

APPENDIX Y

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**COMMISSION ON JUDICIAL CONDUCT
CASE NO. OE-143
COMPLAINT NO. 2019-27**

IN RE PAUL M. SUSHCHYK

**REPORT OF HEARING OFFICER TO
THE COMMISSION ON JUDICIAL CONDUCT**

I. COMPLAINT AGAINST PAUL M. SUSHCHYK

BACKGROUND

This matter came before me on complaint of the Commission on Judicial Conduct (“Commission”) against Paul M. Sushchyk (“Judge Sushchyk”), an Associate Justice of the Probate and Family Court Department alleging that he engaged in willful judicial misconduct and conduct prejudicial to the administration of justice and unbecoming of a judicial officer by inappropriately touching a court employee without her consent.

PROCEDURAL HISTORY

The Commission brought the instant action against Judge Sushchyk as a result of a complaint investigated and reported by the Probate and Family Court Department of the Trial Court. On June 4, 2019, the Chief Justice of the Supreme Judicial Court reported the complaint to the Commission. On July 16, 2019, pursuant to its authority under G.L. c. 211C, sec. 5(5), the Commission issued a Statement of Allegations against Judge Sushchyk. On February 5, 2020, as a result of its actions in conformance with the applicable procedures under G.L. c. 211C, and Commission Rules, the Commission notified Judge Sushchyk that it found sufficient cause to initiate Formal Charges. On February 24, 2020, Judge Sushchyk timely filed his response

denying the allegations. Thereafter, the complaint and response were filed with the Supreme Judicial Court and on February 27, 2020, this Hearing Officer was appointed. Beginning in March 2020, hearing on the matter was necessarily delayed as the courts' operations were restricted to emergency matters during the Covid-19 shut-down in Massachusetts. Accordingly, the Commission extended the discovery deadlines and set a hearing date of July 20, 2020.

On July 15, 2020, the parties were heard on previously filed motions in limine. The motions were acted on in my Memorandum of Decision dated July 17, 2020. The day before hearing, Judge Sushchuk filed a motion for reconsideration of the ruling on one of the motions. The motion was denied after the hearing began for the reasons stated on the record.

On July 20, 2020, Formal Hearing on the complaint began. The hearing was conducted remotely over the next three days and concluded on July 22, 2020. The hearing was conducted in keeping with the protocol established in the Commission's July 10, 2020, "CJC Temporary Emergency Order on Protocols for Remote Formal Hearings." The Commission presented its case-in-chief through the testimony of four witnesses and twelve exhibits. At the conclusion of the Commission's case-in-chief, Judge Sushchuk moved for dismissal pursuant to Mass. Rules Civil Proc., Rule 50(a). The motion was denied for the reasons stated on the record at that time. Judge Sushchuk presented evidence through cross-examination of the Commission's witnesses, and the testimony of two witnesses, including himself.

After hearing and upon review and consideration of the credible evidence adduced, I make the findings of fact stated below.

FINDINGS OF FACT

The Conference

On February 28, 2018, Judge Sushchuk was appointed by Massachusetts Governor Charles Baker to the Massachusetts judiciary as an Associate Justice of the Probate and Family Court (“the Court”). Less than fourteen months later, he attended his second annual Spring Conference for the judges of the Court. Typically, the Court holds a judicial education conference every spring and fall. The spring conferences are two day events generally held at a conference center with dining and overnight accommodations provided. Judges of the Court are expected to attend the conferences. The Court’s 2019 Spring Conference was held on April 25th and April 26th, 2019, at Ocean’s Edge Resort in Brewster, MA. It was attended by forty-eight or forty-nine of the Court’s fifty-one sitting judges. Judge Sushchuk was one of the attendees. On April 25, 2019, at approximately 6:00 AM, he left his home in Sterling, MA and drove to Brewster for the conference which was scheduled to begin at 9:00AM. He brought with him a pocket flask containing his favorite whiskey.

Also in attendance at that spring conference was Emily Deines. Ms. Deines has been an employee of the Administrative Office of the Family and Probate Court since 2004. She is a Field Coordinator for the Court and is assigned to the western region. Her main office is in the Hampden County Hall of Justice in Springfield and she is also assigned space to work out of in the Court’s Hampshire County facility in Northampton.

