

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT
In the Matter of the Proceeding Pursuant
To Section 44, Subdivision 4, of the
Judiciary Law in Relation to

LETICIA D. ASTACIO

a Judge of the Rochester City Court,
Monroe County.

***RESPONDENT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW***

Date: January 26, 2018

Respectfully submitted,

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PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW

Respondent Leticia Astacio sets forth the following as proposed Findings of Fact and Conclusions of Law offering argument where indicated.

BACKGROUND

1. The Honorable Leticia Astacio was born on [REDACTED]. She is 36 years old. She is divorced and has two unemancipated children.
2. Judge Astacio graduated from West Irondequoit High School, Monroe Community College, University of Buffalo as an undergraduate, and received graduate degrees graduated from the University of Buffalo Law School and School of Social Work. (TR. 227)
3. Judge Astacio had historically a difficult upbringing and overcame many hurdles to achieve her college and legal education. (TR. 196-197)
4. Judge Astacio was admitted to the New York State Bar. Her professional work history prior to election to the City Court Bench is: Monroe County Legal Assistance Center, Monroe County District Attorney's Office, Domestic Violence Bureau and her own private practice commencing in 2011. (TR 228-232)
5. In 2014, Judge Astacio ran in a primary for Rochester City Court Judge and even though she was not the party's designated candidate, she won the primary defeating two other candidates, a career Monroe County prosecutor who was a Bureau Chief and an assistant public defendant. (TR 234, 235)
6. Judge Astacio was elected to the Rochester City Court in November 2014, and took office in January, 2015. (TR 235-236)

**PROPOSED FINDINGS OF FACT REGARDING
CHARGE I AND CHARGE II**

THE NIGHT BEFORE THE ARREST

7. Judge Astacio consumed "at most" approximately one half bottle of wine on February 12, 2016 before 12:00 a.m. the evening prior to her arrest. (TR 447)
8. She was candid and straightforward in acknowledging her alcohol consumption.

THE ARREST

1. Judge Astacio awoke at about 7:00 a.m. on February 13, 2016. It was a Saturday. (TR 237) She was to preside over Saturday morning arraignments at 9:30 a.m. at Rochester City Court. (TR 239)
2. Judge Astacio planned to attend the Elmgrove YMCA work out class at 8:00 a.m. (TR 238) Wearing workout clothing, she entered her car and commenced driving to the Y. (TR 238)
3. The weather was bad and the roadway was ice covered. (TR 241)
4. Her vehicle struck something, either ice or debris, in the roadway as she traveled to the YMCA, and likely struck the median in the roadway. (TR 240)
5. She sustained a flat tire to her observation.(TR 240) (TR 307)
6. She pulled her vehicle over to the side of the roadway on Route 490. (TR 240)
7. Judge Astacio called her friend Christian Catalano who is an attorney in Rochester, and asked him to help her change her tire sometime after 7:00 in the morning. (TR 241).
8. She was waiting for him in her car at the side of the road when Trooper Kowalski pulled behind her vehicle at 7:54 a.m. (TR 6, R-246)

9. When Trooper Kowalski approached, or when he was at the car, she rolled her car window down. (TR 242-243)
10. Trooper Kowalski observed 2 flat tires and damage to the vehicle on the left side. (TR 7) Both windows were down according to Trooper Kowalski. (TR 8) Judge Astacio denies that both windows were down and testified she rolled her driver's window down as Trooper Kowalski approached. (TR 243)
11. He asked Judge Astacio to exit the vehicle. (TR 243)
12. He asked Judge Astacio where she was coming from, and "I said my house", and he said where are you headed to, and I said "Well, I have to go do arraignments at 9:30". (TR 248) At that point, she knew she could not make her 8:00 a.m. workout class. (TR 248)
13. According to Judge Astacio, the exchange was as follows in the roadway:
 - Trooper Kowalski told her she had a fruity smell. (TR 244)
 - Then he told her she smelled of alcohol. (TR 244)
 - He asked her if she had consumed alcohol that morning, and she said no. (TR 214)
 - He pointed out 2 flat tires to her.
 - He asked her for her driver's license, and she said she didn't bring any identification as she was going to the gym. (TR 245)
 - He asked her to get in his car, and she said no. (TR 245)
 - "He told me he was placing me under arrest and I didn't have a choice." (TR 245)

- When he said she was under arrest for DUI, and they discussed probable cause, the Judge asked him to call troopers who do DWIs because you're making a big mistake and it's going to have a larger consequence for me than it would normally, and I'd rather you called someone who does know what they are doing. (TR 253)
- Judge Astacio and the trooper had an argument about whether or not he had probable cause to arrest her culminating in his telling her she "could get in his car or I could resist arrest". (TR 246)
- The conversation lasted about 2 minutes on the road. (TR 247) It ended with her arrest at 8:00 a.m. (TR 259)

According to Judge Astacio the following occurred once she entered the Trooper vehicle:

- She entered his car. (TR 246)
- Once in his car, Trooper Kowalski asked if she had an accident with her car and if she had been drinking. In response, she said she didn't drink at 7:00 a.m. (TR 246)
- At about the time she entered the car, Christian Catalano appeared on the scene and remained in his car. (TR 256)
- Trooper Kowalski asked "when is the last time you were drinking? Were you drinking last night", and the Judge said "I've drank in my lifetime, I'm not going to have this discussion with you." (TR 247, 254)
- Before she said the above, Trooper Kowalski asked "upwards of 10 times, were you drinking? No. When were you drinking? Were you in an accident", just constantly. (TR 255)

- He said he smelled alcohol. She said again, I'm chewing gum, this is ridiculous. He rolled down the window and said "spit your gum out", which she did. (TR 246)
- She was asked to do a Standardized Field Sobriety Tests. She advised him there were certain tests she could not do as she had a brain injury.
- The report of Dr. Anstadt, an expert retained by OCA to examine Judge Astacio, confirmed the Judge's representation of a brain injury stating: "She can do a heel toe walk successfully, but with some mild difficulty, most likely related to her Chiari malformation which has otherwise been very well corrected by cervical spine surgery." (Ex. F)
- Trooper Kowalski told her "how could you be a Judge if you have a brain injury". "How would you make decisions on people's cases and about people's lives?" (TR 257)
- Trooper Kowalski persisted in asking her to take the standardized field test.
- The Judge showed him her scar and said you don't know what you are doing, you can't ask me to take the Standardized Field Sobriety Test if I have a brain injury. (TR 257-58)
- She also told him "I'm already under arrest you can't use the test to develop additional probable cause", but she agreed to take non-standardized tests of alphabet and counting which she passed. (TR 258)
- There was no formal advisement of Judge Astacio at 8:43 that she was under arrest contrary to police records. (TR 259-260)

