

APPENDIX P

July 13, 2020

VIA EMAIL

Supreme Judicial Court
John Adams Courthouse, 1st Floor
One Pemberton Square, Suite 1300
Boston, MA 02108-1707

Re: Paul M. Sushchik v. Commission on Judicial Conduct

Dear Sir or Madam:

Enclosed for filing please find an Emergency Petition to Single Justice Pursuant to G. L. c. 211, § 3 in connection with the above-referenced matter:

A check in the amount of \$315.00 has been mailed to the Court to cover the filing fee for this Petition.

Thank you for your attention to this matter.

Very truly yours,


Jared A. Fiore

JAF:sp

Enclosures

cc: Mr. Howard D. Neff, III, Executive Director (via email and facsimile)

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPREME JUDICIAL COURT
CIVIL ACTION NO.

PAUL M. SUSHCHYK,
Plaintiff,

v.

COMMISSION ON JUDICIAL
CONDUCT,
Defendant.

**EMERGENCY
PETITION TO SINGLE JUSTICE
PURSUANT TO G. L. C. 211, § 3**

Pursuant to G. L. c. 211, § 3 and SJC Rule 2.22, the Hon. Paul M. Sushchyk ("Judge Sushchyk") brings this Petition seeking an Order that an evidentiary hearing (the "Hearing") on the Complaint (the "Complaint") brought against him by the Commission on Judicial Conduct (the "Commission") be continued until such time that it can be conducted in person, rather than virtually.

In relying on this Court's July 7 Order (Supplemental Order Regarding Virtual Proceedings And Administration of Oaths And Affirmations) that permitted the Commission to "elect to conduct any proceeding virtually . . ." and over the objection of Judge Sushchyk and after months of preparation for a Hearing scheduled to take place in person in a Courtroom at the Hampshire County Courthouse, the Commission suddenly ruled last Thursday that the Hearing will be conducted virtually. For the reasons set forth

herein, conducting this proceeding virtually would be highly prejudicial to Judge Sushchyk.¹

FACTS

1. The Complaint alleges that Judge Sushchyk improperly grabbed and squeezed the buttocks of a Trial Court employee while she was seated on a barstool in a bar/restaurant. Judge Sushchyk vehemently denies the allegations. See Exhibit 1 (Affidavit of Michael P. Angelini), ¶¶ 2, 6.

2. This Court has appointed Hon. Bertha Josephson (ret.) as the independent Hearing Officer for the Hearing. The Hearing is expected to last several days. Twelve witnesses are expected to testify. See Exhibit 1, ¶¶ 3, 4.

3. The defense will include what is expected to be extensive cross-examination of various witnesses, including the complaining witness. Part of that cross-examination will be a demonstration utilizing a replica of the barstool on which she was seated at the time of the alleged incident. Utilizing the barstool, it will be demonstrated that the various inconsistent and conflicting versions of how this alleged incident has been described should not be credited. Cross-examination of various

¹ Contemporaneous with the filing of this Petition, counsel has submitted a request to the Court that the Justices revise or revoke the relevant part of the July 7 Order, to provide at least that all such hearings resulting from complaints by the Commission may only be conducted virtually with the consent of all parties.

witnesses as well as direct examination will also involve the use of several photographs and poster-sized enlargements of photographs. Plainly , none of these anticipated examinations are suitable for a virtual trial, which would unacceptably prejudice Judge Sushchuk's defense. See Exhibit 1, ¶ 6.

4. Through months of preparation for this Hearing and numerous conferences with Judge Josephson there has been no mention of it being held other than in person, until last week. See Exhibit 1, ¶ 4. Suddenly, two days after the Court's July 7 Order, over Judge Sushchuk's strong objection, the Commission determined that the Hearing would be conducted virtually. See Exhibit 1, ¶¶ 4, 5; Exhibit 2 (Email Exchange, July 9, 2020 to July 10, 2020); Exhibit 3 (Letter Dated July 9, 2020).

5. In response, and to address any possible concerns related to COVID-19, Judge Sushchuk requested that the Commission continue the Hearing to a later date, so that it could be conducted actually, after the COVID-19 situation has further abated. See Exhibit 1, ¶ 7; Exhibit 2; Exhibit 3.

6. The Commission Chair denied this request late last Friday afternoon, without any reason. See Exhibit 1, ¶¶ 7, 8; Exhibit 2.

7. There is no emergency here, and no one will be prejudiced by deferring this Hearing to the extent necessary so that it can be held in person. See Exhibit 1, ¶¶ 8-11.