Ms. Deines’ job responsibilities center largely on handling the Court’s IT and technology initiatives, as well as providing trainings and on-site support to court staff and judges. Ms.

Deines also serves as staff liaison to the Court's Judicial Education Committee ("the Committee") which is responsible for the Court's annual conferences. The Committee meets monthly throughout the course of the year to plan the conferences. Ms. Deines coordinates presenters, oversees technical aspects of materials and presentations, and provides overall support to the judges at the conferences. Since joining the Committee approximately six years ago, Ms. Deines has participated in approximately twelve of the Court's Judicial Conferences. Ms. Deines was required to attend the conference as part of her job responsibilities.

The only other Trial Court attendees at the 2019 Spring Conference who were not judges were Michelle Hynes from the Trial Court's Judicial institution and four Court attorneys who work in the Administrative Office of the Court.

Ms. Deines and Judge Sushchuk knew one another solely from a few interactions they had after he joined the Court. They had met once in person for Ms. Deines to assist Judge Sushchuk in becoming acquainted with the Court's technology. Aside from emails back and forth to set up that training, the only other contact they had had was twice by text or telephone on professional matters.

Ms. Deines left for the spring conference from her home in Northampton MA, the night before the conference and stayed overnight with her parents at their summer home in Eastham, MA. She brought her toddler son with her for her parents to care for while she worked at the conference. The following morning, April 25, 2019, Ms. Deines left her parents' home for Ocean's Edge, twenty minutes away, arriving shortly after 7:45AM. Upon arrival, she and Ms. Haynes began setting up for the conference. As the judges arrived, Ms. Deines and Ms. Haynes greeted them, registered them and provided them with their conference materials. In addition, the

two women made sure that the breakfast was set out and that the presenters were prepared for the day's programs.

The conference began with opening remarks from the Chief Justice of the Trial Court and from the Chief Justice of the Supreme Judicial Court. Educational programs ran in the morning and afternoon with an on-site luncheon served in between. Throughout the day, Ms. Deines attended to her responsibilities, including working through the lunch hour, to ensure that the conference was running as smoothly as possible,. The programmatic aspect of the first day ended shortly before 4:00PM.

At the conclusion of the day's programs, Ms. Deines helped clean up the main conference room, and then went back to her family's home in Eastham. Ms. Deines got her son ready for dinner and for bed and then returned to Ocean's Edge to attend the Court's scheduled dinner.

As part of the conference, a Court-sponsored dinner was to begin at 7:00PM in the ballroom of the facility. Before the dinner, all judges were invited by a pair of colleagues to attend an informal social hour in one of the judge's suites. Judge Sushchuk went to that event and brought his flask of whiskey with him.

The Court dinner began at 7:00PM in the resort's ballroom. A cash bar was available for the attendees. Ms. Deines attended the dinner, arriving at approximately 7:15PM. On arrival, she got herself and one of her dinner companions each a glass of wine from the cash bar. Judge Sushchuk also attended the dinner, going directly to the ballroom from the social hour. At the social hour, Judge Sushchuk had at least one drink, using the whiskey from his flask. Ms. Deines sat at a table with Ms. Hynes and the four staff attorneys whom she knew from the Court's

Administrative Office. Judge Sushchuk sat with other judges of the Court. The dinner lasted until approximately 8:30PM.

After dinner, Ms. Deines and her companions decided to go to the on-site bar, Beyzos Pub (“the Pub”), located a short distance from the ballroom. In addition to Ms. Deines, the group was comprised of Attorneys Evelyn Patsos, Jocelyne Welsh, Denise Fitzgerald and Christine Yurgelun, all of whom worked for the Court and all of whom had been invited by Chief Justice Casey for the stated purpose of promoting good relations between the judges and the Court’s administrative staff. The group was among the first to leave the ballroom after the dinner ended.