- She advised Trooper Kowalski of *Mapp v. Ohio* when he then asked her to take a pre-screen test. "You can't arrest me all day, I don't have to sit on the roadside with you forever. You're delaying me, we're done here. Arrest me, I need to go to work." (TR 259)
- Trooper Kowalski wanted her to do an alco sensor, he spoke with Mr. Catalano after she declined and he represented to Catalano and Judge Astacio if she took the test successfully she would be unarrested. (TR 260, Ex. 25, P. 73) Other Troopers had to deliver the test to Trooper Kowalski. Judge Astacio attempted the test 3 or 4 times. Trooper Kowalski told her the test was high and that she was under arrest and that they were going to the station. (TR 261)
- There is no independent record of the test result, other than Trooper Kowalski. (TR 33)
- Judge Astacio became angry and was crying. (TR 261)
- She acknowledged that she uttered the words in 12 A of the Complaint as follows: "A" "I don't have to talk to you. You're making me feel uncomfortable". (TR 262)
- She acknowledged she said 12 B of the Complaint as follows: "I don't feel comfortable in this car". (TR 263)
- She acknowledged she said 12 C of the Complaint, which was part of a monologue where she said "I don't know what else you might do to me. For all I know you could shoot me." (TR 263)

- She acknowledged utilizing the language that was in paragraph 13 of the Complaint, but not to Trooper Dolan, “No he doesn’t. He can just go and mind his own fucking business.” (TR 264)
- She acknowledged stating paragraph 15 of the Complaint as follows: “I wasn’t driving. You didn’t see me drive.” She explained it was in the context of discussing whether there was probable cause. (TR 265)
- She acknowledged making the statements in Paragraph 16 A, B & C on the way to the trooper barracks as follows: “I can’t believe you’re doing this to me. You’re fucking ruining my life.” (TR 266-267)
- She was handcuffed and shackled to a bench at the trooper barracks. (TR 270)
- She testified that she asked Trooper Kowalski “Why are you doing this to me”, she was asking him for the legal basis for her arrest. (TR 337)
- She advised Trooper Kowalski both in the police car and at the station, “I would never do this to you.” This statement is made in the context of the one hour thirty minute interrogation and negotiation based on Judge Astacio’s belief there was no probable cause for the arrest. (TR 340)
- She was concerned that people at City Court were waiting for her to do arraignments. She expressed this at the Trooper Barracks arriving after 9:30, the time City Court was to start that day. She asked for her cell phone which contained the number she needed to call. She called Kate Johnson at City Court to ultimately advise her of her plight and that she could not do arraignments. (TR 269-270)

- She was released from the State Police station at about 11:00. (TR 270)

14. According to Trooper Kowalski and Lieutenant Lupo, the following occurred:

- She thought she only had a flat tire. (TR 13)
- Trooper Kowalski had her get out and look at the vehicle. (TR 18)
- She did not have a license and registration. (TR 18)
- Trooper Kowalski asked her to come back to his vehicle and she got in. She sat behind him. (TR 18-19)
- Trooper Kowalski asked her to sit in his car at 8:00 a.m. (TR 55)
- She was chewing gum, but he could smell an alcoholic beverage. (TR 19)
- He asked her to remove the gum from her mouth, he rolled down the window and she threw it out. (TR 19)
- There was still a strong odor of alcoholic beverage. (TR 20)
- He asked her if she consumed any alcohol and she answered that she had drunk in her lifetime. (TR 247, 254)
- He asked where she was coming from and she said her house. (TR 20)
- He asked her where she was coming from and where she was going to and what direction she was headed in. She said she was going down to the City of Rochester for her Court arraignments at 9:30. "I am going to the City Court to do the arraignments at 9:30 this morning." (TR 21, 66-67) Trooper Kowalski testified that he did not know she was a City Court Judge until he was processing her at the Trooper barracks when she asked to call her secretary to let them know that she wasn't going to be present for the 9:30 arraignments and to have a Judge sit in. (TR 42)

- According to Trooper Kowalski, she was placed under arrest at 8:43. Trooper Kowalski did not speak to Mr. Catalano at any time before the arrest. (TR 56)
- Trooper Kowalski asked her to take a field sobriety test "a few times". (TR 72)
- Trooper Kowalski stated she did do the counting and alphabet test and passed. (TR 72)
- He kept asking her questions and she said she was uncomfortable. (TR 74-78)
- Trooper Dolan arrived at shortly after 9:00 a.m. with the PBT (Preliminary Breath Test). (TR 33)
- The PBT after 3 attempts came back as a .19 according to Trooper Kowalski. There is no written printout or machine generated record of the test result.
- Trooper Kowalski acknowledged that he mentioned that he could unarrest just to get her to take the PBT test, but admitted he had no intention of unarresting her. (TR 82)
- The PBT only measures the presence of alcohol and the odor of alcohol. (TR 32)
- Trooper Kowalski denied he stated to Judge Astacio in words and substance, if she had a brain injury, how could she be a Judge.
- Trooper Kowalski testified she was loud and swearing in the back seat of his car after 9:17 a.m. on the way to the station. (TR 34) (TR 58)
- Trooper Kowalski testified she was angry and crying at the station. (TR 36)
- Trooper Kowalski arrived at the Trooper Barracks at 9:40 with Judge Astacio in custody. (TR 36)

- At 10:03, Judge Astacio was reported by Lieutenant Lupo to be cooperative to that point in an email to his superior. (Ex. 84)
- She was handcuffed and shackled to the bench at the Trooper barracks.
- She told the troopers she had to go to work. She asked to call City Court because she had to be there for arraignments at 9:30.
- She was eventually permitted to call City Court.

15. Christian Catalano an attorney who arrived at the scene of the arrest, testified at the Trial in City Court before Judge Aronson on the DWI charge, the testimony set forth in Exhibit 25 as follows:

- When Mr. Catalano arrived at the scene Trooper Kowalski told him "he was going to be placing ... Ms. Astacio under arrest" for DWI. (Ex. 25, P. 68)
She was already in custody. (Ex. 25, P. 69)
- Trooper Kolwalski told Mr. Catalano she was under arrest at 7:50 a.m. (Ex. 25, P. 68) Mr. Catalano told Trooper Kowalski that he was going to represent her. (TR 68)
- Mr. Catalano told Trooper Kowalski that his client did not wish to speak with Kowalski or to take any diagnostic tests. (Ex. 25, P. 68)
- Mr. Catalano did not smell alcohol on her breath and her speech was clear and no mental impairment. (Exhibit 25, P. 71)
- A second trooper arrived at 8:15 a.m. or 8:20 a.m. approaches Catalano and asked him where she was going and Catalano said the Elmgrove Y, and then work. He asked if she really was a Judge, and if she had to be at work at 9:30 and Catalano said yes. (Ex. 25, P. 71)

- Mr. Catalano had asked the Trooper as her attorney not to speak with her but one half hour later they were still at the roadside. (Ex. 25, P. 72)
- At 9:15 a.m., Trooper Kowalski told Mr. Catalano he could unarrest her if she . . . under some circumstances. (Ex. 25, P. 73)
- He did not hear her curse at the Trooper either in the police car or at the Trooper barracks. (Ex. 25, P. 79)
- She may have used profanity when speaking with Mr. Catalano. He did hear her crying at the police station and almost hyperventilating. (Ex. 25, P. 77)

