STATE OF MINNESOTA

IN SUPREME COURT

A14-1871

Inquiry into the Conduct of the
Honorable Alan F. Pendleton

BRIEF OF APPELLANT JUDGE ALAN PENDLETON

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LEGAL ISSUES

I. Whether by temporarily staying at his wife's home outside the Tenth Judicial District while addressing an unexpected and unforeseen family emergency Judge Pendleton violated the Minnesota Constitution and ethics rules requiring judges to reside within their judicial district.

The hearing panel found the Judge Pendleton abandoned is Tenth District residence for part of the time he was absent (from January 15, 2014 through June 2, 2014).

Minn. Const., Art. VI, §4.
In re Conduct of Karasov, 805 N.W.2d 255 (Minn. 2011)

II. Whether Judge Pendleton knowingly made a false statement by listing his former residence address by mistake on an affidavit of candidacy that does not require judges to identify their place of residence.

The panel found a violation.

Minnesota Code of Judicial Conduct, Rule 4.1(A)(9)

III. Whether the Board's repeated failure to notify Judge Pendleton of the charges against him, failure to follow Board rules, nondisclosure of material evidence and improper questioning combined to deprive Judge Pendleton of due process.

The panel offered no opinion on the due process issue.

Complaint Concerning Kirby, 354 N.W.2d 410 (Minn. 1984)
In re Gillard, 271 N.W.2d 785 (Minn. 1978)
In re Agerter, 353 N.W.2d 908 (Minn. 1984)

IV. What sanction, if any, is just and proper under the totality of the circumstances in this case.

The panel recommended that Judge Pendleton be censured, suspended without pay for at least six months and receive such other penalties as the Court deems appropriate.

Minn. R. Bd. Jud. Stds. 14(e)
In re Miera, 426 N.W.2d 850 (Minn. 1988)

STATEMENT OF THE CASE

Judge Pendleton serves the Tenth Judicial District. Since his 2007 marriage, he and his wife have lived separately in different judicial districts. After selling his Anoka condominium in November 2013, Judge Pendleton temporarily stayed with his wife in Minnetonka while he actively searched for replacement housing within the Tenth District. Upon learning that his son had been caught with drugs at school, Judge Pendleton placed his housing search on hold while seeking treatment for his son and working with his son's mother to determine whether a school transfer was necessary. When the transfer issue was resolved, and before the Board began investigating, Judge Pendleton rented an apartment in the Tenth District nearby his children's school.

The hearing panel found that Judge Pendleton abandoned his Tenth District residence during a portion of the time he temporarily stayed in Minnetonka. The Panel further found that he violated the Code of Judicial Conduct by listing the Anoka condo as his residence address on an election affidavit filed after the home had been sold. The Panel recommended disciplinary sanctions including censure, unpaid suspension and other conditions.

Jurisdiction over this appeal is conferred by R. Bd. Jud. Stds. 11(c) and 14. Judge Pendleton appeals from the panel's conclusions that he failed to reside in the Tenth District between January 15 and June 2, 2014 and that he violated Rule 4.1(A)(9) of the Code by listing the condo address on the affidavit of candidacy. Judge Pendleton asks this Court to scrutinize the Board's actions throughout his investigation and prosecution and to find that

he was denied due process. Finally, Judge Pendleton urges that the sanction for his actions should be, at most, a public reprimand or censure.

STATEMENT OF FACTS

A. Background Facts

Judge Alan F. Pendleton is a district court judge for the Tenth Judicial District. Tr. 32). Judge Pendleton was appointed to the district court bench in November 1999. *Id.* He was reelected in 2002, 2008 and 2014. *Id.* Judge Pendleton is currently chambered in Anoka County. *Id.*

The Board asserts that Judge Pendleton has violated the Minnesota Constitution and the Minnesota Code of Judicial Conduct (Code) by failing to continuously reside within the Tenth Judicial District and has further violated the Code by making a knowingly false statement regarding his residence address in an Affidavit of Candidacy filed on May 22, 2014. Formal Complaint, "Charges," ¶¶1-2. Judge Pendleton has consistently acknowledged that the his actions with respect to the Affidavit of Candidacy may have created an appearance of impropriety in violation of Rule 1.2 of the Code but denies the remainder of the Board's allegations.

B. Residency

Judge Pendleton has three sons. Tr. 33. His children all reside in Anoka County. Tr. 118. Judge Pendleton shares joint custody of his two youngest sons with his former wife, Sarah. Tr. 34-35. Judge Pendleton has resided in the Tenth Judicial District since 1995. Tr. 118. For the past twenty years he has voted in Anoka County. *Id.* Judge Pendleton has done his personal banking and maintained a safety deposit box in Anoka County for at least fifteen

years. Tr. 118-19. He has seen the same doctor and dentist in Anoka County for more than ten years. Tr. 119. He also fills all medical prescriptions for himself and family members, has his car repaired and obtains laundry and dry cleaning services in Anoka County. *Id.*

Judge Pendleton married his current wife, Kimberly, in September 2007. Tr. 37. Throughout their marriage, Judge Pendleton and Kim have resided separately. Tr. 38. Kim has always lived in the Fourth Judicial District and he has maintained his Tenth District residence. Judge Pendleton frequently sought and obtained advice from the Board's former Executive Secretary, David Paull, regarding his living arrangements. Tr. 57-58. On August 4, 2005, Judge Pendleton called Mr. Paull and reported his pending divorce. Ex. 3. Judge Pendleton informed Mr. Paull that he planned to marry Kim and that she would stay in Minnetonka while he resided in the Tenth District. *Id.*

In October 2010, Judge Pendleton read a newspaper article reporting the Board's disciplinary action against former Hennepin County District Judge Patricia Karasov for residing outside of her judicial district. Tr. 81. A short time later, Judge Karasov called Judge Pendleton complaining that she was being prosecuted for a residency violation while he too lived outside his district. Tr. 81-82. Judge Pendleton denied any wrongdoing and explained to Judge Karasov that he had fully disclosed his living arrangements to the Board. *Id.*

After speaking with Judge Karasov, Judge Pendleton called Mr. Paull for clarification regarding the Karasov proceedings. Ex. 7. Mr. Paull memorialized their conversation in a

memo to the Board's file. *Id.* Paull noted that Judge Pendleton had "mentioned often" that Kim lived in Minnetonka and that Judge Pendleton spent weekends with her, but stayed at their Blaine townhome during the week. *Id.* Paull concluded that Judge Pendleton's living arrangements were "different from the Karasov case" and therefore presented no ethical violation. *Id.*

On November 30, 2010, Judge Pendleton sent an email to all Anoka County Judges responding to Judge Karasov's accusations and other rumors regarding his residency. Ex. 8. Before sending the email, Judge Pendleton shared it with Mr. Paull for his review and comment. Tr. 82. In his email, Judge Pendleton disclosed his living arrangements and noted Paull's conclusion that he was "in full compliance with all residency requirements." Ex. 8.