On entering the Pub, Ms. Fitzgerald stopped to speak to some judges who were seated at the bar, Ms. Deines and Ms. Patsos stopped at the bar to order drinks and Ms. Welsh and Ms. Yurgelun found a spot for the women to sit. Ms. Deines ordered a beer and brought it to the table where Ms. Welsh and Ms. Yurgelun were already seated. The table was a round bar-height high-top table in the bar section of the Pub. It was next to a brick pillar that formed part of an archway connecting the bar section to a dining area of the Pub where tables and chairs were located. The high-top had four round, cushioned, backless barstools around it. Ms. Deines sat at the stool nearest the brick pillar and closest to the archway. Ms. Yurgelun sat on a stool to Ms. Deines’ left and used a second stool to elevate her foot which at that time was in an air boot. Ms. Welsh sat on the stool directly across from Ms. Deines and Ms. Patsos stood next to Ms. Deines’ left at the table.

Judge Sushchuk made his way to the Pub after the dinner, walking with other judges and arriving at approximately 8:45PM. Being relatively new to the Court and having been assigned predominately to the Worcester Court, Judge Sushchuk did not know many of the other judges at

the conference. As the judges who walked with him slowly began to join others in the Pub, Judge Sushchuk stood in the entrance to the Pub, surveying the room. After about ten to fifteen minutes, he noticed Ms. Patsos at the high-top at the far end of the room and he began to make his way to her table. Ms. Patsos was one of few people at the event Judge Sushchuk had known prior to his appointment to the bench. Judge Sushchuk knew her through her work in Worcester as an Assistant Register for the Court six to seven years before. They were not personal friends, but were cordial professional acquaintances who had run into one another prior to the event.

Ms. Deines was seated facing the end of the Pub where Judge Sushchuk stood. As she spoke to Ms. Welch, she was able to see him in the distance over Ms. Welch's left shoulder as he began to make his way through the adjacent dining area toward the table where she and her companions were seated. Ms. Deines saw Judge Sushchuk as he came around the brick pillar to her right. He approached the table from behind Ms. Deines' seat through the archway on her right. Ms. Deines was leaning slightly forward and was engaged in conversation with Ms. Welsh across from her.

As Judge Sushchuk passed behind her stool, Ms. Deines felt the distinct sensation of a hand grabbing the left side of her buttocks and applying a full-handed squeeze to it. The contact lasted several seconds. Stunned, Ms. Deines froze in place, making no move to acknowledge the affront or the culprit. She was aware at that moment that Judge Sushchuk was the only one passing behind her. Judge Sushchuk was then immediately standing next to her on her left and slightly behind her as he greeted Ms. Paskos who was standing to his left. Despite her shock, and as much because of it, Ms. Deines acted as though nothing had happened. She said nothing to Judge Sushchuk and said nothing to her companions at that time.

As Judge Sushchuk stood at the table next to Ms. Patsos, the two discussed what each was drinking. In response, Judge Sushchuk opened his jacket and displayed the flask he was carrying in his inner lapel pocket. As Ms. Deines saw it she asked somewhat cryptically, “Whiskey or bourbon?” He said it was whiskey. He offered to buy a round for the table. Two or three of the women accepted the offer. Ms. Deines did not and, feeling uncomfortable, she left no more than fifteen minutes after Judge Sushchuk arrived at the table. However, before she left, Ms. Deines tried to gain Ms. Patsos’ attention through using facial gestures to subtly signal that something had happened, opening her eyes wide and indicating toward Judge Sushchuk. Ms. Patsos noticed and remembers Ms. Deines doing exactly that, but Ms. Patsos did not understand the meaning at the time.

Ms. Deines left the table and said good-bye to Chief Justice Casey and his wife who were seated at the bar. They had arrived at approximately 8:50PM and were seated at the bar for a short time when Ms. Deines said good-bye. As Ms. Deines was leaving, she also had a short conversation with two judges about an earlier presentation and said good-bye to another judge she passed on the stairs on her way out. It took her no more than fifteen minutes to say her goodbyes and leave the facility. Once in her car, the first thing she did was text her sister about what had just happened to her at the judicial conference, resulting in the following text exchange at 9:24PM:

“OMG. i think one of the judges grabbed my butt on purpose!!!”