**REFEREE'S FINDINGS OF FACT
RESOLVING THE FACTUAL DISPUTES SET FORTH ABOVE**

16. The Referee resolves the following factual disputes as follows:

- There is no dispute that Trooper Kowalski required Judge Astacio to enter his car and sit in the back seat at or around 8:00 a.m. The referee finds that she was under arrest at 8:00 a.m.
- No accident was ever established involving Judge Astacio's vehicle with another vehicle or property. (TR 65)
- Judge Astacio was present in the police car for one hour and thirty minutes until she was taken to the State Trooper's barracks and that during that time she was repeatedly questioned.
- Trooper Kowalski was attempting to persuade Judge Astacio to take a chemical roadside test, and dangled before her and Mr. Catalano the prospect of unarresting her if she passed, but he had no intention of doing that. This was a misrepresentation by Trooper Kowalski. There was no record or

independent proof of the outcome of that test, the result of which was not admitted at her DWI trial.

- Justice Astacio did not violate the Rules of Judicial Conduct in the operation of her motor vehicle on February 13 2106. Proof was not presented in this proceeding by a preponderance of the evidence that she violated the Rules by driving under the influence of alcohol.
- There was the elapse of at least 8 hours from the consumption of alcohol by Judge Astacio and her arrest at 8 a.m.
- Trooper Kowalski questioned Judge Astacio's representation to him that she had a brain injury and made derogatory comments about her ability to function as a Judge with a brain injury thereby provoking her. (TR 257)
- During the total duration of one hour and thirty minutes in the back seat of the police car, Trooper Kowalski repeatedly questioned Judge Astacio which was aggravating and provoked Judge Astacio.
- The situation escalated as time went on and Trooper Kowalski retained Judge Astacio in the back seat of his car.
- Judge Astacio did not use the prestige of her office in the conversations with Trooper Kowalski on the roadway and in the car in violation of the Rules of Judicial Conduct. She told him a fact - - that at 8:00 a.m. her next destination was City Court to do arraignments at 930.
- Judge Astacio was not arrested at 8:43 a.m. and had been placed under arrest at 8:00 a.m. by Trooper Kowalski.

- Trooper Kowalski gave Judge Astacio a preliminary breath test at 9:17 a.m. (TR 32)
- She was transported to the State Police Station arriving at 9:27 a.m.; a trip that took four minutes from the scene of the arrest. (TR 57-58)
- Judge Astacio candidly acknowledged using profanity directed toward Trooper Kowalski. Her comments and conduct were provoked by Trooper Kowalski's lengthy retention of her with repeated questions and the disingenuous offering to unarrest.
- Judge Astacio was cooperative at the Trooper barracks from arrival up to 10:03 a.m. (Ex. 84)
- Judge Astacio was scheduled to do arraignments at Rochester City Court at 9:30 a.m.
- Judge Astacio initially did not mention that she was a Judge, when asked, where she was going by Trooper Kowalski, "Where were you headed", she stated, "I'm going to City Court to do arraignments at 9:30 this morning". (TR 62-64) Even then, Trooper Kowalski testified he did not know she was a Judge. (TR 41-42)
- Judge Astacio properly asked for her cell phone so that she could call City Court to advise that she could not do arraignments that morning as she was being held by the State Police. Ultimately, she was permitted to make this call, well after 9:30 a.m. (TR 42) Preventing her from making this call caused Judge Astacio distress and pressure because she was aware that she had a courtroom full of people waiting for her.

- Judge Astacio was provoked by the State Police conduct in shackling her to the bench and handcuffing her, and not initially allowing her to call City Court, and holding her at the barracks from 9:30 a.m. to 11:00 a.m.
- Judge Astacio did not use the prestige of her office at the Troopers' barracks in violation of the Rules of Judicial Conduct.

CHARGES I & II: MITIGATING FACTORS AS TO RESPONDENT'S CONDUCT

Judge Astacio did not object to the result of the roadside test, inadmissible in a Court of Law, to be before this Tribunal because she believes the Referee and this Tribunal should have all of the contentions of the parties. The test outcome is not supported by any documentation and the only witness to its outcome is Trooper Kowalski, who acknowledged lying to her about unarresting her.

Judge Astacio was provoked as follows:

- Judge Astacio was candid and truthful in her testimony to this Tribunal.
- Judge Astacio was involuntarily present in the Trooper car one hour and thirty minutes during which she was subjected to repeated interrogation while under arrest. (TR 437-439)
- Trooper Kowalski dishonestly offered the likelihood she could be unarrested if she took the field breathalyzer, but he testified he had no intention of unarresting her. (TR 82)

- The Trooper rudely and improperly questioned her representation that she had a brain injury and how could she be a Judge with such an injury. (TR 70)
- The retention of the Judge in the back seat of the trooper's car for one hour and thirty minutes and repeated questioning provoked her into saying she was uncomfortable and was concerned she could be shot. (TR 263)
- The combination of placing of her in handcuffs at the station, on the way to the station, and after having been held in the car for one hour and thirty minutes provoked her verbal outburst. (TR 437-439)
- She did take an alphabet and counting test which she passed, but notwithstanding she was subject to repeated questioning by Trooper Kowalski.
- Trooper Kowalski provoked the Plaintiff by questioning how she could be a Judge if she had a brain injury. (TR 439-442)
- Trooper Kowalski testified he had a discussion with her about her brain injury and being a Judge. (TR 70)

The medical record demonstrates that Judge Astacio did have a neurological condition called Arnold Chiari malformation, it was surgically treated and it did cause her some unsteadiness when she was examined by Dr. Anstadt, an independent medical examiner selected by OCA on 11/16/16. (Ex. E)

Several examinations of Judge Astacio for alcohol abuse have concluded either she does not have an alcohol abuse problem or it is mild. (Ex. N, C, D, A, TR 296)

- No proof was offered by commission staff that Judge Astacio's presence for one hour and thirty minutes in a police car to be arrested for DWI was a usual and ordinary period of time to conduct such an arrest. In fact, prior Commission cases such as in the *Matter of Maney*, this was an extraordinary period of time. (Comm. on Jud. Conduct 2010) This was obviously an abuse of Judge Astacio by Trooper Kowalski and the State Police.

- No proof was offered by Commission staff that one hour and thirty minutes to refuse a breathalyzer test, while handcuffed and shackled to a bench was usual and ordinary. This was obviously an abuse of Judge Astacio.

- At 10:00 a.m., Lieutenant Jon Lupo noted in an email to his Superior that she was cooperative up to that point at the station. (Ex. 84) His notes do not reflect verbal abuse by the Judge or any indication she was requesting special treatment. (Ex. 83)

Judge Astacio complied with all treatment programs recommended or required successfully. (TR 299, Ex. S, Ex. N, Exs. A, B, C)

Judge Astacio was found to be fit to return to the bench by Dr. Anstadt, the OCA examiner, and her treating psychologist Dr. Vincent Ragonese. (Ex.11) Dr. Ragonese noted that "This high level of media attention and public scrutiny that she has been subjected to is unbelievable".

