

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

**INQUIRY CONCERNING JUDGE
ELAINE M. RUSHING,**

No. 177

**DECISION AND ORDER
IMPOSING PUBLIC CENSURE
PURSUANT TO STIPULATION
(Commission Rule 127)**

I. INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Elaine M. Rushing, a judge of the Sonoma County Superior Court since 1992. On February 16, 2006, the commission filed its Notice of Formal Proceedings (Notice) against Judge Rushing in which it charges her with misconduct as follows.

Count one charges that on the night of June 21, 2005, Judge Rushing committed the crimes of driving while under the influence of alcohol (DUI) in violation of Vehicle Code section 23152(a), and driving while having 0.08 percent or more, by weight, of alcohol in her blood in violation of section 23152(b) of that code. The first count also charges that following Judge Rushing's plea of no contest to criminal charges based on the drunk driving, she was convicted in Sonoma County Superior Court on August 8, 2005 of violating Vehicle Code section 23152(b) with an enhancement under section 23578 of that code (for a blood alcohol level of 0.20 percent or more).

Count two charges Judge Rushing with a course of dishonest conduct in connection with her efforts to avoid being arrested in connection with the DUI incident of June 21, 2005 after she drove her car into a ditch, following a hit-and-run property

damage collision involving a wall. The dishonest conduct is discussed further in this decision (*post*, pp. 4-5).

Count three relates to the judge's conduct at the scene where she drove her car into the ditch, and later while she was being transported by California Highway Patrol (CHP) officers from that scene. The charges are that Judge Rushing repeatedly invoked her judicial office, and that of her husband (who is an appellate court justice), in an effort to avoid being arrested, and otherwise to receive preferential treatment. The details of the judge's invocation of judicial office also are discussed further in this decision (*post*, pp. 5-7).

The Supreme Court appointed three special masters to hold an evidentiary hearing and to report to the commission. The masters are Hon. Laurence D. Rubin, Associate Justice of the Court of Appeal, Second Appellate District, Division Eight; Hon. Raymond J. Ikola, Associate Justice of the Court of Appeal, Fourth Appellate District, Division Three; and Hon. Suzanne N. Kingsbury, Presiding Judge of the El Dorado County Superior Court. Prior to the masters holding an evidentiary hearing, however, Judge Rushing and her counsel, James A. Murphy, Esq., and the examiner for the commission, Jack Coyle, Esq., (the parties) proposed a stipulated resolution of this inquiry to the commission, as follows.

By an amended Stipulation for Discipline by Consent (Stipulation), executed by the various parties on May 10 and 11, 2006, the parties proposed pursuant to Commission Rule 127(b) that this inquiry concerning Judge Rushing be resolved with Judge Rushing agreeing to the truth of the charges set forth in the Notice, and the imposition of a public censure. According to the terms of the Stipulation, Judge Rushing also agreed that in its decision and order imposing a censure, the commission "may articulate the reasons for its decision" and that she will "accept any such explanatory language that the commission deems appropriate." (Stipulation, p. 1.) Pursuant to the Stipulation, Judge Rushing "waives hearing, review, and any further proceedings." (*Ibid.*)

In connection with the Stipulation, Judge Rushing also executed on May 10, 2006, the requisite Affidavit of Consent (Affidavit) under rule 127(d) in which she admitted the

truth of the charges, consented to the imposition of a censure, and waived all further proceedings and review by the California Supreme Court.

The proposed agreement, consisting of the Stipulation and Affidavit, was presented to the commission on May 11, 2006, which accepted it that day by a vote of 7 to 2. (Further details concerning the commission vote are set forth at the conclusion of this decision, *post*, at page 10.) This Decision and Order, and the findings and conclusions set forth herein, are based on the Stipulation and Affidavit.

II. STIPULATED FACTS AND LEGAL CONCLUSIONS

Count One

On the night of June 21, 2005, in Sonoma County, California, Judge Rushing committed the crimes of driving while under the influence of alcohol in violation of Vehicle Code section 23152(a) and driving while having 0.08 percent or more, by weight, of alcohol in her blood in violation of Vehicle Code section 23152(b). Breath tests revealed blood alcohol levels of 0.19 and 0.21 percent.