"What???? Slap him."

"He is also carrying a hip flask, so maybe just fell?? Except it was a distinct pinch!!”

Ms. Deines then returned to her family in Eastham where she spent the night.

Judge Sushchuk remained at the table with the group of women until closing at approximately 11:00PM. He offered the women a ride to each of their rooms all of which were about a half mile away. The roadway was dark and walking would have been dangerous. The four women accepted and piled into his truck. Judge Sushchuk drove each to her room and then returned to his room at the conference.

The next day, April 26, 2019, Ms. Deines returned to Ocean's Edge to fulfill her responsibilities at the conference. She worked the remainder of the day until the conference ended. At one point during the day when attendees needed to move their chairs for a presentation, Ms. Deines felt that Judge Sushchuk positioned himself uncomfortably close to her. The conference ended that afternoon and Ms. Deines returned to her parents' home for the evening. The next day she went back to her marital home in Northampton. That afternoon she also texted a friend about the incident.

The Court Action

Over the next few days, Ms. Deines grappled with what to do about the incident. After speaking to a number of people, including two judges on the Committee, she decided to report it. On May 1, 2019, the Wednesday following the conference, she called Chief Justice Casey on the telephone and told him what had happened. Judge Casey had Ms. Deines prepare a written account of the incident.

After receiving the call from Ms. Deines, Judge Casey spoke to the Deputy Court Administrator for the Probate and Family Court Department and called Judge Paula Carey, the Chief Justice of the Trial Court. He also conferred with the sexual harassment policy compliance

officer for the Court. He later had his assistant call to arrange for him to see Judge Sushchuk in Judge Sushchuk's Worcester lobby the morning of May 10, 2019.

On May 10, 2019, Judge Sushchuk was in his lobby preparing for the morning session when Judge Casey arrived and came into the lobby. Judge Casey began the meeting by handing Judge Sushchuk Ms. Deines' written statement summarizing the incident. Upon reading Ms. Deines' statement, Judge Sushchuk became visibly upset. He stood up from his desk, took off his glasses and began to rub his eyes. He said, "I couldn't have" -- "I couldn't have done something like that. I" -- "I wouldn't do something like that. I would never hurt anyone, especially a woman." In support of his position that he could not and would not do something like that, he told Judge Casey of a medical condition he had that negatively impacted his sex drive. They discussed the issue of how much alcohol he had consumed that night. Judge Sushchuk said he had had one drink at the judges' social hour and one drink at the Pub. He did not mention that he had a flask of whiskey on his person that evening. Judge Casey had seen Judge Sushchuk briefly at the conference on the first day. Judge Casey had noticed at the time, that Judge Sushchuk's eyes were red and he seemed tired, but he said nothing about his observations at the time or during the lobby meeting.

The conversation that morning lasted about a half an hour. Judge Casey told Judge Sushchuk to write a statement regarding the allegations for submission to Chief Justice of Supreme Judicial Court, Justice Ralph Gants.

Ten days later on May 20, 2019, Judge Sushchuk submitted his statement to Judge Casey, understanding that it would be provided to the Chief Justice as part of the investigation into the allegations against him. In that statement, Judge Sushchuk agreed that he had been at Ms.

Deines' table in the Pub and confirmed most of the details concerning who was present, where each was located and other descriptive details. He accounted for his time at the table, saying after offering to buy a round, he had purchased a Jameson's whiskey for himself and drinks for two of the women at the table and then stayed at the table until he finished his drink. He denied ever having intentionally touched Ms. Deines, but described in detail leaving the table to use the men's room after he finished his drink, recounting the route he had taken to and from it to return to the table. He wrote in his statement that on his return trip to the table, he "was somewhat unsteady on [his] feet, feeling the effects of past hip replacement surgery, the long day, [] the evening meal and the alcohol consumed." He "recall[ed] that as [he] began to pass by Ms. Deines, to steady [himself], [he] placed [his] hand in the direction of her chair and came into momentary contact with a portion of her lower body" and then "returned to [his] seat at the table, rejoining Ms. Patsos, Ms. Yurgelun, Ms. Welsh and Ms. Deines." As discussed below, that statement was not true.

