

APPENDIX O

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

IN RE: PAUL M. SUSHCHYK

SUFFOLK, ss.

Case No. OE-143

**MOTION IN LIMINE TO PRECLUDE THE RESPONDENT FROM
PRESENTING ANY IN-COURT OR OUT-OF-COURT DEMONSTRATION OR
EXPERIMENT RELATING TO RESPONDENT’S ALLEGED IMPROPER
TOUCHING OF THE COMPLAINING WITNESS**

Now comes the Commission on Judicial Conduct (“Commission”), in the above-captioned matter, and respectfully requests that the Hearing Officer appointed to preside over this matter, the Honorable Judge Bertha Josephson (ret.) (“Judge Josephson”) preclude counsel for the subject judge, Judge Paul M. Sushchyk (“Judge Sushchyk”), Mr. Michael P. Angelini, Esq. (“Mr. Angelini”) from presenting any in-court or out-of-court demonstration or experiment relating to the Respondent’s alleged improper touching of the complaining witness, Ms. Emily Deines (“Ms. Deines”).

In a May 21, 2020 letter relating to this matter, the Respondent’s counsel, Mr. Michael P. Angelini, Esq. (“Mr. Angelini”), notified the Commission, as follows: “The only tangible item that I currently intend to present at the Hearing, in addition to deposition exhibits, is a barstool comparable to the barstool on which Ms. Deines was seated or was about to be seated at the time of this alleged incident.”

In a June 9, 2020 email to counsel for the Commission, Mr. Howard V. Neff, III, Esq. (“Mr. Neff”), Mr. Angelini wrote that he intends to call one of the witnesses on his June 6, 2020 witness list (attached as Exhibit A), Attorney Louis Ciavarra (“Mr. Ciavarra”), solely to participate “in a demonstration of the alleged incident.” In a

subsequent email to Mr. Neff, Mr. Angelini added that Mr. Ciavarra “may also testify regarding that demonstration.”

RESPONDENT COUNSEL HAS FAILED TO MAKE A SUFFICIENT SHOWING THAT HIS “DEMONSTRATION OF THE ALLEGED INCIDENT” WILL BE SUFFICIENTLY SIMILAR TO THE CONDITIONS WHEN THE RESPONDENT IS ALLEGED TO HAVE IMPROPERLY TOUCHED MS. DEINES

In order to admit evidence of an in-court or out-of-court demonstration or experiment, the proponent must establish to the satisfaction of the judge that “the conditions or circumstances were in general the same in the illustrative case and the case in hand.” Commonwealth v. Makarewicz , 333 Mass. 575, 592 (1956). *See, e.g.,* Commonwealth v. Corliss, 470 Mass. 443, 454–456 (2015) (judge did not abuse his discretion by excluding video of perpetrator committing the offense with a superimposed height chart created by defense expert on grounds that under the circumstances it was misleading; judge did admit height chart as a separate exhibit, along with expert witness testimony about limitations of the surveillance video); Commonwealth v. McGee , 469 Mass. 1, 7 (2014) (judge did not abuse his discretion in permitting child witness, then six years old, to use a couch to demonstrate how victim was positioned as defendant killed her); Commonwealth v. Perryman , 55 Mass. App. Ct. 187, 192–193 (2002) (judge did not abuse her discretion in permitting jurors during trial to look through telescope used by police officer to spot defendant in alleged drug transaction).

The formal charges in this matter allege that, “[a]s Judge Sushchyk passed behind Ms. Deines, he intentionally, without justification or excuse, and without invitation or consent from Ms. Deines, placed one of his hands under Ms. Deines’ buttocks or buttock and pinched or squeezed her buttocks or buttocks” while she was seated on a barstool at

Bayzo's Pub in Brewster, Massachusetts on the evening of April 25, 2019 (a photograph of Ms. Deines seated on, and also seated next to, the precise type of barstools she was seated on or about to be seated on at the time of the Respondent's alleged improper touching of her buttocks or buttock is attached as Exhibit B).

As described above, Mr. Angelini has notified the Commission that he intends to use a "barstool comparable to the barstool on which Ms. Deines was seated or was about to be seated at the time of this alleged incident" during the formal hearing in this matter and call Mr. Ciavarra to participate "in a demonstration of the alleged incident."

Collectively, these discovery disclosures suggest that Mr. Angelini intends to seek to use this barstool and Mr. Ciavarra in a demonstration challenging the credibility of Ms. Deines' testimony regarding the alleged assault that gave rise to the formal charges in this matter.

Mr. Angelini has failed to provide any information regarding how the height, weight, configuration, quantity of cushioning, flexibility of cushioning, or materials used in the "comparable" barstool he intends to use during the formal hearing compare to the qualities of the barstool on which Ms. Deines was actually seated at the time she alleged that Judge Sushchyk improperly grabbed her buttock. Mr. Angelini has also provided no information regarding Mr. Ciavarra's physical characteristics, as they compare to either Judge Sushchyk or Ms. Deines.