8. Judge Sushchuk is not involved in any Courtroom functions. He has been assigned to administrative responsibilities pending the resolution of this Complaint. See Exhibit 1, ¶ 11.

9. As the Court has ordered, in-person bench trials may proceed as early as today, July 13. See Supreme Judicial Court third updated order regarding court operations under the exigent circumstances created by the COVID-19 pandemic.

ARGUMENT

Pursuant to the Court's general superintendence power and the statutory framework pertaining to the Commission, this Court maintains control of the Commission and may issue appropriate orders "as may be necessary or desirable for the furtherance of justice." See G. L. c. 211, § 3; G. L. c. 211C, § 3(1) ("The commission shall report only to the supreme judicial court. . . . The commission may adopt rules of procedure . . . subject to the approval of the supreme judicial court."). See also McKenney v. Comm'n on Judicial Conduct, 380 Mass. 263, 268 (1980). Such an Order from the Court is required under the circumstances of this case in order to ensure that justice may be done.

Conducting the Hearing virtually rather than actually will materially hamper and unnecessarily and unfairly prejudice Judge Sushchuk's defense. See Exhibit 1, ¶¶ 6, 10. The incident, which has been described variously and inconsistently by the

complaining witness, allegedly occurred while she was sitting on a barstool in a crowded bar/restaurant. See Exhibit 1, ¶ 6. During cross and direct examinations of several witnesses, counsel intends to utilize a replica barstool to demonstrate, among other things, the impossibility of the incident having occurred. See Exhibit 1, ¶ 6. Counsel also intends during these examinations to utilize multiple photographs and poster-sized enlargements of some of those photographs of the location at which the incident allegedly occurred. See Exhibit 1, ¶ 6. All of this will be impossible in any virtual proceeding, and is part of the prejudice to Judge Sushchuk which would occur by proceeding virtually. See Exhibit 1, ¶¶ 6, 10.

There is no legitimate reason for requiring the Hearing to take place virtually on July 20, as opposed to continuing it to a later date so that it can be conducted in person without any safety concerns. See Exhibit 1, ¶¶ 7-11. This is what the parties have been preparing for for several months, until the middle of last week, and without any prior mention of COVID-19 concerns. See Exhibit 1, ¶¶ 4, 5.² Courts are permitted to conduct bench trials pursuant to this Court's Order and there is no reason why this action cannot be scheduled for an in person hearing in the coming months. See Exhibit 1, ¶¶ 7-11.

² Any new COVID-19 concerns can easily be met by simply continuing the Hearing for a few weeks.

Moreover, Judge Sushchuk is not currently participating in any Courtroom functions and has been assigned to administrative responsibilities until the Complaint is resolved. See Exhibit 1, ¶ 11.

Proceeding virtually benefits the Commission in its prosecutorial goal by substantially prejudicing Judge Sushchuk. See Exhibit 1, ¶ 10. The Hearing Officer's assessment of the facts will largely depend on the complaining witness's credibility and the plausibility of the circumstances that she has alleged. See Exhibit 1, ¶ 6. Judge Sushchuk's proposed demonstrations and exhibits will bear heavily on that determination and will illustrate that the alleged event did not occur. See Exhibit 1, ¶ 6. Those demonstrations will be significantly and negatively impacted if they cannot be performed in person, in part because the witnesses will be in one location and Judge Sushchuk and his counsel will be at another. In addition, counsel intends to use numerous photographs in questioning witnesses, which are not likely to be able to be used effectively, if the Hearing is done remotely. See Exhibit 1, ¶ 6.

We note that while Judge Sushchuk has not been charged with a crime, he is subject to the possibility of subsequent criminal prosecution, thereby justifying the requirement that his due process and constitutional rights be adequately protected during

the Hearing. See Commission on Judicial Conduct Rule 5(E) ("If, in the course of its proceedings, the Commission becomes aware of credible evidence that any person has committed a crime, the Commission may report such evidence to the appropriate law enforcement agency.").

Notably G. L. c. 211C, § 7(3) provides that "The formal hearing shall be public and shall be conducted before the hearing officer appointed by the supreme judicial court . . . and the judge shall be accorded due process of law." See also Maryland v. Craig, 497 U.S. 836, 846 (1990) ("[F]ace-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person."); U.S. v. Yates, 438 F.3d 1307, 1315 (11th Cir. 2006) ("The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation.").