After further investigation, the matter was reported by the Chief Justice to the Commission for action.

Judge Sushchuk's Statement

Judge Sushchuk testified under oath at hearing that he had not come into any physical contact with Ms. Deines that evening and that his written account saying that he had accidentally touched her was untrue. In his testimony before me, he both stood by his written statement that he was unsteady on his feet owing, in part, to alcohol consumption among other factors, and also denied that he was affected by his consumption of alcohol. He gave no account of leaving for the

men's room, making his way back or steadying himself on Ms. Deines' stool, ignoring that part of his written statement.

In contrast to his written statement, he testified that he had no intentional or unintentional physical contact with Ms. Deines' body on April 25, 2019, and that despite his written account to Judge Casey and Chief Justice Gants in which he claimed a very specific memory of contact with Ms. Deines' person, in actuality, he had had no such memory when he wrote his account and that the touching described never occurred. He testified that because he did not think that Ms. Deines would lie, he created a scenario in an attempt to "rationalize what she said and recalling the events of the evening," he could only conclude that there was a possibility that he may have had some fleeting contact with her.

However, that is not what his statement said. It did not say there was a possibility of fleeting contact. It very clearly detailed his account of an inadvertent touching that he said he remembered occurring and the precise circumstances surrounding it. In Judge Sushchik's written account, he has Ms. Deines misperceiving an innocent fleeting touch to a portion of her lower body and confusing it with full-on handgrab of her buttocks. At hearing, Judge Sushchik admitted that he invented the fleeting touch he described. In his testimony, he abandoned that version of events and maintained that there had been no touching at all. His testimony is an admission that during the course of the investigation into Ms. Deines' complaint, he knowingly and intentionally submitted a statement he knew to be untrue in an effort to affect the outcome.

Further, Judge Sushchik's written statement does not comport with the time-frame given by those present. His testimony at hearing was that he arrived at the Pub approximately 8:45PM, stood at the entrance for ten to fifteen minutes and then made his way to Ms. Paskos' table. By

all accounts, Ms. Deines left the table no more than fifteen minutes after Judge Sushchuk arrived at it. While her colleagues lingered at the table with Judge Sushchuk, Ms. Deines did not. She made her way out of the event and was in her car texting her sister at 9:24PM. Yet, in his written statement, Judge Sushchuk recounts joining the table, offering drinks, ordering the drinks at the bar, bringing them back to the table, finishing his drink, leaving to use the men's room and returning, all while Ms. Deines was still at the table. Had Judge Sushchuk gone to the men's room when he claimed he did in the written statement, Ms. Deines could not have been at the table. Accordingly, Judge Sushchuk's statement of having a memory of returning from the men's room while Ms. Deines was at the table is also untrue. Judge Sushchuk's written account that places him behind her stool at any point other than as he joined the table—the point at which she clearly felt him grab her— simply does not comport with the timeframes and appears to be a further fabrication to support his initial invention of an innocent, accidental touching that Ms. Deines misperceived.

FINDINGS AND CONCLUSION AS TO FORMAL CHARGES

The Commission's burden is to prove its case against Judge Sushchuk by clear and convincing evidence. G.L. c. 211C, section 7(4). That standard of proof is greater than the standard applicable in most civil cases which require proof by a fair preponderance of the evidence, but is less than proof beyond a reasonable doubt required to support a criminal conviction. Callahan v. Westinghouse Broadcasting Co., 372 Mass. 582, 584 (1977). To be "clear and convincing" the evidence must be sufficient to prove "to a high degree of probability" that the charge is true. Tosti v. Ayik, 394 Mass. 482, 493 n.9 (1985).

