APPENDIX V

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. COMMISSION ON JUDICIAL CONDUCT
COMMISSION COMPLAINT NUMBER 2019-27

IN THE MATTER OF A JUDGE

POST-HEARING MEMORANDUM OF LAW

In order to satisfy a burden by clear and convincing evidence, “It has been said that the proof must be ‘strong, positive and free from doubt,’ and ‘full, clear and decisive.’” Stone v. Essex Cty. Newspapers, Inc., 367 Mass. 849, 871 (1975) (internal citations omitted). See In re Laurent, 87 Mass. App. Ct. 1, 8–9 (2015) (evidence that was “long on smoke and short on fire” was not “full, clear and decisive”). In applying this standard, “[t]roublesome facts . . . are to be faced rather than ignored.” Doe v. Sex Offender Registry Bd., 94 Mass. App. Ct. 1112, at *1 (2018) (Rule 1:28), review denied, 481 Mass. 1105 (2019), quoting Adoption of Stuart, 39 Mass. App. Ct. 380, 382 (1995).

Massachusetts courts are generally reluctant to impose a hard-and-fast rule as to how much evidence is sufficient to satisfy this burden. However, in certain situations, the uncorroborated testimony of a single witness has been found insufficient to satisfy the clear and convincing standard.

In Adoption of Iris, 43 Mass. App. Ct. 95 (1997), aff'd, 427 Mass. 582 (1998), a proceeding to dispense with parental consent to adoption, the Appeals Court held that the trial judge’s findings did not “provide clear and convincing evidence of current parental unfitness,” where the findings were only supported by the testimony of one witness, a case social worker who had not witnessed any abuse, and 12 exhibits, many of which contained multilevel hearsay. Id. at 100-101. The Court determined that the Department of Social Services presented its case “in a minimalist manner” that “left far too much to speculation, conjecture and surmise.” Id. at

105-106. “To be sure, there was some evidence suggestive of an isolated instance of abuse or neglect, the cause of which may be known to the parents. However, the evidence before the court was as consistent with the cause of the injury being accident as it was abuse, as consistent with whatever caretaker was present at the time the injury occurred not knowing as knowing that a severe trauma had been dealt the child, and as consistent with the parents knowing as not knowing how and when the injury happened and who was present when it did.” Id. at 105. The judge’s findings based on this evidence were “regrettably sparse . . . scant and, variously, without requisite detail, specificity or competent evidentiary support.” Id. at 100-101. Because “[t]he evidence presented by the department was not strong, positive, full or decisive,” it failed to satisfy its burden of presenting clear and convincing evidence, and the Appeals Court remanded the case for further proceedings. Id. at 105-106.

Additionally, some courts in other jurisdictions evaluating various types of claims have held that the uncorroborated testimony of a single witness is insufficient as a matter of law to constitute clear and convincing evidence. See, e.g., Finnigan Corp. v. Int'l Trade Comm'n, 180 F.3d 1354, 1368–69 (Fed. Cir. 1999), quoting Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 143 U.S. 275, 284 (1892) (in patent infringement matter, holding that “corroboration is required of any witness whose testimony alone is asserted to invalidate a patent, regardless of his or her level of interest” because even disinterested witnesses “whose memories are *prodded by the eagerness of interested parties* to elicit testimony favorable to themselves are not usually to be depended upon for accurate information”) (emphasis in original); Darden v. Darden, 152 F.2d 208, 209 (4th Cir. 1945) (“The standard of proof required by the authorities to establish a parol trust of personalty . . . demands clear and unequivocal evidence . . . and the naked oath of one witness, without other corroborating circumstances

proved, ought never to be held as sufficient."); Easton v. Brant, 19 F.2d 857, 859 (9th Cir. 1927) (in action to alter terms of a written contract and establish a trust, stating that "courts have frequently held the testimony of a single witness not to be [] clear and convincing proof as is required to sustain a verdict or finding where it was offered for the purpose of varying or contradicting a writing"); In re Leach, 2010 WL 3038794, at *4 (W.D. Pa. July 30, 2010) ("To satisfy the clear and convincing standard in [mortgage] reformation cases, the movant must provide evidence by 'two witnesses, or one witness and corroborating circumstances.'"); Perdigao v. Delta Air Lines, Inc., 2003 WL 21181510, at *1 (E.D. La. May 19, 2003) (where defendant disputed adequate service of process, holding that "while the 'return of a sheriff is given great weight,' it can be overcome by clear and convincing evidence, and a return cannot be overcome by the uncorroborated testimony of a single witness"); In re Speer, 2020 WL 3167690, at *6 (Bankr. D. Conn. June 12, 2020) (holding that "the testimony of one witness without any documentary support" was insufficient to meet the clear and convincing standard required for an award of sanctions under applicable federal statute).

Respectfully Submitted,

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By His Attorney,

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Date: July 30, 2020

CERTIFICATE OF SERVICE

I, Michael P. Angelini, hereby certify that I have served a copy of the foregoing on the following by electronic mail, this 30th day of July 2020, to:

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

/s/ Michael P. Angelini
Michael P. Angelini