On August 8, 2005, upon a plea of no contest in Sonoma County Superior Court case number SCR-469285, Judge Rushing was convicted of violating Vehicle Code section 23152(b) with an enhancement under Vehicle Code section 23578 (for a blood alcohol level of 0.20 percent or more). The charge under Vehicle Code section 23152(a) was dismissed. Judge Rushing was placed on three years of informal probation, ordered to perform 10 days of work release, attend a 45-hour alcohol program, pay a mandatory fine, and comply with other conditions of probation.

Judge Rushing's conduct violated the Code of Judicial Ethics, canons 1 (failing to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved) and 2A (failing to comply with the law and failing to act in a manner that promotes public confidence in the integrity of the judiciary), and constituted prejudicial misconduct. (See *In the Matter Concerning Alvarez* (Dec. 27, 2005) Decision and Order, p. 2 [DUI found to be prejudicial misconduct].)

By letter dated June 24, 2005, Judge Rushing promptly reported her arrest to the commission as required by canon 3D(3). Upon her conviction, Judge Rushing issued a public apology to the people of Sonoma County in a local newspaper.

Count Two

In an effort to avoid being arrested for crimes related to her drinking and driving referenced in count one, Judge Rushing engaged in a course of dishonest conduct, as follows. While driving under the influence of alcohol on June 21, 2005, Judge Rushing collided with a wall at 5571 Crystal Drive in Santa Rosa, causing property damage. Judge Rushing sustained a minor head injury. She left that scene without notifying law enforcement or the property owners, and continued driving for approximately two miles until she drove her car into a ditch on Riebli Road in Sonoma County.

Judge Rushing remained under the influence of alcohol during the subsequent events of this count and the next. When a passerby stopped her car and asked Judge Rushing if she was all right, Judge Rushing told her to leave. When a second driver stopped and offered to call for help, Judge Rushing said, “we’re fine” (even though she was alone) and told her not to call anyone. Judge Rushing also falsely told the second driver that her husband was with her.

Having been notified by someone other than Judge Rushing, California Highway Patrol (CHP) officers and other emergency personnel arrived at the scene at Riebli Road. When Firefighter Ramos found Judge Rushing sitting in the driver’s seat, Judge Rushing falsely told him that she had not been the driver. She said that an unknown woman had been the driver, and then that an unknown man had been the driver. When Firefighter Ramos asked her where the keys to the car were, Judge Rushing said that the male driver had taken them when he fled the scene up a nearby hill.

When CHP Officer Holeman arrived on the scene as the investigating officer, he asked Judge Rushing what had happened. She falsely told him that she had not been the driver. Judge Rushing said that there had been two other people in the car with her, a man and a woman, and that the man had been driving. She said that she had met them at a friend’s house, but did not know their names. She said that she had been sitting in the

back seat (even though the car had no back seat). When Officer Holeman asked Judge Rushing where the keys to the car were, she first told him that she thought they were in the car, then said that the male driver had taken the keys with him when he and the woman left the scene on foot, walking back toward the friend's house. She said that she had let the man drive her car because he and the woman were going to give her a ride home and then drive her car back to the friend's house. When Officer Holeman asked Judge Rushing how much alcohol she had consumed, she first answered "two bottles," then said, "two glasses." When the officer asked Judge Rushing what she had been drinking, she asked him why he was asking and again asserted that she had not been driving the car.

Judge Rushing's conduct violated canons 1 and 2A (failing to act at all times in a manner that promotes public confidence in the integrity of the judiciary), and constituted prejudicial misconduct. (See *Inquiry Concerning McGraw*, No. 169 (Apr. 3, 2003) Decision and Order, p. 5 [false and misleading statements to media by judge not acting in judicial capacity found to be prejudicial misconduct].)

Count Three

At the scene on Riebli Road, referenced in count two, and while being transported from that scene, Judge Rushing repeatedly invoked her judicial office, and that of her husband, in an effort to avoid being arrested for crimes related to her drinking and driving and to otherwise receive preferential treatment, as follows.

Judge Rushing identified herself to Firefighter Ramos by showing him her Sonoma County Court Judge identification badge. When Judge Rushing was asserting her false story that she was not the driver to Officer Holeman, she repeatedly told him that she was a superior court judge in Sonoma County. She also repeatedly requested that Officer Holeman call her husband who, she informed the officer, was an appellate court justice.