Judge Pendleton to a condominium in Anoka in April or May 2012. Tr. 45. Twice during 2013, Tenth District Guardian ad Litem Manager Greg King visited Judge Pendleton at the Anoka condo and observed furniture, clothing, food, utility service, workpapers and other evidence that Judge Pendleton was actually living there. Tr. 187-88.

Under financial duress, Judge Pendleton listed the Anoka condo for sale in the Fall of 2013. Tr. 85-86. He did not expect it to sell quickly and anticipated an extended marketing period. Tr. 86. He was surprised to quickly receive a favorable purchase offer. The sale of the Anoka condo closed on November 27, 2013. Tr. 47.

After the closing, Judge Pendleton moved his personal belongings into a paid storage unit and began temporarily staying with Kim at her home in Minnetonka while he searched

for replacement housing in the Tenth District. Judge Pendleton intended to promptly return to the district and shared his plan with the owner of the company moving his personal belongings. Tr. 86-87. The mover's invoice confirmed their discussions, stating: "Customer will call soon to move back to Anoka." Ex. 12.

Judge Pendleton began searching for replacement housing within the district promptly after the condo purchase agreement was signed. Tr. 50. Due to his financial situation, he had to wait to put money down on an apartment until after the sale closed. *Id.* In November and December 2013, Judge Pendleton vigorously looked for a replacement apartment in the Anoka area. Tr. 87. He visited more than a dozen potential apartments and personally met with three complex managers to tour individual units. Tr. 47-48. Judge Pendleton's court reporter testified that Judge Pendleton began looking for an apartment right after he sold the Anoka condo, spending many lunch hours and breaks hunting for an appropriate rental. Tr. 199.

Judge Pendleton left Minnesota for a family vacation on December 20, 2013. Tr. 90. He returned on January 7, 2014 and fell ill. Tr. 91. After visiting his doctor at the Ramsey clinic, he spent the next week at home sick. *Id.* He returned to work on January 13, 2014 and resumed his apartment search on January 14, 2014. Tr. 91-92.

The next day, Judge Pendleton learned his son had been caught with drugs and drug paraphernalia at Anoka High School. Tr. 92. He was extremely upset, concerned and beside himself with worry. Tr. 92. Judge Pendleton's initial reaction was to change schools but

Sarah, with whom he shared custody, wanted to wait. Tr. 96. They soon learned that the open enrollment period for school registration had closed, meaning any school transfer would require establishing physical residence within the new school district. Tr. 62.

Judge Pendleton acted immediately to address the situation. He took his son to drug testing and enrolled him in intensive tutoring and drug counseling programs. Tr. 93-95. He met with the school principal, counselor and his son's teachers. 93-94. Reluctantly, he acceded to Sarah's wishes to postpone any school transfer to see how their son responded to drug counseling and tutoring. Tr. 96.

Judge Pendleton had little choice but to delay obtaining a replacement apartment until after the transfer issue was resolved. If they chose the Andover school district, then Judge Pendleton planned to rent an apartment in Andover. Tr. 62; Ex. 30. If they decided to keep their son in Anoka, he would rent nearby. By necessity, the decision where to rent would follow the school transfer determination. Tr. 98; Ex. 30.

From February through May 2014, Judge Pendleton drove his son to Sylvan Learning Center in Coon Rapids to participate in an intensive tutoring program every Monday and Tuesday evening. Tr. 94. After each session, he took his son to dinner before driving him back to Sarah's house. Tr. 95. Judge Pendleton then drove another hour to Kim's Minnetonka home, where he was temporarily staying. *Id.* Every Wednesday, Judge Pendleton followed the same basic routine while his son attended drug counseling classes in Coon Rapids. *Id.* On most of those nights, Judge Pendleton arrived in Minnetonka between

9:00 and 10:00 p.m. *Id.*

For the first two months, Judge Pendleton's son was so angry he refused to look at or speak to his father. Tr. 94-95. Throughout that time Judge Pendleton and Sarah monitored their son's performance and discussed his progress. *Id.* The son improved in some areas but not in others. Ex.30. Good days were followed by bad ones. Tr. 95. Both parents recognized that uprooting their son and moving him elsewhere in the middle of his junior year of high school could prove extremely destructive. *Id.* They wanted to give this important decision the time and attention it deserved. Tr. 96; Ex. 30. By the end of May 2014, no decision had yet been reached because Sarah wanted to see their son's year-end grades. Tr. 96.

On June 1, 2014, an unrelated domestic incident involving Judge Pendleton's other minor son abruptly ended all communication between Judge Pendleton and Sarah. Tr. 97. Judge Pendleton learned of the incident on June 2, 2014 and immediately began searching for an apartment near the Anoka High School. Tr. 98.

On June 3, 2014, Judge Pendleton contacted the manager of the Manor Apartments in Anoka, which had no vacancies. Tr. 98. He obtained three other listings of Anoka apartments from Craigslist the next day and began making calls. Tr. 98-99.

On June 6, 2014, Judge Pendleton spoke with the manager for the Rivers Bend Apartments in Ramsey, MN. Tr. 99. She described a unit under renovation that Judge Pendleton deemed to be "perfect," given its proximity to Anoka High School, the available

parking and the affordable rent. *Id.* Judge Pendleton offered to rent the unit sight unseen but the apartment manager asked him to wait until the unit could be viewed. *Id.*

Judge Pendleton met with the Rivers Bend manager and looked at the unit on July 5, 2014. Tr. 99. He agreed to rent the apartment and signed a rental application that same day. *Id.*; Ex. 16. On July 7, 2014 he paid the rental application fee and security deposit. Tr. 101; Ex. 17 and 18. He signed a one-year lease and moved into the new apartment on August 1, 2014, the day the renovation was complete. Tr. 101; Ex. 23. The movers retrieved his personal property from storage and moved it into the apartment at the same time. Tr. 102; Ex. 24.

C. Affidavit of Candidacy

While Judge Pendleton remained focused on helping his son between January and May 2014, his friends and work colleagues recall that Judge Pendleton was constantly stressed, preoccupied, obsessed and distracted. Tr. 191; 200. Court reporter Jay Ward remembers that the family situation weighed so heavily on Judge Pendleton's mind that sometimes "when you were talking to him . . . he really wasn't there." Tr. 200.