Judge Astacio apologized to Trooper Kowalski for her language and behavior. (TR 443)

Judge Astacio acknowledged that her presence in the Trooper vehicle for 1 ½ hours angered her and prompted intemperate comments. (TR 443)

CHARGES I AND II: CONCLUSIONS OF LAW

1. Judge Astacio did not improperly utilize or abuse the prestige of her office when she was arrested and held on the roadway for one hour and thirty minutes. She raised the issue of doing arraignments in response to specific questions by Trooper Kowalski: “where are you headed?” (TR 248), and she answered “Well, I have to go do arraignments at 9:30”. (TR 248) She did not say she was a Judge. In fact, Trooper Kowalski acknowledged he did not know she was a Judge until he was processing her at the Trooper barracks after 9:30 a.m. when she asked to call City Court to get another Judge to do arraignments. (TR 42) All she said was the truth – she was due at City Court at 9:30, her next destination as she was late for and unable to attend her work out class. (TR 248 – 251)
2. Judge Astacio was held by the State Police from 8:00 a.m. until 11:00 a.m. She was due in City Court at 9:30 a.m. She was not timely accorded the opportunity to advise the City Court that she was detained and unable to perform the arraignments.
3. Judge Astacio properly asked the State Police for the opportunity to call the City Court to advise that she would be unable to do the Saturday morning arraignments.

She had a duty to her oath of office, the litigants, lawyer and Court employees expecting her at 9:30 a.m. to advise City Court that she could not do the morning arraignments she was scheduled to perform. (TR 41-42)

4. Judge Astacio used inappropriate language after being provocation by Trooper Kowalski, having been held for one hour and thirty minutes in the back seat of the Trooper car, and one hour and thirty minutes at the Trooper barracks, where she was handcuffed and tethered to a bench. The provocation included repeated questioning, offers to unarrest her, and a sarcastic characterization of her disability.
5. Judge Astacio was convicted of a DWI after a bench trial and that conviction was affirmed.
6. Judge Astacio was cooperative with the Commission investigation and answered all questions raised with candor and truthfulness.
7. By virtue of her conviction for DWI alone, she did not violate Rules 101.1 and 100.2A given the facts as presented at the hearing.
8. Pursuant to the Rules, she is allowed to advocate for herself, *pro se*, which she did during certain of her discussions with Trooper Kowalski. 100.4(6) Rules of the Administrative Judge.
9. Given the overall context of her arrest which was an escalating situation prompted by a 3 hour arrest, her conduct of coarse language was provoked and therefore she did not violate any of the charged rules regarding her conduct either in the Trooper vehicle or at the Trooper barracks by virtue of the provocation.
10. She did not use the power and prestige of her office inappropriately during the arrest and violated no rules in this regard.

11. She did not violate Rules 100.1, 100.2(A), 100.4 (A)(2) or 100.2(C) as charged in Charges I and II of the Formal Written Complaint.

ARGUMENT: CHARGES I & II

As the referee knows, how his Findings are couched will be crucial to the Respondent's incumbency.

Judge Astacio's conviction for DWI does not require the Referee to find that she violated the Rules of Judicial Conduct. The Commission has previously not held itself bound by a criminal verdict. In *Matter of Mills*, Comm. on Jud. Conduct, 2005, the Commission stated:

In the wake of increased recognition of the danger of driving while under the influence of alcohol and the toll it acts on society, alcohol related driving misbehavior must be regarded with particular severity, even, as here, where respondent was not convicted of any offence.

Like Judge Astacio, Judge Mills acknowledged to the Commission that she consumed alcohol. The time frame in the *Mills* case is substantially different from that of the Astacio case – Mills consumed alcohol and then immediately attempted to drive. Judge Astacio did not drink alcohol for at least seven hours prior to entering her car.

Judge Astacio is mindful of this body's determination in *Matter of Maney* (Comm. on Jud. Con., 2010) and the well-reasoned dissent in that case by Mr. Belluck. We have noted below the difference in the arrest time frame for Judge Astacio as opposed to Judge Maney, 90 minutes versus 30 minutes, and the mitigating factors associated therewith. We recognize that in

that dissent, he argued that in his view “the past disciplinary decisions for drunk driving have been unduly lenient given the seriousness of such behavior.”

Our argument to the Referee regarding this case is unlike the prior DWI related Commission cases likely to be cited by Commission Counsel as precedent for discipline. We believe based on *Mills* (supra), the Referee and the Commission are not bound by the verdict of the trial Court. We further argue that given the misconduct of the State police, the publicity that surrounded Judge Astacio’s arrest, her reasonable belief she could not get a fair jury to try her case, and the underlying facts in the case, the Referee can properly find her to not be in violation of any Rules of Judicial Conduct.

However, if the Referee holds otherwise with regard to the alcohol related violation, we believe the circus propagated by the State Police surrounding her apprehension and arrest should excuse her otherwise intemperate comments.

She does not believe fairness and justice should result in her removal - - the likely outcome sought by Commission Counsel. While the Referee usually does not recommend discipline in his/her report, the Findings of the Referee can and do influence the disciplinary outcome. Particularly in this case, where the conduct of the State Police clearly escalated and aggravated the situation. The Referee is asked to give great weight to the mitigating factors in this matter. If the Referee does conclude that either he is bound by the conviction or based on his own analysis of the facts that Respondent has violated the charged rules, the total circumstance we respectfully suggest creates significant mitigation.

THE ARREST

It is in that context that the circumstances surrounding Respondent's arrest and retention at the Trooper barracks are significant factors in weighing her conduct.

The record demonstrates that there was an escalating situation caused by Trooper Kowalski and that the charges brought against Respondent relating to her conduct on the road and at the Trooper barracks were provoked by a one hour and thirty minute apprehension, interrogation and negotiation at the roadway and another one hour and thirty minute retention at the Trooper barracks.

It is noteworthy that very capable Commission counsel chose not to address with the three troopers who testified whether or not one hour and thirty minutes at the roadside was a common time frame - - knowing that Respondent was and is arguing that it was unreasonable and abusive. That was prudent given that the period of time the Judge was held against her will is on its face, abusive.

The Referee is directed to the facts in the *Matter of Maney* for guidance in this regard. Judge Maney was stopped on suspicion of a DWI at 8:30 p.m. At 9:02 p.m., he was arrested and transported to the police station. At 10:00 p.m., after being allowed to make 8 phone calls, including an attempting to contact the Albany County District Attorney and repeatedly asking for special treatment, Judge Maney took a breathalyzer test. Judge Maney pled guilty to DWAI. Judge Maney's conduct resulted in censure.

In another comparable case, Judge Mills when arrested flailed her arms at arresting officer and accused the arresting officers of arresting her because she was an African American. *Matter of Mills*, Commission on Judicial Conduct, 2005.