When Officer Holeman told Judge Rushing that he had determined that she had in fact been the driver, and that he needed her to answer some questions and perform some field sobriety tests, she responded to the effect of, "but I'm a judge, and I told you I

wasn't the driver." She then declined to answer any more questions and declined to perform any field sobriety tests.

When Officer Holeman placed Judge Rushing under arrest for driving under the influence, she persisted in telling him that she was a superior court judge. She told him that because she was a judge he should not be arresting her. She also repeatedly requested that he call her husband, the appellate court justice.

When Judge Rushing was handcuffed and placed in a patrol vehicle, she began complaining about the handcuffs and asked Officer Holeman if he had seen her superior court judge identification badge. She asked him if he knew she was a judge. She told him that he did not need to be doing what he was doing and that he could remove the handcuffs. Officer Holeman explained that they could not be removed, pursuant to CHP policy. Judge Rushing then said that the handcuffs were too tight. Officer Holeman helped her out of the car, checked the handcuffs himself and had another CHP officer check them to confirm that they were not too tight and had been placed on her in a manner consistent with CHP policy.

Judge Rushing was helped back into the car, and when Officer Holeman was transporting her to a CHP office, she repeatedly told him that he should remove the handcuffs. Officer Holeman again advised her that he could not do so, pursuant to CHP policy. Judge Rushing then told Officer Holeman that in her courtroom she goes against court policies for CHP and other officers, and that he should extend that courtesy to her. She persisted in telling Officer Holeman that she was a superior court judge and that her husband was an appellate court justice.

Judge Rushing's conduct violated canons 1, 2A (failing to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and 2B(2) (lending prestige of judicial office to advance personal interests); see commentary to canon 2B(2), stating that judge must not use position to gain preferential treatment when stopped by a police officer. Because Judge Rushing was not acting in a judicial capacity when she attempted to obtain preferential treatment, she committed

prejudicial, rather than willful misconduct. (See *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 317-319 (*Kennick*.)

Other Factors Relevant To Discipline

Judge Rushing has no prior discipline. Numerous people, primarily from the legal community, have submitted letters in support of Judge Rushing's remaining in judicial office.

III. DISCIPLINE

The starting point of our analysis concerning the appropriate level of discipline is the Supreme Court's admonition that the purpose of judicial discipline "is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112 (*Broadman*), citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.)

Based on Supreme Court decisions, the commission has identified several factors that are relevant to determining appropriate discipline in furtherance of the foregoing overall disciplinary objectives enunciated in *Broadman*. (Decision and Order Removing Judge Ross from Office, Inq. 174 (2005), p. 64.) As relevant here, the factors include the number and nature of the acts of misconduct; the existence of prior discipline; whether the judge appreciates that he or she committed misconduct; the judge's general integrity; the likelihood of future misconduct; the impact of the misconduct on the judicial system; and the judge's veracity. In many respects, the various considerations overlap one another. Applying these standards here, we are satisfied that the stipulated censure is the appropriate level of discipline.

The number of acts of misconduct is relevant to the question of discipline, but not according to any rigid formula. (*Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1307.)

The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct

establishing “lack of temperament and ability to perform judicial functions in an even-handed manner.” [Citation.]

(*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918, quoting from *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653.)

Judge Rushing admits she committed three instances of prejudicial misconduct. Prejudicial misconduct, committed outside of a judge’s official capacity may be the basis for removal or censure (Cal. Const., art. VI, §18, subd. (d)), but is generally considered less serious than willful misconduct in office. (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284.)

There is no indication of any pattern of behavior similar to that charged in the Notice, or of any lack of judicial temperament. Nonetheless, Judge Rushing’s DUI, as well as the hit-and-run property damage incident involving the wall, and her resulting criminal conviction are utterly irreconcilable with minimum standards expected of a judge, and as stipulated (see *ante*, p. 5) with the requirements of canons 1 and 2A.

Judge Rushing’s conduct following her attempts to drive while drunk is particularly egregious. Falsifying stories to persons seeking to offer early assistance, and to emergency personnel and the arresting CHP officers reflects poorly on Judge Rushing’s integrity and without doubt seriously negatively impacts the public perception of her, and of the judiciary in general. Judge Rushing left the scene after colliding with a residential wall, lied to citizens offering her initial assistance, and provided a fabricated story to emergency personnel and the investigating officers that she was not the driver. None of this behavior can be reconciled with either canon 1 or 2A or with the standard set by the Supreme Court in *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865, that honesty is a “minimum qualification” expected of every judge.