Judge Pendleton sought reelection to judicial in November 2014. Tr. 32. On May 22, 2014, Judge Pendleton filed an Affidavit of Candidacy for his judicial seat. Ex. 13. Someone told him to go the county registrar's office and file an affidavit since they mistakenly believed that it was the last day for filing same. Tr. 73. Judge Pendleton went to the Registrar's office at 1:15 p.m. and hurriedly completed the form so he could make a

1:30 p.m. court appearance. *Id.*

Seeing the section that asked for a home address, Judge Pendleton wrote in his last Anoka County address: the Anoka condo he sold on November 13, 2013. Tr. 73. At the time, he was temporarily staying with Kim in Minnetonka but he did not consider Kim's house to be his residence or address. Tr. 74. He made a spontaneous, split-second decision to list the Anoka condo without giving the matter a great deal of thought. *Id.*

Judge Pendleton knew that identifying the Anoka condo as his residence was inaccurate but denies any intent to deceive or mislead the electorate. Tr. 74. He knew he would have a new Anoka county address in a few weeks once a final decision was reached regarding his son's school situation. *Id.* Judge Pendleton acknowledges that by listing the Anoka condo as his residence address on the Affidavit of Candidacy that he made an error in judgment and created an appearance of impropriety. Tr. 74.

D. Board Investigation

Around July 9, 2014, the Board received a letter reporting that an unidentified source had accused Judge Pendleton of spending significant amounts of time living in Minnetonka. Tr. 228; Ex. 19. This letter was the first notice to the Board regarding Judge Pendleton's alleged residency outside the Tenth Judicial District. Tr. 208. By then, Judge Pendleton had already applied to rent and put money down on the Ramsey apartment he now rents.

The Board's Executive Secretary, Tom Vasaly, immediately reviewed the Minnesota Secretary of State website and learned that Judge Pendleton had listed the Anoka condo as

his residence. Tr. 228; Ex. 14. On July 15, 2014, Vasaly sent a letter informing Judge Pendleton that the Board heard he "may have been living" with Kim in Minnetonka "for significant periods of time over the last several years." Ex. 20. The Board said if the report was true, then he may have violated Rules 1.1 and 1.2 of the Code of Judicial Conduct, Article VI, §4 of the state constitution and the holding of *In re Karasov*. *Id.* The notice said nothing about the Affidavit of Candidacy and asked Judge Pendleton to respond within thirty days. *Id.*

Judge Pendleton responded three days after receiving the Board's letter. Tr. 103; Ex. 21. He described his son's problems and truthfully acknowledged temporarily staying at Kim's Minnetonka home while the family worked things out. Ex. 21.

After receiving Judge Pendleton's reply, Vasaly procured a copy of Judge Pendleton's Affidavit of Candidacy from the Minnesota Secretary of State. Tr. 210. On July 31, 2014, the Board demanded that Judge Pendleton appear and answer questions under oath at an August 15, 2014 Board meeting. Ex. 22. Vasaly originally estimated that the meeting would last less than an hour and invited Judge Pendleton to call "if you have any questions or would like to discuss any aspect of your appearance." *Id.*

On August 1, 2014, Judge Pendleton called Vasaly to discuss the upcoming appearance. Tr. 104, 229. Judge Pendleton specifically asked Mr. Vasaly what he was being accused of and what alleged ethics violations were being investigated. Tr. 105. Vasaly responded that the questions would be limited to Judge Pendleton's residence within his

judicial district. *Id.* Vasaly never disclosed that the Affidavit of Candidacy would be a subject of questioning. Tr. 106.

Judge Pendleton and Mr. Vasaly discussed the upcoming appearance again on August 14, 2014. Ex. 26. At that time, Vasaly warned Judge Pendleton that his prior prediction of one hour for the meeting was probably an underestimate. *Id.* Although the Affidavit of Candidacy had by then become a "concern" of the Board and "one of several subjects that the Board was interested in" exploring, Vasaly gave Judge Pendleton no notice he would be asked about the affidavit. Tr. 211, 226.

Judge Pendleton appeared before the full Board on August 15, 2014 and answered every question posed to him. Tr. 106; Ex. 27-28. When Vasaly confronted him with the affidavit, Judge Pendleton immediately admitted that the listed address was incorrect. Tr. 106.

During the questioning, Vasaly also asked Judge Pendleton when he commenced an "intimate relationship" with Kim. Ex. 27, p. 29. They had this exchange:

> Mr. Vasaly: When did you remarry?
>
> Judge Pendleton: I remarried in September of 2007.
>
> Mr. Vasaly: And when did you begin your relationship with your current wife?
>
> Judge Pendleton: Well, I've known her since we were teenagers. So I guess I'm not sure what you're asking.
>
> Mr. Vasaly: When did you begin an intimate relationship with your present wife?

> Judge Pendleton: I'd say after the divorce proceedings were commenced. Would have been the summer of 2006, during the time I was staying in the hotel.

Id.

Mr. Vasaly admits that Judge Pendleton's personal sex life was irrelevant to the Board's investigation. Tr. 238. Vasaly testified at the hearing, however, that he chose to ask about Judge Pendleton's "intimate relationship" with Kim nonetheless. Tr. 238, 241. Judge Pendleton was understandably shocked, embarrassed and humiliated by Mr. Vasaly's question about having sex with his wife but reluctantly so as to not appear uncooperative. Tr. 110.

On September 26, 2014, the Board accused Judge Pendleton of violating various ethics rules by allegedly not residing within his judicial district and by listing a false address on his election affidavit. Ex. 123. The Board opined that the matter was "at least as serious" as *Karasov* matter and told Judge Pendleton that he could "meet with Board representatives and/or . . . submit additional information and explanation regarding this matter." *Id.*

Judge Pendleton accepted the Board's offer within three hours of receiving the letter, stating: "I would like to exercise my right to meet with board representatives and/or submit additional information." Ex. 124. Mr. Vasaly replied that a meeting was "strictly optional" and suggested that the meeting happen by October 10, 2014. *Id.*

On October 7, 2014, The Board served its Formal Complaint on Judge Pendleton's counsel. Judge Pendleton was afforded no opportunity to meet with Board representatives

or provide additional information before the Complaint was served. Tr. 118.