In the *Matter of Richardson*, the Judge called the arresting officer a “little pisspot” and proclaimed that he never should have become a police officer. *Matter of Richardson*, Commission on Judicial Conduct, 1981.

In the case at bar, Judge Astacio was actually arrested at 8:00 a.m. Trooper Kowalski admitted that if she refused to go into the back seat of his car at 8:a.m., he would have required her to go to his car. (TR 50) According to State Police records, she was arrested at 8:43 a.m. After she was arrested a preliminary chemical test was performed at the roadside at about 9:18. She was not brought to the station until 9:30 a.m. Trooper Kowalski acknowledged that he engaged in an extended interrogation of the Judge, that he offered the possibility that she could be unarrested to induce her to take a roadside chemical test, and he acknowledged that he had no intention of unarresting her. (There is no proof except Kowalski’s word as to the outcome of the test and the test is unreliable and not admitted into evidence in criminal cases.) In short, he played mind games with the Judge from 8:00 a.m. until 9:30 a.m. The Referee can fairly infer that she received this treatment, unfair and cruel, because she is a Judge. The Referee also can fairly conclude what the Judge said was a fact in her testimony - - her intemperate remarks were provoked by Trooper Kowalski.

We respectfully assert that while Judge Astacio’s verbal responses to this pattern of abuse were not exemplary - - the acknowledged words came after an extensive discussion with the Trooper in which he questioned her brain injury and her ability to function as a Judge and held her against her will at the roadside, repeatedly questioned her, negotiated with her offer to unarrest her, and led her to believe that he was considering unarresting her. Indeed Judge Astacio told the Trooper “you can’t arrest me all day. I don’t have to sit at the roadside forever.” (TR 259) Judge Mills and Richardson were arrested promptly. Judge Maney was on his way to

the police station in a half hour. Judge Astacio, if the Trooper's records are to be believed, and we assert that they should not, was in the back of the police car and not even arrested for forty-five minutes. Then she was in the back seat arrested for another forty minutes. No extended delays such as in this case occurred to the Judges in *Maney, Mills* or *Richardson, (supra)*.

At the Trooper barracks, the Respondent, according to the Trooper's in Court testimony, was abusive, loud and out of control. Omitted from the direct proof that she was handcuffed and shackled. Also omitted from the direct proof was the fact that Lieutenant Lupo at 10:04 sent an email to his supervisor that the Judge, from the time of her arrival at the barracks at 9:30 that, "so far she's cooperative". (Ex. 84) Lieutenant Lupo could not explain the inconsistency in his testimony. It is obvious that the situation at the station was not as dramatic as the Troopers represented in their records or direct testimony. Her attorney, Christian Catalano testified he did not hear her curse at or abuse the police officers. (Ex. 25, p.77)

It is noteworthy that Judge Astacio testified that she was not proud of her language during her three hour ordeal with the police. She was candid about and remorseful for her angry response. But what she said was in response to her treatment by Trooper Kowalski and the State Police. There is a lack of candor in this case is on the part of the State Police. They lied to Judge Astacio about unarresting her. They held her for one and one-half hours against her will and questioned her contrary to her request and her Counsel's request. They did not honor her request to call City Court to advise she would not be there and they exaggerated her conduct at the Trooper barracks. Their abusive misconduct and misrepresentations were provoking factors in this case. Their lack of candor undercuts the weight and integrity of their claim that Judge Astacio was driving while intoxicated.

ABUSE OF OFFICE

Unlike in the *Matter of Judge Maney, supra.*, in her one and one half hours at the roadside, Judge Astacio never asked to be “cut a break” because of her office:

- She did not raise the issue of her judicial office when she was asked where she was going at the roadside, Trooper Kowalski acknowledged he did not know she was a Judge until he was processing her at the Trooper barracks.
- She asked to be able to call the Court when it became clear she would be late or unable to attend Court.
- She raised the issue of her judicial office during her one hour and thirty minute retention at the Trooper’s barracks because she knew she would have a Courtroom full of people waiting for her at 9:30 a.m. - - an undisputed fact. However, Trooper Kowalski admitted he did not know she was a Judge until after she arrived at the barracks. (TR 42)
- Never does she, unlike Judge Maney, ask for professional courtesy with regard to the charge. She did ask to be allowed to call the Court to advise them that she would be late or unable to attend that morning. (TR 268-269) Wasn’t that her duty? Wasn’t she obligated to the parties, the attorneys and Court staff gathered at City Court to advise them of her potential lateness or non-attendance? Yet, the State Police did not accord her the courtesy of calling the City Court until she was already late and at the Trooper’s Barracks, causing unnecessary stress and embarrassment for the Judge. Ultimately, Captain Lupu wrote – let her call the Court Clerk. (TR 138) The suggestion on cross-examination that should have only told the State Troopers that she

had an appointment is, respectfully, absurd. Her duty was to be in Court and if unable to perform that duty, she was obligated to advise the Court.

- Moreover, nowhere in Captain Lupu's written notes of that morning does he note the Judge was verbally abusive at the barracks. He writes only "crying, weeping, smell of alcohol beverages". He does not note that she is asking for special treatment, nor does he ever advise his superiors she is asking for special treatment (TR 137)
- Captain Lupu writes in Exhibit 83: "pleading, begging, please don't do this, I have to go to work, I have arraignment. I have Court right now." (TR 141)
- That was a true and accurate representation by Judge Astacio - - she did have Court at that very moment. Moreover, Lupu could not say if the "please don't do this" applied to her being arrested or her being late to Court - - he did not write she was asking not to be arrested, he did write that she was stating she had to go to work. (TR 145) That was her testimony - she was concerned about the Courtroom full of people waiting for her. (TR 268-269)
- Captain Lupu never wrote to his Superior or in his notes that the Judge was asking for special treatment. (TR 146)

The point in summary is Judge Astacio did not seek special treatment. She vigorously disagreed that she should be arrested. That was her right as a citizen and as a Judge under Rules she can argue *pro se*, Rule 100.4 (G). She was held at the roadside for an hour and a half. She was told she could be unarrested if she took a preliminary breath test. That was a misrepresentation by the Trooper, and by the time she was transported to

the station, she was very angry, with good reason. The Troopers violated their duty to her to be respectful and dedicated in their service while safeguarding her rights. (Tr. 46-47) They were rude, unprofessional, discourteous and deceitful.

At the station, both Mr. Catalano, by testimony, and Capt. Lupo in a 10:03 email, describe her as cooperative. (TR 25, pp. 77-79, Ex. 84) She candidly acknowledged that she used some vulgarity and was angry in the Trooper car and at the station, but this was after she had been held for an extended period of time and peppered with questions for an excessive and inappropriate period of time and had to beg to be allowed to contact City Court.