A demonstration is appropriate if it is relevant, Commonwealth v. Darby, 37 Mass. App. Ct. 650, 653 (1994), if it is not substantially more prejudicial than probative, *see* Commonwealth v. Rosario, 444 Mass. 550, 557 (2005); Mass. G. Evid. § 403 (2013), and if it "sufficiently resembles the actual event so as to be fair and informative,"

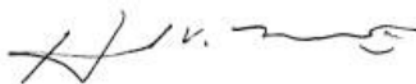
Commonwealth v. Perryman, 55 Mass. App. Ct. 187, 193-194 (2002), quoting Terrio v. McDonough, 16 Mass. App. Ct. 163, 173 (1983). See Commonwealth v. Butynski, 339 Mass. 151, 153 (1959).

CONCLUSION

The Commission respectfully submits that Mr. Angelini has failed to provide the Commission or the Hearing Officer with any information that his proposed “demonstration of the alleged incident” would be “relevant,” would “not [be] substantially more prejudicial than probative,” or would “sufficiently resemble[] the actual event so as to be fair and informative.” The Commission further submits that Mr. Angelini providing any such information at this late stage of the proceedings would unfairly prejudice the Commission and should not be permitted.

For the above reasons, the Commission respectfully requests that Judge Josephson preclude Mr. Angelini from presenting any demonstration or experiment relating to Judge Sushchyk’s alleged improper touching of the complaining witness, Ms. Deines.

Respectfully Submitted,
For the Commission on Judicial Conduct,



by:

Howard V. Neff, III
BBO # 640904
Commission on Judicial Conduct
11 Beacon Street, Suite 525
Boston, MA 02108
(617) 725-8050

Dated: July 10, 2020

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

IN RE: PAUL M. SUSHCHYK

SUFFOLK, ss.

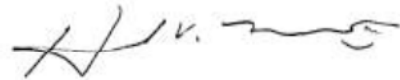
Case No. OE-143

AFFIDAVIT OF HOWARD V. NEFF, III

I, Howard V. Neff, III, Counsel for the Commission on Judicial Conduct in Case No. OE-0143, submit this Affidavit in support of the Commission's "Motion in Limine to Preclude the Respondent from Presenting Any In-court or Out-of-Court Demonstration or Experiment Relating to Respondent's Alleged Improper Touching of the Complaining Witness" and do hereby state the following:

1. I am presently employed as the Executive Director of the Commission on Judicial Conduct and have served in that capacity since September of 2012.
2. The assertions in the Commission's "Motion in Limine to Preclude the Respondent from Presenting Any In-court or Out-of-Court Demonstration or Experiment Relating to Respondent's Alleged Improper Touching of the Complaining Witness" are true to the best of my knowledge and belief.

Signed under pains and penalties of perjury this 10th day of July, 2020.



Howard V. Neff, III
BBO # 640904
Commission on Judicial Conduct
11 Beacon Street, Suite 525
Boston, MA 02108
(617) 725-8050

Dated: July 10, 2020

EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

COMMISSION ON JUDICIAL CONDUCT
COMMISSION COMPLAINT NUMBER 2019-27

IN THE MATTER OF A JUDGE

RESPONDENT'S LIST OF POSSIBLE WITNESSES

The following is a list of witnesses who may be called on behalf of Judge Sushchyk:

1. Ms. Emily Deines;
2. Chief Justice John G. Casey;
3. Attorney Evelyn Patsos;
4. Judge Linda Fidnick;
5. Judge Richard Simons;
6. Attorney Jocelynne Welsh;
7. Attorney Denise Fitzgerald;
8. Ms. Noelle Stern;
9. Ms. Christine Yurgelun;
10. Attorney Louis Ciavarra;
11. Dr. Hanya Bluestone; and
12. Those persons who on behalf of the Commission recorded statements made by

Judges Fidnick and Simons, Ms. Deines, Attorney Patsos, Attorney Welsh, Ms. Yurgelun, Attorney Fitzgerald and Ms. Stern.

Dr. Bluestone is a licensed psychologist with experience treating individuals who have been exposed to trauma. She may offer testimony regarding circumstances by which sensory input triggers a misperceived response by reason of a prior independent circumstance or traumatic event.

Respectfully Submitted,

HON. PAUL M. SUSHCHYK

By His Attorney,



Michael P. Angelini (BBO# 019340)
BOWDITCH & DEWEY, LLP
311 Main Street
P.O. Box 15156
Worcester, MA 01615-0156
Telephone: 508-926-3400
Facsimile: 508-798-3537
E-mail: mangelini@bowditch.com

Date: June 6, 2020

CERTIFICATE OF SERVICE

I, Michael P. Angelini, hereby certify that I have served a copy of the foregoing on the following by facsimile and emailing the same, this 6th day of June 2020, to:

Mr. Howard D. Neff, III
Commission on Judicial Conduct
11 Beacon Street, Suite 525
Boston, MA 02108

A handwritten signature in black ink, appearing to be 'M. Angelini', written in a cursive style.

Michael P. Angelini

EXHIBIT B

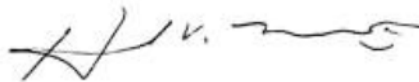


CERTIFICATE OF SERVICE

I, Howard V. Neff, III, attorney for the Commission on Judicial Conduct, hereby certify that I have this day served a copy of the foregoing document upon the party of record in this proceeding, as follows:

By email (mangelini@bowditch.com):

Mr. Michael P. Angelini, Esq.
Bowditch & Dewey, LLP
311 Main Street
P.O. Box 15156
Worcester, MA 01615



Howard V. Neff, III, Esq.
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Dated: July 10, 2020