Conceding that the state of the law does not require it, the defense suggests that independent collaboration should be necessary to satisfy the standard. In support of its argument, the defense relies on cases from other jurisdictions and one Massachusetts case. None are applicable to this case. Cases from outside the Commonwealth provide no precedential effect and the ones relied on by the defense offer no persuasive value as they involve claims far different than the type of claim here. In the Massachusetts case cited, the uncorroborated hearsay testimony of a social worker who had not witnessed any abuse was found insufficient to support the termination of parental rights. Adoption of Iris, 43 Mass. App. Ct. 95 (1997), aff'd, 427 Mass. 582 (1998). In contrast, Ms. Deines is a percipient witness with direct knowledge of the facts she related. Moreover, were any corroboration necessary, it exists in the form of Ms. Deines' first complaint within minutes of the event, Ms. Patsos' confirmation of Ms. Deines' attempt to signal her, and Judge Sushchik's own statements.

In summary, Ms. Deines gave a cogent, credible, consistent account of what occurred. Based on her testimony and my observations of her over the hours she testified, including during rigorous cross-examination, I believe her. The variations in accounts highlighted in defense of Judge Sushchik do not detract from the believability of her version of events. Other credible evidence further supports it. Ms. Deines' complaint that Judge Sushchik grabbed her buttock was made within minutes of the incident and has remained essentially unchanged since. Her behavior at the time of the event and after, both in her facial gestures at the table as confirmed by Ms. Paskos and in her nearly immediate text to her sister conveying her shock and disbelief, serve to further bolster the reliability of her account. Her later statements and testimony remain,

in my view, consistent with the events as she has recounted them. Indeed, Judge Sushchuk's first account confirmed that he had "contact with a portion of her lower body."

In contrast, Judge Sushchuk has not been honest in his accounts. He was not forthright in his written statement. He generated a statement he knew to be false in which he invented out of whole cloth a version of events in which Ms. Deines' very clear perception of what happened to her person was to be dismissed as misimpression or an exaggeration. He admitted under oath that, in truth, what he wrote had happened simply had not. He falsely claimed to the Court administration investigating the matter that he had a recollection of incidental contact, a falsehood he knowingly provided in an attempt to exculpate himself. Such misdirection during the investigation not only evinces a consciousness of guilt, but is wholly inconsistent with the oath of office and ethical conduct required of a judge.

Judge Sushchuk's explanation of why he wrote a false account is equally problematic. In essence, he says he did not think Ms. Deines would lie so he did. One problem with lying is once it begins, it's hard to know when it ends. Judge Sushchuk's lack of candor at the inception of this matter undermines his credibility at hearing. His initial response suggests that he did what he was accused of doing and sought to minimize his culpability for it. I do not find Judge Sushchuk's testimonial denials of intentional contact with Ms. Deines reliable or believable. Ms. Deines' immediate, consistent and credible complaint that she was grabbed by Judge Sushchuk is not only more believable than his reworked denials, it is bolstered by them. I find Judge Sushchuk's testimony at hearing is a further instance of his failure to be truthful in this matter.

FINDINGS AS TO VIOLATIONS

For the reasons stated, I find the allegation that Judge Sushchyk engaged in an intentional, nonconsensual touching of Ms. Deines as detailed in the complaint against him has been proved by clear and convincing evidence. As Judge Sushchyk admitted at hearing that he had a flask of whiskey in his pocket at the conference and that he displayed it to the Court employees at the table, I find that allegation supported by clear and convincing evidence as well.¹ I further find clear and convincing evidence that Judge Sushchyk deliberately lied during the investigation in submitting a version of events he knew to be untrue. In committing the acts that he did, Judge Sushchyk engaged in willful misconduct that brings the judicial office into disrepute, is prejudicial to the administration of justice and is unbecoming a judicial officer.

Accordingly, the Commission has proved the allegations contained in the Formal Charges in Complaint Number 2019-17, that Judge Sushchyk violated the Massachusetts Code of Criminal Conduct (Supreme Judicial Court Rule 3:09), by failing to act, at all times, in a manner that promotes public confidence in the integrity of the judiciary, and by failing to avoid impropriety and the appearance of impropriety, in violation of Rule 1.2; by failing to perform the duties of judicial office without harassment, in violation of Rule 2.3(A); by failing, in the performance of judicial duties, to refrain from engaging in harassment, in violation of Rule 2.3(B); by failing to be dignified and courteous to court personnel, in violation of Rule 2.8(B); and by participating in activities that would appear to a reasonable person to undermine the judge's integrity, in violation of Rule 3.1(C). The conduct engaged in constitutes willful judicial

¹ However, I do not believe in these circumstance, Judge Sushchyk's conduct in carrying and displaying a flask of whiskey rises to the level of requiring sanction.

misconduct, conduct prejudicial to the administration of justice and unbecoming a judicial officer, and brings the judicial office into disrepute, in violation of G.L. c. 211C.