If Judge Astacio violated the Rules, it was only by virtue only of her DWI conviction, and we argue that the Referee may independently find that her driving conduct did not violate the rules. If she is found to have driven under the influence by the Referee, we ask simply that the time delay between alcohol consumption and driving be considered in mitigation. The three hour arrest and the circumstances surrounding the Trooper's conduct and lack of candor does not just mitigate her language in the presence of the Troopers, it excuses it. Finally, it is quite clear that Judge Astacio did not assert or use her judicial office as an attempt to get out of the arrest. (TR 62-62)

CHARGE III -- FINDINGS OF FACT

1. Judge Astacio acknowledged that she attempted to start and operate her vehicle on October 3, 2016 having consumed alcohol.

2. Judge Astacio testified that she had not read the conditional discharge order, Ex. 37, with sufficient care and was unaware that she was under an order not to consume alcohol. (R – 276)

CHARGE III – MITIGATING FACTORS

1. Judge Astacio was honest, truthful and remorseful to both Judge Aronson and the Commission and this tribunal with regard to her transgression. She apologized to Judge Aronson (R – 278) (Ex. 34, p. 13)

CHARGE III – CONCLUSIONS OF LAW

1. Judge Astacio violated the conditions of her probation which she acknowledged. As a consequence she violated the Rules alleged.

CHARGE IV – FINDINGS OF FACT

ARRAIGNMENT OF JAMES THOMAS

1. This charge involves the arraignment of James Thomas on January 20, 2015 by Judge Astacio. (R – 279)
2. Judge Astacio had been a Judge for 20 days. (R – 280)
3. James Thomas had previously been a client of Judge Astacio's when she was a practicing lawyer. (R – 279)
4. On January 20, 2015, Judge Astacio made the determination she should not arraign Mr. Thomas and wanted to transfer the case. (R – 280)

5. Judge Astacio stated “I was still pretty new and didn’t know the procedure for transferring cases.” (R – 280)
6. Judge Astacio testified Mr. Thomas was being held by parole “so I did what I typically do. I put a \$50 hold on the petit larceny, so he would get credit for the time he was in jail, for that and adjourned it to be arraigned in front of, I believe Judge Miller.” (R – 280)
7. Judge Astacio asked: Can it (the case) not go to Johnson, please”. (R – 281)
8. Judge Astacio testified at this hearing that she now realizes that the request was inappropriate. (R – 281)
9. Judge Astacio testified that she treated Mr. Thomas as she would have treated any other defendant being held by parole in holding him with a \$50 cash or bond so he could credit for time served, but understands now that has an inappropriate appearance. (TR 282)

CHARGE IV: CONCLUSIONS OF LAW

1. Judge Astacio did not violate Section 100.1 or 100-2(A) or 100.3(9)(1)(a)(i) of the Rules.

ARGUMENT

Judge Astacio acknowledges that requesting that this defendant’s case not go to Judge Johnson was inappropriate. In fact, the case went to the proper Judge. Judge Astacio’s request

was based on her inexperience 20 days into office. In granting the Defendant, who was incarcerated on another charge, \$50.00 bail, she engaged in a routine act she would have done for any defendant similarly situated, allowing the defendant to receive credit for time served. Given the routine nature of the act, and her public declaration of a conflict, there can be no appearance of impropriety. Judge Astacio made it clear that she was conflicted out of the case and her act was ministerial in nature.

CHARGE V – FINDINGS OF FACT

T [REDACTED] **L** [REDACTED]

1. Judge Astacio had an off the record discussion about this defendant on January 27, 2015, 27 days into being a Judge. (TR 283) Because Rochester City Court uses tape and not a stenographer, off the record conversations are sometimes recorded such as in this case.
2. The Judge was talking to a deputy who had approached the bench. He told her that Defendant was “spitting on us, she’s fighting us; she’s calling racial slurs. Do we have to bring her out?” (TR 284)
3. The Judge had a conversation with a deputy stating “she would like to bring her out, but asked if I make you bring her out, we’re going to end up turning a dis-con into an assault II?” (TR 284)
4. Judge Astacio acknowledged that what was said by her during this conversation such as: “Is she crazy or is she bad”, the question was intended to determine if she was angry and disrespectful or did she legitimately have issues. (TR 285-286)

5. She incorrectly remembered she went off the bench to see her that day while she was in custody. (TR 286)

MITIGATING FACTORS

6. A discussion that was off the record was recorded. The Judge acknowledged that the wording of her casual conversation off the record was disrespectful and inappropriate but simply does not rise to misconduct, particularly 27 days into her Judgeship. She had the discussion to attempt to avoid escalating the situation so that Ms. L [REDACTED] would not create further legal problems for herself by acting out in open court. (TR 284)
7. The Judge was candid and remorseful, but not intentionally being disrespectful.

CONCLUSION OF LAW – PEOPLE V. L [REDACTED]

1. The Judge did not violate 100.1, 100.2A or 100.3(B)(3) of the rules of Judicial conduct.

CHARGE V – PEOPLE V. V [REDACTED]

FINDINGS OF FACT

1. The Defendant was being arraigned by Judge Astacio. He was a 17 year old high school student who was accused of selling prescription drugs in school.

2. At arraignment, Judge Astacio gave the Defendant a lecture that implied that he was guilty. She acknowledged her statements could have given the Defendant the impression she was not being given the presumption of innocence. (TR 289)
3. She stated: "I would probably be beating my daughter currently, right now, while she was getting arraigned... Don't embarrass your mother." (TR 286)
4. Judge Astacio testified by beating she meant a "whoopin" (TR 287, 288) or a "spanking", not that she or any parent would or should beat up a child. It was a figure of speech. (TR 287, 288)

MITIGATING FACTORS

1. Judge Astacio conceded that her choice of words was poor and that in giving the lecture to the young man at his arraignment, she gave the impression he would not receive due process. (TR 289)
2. The Judge's "lecture" was administered because she observed the 17 year old boy's mother crying at his arraignment, she believed he would be into Teen Court diversion program, likely receive an adjournment in contemplation of dismissal, and not proceed through the system and she wanted to make an impact on him. (TR 287)

CONCLUSIONS OF LAW

1. Judge Astacio in People v. V [REDACTED] did not violate Rules 100.1, 100.2(A) and 100.3(B)(3). She understood that V [REDACTED] would be diverted and she simply wanted to make an impression on him. She was speaking to him in street vernacular, in a

manner he could understand, endeavoring to impress upon his potential and the risk he was taking if his conduct was proven.

PEOPLE V. D [REDACTED] Y [REDACTED]

FINDINGS OF FACT

1. On August 15, 2015, Judge Astacio arraigned Mr. Y [REDACTED] for disorderly conduct.
2. Mr. Y [REDACTED] pled guilty.
3. When accepting his plea, Judge Astacio stated:

“Mr. Y [REDACTED] stay out of the Street. It’s super annoying. I hate when people walk in front of my car. If there was (sic) no rules I would totally run them over because it’s disrespectful.” (TR 290)
4. Judge Astacio acknowledged that she used these words. (TR 290)
5. Judge Astacio simply was advising the Defendant that his conduct was both annoying to the public and dangerous in plain language he could understand. (TR 289-290)

CONCLUSIONS OF LAW

1. Judge Astacio did not by virtue of her conduct violate any rule of Judicial Conduct. In sentencing Mr. Y [REDACTED], she told him the truth - - his conduct was both annoying and dangerous. That is the role of a sentencing Judge - to advise why the sentence is being given.