Judge Rushing also repeatedly invoked her judicial office and that of her husband in an effort to avoid arrest and otherwise receive preferential treatment. She stipulates (see *ante*, pp. 6-7) that her conduct in this regard is inconsistent with canons 1, 2A, and 2B(2). In the *Kennick* case, the Supreme Court found Judge Kennick’s attempts to invoke the prestige of office as a basis for receiving preferential treatment from the California

Highway Patrol the day after his arrest for drunk driving to be “reprehensible.” (*Kennick, supra*, 50 Cal.3d. at p. 340.) The commission views Judge Rushing’s comparable behavior similarly.

Although Judge Rushing’s overall conduct here is seriously at odds with the canons and expected judicial behavior, the commission recognizes that all three instances of wrongdoing arose out of one drunken lapse of judgment to get behind the wheel of her car. However, that lapse is no more excusable here than when anyone else makes a similar mistake while under the influence.

Judge Rushing’s veracity and integrity have been seriously impugned. Her attempts to obtain preferential treatment, however, were unsuccessful. There was no on-bench misconduct and there was no direct adverse affect on the administration of justice per se. Several people, primarily from the legal community, have submitted letters in support of Judge Rushing remaining in judicial office.

In assessing the likelihood of whether Judge Rushing will commit future misconduct, the commission has taken into consideration the judge’s assurance to the commission that she has modified her behavior to ensure she will not reoffend. She has no prior history of any alcohol-related offenses or misconduct, and she has no prior discipline by the commission during more than 14 years on the bench. The judge promptly acknowledged to the public and to the commission the serious nature of, and her expressions of remorse over, her wrongdoing. Finally, Judge Rushing has stipulated to the imposition of this serious discipline as the appropriate sanction that is commensurate with her admitted serious wrongdoing.

Based on the foregoing analysis and appraisal of Judge Rushing’s wrongdoing, the commission concludes the misconduct here does not rise to the level of wrongdoing in which the Supreme Court has imposed the ultimate sanction of removal from office. The commission also concludes that the purposes of judicial discipline as enunciated in *Broadman* – protection of the public, enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of

the judicial system – can be accomplished through a censure. Accordingly, the commission hereby imposes this public censure of Judge Rushing.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Ms. Patricia Miller, Mrs. Penny Perez, Judge Risë Jones Pichon, Ms. Barbara Schraeger and Mr. Lawrence Simi voted to accept the parties’ settlement proposal and to issue this decision and order imposing a public censure pursuant to the stipulated agreement. Commission members Mr. Michael A. Kahn and Mr. Jose Miramontes voted to reject the proposed settlement, and dissent from this decision and order imposing the public censure, on the ground that the public interest would be better served if the matter were decided after the development of a full factual record following a hearing before the special masters. Commission member Justice Judith D. McConnell is recused, and commission member Mrs. Crystal Lui did not participate in this matter.

Dated: June 8, 2006

/s/
Marshall B. Grossman
Chairperson

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

**INQUIRY CONCERNING JUDGE
BERNARD J. SCHWARTZ,**

No. 178

**DECISION AND ORDER
IMPOSING PUBLIC CENSURE
PURSUANT TO STIPULATION
(Commission Rule 127)**

I. INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Bernard J. Schwartz, a judge of the Riverside County Superior Court since 2003. On February 22, 2006, the commission filed its Notice of Formal Proceedings (Notice) against Judge Schwartz in which it charges him with misconduct as follows.

Count one charges that on the night of July 16, 2005, Judge Schwartz committed the crimes of driving while under the influence of alcohol (DUI) in violation of Vehicle Code section 23152(a), and driving while having 0.08 percent or more, by weight, of alcohol in his blood in violation of section 23152(b) of that code. The first count also charges that following Judge Schwartz's plea of no contest to criminal charges based on the drunk driving, he was convicted in San Luis Obispo County Superior Court on September 6, 2005 of violating Vehicle Code section 23152(b).