ARGUMENT

To prove judicial misconduct, the Board must present clear and convincing evidence that Judge Pendleton violated the Code of Judicial Conduct. R. Bd. Jud. Stds. 10(b)(2); *In re Blakely*, 772 N.W.2d 516, 522 (Minn. 2009). This heightened evidentiary standard requires proof that "the truth of the facts asserted [in the Board's complaint] is 'highly probable.'" *In re Miera*, 426 N.W.2d 850, 853 (Minn. 1988)(quoting *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978). Ultimately, the Board must present evidence strong enough to "impose discipline with clarity and conviction." *In re McDonough*, 296 N.W.2d 648, 692 (Minn. 1979).

Where a panel recommends sanctions, the Court independently reviews the entire record to determine whether a Code violation occurred and, if so, what type of discipline "is just and proper." R. Bd. Jud. Stds. 14(e); *In re Conduct of Karasov*, 805 N.W. 2d 255, 264 (Minn. 2011). The panel's factual findings are accorded deference unless clearly erroneous. *Id.* Significantly, however, no deference is warranted if "a relevant factor that should have been given significant weight is not considered" by the factfinder. *Cadle Co v. Citizens Nat. Bank*, 200 W.Va. 515, 517-18 (1997).

I. THE PANEL ERRED IN FINDING A RESIDENCE VIOLATION.

A. The governing test examines intent, not just physical presence.

The Minnesota Constitution requires that "[e]ach judge of the district court in any

district shall be a resident of that district at the time of his selection and during his continuance in office." Minn. Const., Art. VI, § 4. The constitution neither explains nor defines the concept of residency. Recently, however, this court applied the analytical framework for legislators' residency to decide a judicial residency dispute. *Karasov*, 805 N.W.2d at 265. Under that test, "'the foremost considerations with respect to residency . . . are physical presence and intent.'" *Id.* at 264 (quoting *Piepho v. Bruns*, 652 N.W.2d 40, 44 (Minn. 2002). Although presence and intent inform one another, neither is singularly determinative of residence. *Id.*

The Court also drew upon the principles set forth in Minn. Stat. § 200.031 after noting that "'the concept of residency is captured and perhaps best summarized' in that statute." *Id.* (quoting *Piepho*, 652 N.W.2d at 44). Section 200.031 provides in pertinent part:

> Residence shall be determined in accordance with the following principles, so far as they may be applicable to the facts of the case:
>
> (a) the residence of an individual is the precinct where the individual's home is located, from which the individual has no present intention of moving, and to which, whenever the individual is absent, the individual intends to return;
>
> (b) an individual does not lose residence if the individual leaves home to live temporarily in another state or precinct;
>
> (c) an individual does not acquire a residence in any precinct of this state if the individual is living there only temporarily, without the intention of making that precinct home.
>
> * * *
>
> (I) . . . moving to a new location is not sufficient to acquire a new

residence unless the individual intends to remain there.

Id.

B. Judge Pendleton's words and actions demonstrate his intent to remain a Tenth District resident.

"Whether a district court judge has violated the Minnesota Constitution's residency requirement is a highly fact-specific inquiry." *Karasov*, 805 N.W.2d at 265, n.6.[1] Here, the relevant facts overwhelmingly demonstrate that Judge Pendleton never affirmatively abandoned his residence within the Tenth District to establish residence elsewhere. This is crucial since, as Justice Page observed in his *Karasov* concurrence, where one lives and where he resides are neither the same nor even inextricably linked. *Id.* at 277. "That is to say, a person may live in one place while residing someplace else." *Id.*

The crux of the instant dispute in this case turns on Judge Pendleton's intent. His state of mind is the key consideration since mere absence without a corresponding intent to abandon one's home and establish a new home elsewhere effects no change in residency. *Davidner v. Davidner*, 304 Minn. 491, 494, 232 N.W.2d 5, 7 (1975); *see also* Minn. Stat. § 200.031(b)(noting that residence is not lost if one leaves home to live temporarily elsewhere). Intent "is often proved circumstantially by looking at a person's conduct and inferring from that conduct . . . [his] mental state." *Karasov*, 805 N.W.2d at 267, n.7 (citing *Stiles v. State*,

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[1]The residency violation found in *Karasov* was based on the "specific facts" shown there. 805 N.W.2d at 266, n.6. Because residence determinations are fact-driven inquiries, the Court warned: "Our opinion should not be read to address whether any other out-of-district living arrangement by a district court judge would violate the Minnesota Constitution's residency requirement." *Id.*

664 N.W.2d 315, 320 (Minn. 2003)). The relevant inquiry considers the totality of the surrounding circumstances, including both the subject's words and actions. *State v. Robideau*, 817 N.W.2d 180, 187 (Minn. App. 2012). Actions are generally assigned greater weight than words and it is important to consider acts both contemporaneously and after the time in question to discern the sincerity of stated intent. *Larson v. Comm'r of Revenue*, 824 N.W.2d 329, 332-33 (Minn. 2013).

In *Karasov*, the hearing panel deemed a judge's professed intent to remain a district resident "not credible" when gauged against her actions showing intent to remain and reside outside her judicial district. *Id.* at 267. Here, by contrast, the evidence shows that "because of an emergency or other unforeseen circumstance," Judge Pendleton unexpectedly found himself without a home in his judicial district for a period of time while he worked to address pressing family problems of extreme magnitude. *Id.* at 276. Upon resolving the crisis, Judge Pendleton found a place to stay within the Tenth District in just days and has remained there since. Accordingly, Judge Pendleton's temporary and justifiable absence did not vacate or abandon his steadfast intent to remain a Tenth District resident.

Judge Pendleton freely acknowledged temporarily spending nights at his Kim's Minnetonka home while he and Sarah worked through their son's issues. The Board alleged a residence violation spanning November 26, 2013 through July 31, 2014. *See* Formal Complaint, Charge 1. The panel disagreed, finding that Judge Pendleton resided within the district between November 27, 2013 through January 14, 2014 and June 3, 2014 through July

31, 2014. Panel Opinion at ¶ 43 (noting that Judge Pendleton was "actively pursuing replacement housing" within the district during those times). The panel concluded, however, that Judge Pendleton resided outside the Tenth District between January 15, 2014 and June 2, 2014. *Id.*

C. By focusing solely on Judge Pendleton's search for replacement housing, the panel ignored key evidence of intent.

The panel based its finding of a residency violation on the belief that Judge Pendleton (1) suspended his housing search between January 15, 2014 and June 2, 2014, (2) abandoned in-district residency while addressing familial issues, (3) voluntarily decided to live in Minnetonka indefinitely, and (4) failed to disclose his living situation to others. *Id.*