The Commission's refusal to delay the Hearing smacks of an attempt to tilt the playing field in favor of its prosecution. See Exhibit 1, ¶ 10. This injustice warrants the Court's intervention. See Comm. v. Fontanez, 482 Mass. 22, 24-25 (2019) (Single Justice may exercise the Court's general superintendence power when the subject of the Petition is "sufficiently important and extraordinary"). The Judge's career is at stake, as the Commission has demanded his resignation and by every test

this Petition raises issues which are "sufficiently important and extraordinary." See Exhibit 1, ¶ 9.

WHEREFORE, the Hon. Paul M. Sushchuk respectfully requests that this Honorable Court:

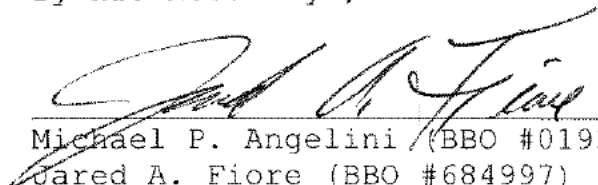
1. Grant relief on this Petition in favor of Judge Sushchuk by ordering that the Hearing be continued to a date when it can be conducted in person; and

2. Issue such further relief in Judge Sushchuk's favor as is just.

Counsel respectfully requests that this matter be heard on an emergency basis and that counsel be provided an opportunity to be heard, either remotely or in person.

PAUL M. SUSHCHUK

By His Attorneys,



Michael P. Angelini (BBO #019340)
Jared A. Fiore (BBO #684997)
Andrew C. Bartholomew (BBO #696573)
BOWDITCH & DEWEY, LLP
311 Main Street
P.O. Box 15156
Worcester, MA 01615-0156
Telephone: 508-926-3404
Facsimile: 508-929-3192
E-mail: mangelini@bowditch.com
E-mail: jfiore@bowditch.com
E-mail: abartholomew@bowditch.com

Dated: July 13, 2020

CERTIFICATE OF SERVICE

I, Jared A. Fiore, hereby certify that I have served a copy of the foregoing on the following by electronic mail (due to COVID-19), this 13th day of July 2020, to:

Howard D. Neff, III, Executive Director
Commission on Judicial Conduct
11 Beacon Street #525
Boston, MA 02108

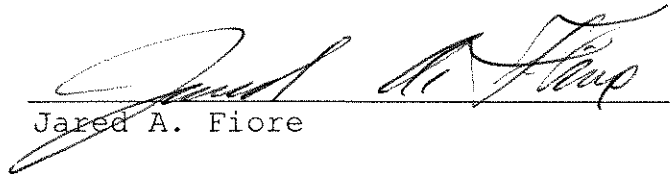

Jared A. Fiore

EXHIBIT 1

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPREME JUDICIAL COURT
CIVIL ACTION NO.

PAUL M. SUSHCHYK,
Plaintiff,

v.

COMMISSION ON JUDICIAL
CONDUCT,
Defendant.

AFFIDAVIT OF MICHAEL P. ANGELINI

I, Michael P. Angelini, do hereby depose and state as follows:

1. I have been an active trial lawyer in Massachusetts since admission to the Bar in 1968 and am the senior trial lawyer in the firm of Bowditch & Dewey LLP. I am a Fellow of the American College of Trial Lawyers.

2. My firm and I represent Judge Paul M. Sushchyk in proceedings brought against him by the Commission on Judicial Conduct, alleging that on April 25, 2019, Judge Sushchyk intentionally had improper physical contact with a Trial Court employee during a social event. In the strongest possible terms, Judge Sushchyk denies the allegation.

3. The Supreme Judicial Court has appointed Hon. Bertha Josephson (ret.) as the Hearing Officer for the evidentiary hearing at which this claim will be adjudicated.

4. Until last Thursday, July 9, it was planned by the parties and Judge Josephson that this evidentiary hearing would take place on July 20 in a Courtroom arranged by Judge Josephson at the Hampshire County Courthouse in Northampton. The Hearing is expected to last several days. Twelve witnesses are expected to testify. The parties have been planning for the Hearing for several months. Until the middle of last week there had been no prior mention of COVID-19 concerns preventing the Hearing from taking place in person on July 20.