Count two charges that before and after Judge Schwartz's arrest related to the DUI on July 16, 2005, the judge repeatedly attempted to avoid being arrested and incarcerated and otherwise to receive preferential treatment because of his status as a judge.

Pursuant to a Stipulation for Discipline by Consent (Stipulation), Judge Schwartz, his counsel Edward P. George, Jr., Esq., and the examiner for the commission, Jack Coyle, Esq. (the parties), propose pursuant to Commission Rule 127(b) that this inquiry be resolved with Judge Schwartz agreeing to the truth of the charges set forth in the Notice, and the imposition of a public censure. The Stipulation was signed by the various parties on April 25, 27 and 28, 2006. According to the terms of the Stipulation, Judge Schwartz also agreed that in the decision and order imposing a censure, the commission “may articulate the reasons for its decision” and that he will “accept any such explanatory language that the commission deems appropriate.” (Stipulation, p. 1.) Pursuant to the Stipulation, Judge Schwartz “waives hearing, review, and any further proceedings.” (*Ibid.*)

In connection with the Stipulation, Judge Schwartz also executed on April 25, 2006, the requisite Affidavit of Consent (Affidavit) under rule 127(d) in which he admitted the truth of the charges, consented to the imposition of a censure, and waived all further proceedings and review by the California Supreme Court.

The proposed agreement, consisting of the Stipulation and Affidavit, was presented to the commission on May 10, 2006, which accepted it that day by a vote of 9 to 0. (Further details concerning the commission vote are set forth at the conclusion of this decision, *post*, at page 8.) This Decision and Order, and the findings and conclusions set forth herein, are based on the Stipulation and Affidavit.

II. STIPULATED FACTS AND LEGAL CONCLUSIONS

Count One

On the night of July 16, 2005, in Pismo Beach, California, Judge Schwartz committed the crimes of driving while under the influence of alcohol in violation of Vehicle Code section 23152(a) and driving while having a 0.08 percent or higher blood alcohol level in violation of Vehicle Code section 23152(b). Judge Schwartz had a blood alcohol level of 0.17 to 0.18 percent, as evidenced by his breath tests. On September 6, 2005, upon a plea of no contest in San Luis Obispo County Superior Court case number M376280, Judge Schwartz was convicted of violating Vehicle Code section 23152(b).

(The charge under Vehicle Code section 23152(a) was dismissed.) He was placed on probation for three years with standard conditions for a first DUI offense.

Judge Schwartz's conduct violated the Code of Judicial Ethics, canons 1 (failing to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved) and 2A (failing to comply with the law and failing to act in a manner that promotes public confidence in the integrity of the judiciary), and constituted prejudicial misconduct. (See *In the Matter Concerning Alvarez* (Dec. 27, 2005) Decision and Order, p. 2 [DUI found to be prejudicial misconduct].)

Count Two

Before and after Judge Schwartz's arrest by the Pismo Beach Police Department for the crimes referenced in count one, he repeatedly attempted to avoid being arrested and incarcerated and otherwise to receive preferential treatment because he was a judge, as follows.

Pismo Beach Police Officer Trimble observed Judge Schwartz's vehicle "swerving all over the road" and pulled him over after he twice violated Vehicle Code section 21460(a) (driving to the left of double parallel solid lines). It appeared to the officer that Judge Schwartz had been drinking. When the officer requested that the judge take a preliminary alcohol screening (PAS) test, the judge responded, "Did you run my license yet?" When the officer said that he had not and again asked the judge to take the PAS test, the judge responded, "Why don't you run my license and then we can talk?" When the officer asked the judge if he was trying to say he was a police officer, Judge Schwartz responded, "No, I'm a judge."

Pismo Beach Police Sergeant Portz arrived on the scene and Judge Schwartz took a PAS test. (From this point on, the conversations were tape recorded.) Officer Trimble informed the judge that the test indicated that his blood alcohol level was 0.15, which was over the legal limit of 0.08 percent. The judge asked if he could just go back to the hotel (where he was staying for the weekend) and leave his car. The officer told the judge "my hands are tied" and there was "nothing I can do."

Officer Trimble then asked Judge Schwartz questions regarding his drinking and driving. The judge claimed to have had only “a couple of glasses of wine,” denied being under the influence of alcohol, and asked, “Is this really necessary, all this stuff we have to go through?” Sergeant Portz responded that they had to do their job “unbiased.”