Judge Pendleton has always conceded he had no place to stay in the Tenth District from November 27, 2013 through August 1, 2014.[2] The panel split his temporary stay at Kim's house into three discrete subparts: (1) November 27, 2013 through January 14, 2014, (2) January 15, 2014 through June 2, 2014, and (3) June 3, 2014 through July 31, 2014. The panel found no violation for the first and third intervals but found that Judge Pendleton violated the residency rules during the middle time period. Panel Opinion at ¶¶ 42-43. The only difference concerned his search for replacement housing. *Compare* Panel Opinion at ¶ 42 (finding no residence between January 15, 2014 through June 2, 2014 because "Judge

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[2]Judge Pendleton committed to rent his current apartment in Anoka on June 6, 2014 and put down money to secure the unit on July 7, 2014. *See* Panel Findings at ¶ 24. He was unable to assume occupancy until August 1, 2014, after the lessor's renovations to the unit were completed.

Pendleton suspended his housing search completely") to ¶ 43 (finding no violation during the other periods because he "was actively pursuing replacement housing in the 10th Judicial District"). By focusing solely on Judge Pendleton's apartment search to the exclusion of all other relevant facts, the panel disregarded the totality of the circumstances and ignored crucial evidence revealing Judge Pendleton's true intent.

D. The totality of the circumstances demonstrates Judge Pendleton's continued residence within the district.

It is undisputed that after Judge Pendleton sold his Anoka condo on November 27, 2013, he intended to immediately find a new apartment that was more affordable and closer to the Anoka High School. Panel Finding ¶ 17; Tr. 47, 85-87. Consistent with that desire, he moved his personal property and furniture from the condo into a paid storage unit. Tr. 86-87. This was starkly different from *Karasov*, where the respondent judge moved all personal belongings and household furniture into her retirement home outside the judicial district. The Court found that moving her personal property to the new residence was "*highly probative* of whether Judge Karasov was only temporarily staying at her lake home or whether she intended to remain and reside" there. 805 N.W.2d at 266, n.7.

Despite its "highly probative" evidentiary value, the panel inexplicably made no findings regarding Judge Pendleton's property storage. The lack of any findings is particularly perplexing since Judge Pendleton's contemporaneous statements to the moving company provide compelling insight into his intent and confirm his plan to find a new place to stay within the Tenth District as soon as he sold the Anoka condo. Judge Pendleton

testified:

> I told him [the moving company owner] . . . I was selling the condo, I was going to get a less expensive apartment in the area, that my intent was to make that switch as soon as possible, so I told him I needed my property transported to the storage unit, but said, be prepared because I expect I'm going to call you very shortly and you're going to move me right back up to the apartment that I would find.

Tr. 87. The mover's invoice corroborates that discussion, bearing this reminder: "Note: *Customer will call soon to move back to Anoka.*" *See* Exhibit 12 (emphasis added).

Although Judge Pendleton's counsel repeatedly stressed the significance of the invoice during opening statement[3], included it in proposed findings submitted to the panel and argued it in post-hearing briefing, the panel opinion ignored the exhibit and testimony. Given the panel's wholesale failure to consider such highly probative and material evidence, its findings regarding Judge Pendleton's deserved no deference. *Cadle*, 200 W.Va. At 517-18; *see also Elwert v. Elwert*, 196 Or. 256, 270, 248 P.2d 847, 853 (1952)(noting a relevant inquiry regarding whether someone has abandoned his former residence and established a new home is, "Has he brought his goods?").

E. Judge Pendleton never abandoned his Tenth District residence.

The panel's conclusion that Judge Pendleton abandoned his Anoka County residence is equally flawed. Abandonment presupposes intentional action to leave a residence,

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[3]Judge Pendleton's counsel specifically highlighted Exhibit 12 during his opening statement and explained its importance in showing Judge Pendleton's immediate intent to look for a place to stay within the district upon the condo sale closing. Tr. at 23-24 ("this is an extremely important window into Judge Pendleton's [state of] mind").

establish a new home elsewhere, and harbor no intent to return. As Justice Page recognized in *Karasov*, a temporary absence will not change a judge's residency. 805 N.W.2d at 277-78. Indeed, Minnesota law confirms that "an individual does not lose residence if the individual leaves home to live temporarily" elsewhere. Minn. Stat. § 200.031(bId. Likewise, by living somewhere only temporarily, without intending to remain there and make the new place his home, one does not acquire a new residence. Minn. Stat. § 200.031(c) and (I).

In finding that Judge Pendleton affirmatively abandoned his Tenth District residence by temporarily staying with Kim in Minnetonka, the panel focused on the 'indefinite" length of his stay pending resolution of his son's personal and school-related issues. Panel Opinion at ¶ 42. A similar argument was soundly rejected by the Colorado Supreme Court in *People v. Owers*, 29 Colo. 535, 69 P. 515 (1902). There, the court was asked to determine whether a Judge chambered in Leadville abandoned his residency by living with his wife and family outside his district in Denver to alleviate a medical condition that hampered his ability to sleep at Leadville's higher elevation. Explaining that judicial residency laws should be interpreted in a "reasonable, and not a purely technical" manner, the court held that the judge's bona fide intent to return to Leadville and resume living there as soon as his health permitted excused his temporary absence the district. 29 Colo. at 548, 69 P. at 519. The court disagreed that the open return date represented little more than a "shadowy hope," because the indefiniteness arose "out of the necessities of the case." *Id.* The unexpected and unforeseen family emergency that engendered Judge Pendleton's temporary stay at Kim's

house was likewise necessary and deserves similar consideration.

It is undisputed that when Judge Pendleton returned to work on January 13, 2014 he intended to immediately resume his search for an apartment in Anoka. Tr. 61. As noted above, the panel found (and the Board does not dispute) that Judge Pendleton committed no residence violation from November 27, 2013, when the condominium sale closed, to January 15, 2014 because he was actively searching for a replacement apartment. Panel Opinion at ¶ 43. Judge Pendleton's search was abruptly placed on hold on January 15 after he learned that his 16-year-old son was caught in school with drugs and drug paraphernalia. Panel Opinion at ¶ 18; Tr. 62-63, 92 and 201-02. The specter of a potentially serious drug problem combined with his son's failing performance in the classroom understandably left Judge Pendleton extremely upset and beside himself with worry. Tr. 92-93. For Judge Pendleton, the situation constituted an "extremely serious family emergency" that demanded his immediate attention. Tr. 64.