5. On July 9, the Commission suddenly determined that the Hearing would be conducted remotely and virtually.

6. Trying this matter virtually rather than actually will substantially interfere with the presentation of evidence which I intend to present and will prejudice Judge Sushchuk's defense. This alleged incident has been described variously and inconsistently by the complaining witness. It allegedly occurred while she was sitting on a barstool in a crowded bar/restaurant. I expect there will be extensive cross-examination of the complaining witness, including demonstrations which will utilize a replica of the barstool on which she was seated at the time of the alleged incident. I also intend to use this barstool during the testimony of other witnesses, all to demonstrate that the incident did not occur. I also intend to utilize multiple photographs and poster-sized enlargements of

portions of photographs of the location at which the incident allegedly occurred. In my judgment and based on my experience, none of this can be appropriately accomplished in any virtual proceeding. This is but one part of the prejudice which will be caused to Judge Sushchuk by proceeding virtually.

7. Given the Commission's decision that the Hearing would be conducted virtually and to meet any safety concerns related to COVID-19, I promptly requested that the Commission defer the Hearing to a later date, after the COVID-19 situation has further abated. I note that this Court has indicated that jury-waived trials in the courts may begin today, July 13. Unfortunately, late on the afternoon of Friday, July 10, the Chair of the Commission refused any continuance and the insistence on a virtual hearing continues.

8. No reason for denying the continuance has been advanced, nor has there been any justification for denying Judge Sushchuk the opportunity of presenting his defense fully, in accordance with Massachusetts evidentiary rules.

9. The stakes here are high. The Commission has insisted that Judge Sushchuk resign his position. There is simply no good reason why his defense should be jeopardized.

10. The Commission's refusal to a delay the Hearing so that it can be conducted in person and insisting on proceeding virtually advantages its prosecution by limiting Judge

Sushchyk's defense, tilting the playing field to its favor. No one will be legitimately prejudiced by conducting this Hearing in late July or early August or even in September rather than on July 20, and only Judge Sushchyk will be prejudiced if the case is tried virtually.

11. There is no emergency here. Until the final resolution of this claim by the Commission, Judge Sushchyk is not involved in any Courtroom functions and has been assigned to administrative responsibilities. He is anxious to have this matter adjudicated and to return to his full responsibilities, but not at the price of incurring a large and completely unnecessary risk.

12. The exhibits attached to the Petition are true and correct copies.

Signed under the pains and penalties of perjury this 13th day of July, 2020.



Michael P. Angelini

EXHIBIT 2

Sara E. Riley

From: Howard V. Neff, III <hneff@cjc.state.ma.us>
Sent: Friday, July 10, 2020 5:35 PM
To: Michael P. Angelini
Cc: berthajosephson@aol.com
Subject: Re: Virtual hearing protocol suggestion

Dear Mr. Angelini,

Yesterday, I forwarded your request to defer the formal hearing to the Commission's Chair, Judge Bernard, as she has the authority to defer this hearing, pursuant to Commission Rule 6U.

I am now contacting you to notify you that the Commission's Chair has denied your request to defer the hearing.

Howard Neff

I am now contacting

From: Michael P. Angelini <MANGELINI@bowditch.com>
Sent: Thursday, July 9, 2020 11:26 AM
To: Howard V. Neff, III
Cc: berthajosephson@aol.com
Subject: Re: Virtual hearing protocol suggestion

Since the SJC published its Order only yesterday and since, as you have indicated, the Commission's next meeting is on Tuesday, I'm curious about the process by which the Commission has purportedly voted that these proceedings will be virtual.

Conducting this hearing in this matter would negatively impact Judge Sushchik defense.

If the Commission has in fact determined that a hearing on July 20 must be conducted virtually by reason of COVID-19 considerations I request that the hearing be deferred so that it can be conducted actually rather than virtually.

Mike Angelini

Sent from my iPad

Michael P. Angelini
Chairman

T 508-926-3400 | C 508-864-6888
MANGELINI@bowditch.com | Bio | LinkedIn
bowditch.com | MSI Global Alliance Member
311 Main Street, Worcester, MA 01608

BOWDITCH

On Jul 9, 2020, at 10:14 AM, Howard V. Neff, III <hneff@cjc.state.ma.us> wrote:

CAUTION: This email originated outside of the organization. Do not click links or open attachments you were not expecting.

Dear Judge Josephson and Mr. Angelini,

I am contacting you with some updates.

Judge Josephson: Thank you very much for your efforts in securing a courtroom for purposes of the formal hearing in this matter. Thank you also for drafting proposed protocols. I see your proposed protocols attached, but I am not able to open them. If you could re-send them in a different file format, that might be helpful. If I am able to find a way to open your file, I will pass your proposed protocols on to the members of the Commission.