After Judge Schwartz performed poorly on field sobriety tests, Officer Trimble asked if he would agree to another PAS test. The judge again asserted, “I’m really not under the influence. I’ve had a couple of drinks, but I’m really not under the influence.” Sergeant Portz again told him, “we’re just trying to do our job, unbiased and fairly to everybody.”

When Judge Schwartz took a second PAS test, Officer Trimble informed him that it indicated a higher alcohol level (0.18) than the first test. When the officer told the judge that he was under arrest and asked that he place his hands behind his back, the judge responded, “Can you consider the circumstances of it, and I can just leave my car here, and take me back to the hotel; is that a possibility?” Sergeant Portz again told him, “we have to be fair and unbiased, sir.” The judge responded, “But you know what this is going to do; this will substantially impair my career.” Officer Trimble said, “If I let you go, it could impair my career.” The judge then said, “You don’t have to let me drive; you could just let me go home.” Officer Trimble told him, “I can’t do that.”

Judge Schwartz persisted by asking, “can’t you guys consider the circumstances?” Sergeant Portz responded, “Sir, I’ve already told you that we’ve made our decision. This is the way it’s got to happen.” The judge again asserted, “This really is going to affect my career, I don’t know if you realize that.” When Sergeant Portz suggested that the judge would still have a job, the judge responded, “No, no, I really won’t.” The judge informed the officers that he would have to “self-report” the DUI to the Commission on Judicial Performance.

After being placed in a patrol car, Judge Schwartz said, “You know what? Just leave my car there; just take me back to the hotel and I’ll go to sleep. You can have my keys.” After Sergeant Portz told the judge two more times that they had to be “fair” with everyone, the judge responded, “I know. But, I’m all of a mile away from the hotel....

I know you guys are doing your job, but this is not good for me. I'm running for election next year and this is not a good time."

After Judge Schwartz was taken to the police station, he asked to speak to a "lieutenant or captain." Sergeant Portz told the judge that he would first have to take the breath test (that the judge had chosen to take rather than a blood test) to determine his blood alcohol level. Later, but still before taking the breath test, the judge again asked, "Is there a lieutenant or captain or somebody that I can speak to?" The sergeant again told him that he would first have to take the test.

Judge Schwartz again talked about the Commission on Judicial Performance and being up for reelection and losing his judgeship. Sergeant Portz again told him that they had to be "fair and unbiased." The judge responded, "But, this is a substantial issue with my career. All you have to do is just take me back to the hotel and I'll go to sleep and wake up in the morning and get my car." He again asked the sergeant, "Is there someone I can talk to before I take the test?" The sergeant reiterated that the judge first had to take the test. When the sergeant informed the judge that the result of the breath test was ".17, .18," the judge recognized "that's not good" and again asked to speak to a lieutenant or captain.

After Sergeant Portz informed Judge Schwartz that he would be held in custody until the next morning or until his wife, who was several hours away, could pick him up, he asked the sergeant if the sergeant could telephone the "on-call judge." Despite the sergeant telling Judge Schwartz that he could not "because you are a citizen of the State of California and we're treating you like everybody else," Judge Schwartz persisted in asking him to call a judge that Judge Schwartz could talk to.

Judge Schwartz's efforts to obtain preferential treatment having failed, he told Sergeant Portz and Officer Trimble "there is no professional courtesy here anymore" and "this is bullshit." Judge Schwartz then stated, "You guys come in and appear before me" in court on certain matters. When the sergeant asked the judge why he brought that up, the judge said, "because I'm not being treated fairly." The sergeant responded, "We're

treating you about as fair as we can, same as everybody else. What you are asking for is special treatment.” Judge Schwartz acknowledged, “To some degree, I guess.”

Judge Schwartz’s conduct violated the Code of Judicial Ethics, canons 1, 2A (failing to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and 2B(2) (lending prestige of judicial office to advance personal interests); see commentary to canon 2B(2), stating that judge must not use position to gain preferential treatment when stopped by a police officer. Because Judge Schwartz was not acting in a judicial capacity when he attempted to obtain preferential treatment, he committed prejudicial, rather than willful misconduct. (See *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 317-319 (*Kennick*).

