payment to Judy Nash, respondent's former secretary who, at the time, was employed by Hayner & Moynihan. At the hearing, respondent testified that he could not recall why he made the changes but assumed that it was to denote an Easter gift to Ms. Nash for her service prior to 1988 to his former clients.

40. On his Attorney At Law account, respondent changed "Jas" or "Jes" and "work" to "for Jamesway working cabinet" on check stub 8087, dated October 7, 1988. The check was a payment to Ms. Howard for her help in the Jessen estates. At the hearing, respondent testified that he had made the change to reflect that his daughter had used the money to purchase a workbench from a Jamesway store.

As to Charge IV of the Formal Written Complaint:

41. The charge is not sustained and is, therefore, dismissed.

As to Charge V of the Formal Written Complaint:

42. Respondent did not file reports for 1987, 1988 and 1989, stating the date, place and nature of extra-judicial

activities for which he had received compensation and the names of payors and amounts of the compensation received.

43. On March 28, 1990, after having been asked by a member of the Commission about his failure to report extra-judicial compensation, respondent prepared and delivered to the clerk of his court a document which did not comply with the reporting requirements in that it set forth only the gross amounts of legal fees, commissions and rental income received in each of the preceding three years.

As to Charge VI of the Formal Written Complaint:

44. After he became a full-time judge on July 1, 1987, respondent maintained a business and financial relationship with his son's law firm in that:

a) he continued as fiduciary for eight estates which were pending in his court and were represented by his son's law firm, as set forth in paragraphs 5 through 13 above;

b) he performed services for clients of his son's law firm and for which his son's law firm billed the clients, as set forth in paragraphs 15 through 31 above;

c) on December 29, 1988, respondent paid his son's law firm \$1,000 to complete the Estate of Ray Wilkes; in June 1988, respondent had received a legal fee of \$10,000 for services to the estate;

d) on December 29, 1988, respondent paid his son's law firm \$1,950 to complete work on the Estate of Earl Paxton, having been paid \$13,000 in June 1987 for legal fees in connection with the estate;

e) in January 1989, Mr. Hayner obtained and filed in the Surrogate's Court a Receipt, Release and Waiver in the Estate of Marjorie Van Vorst in connection with the judicial settlement of the estate, for which respondent was executor; Mr. Hayner also obtained the Attorney General's letter of no objection to the accounting;

f) respondent paid Judy Nash, a legal secretary for Hayner & Moynihan, \$350 in checks and \$100 in cash between December 1987 and December 1988;

g) respondent acted as surrogate in the Estate of Nilsson W. Zeh, which was represented by Hayner & Moynihan.

45. The allegations in paragraph 14(e) of Charge VI of the Formal Written Complaint are not sustained and are, therefore, dismissed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a), 100.3(c)(1), 100.5(c)(1), 100.5(d) and 100.6(c), and Canons 1, 2A, 3C(1), 5C(1), 5D and 6C of the Code of Judicial Conduct. Charges I, II, III, V and VI of the Formal Written Complaint are sustained insofar as they are consistent with the findings

herein, and respondent's misconduct is established. Charge IV is dismissed.

For over two years after he became a full-time judge, respondent continued to perform legal services for many of his former clients. He used the successor to his former law firm to cloak his improper extra-judicial activities, failed to publicly disclose the source of his extra-judicial income and improperly altered records to conceal from the Commission his continuing involvement on behalf of clients.

A full-time judge is prohibited from acting as a fiduciary under an instrument executed after January 1, 1974, except in an estate involving a close relative. (Rules Governing Judicial Conduct, 22 NYCRR 100.5[d]). Respondent ignored this proscription and continued to handle banking, tax, investment and other matters for eight estates pending in the Surrogate's Court, in some instances for as long as two years after becoming a judge.