II. RECOMMENDATION OF SANCTIONS

DISCUSSION

The preamble to the Code of Judicial Conduct sets out its purpose stating that our “legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of persons of integrity, will interpret and apply the law that governs our society.” S.J.C. Rule 3:09. It advises that “[j]udges should maintain the dignity of the judicial office at all times, and avoid both impropriety and the appearance of impropriety in their personal and professional lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.” Id.

The Supreme Judicial Court has explained that the purpose of the Code of Judicial Conduct is to “preserve the integrity, independence and impartiality of the judiciary and, moreover, to preserve public confidence in the integrity, independence, and impartiality of the judiciary.” In the Matter of Killam, 388 Mass. 619, 622 (1983). All other provisions of the Code are to be “construed and applied to further that objective.” S.J.C. Rule 3:09, Code of Judicial Conduct, Canon 1.

Fortunately, there are few similar previous Commission proceedings to establish a robust body of precedent for guidance. Since 1995, the Commission has had no more than twenty complaints that have met the requirements needed for public disclosure. In the few that have proceeded to Formal Hearing, hearing officers and the Commission have considered mitigating factors as well as aggravating factors in crafting a recommendation.

Mitigating and Aggravating Factors

Judge Sushchyk denies committing the act at issue and therefore offers no expressions of remorse that might be viewed as mitigation. Although the presence of alcohol plays into the events, there is no suggestion that it was disinhibiting factor to be considered in recommending a sanction. Judge Sushchyk is relatively new to the bench and therefore cannot rely on a long judicial history of positive performance. At the same time, misconduct committed so early in a judge's tenure, in other circumstances, might be considered a mitigating factor. This is not such a case due to the nature of the misconduct. The conduct is prohibited not because of constraints and duties unique to judicial office: it is wholly inappropriate conduct in any work setting. The line crossed here is not a murky one. That the misconduct was confined to a single act of short duration neither excuses it nor diminishes its impact or serious nature. The touching engaged in here was offensive and an affront to one's bodily integrity and dignity. The same conduct would have been actionable if a judge engaged in it in a nonprofessional social setting.

That the incident occurred at a Court event, sponsored and conducted by the Court, makes it even more troubling. The judicial and other court-employed attendees at the conference were there because of their official positions, whether or not they were then performing their usual job responsibilities. The group seated at the table was part of a structure in which a judge occupies a position of unique power. In that structure, the people who provide support function as subordinates, in that their role is mainly defined by what a judge needs to perform her/his/their duties. Ms. Deines and the staff attorneys at the table are high-level professionals who must be afforded the respect, courtesy and deference due them and owed all Trial Court employees. Judge

Sushchik's conduct was not in keeping with the dignity, regard and professionalism he owed them and his position.

G.L. c. 214, section 1C, provides in pertinent part, "[a] person shall have the right to be free from sexual harassment, as defined in" G.L. c. 151B and 151C. G.L. c. 214, section 1C, provides, "all employees are protected against sexual harassment in the workplace." See, Lowery v. Klemm, 446 Mass. 572 (2006). In any work place, a supervisor engaging in such misconduct toward a subordinate could reasonably be expected to be removed from his position. The public can expect at least as much of the Court as a work place.

"Men and women now largely agree that people are entitled to show up to work and be treated as colleagues, not as sexual targets or opportunities. Sexual harassment—certainly if it involves groping, touching, or sexual ridicule—is now viewed as aberrant behavior that most Americans, of all genders, consider inappropriate. *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 Mich. St. L. Rev. 139, 152-153.