Other Facts Relevant to Discipline

By letter of July 18, 2005, Judge Schwartz promptly reported his arrest to the commission as required by canon 3D(3). Judge Schwartz has no prior discipline.

III. DISCIPLINE

The purpose of judicial discipline “is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.” (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112 (*Broadman*), citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.)

The commission has identified several overlapping factors that are relevant to determining appropriate discipline in furtherance of the disciplinary objectives enunciated in *Broadman*. (Decision and Order Removing Judge Ross from Office, Inq. 174 (2005), p. 64.) As relevant here, the factors include the number and nature of the acts of misconduct; the existence of prior discipline; whether the judge appreciates that he or she committed misconduct; the judge’s general integrity; the likelihood of future misconduct; and the impact of the misconduct on the judicial system. Applying these standards here, we are satisfied that the stipulated censure is the appropriate level of discipline.

The number of acts of misconduct is pertinent to the question of discipline, not according to any rigid formula, *Furey v. Commission on Judicial Performance* (1987)

43 Cal.3d 1297, 1307, but rather, for determining whether the wrongdoing was isolated, or part of a course of conduct establishing “lack of temperament and ability to perform judicial functions in an even-handed manner.” (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918, quoting from *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653.)

Judge Schwartz admits he committed two instances of prejudicial misconduct. Prejudicial misconduct, committed outside of a judge’s official capacity may be the basis for removal or censure (Cal. Const., art. VI, §18, subd. (d)), but is generally considered less serious than willful misconduct in office. (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284.)

There is no indication of any pattern of behavior similar to that charged in the Notice, or of any broader issue concerning lack of judicial temperament. Nonetheless, Judge Schwartz’s DUI and his resulting criminal conviction are utterly irreconcilable with minimum standards expected of a judge, and as stipulated (see *ante*, p. 3) with the requirements of canons 1 and 2A.

Judge Schwartz’s conduct when he was stopped by the police and in connection with his arrest is particularly offensive. He repeatedly invoked his judicial office in an effort to avoid arrest and otherwise to receive preferential treatment. The judge stipulates (see *ante*, p. 6) that his conduct in this regard is inconsistent with canons 1, 2A, and 2B(2). In the *Kennick* case, the Supreme Court found Judge Kennick’s attempts to invoke the prestige of office as a basis for receiving preferential treatment from the California Highway Patrol the day after his arrest for drunk driving to be “reprehensible.” (*Kennick, supra*, 50 Cal.3d. at p. 340.) The commission views Judge Schwartz’s comparable behavior similarly.

Although Judge Schwartz’s overall conduct here is seriously at odds with the canons and expected judicial behavior, the commission recognizes that all of the wrongdoing arose out of one drunken lapse of judgment to get behind the wheel of his car. However, that lapse is no more excusable here than when anyone else makes a similar mistake while under the influence.

In assessing the likelihood of whether Judge Schwartz will commit future misconduct, the commission has taken into consideration the judge's assurance to the commission that the behavior in question was aberrational; implicit in that assurance is the concept that the judge will not reoffend. The judge has no prior history of any alcohol-related offenses or misconduct, and he has no prior discipline by the commission. The judge promptly self-reported his arrest to the commission. He has acknowledged to the commission the serious nature of, and his expressions of remorse over, his wrongdoing. Finally, Judge Schwartz has stipulated to the imposition of this serious discipline as the appropriate sanction that is commensurate with his admitted serious wrongdoing.

Based on the foregoing analysis and appraisal of Judge Schwartz's wrongdoing, the commission concludes the misconduct here does not rise to the level of wrongdoing in which the Supreme Court has imposed the ultimate sanction of removal from office. The commission also concludes that the purposes of judicial discipline as enunciated in *Broadman* – protection of the public, enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system – can be accomplished through a censure. Accordingly, the commission hereby imposes this public censure of Judge Schwartz.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Justice Judith D. McConnell, Ms. Patricia Miller, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, Ms. Barbara Schraeger and Mr. Lawrence Simi voted to accept the parties' settlement proposal and to issue this decision and order imposing a public censure pursuant to the stipulated agreement. Commission members Mr. Michael A. Kahn and Mrs. Crystal Lui did not participate in this matter.

Dated: June 8, 2006

/s/
Marshall B. Grossman
Chairperson