A judge must also "refrain from financial and business dealings that tend to reflect adversely on impartiality...or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which he or she serves." (22 NYCRR 100.5[c][1]). Respondent's activities as fiduciary for the eight estates involved him in numerous transactions with his son's law firm. Bank and court documents were sent to respondent at the law firm's office. Respondent had

access to and made notations on law firm files. He prepared tax and estate documents signed by the members of the firm. He used the firm's secretary to assist him in some cases, and the secretary continued to write checks on respondent's law office bank accounts. There was a steady stream of financial transactions between the firm as attorneys for the estates and respondent as fiduciary.

In addition, respondent continued after he became surrogate to perform banking, investment and tax services for 16 other former clients being represented by his son's law firm. The law firm billed the clients for some of the services performed by respondent. As the successor to respondent's estates and trusts practice, Hayner & Moynihan was an active litigator in the Surrogate's Court. Whether or not respondent's continuing work on behalf of his former clients constituted legal services or the practice of law, he was performing services for clients of his son's law firm for which the firm was being paid. Thus, respondent was involved in transactions with lawyers likely to appear in the court on which he serves, in violation of 22 NYCRR 100.5(c)(1). It does not matter whether respondent's purpose in continuing to provide services for his former clients was for the benefit of the clients, himself or his son's firm.

Since respondent prepared tax returns and court accountings that were signed by members of the law firm, it is evident that he knew that his extra-judicial activities were improper and that he was attempting to shield his involvement.

Such conduct cannot be condoned. (See, Matter of Intemann v. State Commission on Judicial Conduct, 73 NY2d 580, 581-82).

Respondent's actions were not isolated efforts to conclude some outstanding ministerial matters in estates left open when he ascended the bench. Rather they reflect a continuing course of involvement in his cases. Respondent simply couldn't let go of them. For example, he filed a petition for voluntary administration in the Estate of Edith Uniacke on July 1, 1987, the same day that he became a judge.

He also failed to conform with the "sunshine" provision of the Rules Governing Judicial Conduct, which requires judges to disclose the source of extra-judicial income and expose potential conflicts of interest. (See, 22 NYCRR 100.6[c]).

These acts alone would justify respondent's removal from office.

Respondent compounded his egregious conduct by altering his banking records. After checks and check stubs were written and the checks had cleared the bank but before they were reviewed by the Commission staff, respondent changed the records in ways that obscured their reference to estates and former clients for whom he had performed services after becoming a full-time judge. As the distinguished referee found, respondent's alterations were "deliberate uses of susceptible words and characters to change their meaning." (Referee's report, p. 69). For example, respondent changed "est. E.S. King" to "West p.s. Bington" and the words "clients" to "clerks" and "diets".

Respondent admits that he made the alterations. That admission, the nature of the changes and the lack of any credible explanation permit the inference that the alterations were made to conceal respondent's involvement in the matters after he became surrogate. Although respondent denies making the changes for the purpose of deceiving the Commission, we find the denial unworthy of belief because respondent testified that he couldn't recall why he made some of the changes and where he did offer an explanation, it was incredible. We therefore conclude that respondent made the changes in an attempt to conceal from the Commission his impermissible services to some of his former clients.

"Such deception is antithetical to the role of a Judge who is sworn to uphold the law and seek the truth," (Matter of Myers v. State Commission on Judicial Conduct, 67 NY2d 550, 554) and "cannot be condoned," (Intemann, supra at 582).

By reason of the foregoing, the Commission determines that the appropriate sanction is removal.

Mr. Berger, Judge Altman, Ms. Barnett, Mr. Bellamy, Mrs. Del Bello, Mr. Goldman, Mr. Sheehy and Judge Thompson concur, except that Mrs. Del Bello dissents as to Charge II only in that she would also find a violation of the Rules Governing Judicial Conduct, 22 NYCRR 100.5(f).

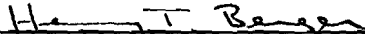
Judge Ciparick, Mr. Cleary and Judge Salisbury dissent as to Charge III and vote that the charge be dismissed and dissent as to sanction and vote that respondent be censured.



CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct, containing the findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

Dated: April 3, 1992

  
Henry T. Berger, Esq., Chair  
New York State  
Commission on Judicial Conduct