PEOPLE V. D [REDACTED] W [REDACTED]

FINDINGS OF FACT

1. The Defendant was being arraigned before Judge Astacio for sexual misconduct.

2. Judge Astacio acknowledged in the pleadings and in the hearing that her conduct and comments on the bench were inappropriate in that she:
 - (a) Laughed at the defense attorney's characterization of the alleged victims delay in signing a statement as "buyer's remorse"
 - (b) For saying it was
 - "funny" four times
 - "freaking hilarious" and "hilarious"

MITIGATING FACTORS

1. Judge Astacio was aware the Complainant was not present in the Court room. The comments were made with counsel at the bench, people weren't in the courtroom as it was the end of the docket, and the courtroom was emptying out. (TR 293)
2. Judge Astacio was caught by surprise by defense counsel's flip comment. (TR 291) She did not intend to laugh. (TR 293) The initial laughter was involuntary.
3. Judge Astacio in attempting to explain her inappropriate laugh made the situation worse which she acknowledges. (TR 293)
4. Judge Astacio was candid about her conduct and expressed genuine remorse to this Tribunal, stating that her conduct was not intended to mean she "took the situation lightly or that I didn't care about what was alleged to have happened to her. That's the opposite of everything I've ever stood for." (TR 294)

CONCLUSIONS OF LAW

1. Judge Astacio violated Rules 100.1, 100.2(A) and 100.3(B) (3) for which she is charged. She was candid regarding her failure and remorseful for her conduct.

CHARGE VI

FINDINGS OF FACT

1. On 8/22/16, Judge Astacio was convicted of DWI and given a conditional discharge. (Ex. 27)
2. The Vehicle and Traffic Law Conditions of Conditional Discharge (CCD) is a three page document signed by Judge Aronson and Judge Astacio on 8/22/16 and went into effect thereon. (Ex. 27) It was to expire on 8/22/17.
3. The CCD ordered that Judge Astacio install an ignition interlock device (id).
4. The CCD provides that Judge Astacio shall:

“submit to any recognized tests that are available to determine the use of alcohol or drugs.” (Ex. 27)
5. There is no provision of the CCD which required Judge Astacio to remain in the City of Rochester or Monroe County or in America.
6. No alcohol or drug test was ordered pursuant to the CCD until May 15, 2017 when Judge Aronson wrote a letter to Judge Astacio’s then attorney, that he:

“intend (ed) to enforce the provision of the conditional discharge requiring the defendant to submit to tests for alcohol use”

And Judge Astacio was “require(d) ... to submit to an EtG lab analysis of her urine sample”... to be done immediately. (Ex. 45)

7. At the time of this order, Judge Aronson learned the Respondent was in Thailand.
(Ex. 47, pp. 3-6)
8. The ordered laboratory test was to be submitted to the Judge by counsel.
9. The Respondent left for Thailand on vacation on May 2, 2017.
10. Previous to that date she had been relieved of any duties, she was not allowed to report to the Monroe County Courthouse as a Judge, and had no report obligations of any type. (TR 305, Ex.I, Ex. J) She had been subject to a high level of media attention that was deemed very stressful by her psychologist. (Ex. H)
11. On April 9, 2017, there had been a “bad blow” into her ignition device. There was no ramifications from that. (TR 307)
12. On May 2, 2017, Judge Astacio left for Thailand with a one way ticket. (TR 307)
13. Judge Astacio upon leaving believed she had satisfied all requirements of conditions of the conditional discharge. (TR 306)
14. There was a bad blow on April 29, 2017 that Judge Astacio was unaware of. (TR 309)
15. On May 7, 2017, Judge Astacio had a telephone conversation with her then DWI attorney Edward Fiandach who advised her there had been a bad blow, but he didn’t know the date. Judge Astacio believed it was the April 9, 2017 bad blow. (TR 309) Judge Astacio advised Mr. Fiandach she was in Thailand during this conversation and that because of the uncertainties of the telephone, email would be the best mode of contact.
16. Judge Astacio was told by Mr. Fiandach in the May 7, 2017, that probation had indicated the Judge should not file a violation. (TR 304) She told Mr. Fiandach

email would be the most reliable measure of communication with her while she was away. (TR 309)

17. Judge Astacio proceeded with her trip living for a period of time in a Wat with Monks. (TR 309)

18. On May 15, 2017, Judge Astacio was ordered to do any immediate ETG Lab. (Ex. 44 and 45) There was no conclusive proof that either order was sent to the Judge Astacio's home. Judge Aronson knew at or around the time of this order, Judge Astacio was in Thailand. (Ex. 47, pp. 306; Ex. 45, 46, 47, 48)

19. Mr. Fiandach was not able to contact Judge Astacio until May 27th.

20. On 5/23/17 (S K) a letter notice was ostensibly sent to the Judge's home and Mr. Fiandach. (Ex. 46)

21. On 5/30/17, Judge Astacio was declared to be delinquent by Judge Aronson. (Ex. 48)

22. On 5/30/17, a bench warrant was issued by Judge Aronson. (Ex. 49)

23. On June 5, 2017, Mr. Fiandach explained that communication had broken down, the Judge had not received a voicemail left by Fiandach, but once they made contact by email Judge Astacio returned promptly. Mr. Fiandach pointed out to the Court that there was "no willful violation of the Court Order." (Ex. 51, p. 8)

24. At that arraignment, Judge Aronson advised Judge Astacio that:

- He regarded her as being contemptuous. (Ex. 51, p. 10)
- Criticized her not turning herself in on Sunday evening. (Ex. 51, p. 11)
- Told her she was self-sabotaging her return to the bench. (Ex.51, p. 11)

- He advised her that based on her attorney's representations, he would "have a lot of trouble with the defense of impossibility when it was self-imposed by you travelling half way around the world. (Ex. 51, p. 13)
25. On May 27, 2017 in Thailand at 3:30, she received an email from Mr. Fiandach advising her she had Court on May 30, 2017, a Tuesday, based on the bad blow on April 29, 2017. (TR 311) When Fiandach next achieved contact with her on May 27, 2017, and advised her that the Judge had issued a warrant without bail, an immediate warrant. (TR 311)
26. She did not have sufficient time to get a urine ETG test in Thailand and she didn't have sufficient time to travel back to the U.S. for the May 30, 2017 return date, so she requested that Mr. Fiandach request an adjournment of her case, requesting a week. (TR 311) Judge Aronson denied that request.
27. She made arrangements to come home.
28. At this time, she also became aware of a letter from Judge Lawrence Marks, the Chief Administrative Judge of the State of New York, dated May 30, 2017 ordering Judge Astacio's presence on June 5, 2017 at 9:00 a.m. in the Rochester Chambers of the Administrative Judge. (Ex. K)
29. Judge Astacio had been functioning under the terms of a conditional discharge since 8/22/16 when she left for Thailand, and
- No type of alcohol tests had been previously ordered. (TR 316)
 - Mr. Fiandach left her a voicemail message on or about May 15, 2017, but did not email her and calls were not being put through to her voicemail. (Ex. 51, p. 7)