During the ensuing time, Judge Pendleton met individually with the school principal, counselor and each of his son's teachers and worked closely with is ex-wife, Sarah, to implement drug testing, weekly drug counseling and intensive tutoring for their son, all within Anoka County. Tr. 93-95. Judge Pendleton desired to immediately transfer his son from Anoka to Andover High School to remove him from an unhealthy environment but needed Sarah's consent to do so. Tr. 95-96. Further inquiry revealed that the open enrollment period for out-of-district transfers had closed, meaning that a mid-year transfer

would require moving to the Andover school district. Tr. 62. Judge Pendleton was willing to make such a move but needed Sarah's consent [under the terms of their joint custody arrangement]. Tr. 95-96.

Judge Pendleton testified before the panel:

> During that period of time, I was a father who was greatly concerned about my son struggling and my paramount concern . . . , my focus at the time was trying to do what I thought was best for my son. So that concern took priority over almost everything else, but I was well aware of my residency requirement and that's why I . . . knew I had to choose either Andover or Anoka, but I had to wait until that decision was made before I could - before I knew where to go.

Tr. 69.

Addressing his son's pressing needs through the lives of Judge Pendleton and his family into turmoil. Judge Pendleton painfully testified:

> [M]y son hated me. He wouldn't talk to me, he wouldn't look at me, I mean he hated me for what I was doing. So Mondays and Tuesdays . . . I took him to tutoring. His mother wanted me to make sure he was fed, because [the tutoring session] was from 5 to 7, so I would take him out to eat every Monday and Tuesday. They were long, silent drives, long, silent dinners. After tutoring on Monday and Tuesdays, I would then drive him home and they lived on the far west side of Ramsey. I would take him home and then I would turn around and drive almost an hour down to Minnetonka, where I was temporarily staying with my wife [Kimberly]. On those days, I would get home between 9 and 10 at night and then I would repeat that on Wednesdays, when I had him enrolled in a drug counseling program.

Tr. 94-95. The stress of the situation was understandably acute. Greg King, the Tenth Judicial District Guardian ad Litem Manager recalled Judge Pendleton being "distracted" and "preoccupied, . . . if not obsessed" with his family issues. Tr. 190-91. Judge Pendleton's court reporter, Jay Ward, made similar observations, testifying that Judge Pendleton

frequently "wasn't there" figuratively during their discussions and that he seemed to be in "a holding pattern . . . waiting for something to happen" with his son. Tr. 200-03.

The decision regarding his son's school transfer was guided by a variety of considerations including his son's progress with drug counseling and tutoring, academic performance, and relationship with his mother. Tr. 95-96. Although affixing a precise date for resolving the potential school transfer proved impossible, Judge Pendleton testified:

> My intent was always to maintain a residence in Anoka County. It was never my intent to abandon my residence. I couldn't determine which [school] district to live in until I could resolve this emergency problem with my son. So my biggest priority was trying to help my son through his struggle, and as soon as I . . . knew where my son was going to school, then my intent, my plan all along was to immediately obtain the physical residence in whichever school district he ended up in.

Tr. 69-70, 119.

F. The panel erred by disregarding Judge Pendleton's voluntary return to the district before the Board investigated.

After an incident involving their youngest son terminated all contact between Judge Pendleton and Sarah on June 2, 2014, Judge Pendleton realized his sons would both remain in Anoka High School. Consistent with his stated intent throughout these proceedings, as soon as the school transfer issue was resolved, Judge Pendleton immediately resumed his search for an apartment in the Anoka area. Within four days, he found the in-district apartment where he currently resides. Tr. 69. Although Judge Pendleton obtained the Anoka apartment *before* the Board investigation, the panel accorded no weight to that fact, opining: "[t]he fact that Judge Pendleton subsequently renewed his intent to reside in the district does

not persuade the panel that he remained a resident of the district throughout." *Id.* "[D]eclarations accompanied by acts afford the strongest evidence which the nature of a case can furnish" respecting an individual's intent to maintain or establish a legal residence. *Redrow v. Redrow*, 94 Ohio. App. 38, 44, 114 N.E.2d 293, 296 (1952). The panel's casual disregard of Judge Pendleton's rental of an in-district apartment is remarkable since Judge Pendleton's actions corroborate and confirm the veracity of his stated intent.

Moreover, the timing is dramatically different than that present in *Karasov*. There, unlike this case, the respondent judge faced no "emergency or unforseen circumstance" but rather voluntarily and "deliberately chose to live outside her judicial district for an extended period of time." 805 N.W.2d at 276. Judge Karasov did not reestablish a place to live in her judicial district until after she learned of the Board's investigation into her residency. *Id.* Indeed, the Court found that "the record strongly demonstrates that Judge Karasov intended to remain at her lake home and that it was the Board's investigation that caused her to change her plans." *Id.* at 266. Not so here.

When Judge Pendleton resumed his search for an Anoka apartment on June 2, 2014, the Board had not opened an investigation nor received any complaint respecting his residency. Judge Pendleton first learned of the Board's investigation when he received its initial letter on July 21, 2014. By then, Judge Pendleton had signed papers and deposited money to secure his new apartment. The panel's decision to ignore this crucial evidence is directly at odds with this Court's decision in *Karasov*. Per *Karasov*, the fact that Judge

Pendleton had located and paid for an in-district apartment long before the Board even started an investigation is a "key fact" showing that his absence from the Tenth District was only temporary and that Judge Pendleton always intended to maintain, and not abandon, his residency in Anoka County. 805 N.W. 2d at 267, n.9. By failing to give the circumstances surrounding Judge Pendleton's return to Anoka due weight in its opinion, the panel clearly erred.

G. By maintaining his personal privacy, Judge Pendleton did not forfeit his residency.

In deciding *Karasov*, the Court also relied on statements made by the respondent judge to others to the effect she never intended to live in her judicial district after moving away. 805 N.W.2d at 267. Judge Pendleton made no such statements. Lacking same, the panel emphasized that he kept his living arrangements "very private" and did not discuss his living arrangements with the Board's former or present Executive Secretary or the Tenth Judicial District Administrator. Panel Opinion at ¶¶ 25, 28. The fact that Judge Pendleton, a private person by nature, did not share his personal turmoil with others beyond his law clerk, court reporter and the Guardian ad Litem Coordinator is irrelevant. David Paull had retired from the Board prior to January 15, 2014. Tr. 66. Judge Pendleton enjoyed no relationship with Mr. Vasaly, who replaced Paull as Board Secretary, and had no reason to contact the Board for advice given Judge Pendleton's reading of the *Karasov* opinion and his belief he was compliant with the residency rules. Tr. 65-66.