As I said I would last Friday, I contacted the CJC's usual court reporting service to arrange for a court reporter at the Hampshire County Superior Court. Yesterday, that company advised me that all of their employees had health/safety concerns relating to the ongoing COVID-19 pandemic, and for that reason, none were willing to appear there.

As you indicated, on July 7, 2020, the Supreme Judicial Court issued an Order granting the CJC authority to "elect to conduct any proceeding virtually and [] issue protocols to govern such virtual proceedings" (a copy of that Order is attached).

Accordingly, the Commission has voted to make the upcoming July 20, 2020 formal hearing in this matter virtual, with all parties and participants appearing virtually through a remote videoconference platform.

Consistent with the SJC's Order, the Commission is also reviewing a set of protocols to govern virtual proceedings. I expect to be able to provide you both with a copy of those protocols tomorrow, once the Commission has approved a final draft. I would suggest that we discuss any remaining issues or questions relating to the virtual hearing during our already-scheduled conference on July 14, 2020.

I will also be filing my motions in limine tomorrow, as planned.

Thank you.

Howard

Howard V. Neff, III
Executive Director
Commission on Judicial Conduct
11 Beacon Street, Suite 525
Boston, MA 02108
617-725-8050

From: bertha.josephson@aol.com <bertha.josephson@aol.com>
Sent: Thursday, July 9, 2020 9:42:02 AM
To: MANGELINI@bowditch.com; Howard V. Neff, III
Subject: Fwd: Virtual hearing protocol suggestion

Dear Counsel,

As you know, on July 7, 2020, the Supreme Judicial Court issued its Supplemental Order Regarding Virtual Proceedings and Administration of Oaths and Affirmations, providing, in part, that “the Commission on Judicial Conduct may elect to conduct any proceeding virtually and may issue protocols to govern such virtual proceedings.”

We are less than two weeks from the hearing date and we don’t know if the Commission intends to elect to conduct the currently scheduled hearing in the above-referenced matter virtually and, if so, what the protocols would govern such virtual proceedings. Accordingly, I have attached a draft suggested protocol should the Commission elect to have the hearing conducted virtually.

I suggest we keep our to schedule of deadlines until further notice.

Sincerely yours,

Bertha Josephson

Sent from AOL Mobile Mail
Get the new AOL app: mail.mobile.aol.com

<jud-SJC-Order-Virtual-Proceedings-and-Oaths.pdf>

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EXHIBIT 3

Michael P. Angelini
Direct telephone: 508-926-3400
Direct facsimile: 508-798-3537
Email: mangelini@bowditch.com

July 9, 2020

VIA FACSIMILE

Members of the Commission on Judicial Conduct
c/o Hon. Julie J. Bernard, Chair
11 Beacon Street, Suite 525
Boston, MA 02108-3006

Re: Complaint No. 2019-27/SJC OE-0143

Dear Members of the Commission:

Yesterday, the Supreme Judicial Court published its Supplemental Order Regarding Virtual Proceeding and Administration of Oaths and Affirmations (the "Order"). The Order provides, among other things, that "the Commission on Judicial Conduct may elect to conduct any proceeding virtually and may issue protocols to govern such virtual proceedings."

As the Commission is aware, I represent Judge Paul Sushchuk in connection with a matter before the Commission on which an evidentiary hearing is scheduled to begin on July 20, 2020. I urge the Commission not to require that all or any part of those proceedings may be conducted virtually.

The Commission is required to "provide a fair and reasonable process to address judicial misconduct." This implicitly requires a fair and reasonable process to determine whether judicial misconduct has occurred. In the circumstances of the case against Judge Sushchuk, allowing any part of the hearing to take place virtually rather than actually would be inconsistent with that obligation.

Judge Sushchuk's defense necessarily will require that the complaining witness demonstrate the alleged event and the various manners in which she has claimed the alleged physical interaction between her and Judge Sushchuk. For a variety of reasons, this cannot be done virtually and my responsibility to fairly represent Judge Sushchuk in this matter can only be discharged if there is an actual hearing and not a virtual one.

Accordingly, it would be inconsistent with the Commission's responsibility to allow this hearing to occur virtually. If it is necessary to defer the hearing because of COVID-19 considerations, we would not object to any such deferral.

Judge Sushchuk is entitled to a vigorous and full defense of the claims against him and we urge you not to engage in any rulemaking which would in any way limit that right.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Michael P. Angelini', with a stylized, cursive script.

Michael P. Angelini

MPA:sp

cc: Mr. Howard D. Neff, III (via email only)
Hon. Bertha Josephson, (Ret.) (via email only)