- With proper email notice, she could have complied with the testing in Thailand. (TR 316)
 - Once e-mailed, the Respondent promptly responded and came home. (Ex. 51, p. 8)
30. Judge Astacio provided proof of her plane flight home. Mr. Fiandach advised her he asked to have the warrant lifted and the DA consented but Judge Aronson refused. (TR 312)
31. The Judge flew home arriving on Sunday, June 4th, intending to go to the Hall of Justice on Monday to meet with Judge Doran and then comply with arrest warrant. (TR 313)
32. The Judge flew home promptly. (TR 51, p. 8)
33. Judge Astacio arrived at the Hall of Justice reporting to Judge Doran's office before 9:00 a.m. The Rochester Police arrived after Judge Astacio's arrival and before Judge Doran, but did not arrest her until she completed her meeting with Judge Doran. (TR 313-314)
34. She appeared before Judge Aronson at 10:30 on June 5, 2017 for her arraignment. (TR 314)
35. Judge Aronson advised Judge Astacio at her arraignment as follows:
- That he was angry with her;
 - That he was denying bail;
 - That he was jailing her pending a hearing. (Ex. 51)
36. Judge Astacio was removed to jail without bail pending her hearing. (Ex. 51)

37. A hearing was held on June 10, 2017 before Judge Aronson. (Ex. 52)
38. Judge Astacio was found to be in violation of her conditional discharge and sentenced to jail and probation.
39. The matter was appealed and affirmed.
40. In his bench decision, Judge Aronson stated:

- "... no ETC test (was) submitted as required by the orders of the conditional discharge.
- The fact that the defendant absented herself from the jurisdiction intending it to be for three months was not a technical violation of the conditions. However, it was inferentially a violation if she absented herself from this jurisdiction with the understanding that she intended to be away from this jurisdiction for three months.

MITIGATING FACTORS

1. At the time, Judge Aronson ordered the Respondent to have the EtG test on May 15, 2017 to be done by her own physician, he knew she was in Thailand. (Ex. 45 and Ex. 47, pp. 3-6, Ex. 45, 46, 47 and 48)
2. Judge Astacio's violation of the conditional discharge was acknowledged by Judge Aronson to be "inferential". (Ex. 52, p. 42) Respondent has not found any authority to support Judge Aronson's decision and he did not cite authority for this holding.
3. Judge Astacio had not previously been ordered to take any drug and alcohol tests.
4. She returned to the Country promptly when advised that the arrest warrant would not be lifted. (Ex. 51, p. 8)
5. She was not intentionally in violation of the conditional discharge.

6. She only received actual notice of Judge Aronson's order that she appear on May 30, 2017 on May 27, 2017 while she was in Thailand.
7. When she returned to the Country, she had two obligations -- attending the ordered meeting with Judge Doran (Ex. K), and complying with the outstanding warrant. It is noteworthy that the police allowed her to complete her meeting with Judge Doran before she was formally arrested and taken to Judge Aronson.
8. Judge Astacio offers in mitigation that she voluntarily submitted to a test of 1.5 inches of hair, extricated by a recognized laboratory on 8/31//17. (Ex. G) The sample was obtained by Claudia P. Caparco, a registered nurse who operates Alpha Checkpoint of Rochester, Inc., a company that provides drug and alcohol testing services and DNA testing services. (TR 171-173)
9. The sample was sent to ExperTox, a Texas laboratory certified to do this type of testing. (Tr. 176)
10. The test showed there was no exposure to or the consumption of alcohol by Judge Astacio within approximately 3 months of the date of the test. (TR 177-180) (Ex. G)
11. The test was offered to demonstrate that around or during the time Judge Aronson was ordering a urine test, Judge Astacio had not consumed alcohol.
12. Judge Astacio candidly testified that in retrospect she would have handled the trip in a different manner. (TR 317)
13. Judge Astacio testified that with proper notice, she could have complied with the conditional order while in Thailand. (TR 316)

CONCLUSIONS OF LAW

1. Judge Astacio did not willfully violate Rules 100.1, 100.2A, 100.4(A)(2) of judicial conduct. There was no “inferential” violation of the conditional discharge and no willful violation on Judge Astacio’s part.

VI. ARGUMENT

Judge Astacio acknowledged in her testimony that she, in retrospect, would have handled her trip to Thailand in a different manner. (TR 317) Judge Aronson knew she was in Thailand on May 15 or shortly thereafter. He was advised that Judge Astacio was going to return. He refused to recall the bench warrant he issued for Judge Astacio, even after being advised that she was returning from Thailand. (TR 311) The transcript of Judge Astacio’s May 30, 2017 non-appearance and June 6, 2017 appearance, Judge Aronson is the very essence of anger and prejudged Judge Astacio’s charge. (Ex. 50, Ex. 51). He ultimately found in her violation and on July 6, 2017 sentenced her to sixty days in jail, three years’ probation and required to wear a device. (Ex. 51) Her presence in Thailand was deemed by Judge Aronson “inferentially” to be a violation of the conditional discharge. For that inferential violation, she received sixty days in jail, after ordering her to jail without bail once she appeared and was arraigned on the charge on June 7, 2017.

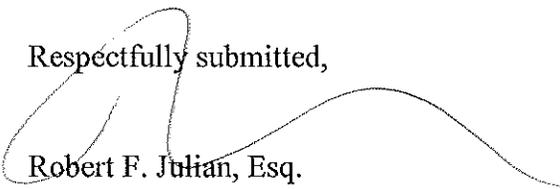
It was reasonable for Judge Astacio to ask for an adjournment and once one was denied, she returned to the country within seven days. She, upon her return, offered to take an Etg test, but she was jailed without bail instead.

The hair follicle Etg test that she obtained showed that during the time period in question late May, 2017, she likely had not used alcohol. (Ex. G)

In mitigation, the Referee is asked to consider that no prior tests had been ordered, that she was barred from the courthouse and without duties despite a neutral physician and a psychologist finding she was able to perform her duties and despite her attending two alcohol counseling programs and having been found to have, a worst, a mild alcohol disorder. As she testified, she was and is the object of tremendous scrutiny by the press. Her psychologist, Dr. Vincent Roganese, clearly outlines the tremendous pressure she was under due to press. (Ex. H) In light of the foregoing, it is respectfully argued, consistent with our argument regarding *Matter of Mills* as a precedent, that she did not violate the Rules of Judicial Conduct by virtue of her actions relating to this charge.

Date: January 25, 2018

Respectfully submitted,



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