Nor was Judge Pendleton required to notify District Administrator Moriarity of his

temporary living arrangements. As Mr. Moriarity testified at the hearing, no district policy requires judges to notify him of their personal addresses. Tr. 171. Tenth District judges may freely choose whether to respond to or ignore the Administrator's informal requests for updated contact information. Mr. Moriarity acknowledged his lists were inaccurate, said the only purpose of the informal list was to contact judges in an emergency situation and testified he always had Judge Pendleton's cell phone number available. Tr. 149-50, 171-80. Given these facts, the panel's reliance on Judge Pendleton's *lack* of statements to others about his temporary living arrangements is misplaced and erroneous.[4]

In summary, Judge Pendleton has always lived in the Tenth Judicial District. His temporary absence was neither planned nor intended but resulted from unforeseen and unexpected events involving his family, which demanded he do what was best for a minor child. He never abandoned his residence within the judicial district or established a new residence elsewhere. Most importantly, Judge Pendleton voluntarily returned of his own accord after the family crisis involving his son had abated *before* learning of the Board's investigation. On these facts, the Board failed to prove any residence violation by clear and convincing evidence.

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[4]The panel's emphasis on Judge Pendleton's choice not to widely discuss his family situation or sua sponte call the Board for advice is further disingenuous insofar as those considerations, if relevant, apply equally to the other periods for which the panel found no violation.

II. THE PANEL ERRED IN FINDING THAT JUDGE PENDLETON DELIBERATELY INTENDED TO DEFRAUD THE ELECTORATE.

The second count of the Board's Complaint charged Judge Pendleton with violating Rules 1.1, 1.2 and 4.1(a)(9) of the Code by filing a May 22, 2014 affidavit of candidacy respecting his judicial seat that contained his outdated Anoka address. Throughout these proceedings, Judge Pendleton has acknowledged that his actions gave rise to an appearance of impropriety forbidden by Rules 1.1 and 1.2, while denying that he made a knowingly false statement in violation of Rule 4.1(a)(9). *See* Panel Opinion at ¶ 32.

During his hearing testimony, Judge Pendleton truthfully recounted the circumstances surrounding his completion of the election affidavit. He was running late, was pressed for time and mistakenly believed that the form was due immediately. He went to the Registrar's Office on a break from his calendar, obtained the form and began filling it out. Seeing a space for a residence address, Judge Pendleton listed the Anoka condo, considering it his last address within the district and knowing that, one way or another, he would rent a new apartment within the district within the next few weeks, and well before the election. Including the condo address was a "spontaneous, split-second decision" that Judge Pendleton made with "very little or no thought." Tr. 74. He had no knowledge that information from the form would be later published by the Minnesota Secretary of State on its website and vehemently denies any intent to mislead or deceive the voters. Tr. 72-74.

The fact that Judge Pendleton inserted an inaccurate address in the Affidavit of Candidacy is not and never has been in dispute. He openly and honestly acknowledged that

mistake and error in judgment from the very onset of this case. Judge Pendleton has always agreed that his actions created an appearance of impropriety and stands willing to accept responsibility for that mistake.

What is disputed concerns Judge Pendleton's state of mind when he filled out the affidavit. The panel, rather than focusing on Judge Pendleton's conduct before, during and after he completed the affidavit, chose to rely on the act itself—listing an outdated address—to establish malicious intent to deceive the electorate. Judge Pendleton denies any such motivation and asks this Court to ascertain his true intent based on the undisputed facts regarding his conduct before, during and after he completed the affidavit. All such facts should be viewed within the context of Judge Pendleton's mind frame at the time, when all witnesses who testified about the issue agree he was distracted, extremely distressed and intensely focused on resolving serious and ongoing familial issues involving his 16 year-old son.

During the hearing, in response to a panel question asking why he wrote in a wrong address when listing an address was optional (so he could have left the address section blank without adverse consequences), Judge Pendleton explained:

> There was—I swear, there was no intent to deceive. It was not—my intent was not to mislead. It was an error of judgment. I accept that and have admitted that from day one. . . . I did not consider my wife's home at the time my address. I didn't consider it my residence. I guess not unlike being in a hotel, I should have left it blank but I had no mindset at the time. I had no specific intent. I filled it out on the spur of the moment. I just didn't give it much, if any, thought at all and I had completely forgotten about it at all and, in fact, within 14 days of signing [the form] I found the apartment that I ended up

renting, so it turned out to be a very short gap in time.

Tr. 145-46.

Judge Pendleton made a serious mistake. He has consistently acknowledged his error. He has never denied it or attempted to justify his action, but rather only to put it into context. To err is quintessentially human, but to find intentional deceit demands much more. We ask only that the Court consider the totality of the circumstances when determining an appropriate sanction commensurate with the affidavit-related conduct.

III. THE BOARD'S ACTIONS DEPRIVED JUDGE PENDLETON OF DUE PROCESS.

A. Judge Pendleton was entitled to due process throughout these proceedings.

Judges are guaranteed due process of law in disciplinary investigations & hearings. *Karasov*, 805 N.W.2d at 270 (citing *Complaint Concerning Kirby*, 354 N.W.2d 410, 415 (Minn. 1984)); see also *In re McDonough*, 296 N.W.2d at 701. This includes the right to fair and regular proceedings. *In re Gillard*, 271 N.W.2d 785, 812 (Minn. 1978). At bottom, judicial disciplinary proceedings must be "essentially fair." *Inquiry Concerning Graziano*, 696 So.2d 744, 750 (Fla. 1997).

Basic fairness contemplates affording judges the opportunity to be heard at a reasonable time and in a meaningful manner and giving them sufficient notice of the charges against them to permit preparing and presenting their defense. *Karasov*, 805 N.W.2d at 270. Here, the Board repeatedly failed to follow its own rules, hid its investigation of Judge

Pendleton's affidavit of candidacy until after obtaining his sworn testimony, improperly inquired into Judge Pendleton's sexual relationship with his wife during his appearance before the Board, disclosed evidence the night before the trial and revealed an entirely newfound and previously undisclosed theory of its case that was not alleged in the Complaint or disclosed during prehearing discovery.

Sharp practices have no place in adversary proceedings and are particularly pernicious in disciplinary proceedings where the Board's mandate is to promote and preserve the integrity and reputation of the judiciary, not to resort to dirty tricks in an unfair and improper effort to win at all costs. The Board's actions, taken together, served to deprive Judge Pendleton of due process and rendered the disciplinary investigation fundamentally unfair. They reveal that the investigation and prosecution of Judge Pendleton was not a fair and unbiased quest for the truth but rather an improper witch hunt.