Available Sanctions

G.L. c. 211C, section 8(4), sets out eight sanctions that the Commission may recommend to the Supreme Judicial Court; removal, retirement, imposition of discipline as an attorney, imposition of limitations or conditions on the performance of judicial duties, public or private reprimand or censure, imposition of a fine, assessment of costs and expenses, or imposition of any other sanction which is reasonable and lawful. G.L. c. 211C, section 8(4)(a)-(h).

While the range of sanctions is broad, in this case, there are few appropriate ones available, not only because of the nature of the misconduct, but also because it has been compounded by Judge Sushchik's misrepresentations during the investigation. His written account to the Chief Justice contained deliberate falsehoods, as Judge Sushchik admitted at hearing. The suggestion that his initial account of inadvertent, fleeting touching was concocted in

deference to his belief in Ms. Deines' veracity, fails to recognize that his written version of events was a fiction that excuses his wrong-doing and falsely attacks Ms. Deines' perception of reality. If Judge Sushchuk indeed knew he did not do as Ms. Deines claimed, he was required to tell that truth rather than invent a tale. The path he chose supports the conclusion that he was attempting evade responsibility for his act.

Further, Judge Sushchuk tried to bolster his lie by manufacturing details that were not true either. He denied contact at a time that would support Ms. Deines version of events, instead inventing a trip away from and back to the table while Ms. Deines was present when that simply was not true. He offered that he was "unsteady in his feet" owing, in part, to alcohol, and then denied under oath that he had difficulty or was affected by alcohol. He initially admitted touching Ms. Deines inadvertently, but under oath denied he had any unintentional contact. He presented his written account as his specific recollection when, in fact, he had no such recollection of events he recounted because they never occurred. The lapses here are intentional and were designed to mislead the authority investigating the claim. His testimony at hearing also was contrary to the facts proven by clear and convincing evidence.

"There are few judicial actions in our view that provide greater justification for removal from office than the action of a judge in deliberately providing false information to the Commission [] in the course of its investigation into charges of willful misconduct on the part of the judge." Adams v. Commission on Judicial Performance, 10 Cal. 4th 866, 914 (1995).

Being a member of the judiciary is a position of honor as every aspect of it daily reminds judges and those with whom judges interact. Once the oath of office is administered, the person sworn is no longer "Mr." or "Ms." or "Counsel" but is consistently, on the bench and off, in the

courthouse and outside of it, “Your Honor.” The physical placement of the judge’s bench in the courtroom is not only practical, it is emblematic of the figurative position the judge occupies; the highest position in the tribunal where the judge is “looked up to.” A judge is vested with extraordinary power; the power to deprive a person of funds, family and even freedom. With such consequential authority comes a responsibility to conduct oneself honorably, to produce in the minds of the public a settled confidence and comfortable trust that such awesome power is held by those worthy of it and the respect it commands. Judge Sushchuk’s behavior in this matter fundamentally undermines that confidence and trust. Given his misconduct and the public awareness of it, it is extremely unlikely that he would be able to command the respect and authority essential to the performance of his judicial function. The sanction recommended is not an effort to punish Judge Sushchuk so much as an attempt to maintain the trust and confidence in the judiciary and the mechanisms designed to protect the public against judicial wrongdoing.

“That the standards imposed on judges are high goes without saying. Because of the great power and responsibility judges have in passing judgment on their fellow citizens, such standards are desirable and necessary and there should be strict adherence to them. Failure on the part of even a few judges to comply with these standards serves to degrade and demean the entire judiciary and to erode public confidence in the judicial process. Anyone who is unwilling to accept and abide by such stringent rules of conduct should not aspire to or accept the great honor and the grave responsibility of serving on the bench.” Matter of Morrissey, 366 Mass. 11, 16-17(1974).

RECOMMENDATION

Accordingly, having found that Judge Sushchuk violated G.L. c. 211C, both in his conduct toward Ms. Deines and by providing false statements during the course of the investigation, I recommend retirement from office pursuant to G.L. c. 211C, section 8(4)(b) or removal from office pursuant to G.L. c. 211C, section 8(4)(a).

Respectfully submitted,

8/17/20


Bertha D. Josephson
Hearing Officer