

# APPENDIX W

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

IN RE: PAUL M. SUSHCHYK

SUFFOLK, ss.

Case No. OE-143

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POST-HEARING MEMORANDUM OF LAW

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Now comes the Commission on Judicial Conduct (“Commission”), in the above-captioned matter, and respectfully submits this memorandum in response to the Respondent’s July 30, 2020 “Post-Hearing Memorandum of Law.”

**THE DEFINITION OF PROOF BY “CLEAR AND CONVINCING EVIDENCE” IS WELL-SETTLED IN MASSACHUSETTS.**

In the present matter, the Commission is required to present clear and convincing evidence<sup>1</sup> to establish that Judge Paul M. Sushchyk (“Judge Sushchyk”) engaged in willful judicial misconduct that brings the judicial office into disrepute, as well as conduct prejudicial to the administration of justice and unbecoming a judicial officer, in violation of M.G.L. c. 211C. The Commission must satisfy the same burden of proof to establish that Judge Sushchyk has violated the Rules of the Massachusetts Code of Judicial Conduct (Supreme Judicial Court Rule 3:09).

“Clear and convincing proof involves a degree of belief greater than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in criminal cases.” Callahan v. Westinghouse Broadcasting Co., 372 Mass. 582, 584 (1977) (citations omitted).

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<sup>1</sup> At the conclusion of a formal hearing, M.G.L. c. 211C, sec. 7(4) requires that the Commission prove the charges of judicial misconduct against a judge by the standard or proof of “clear and convincing” evidence.

Under that standard, “[t]he requisite proof must be strong and positive; it must be ‘full, clear and decisive.’” Adoption of Iris, 43 Mass. App. Ct. 95, 105 (1997), quoting Callahan v. Westinghouse Broadcasting Co., 372 Mass. at 584. In addition, the findings must be ‘specific and detailed findings demonstrating that close attention has been given to the evidence.’ Adoption of Quentin, 424 Mass. 882, 886 (1997).

In one of the first Massachusetts cases applying the standard of “clear and convincing” evidence to a civil matter, the Supreme Judicial Court held:

Clear and convincing proof involves a degree of belief greater than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in criminal cases (citations omitted). It has been said that the proof must be ‘strong, positive and free from doubt’ (citations omitted), and ‘full, clear and decisive’ (citations omitted). *See generally*, Wigmore Evidence, sec. 2498(3) (3d ed. 1940).

Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 871 (Mass. 1975)

In Adoption of Iris, the Appeals Court stated:

The evidence must be sufficient to convey to ‘a high degree of probability’ that the proposition is true. Tosti v. Ayik, 394 Mass. 482, 493 n.9 (1985), cert. denied, 484 U.S. 964 (1987). The requisite proof must be strong and positive; it must be “full, clear and decisive.” Callahan v. Westinghouse Broadcasting Co., 372 Mass. at 584. *See* Liacos, Massachusetts Evidence s.s. 5.2.2 - 5.2.3 (6th ed. 1994); Ireland, Juvenile Law sec. 107 (1993).

Adoption of Iris, 43 Mass. App. Ct. at 105.

**ESTABLISHED PRECEDENT RELATING TO THE EVIDENTIARY BURDEN  
REQUIRED TO ESTABLISH PROOF BY “CLEAR AND CONVINCING EVIDENCE”  
IN CIVIL PROCEEDINGS SHOULD NOT BE ALTERED.**

Relying on Federal cases from other jurisdictions, the Respondent argues that, to meet the clear and convincing standard, the Commission must introduce evidence to corroborate the testimony of Ms. Emily Deines. Such additional proof is not required in civil cases in Massachusetts.

In criminal matters, the Massachusetts Supreme Judicial Court, has, under certain circumstances, required corroborating evidence to support the testimony of a single witness where there is a higher burden of proof of “beyond a reasonable doubt.” The Supreme Judicial Court has never required that the testimony of a single witness be corroborated for a trier-of-fact to find that a particular fact or facts testified to by that witness has been proven by clear and convincing evidence. *See, e.g. Commonwealth v. Robert White*, 475 Mass. 742 (2016) (The Supreme Judicial Court concluded that independent, corroborating evidence was required by G. L. c. 277, sec. 63, to support a conviction of certain sex offenses against children based on an indictment returned more than twenty-seven years after the offense must relate to the specific criminal act or acts of which a defendant is accused. . . .)

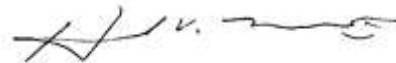
While evidence to corroborate a witness’s statement is not required to meet the clear and convincing standard, credible evidence supporting Ms. Deines’ testimony was presented:

1. In Exhibit 10, a statement written by Judge Sushchyk, dated May 20, 2019 and introduced during the hearing in this matter, Judge Sushchyk corroborated Ms. Deines’ report that Judge Sushchyk touched her in the area of her buttocks on April 25, 2019, writing, “I recall that as I began to pass by Ms. Deines, to steady myself, I placed my hand in the direction of her chair and came into momentary contact with a portion of her lower body.”
2. Ms. Deines testified that, following Judge Sushchyk’s alleged assault against her on April 25, 2019, she responded in a shocked but understandable manner, reacting at first only by trying to get the attention of her friend and co-worker, Ms. Evelyn Patsos, Esq. (“Ms. Patsos”). (Tr. Vol.1, p.86). In her own

testimony, Ms. Patsos corroborated that she noticed Ms. Deines trying to get her attention that night but did not know why. (Tr. Vol.2, p.183-186).

3. In her testimony, Ms. Jocelyne Welsh, corroborated that she observed Judge Sushchuk display a flask of whiskey at the Bayzo's Pub on April 25, 2019 (Tr. Vol.2, p.237).
4. In Exhibit 5, a text message exchange introduced during the hearing of this matter, Ms. Deines sent a text message about Judge Sushchuk's alleged assault against her to her sister later on the same day as the alleged assault: April 25, 2019. (Tr. Vol.1. p. 91)
5. In Exhibit 7, a text message exchange introduced during the hearing of this matter, Ms. Deines reported Judge Sushchuk's alleged April 25, 2019 assault against her to two friends of hers on April 26, 2019 (Tr. Vol.1. p. 196-199).

Respectfully Submitted,  
For the Commission on Judicial Conduct,



By: \_\_\_\_\_  
Howard V. Neff, III  
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11 Beacon Street, Suite 525  
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(617) 725-8050

Dated: August 3, 2020

**COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT**

**IN RE: PAUL M. SUSHCHYK**

**SUFFOLK, ss.**

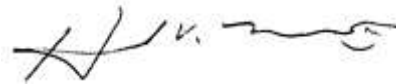
**Case No. OE-143**

**AFFIDAVIT OF HOWARD V. NEFF, III**

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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 "Post-Hearing Memorandum of Law" 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 "Post-Hearing Memorandum of Law" are true and accurate to the best of my knowledge and recollection.
3. Signed under pains and penalties of perjury this 3rd day of August, 2020.



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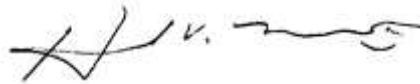
Dated: August 3, 2020

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.  
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