B. By failing to follow its own rules, the Board deprived Judge Pendleton of due process.

Due process demands that disciplinary Boards comply with their procedural rules. *Graziano*, 696 So.2d at 750. Accordingly, the Minnesota Supreme Court long ago directed the Board to ensure "scrupulous compliance" with Board rules throughout judicial discipline cases. *Gillard*, 271 N.W.2d at 813. Subsequently, the court again warned the Board not to "breach its own procedural regulations" while investigating alleged judicial misconduct. *Kirby*, 354 N.W.2d at 416. In *Kirby*, the court stressed:

An investigation into a judge's conduct on or off the bench should not be, and

> should not give the appearance of being, a witch hunt. Professional behavior, concern for all parties involved and, above all, for the public's respect for the integrity of the judiciary should at all times characterize the Board's conduct. Adherence to its own rules of procedure will ensure such objectivity. We strongly encourage the Board to do so in the future.

Id.

Despite these repeated warnings, the Board inexplicably refused to follow its rules in multiple respects during its investigation of Judge Pendleton. First, the Board failed to identify the source of the initial report or reveal that it had become the complainant against Judge Pendleton even though Rule 6(d)(2)(iv) demands such disclosure unless good cause is shown to hold back the information.[5] Second, the Board violated Rule 6(d)(6) by giving Judge Pendleton less than the required 20 days notice before summoning him to appear before the Board for sworn testimony on August 15, 2014.[6] Third, and most importantly, the Board steadfastly refused to inform Judge Pendleton that it was investigating his affidavit of candidacy, which culminated in Count 2 of the complaint. This nondisclosure was

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[5]Rule 6(d)(2) commands the Board to notify a judge that he is being investigated within 10 days after an investigation is authorized. Among other things, the mandatory notice must provide:

> (I) a specific statement of the allegations and possible violations of the Code . . . being investigated . . .
>
> * **
>
> (iv) the name of the complainant, unless the Board determines there is good cause to withhold that information.

Id.

[6]Under Rule 6(d)(6), "[i]f the board requests the judge's appearance, the executive secretary shall give the judge 20 days notice" before the testimony.

particularly egregious and gives rise to a significant and irrefutable due process violation.

As a preliminary matter, the Board's function in judicial disciplinary proceedings bears consideration. The Board cannot adopt a win-at-all-costs approach or act as an advocate. Instead, "[w]hen the Board proceeds with a preliminary investigation . . . it proceeds not as a prosecutor to prove a case, but as an impartial investigator, sensitive to the rights of the judge, the complainant, and the public." *Agerter* at 913. Notably, the Board must "avoid the assumption of an adversary posture" in judicial disciplinary investigations. *McDonough* at 691. Unfortunately, the Board ignored its obligation of impartiality in this case and opted instead to throw Judge Pendleton off guard and ambush him with undisclosed accusations regarding the election affidavit during his August 15 Board testimony.

Due process guarantees judges the right to be heard in a meaningful manner in every case. *Kirby*, 354 N.W.2d at 415. Consequently, all allegations must be sufficiently specific to apprise the judge of the allegations against him and not so vague as to mislead or prevent him from mounting an adequate defense. *Id.* at 416. In *Gillard*, the Minnesota Supreme Court engrafted due process standards from lawyer discipline cases into judicial disciplinary proceedings. 271 N.W.2d at 808. That approach demands that charges of professional misconduct, even "'though informal, should be sufficiently clear and specific, in light of the circumstances of the case, to afford the respondent an opportunity to anticipate, prepare and present his defense.'" *Id.* (quoting *In re Application for Discipline of Eugene A. Rerat*, 224 Minn. 124, 128, 28 N.W.2d 168, 172 (1947)).

Gillard explains that the precise requirements of procedural due process depends on the type of case, the context of the proceedings and the extent to which the affected claimant risks grievous loss. 271 N.W.2d at 812. Where, as here, insufficient notice impacts a central aspect of the case, rather than a merely collateral matter, a due process violation results. *Kirby*, 354 N.W.2d at 415.

C. By obtaining his sworn testimony without disclosing that the election affidavit was being investigated, the Board deprived Judge Pendleton of due process.

Under the facts of this case, the Board's willful refusal to notify Judge Pendleton that it was investigating his affidavit of candidacy before interrogating him about it under oath and soliciting his sworn admissions was so egregious as to deprive him of fundamental fairness. When confronted with similar facts in a lawyer-disbarment case, the United States Supreme Court held that a disciplinary board's failure to afford the respondent lawyer fair notice of the precise nature of the charges against him triggered a due process violation. *See In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

Ruffalo represented plaintiffs in lawsuits against defendant railroads. 390 U.S. at 546. He was accused of using a paid investigator, Orlando, to improperly solicit legal clients. *Id.* During testimony by both Ruffalo and Orlando denying any solicitation, they admitted that some of the cases involved lawsuits against a defendant railroad that also employed Orlando. *Id.* Based on Ruffalo's sworn testimony, the ethics board moved to add a new charge accusing him of conspiracy to deceive the railroad. *Id.* Based on his admissions, Ruffalo

was disbarred.

On appeal, the Supreme Court reversed the disbarment. In doing so, the Court took particular umbrage with the fact that Ruffalo "had no notice that his employment of Orlando would be considered a disbarment offense until after both he and Orlando had testified at length on all the material facts." *Id.* at 550-51. Agreeing that "'[s]uch procedural violation of due process would never pass muster in any normal civil or criminal litigation,'" the Court rebuked the disciplinary board for its inadequate notice leading to Ruffalo's self-incrimination during his sworn testimony. *Id.* at 551. The Court explained:

> The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.

Id.

The Board's failure to notify Judge Pendleton of the possible violation involving the affidavit of candidacy also specifically ignored Rule 6(d)(2)(I), which requires the Board, within 10 days after an investigation is authorized, to provide the judge with "a specific statement of the allegations and possible violations of the Code . . . being investigated." Here, the Board had repeated opportunities to inform Judge Pendleton it was investigating his affidavit of candidacy but failed to give notice. The pertinent chronology follows.

On July 9, 2014, Mr. Vasaly downloaded Judge Pendleton's candidate information from the Secretary of State's website and saw that the Anoka condo was listed as Judge Pendleton's residence address. Tr. 228; Ex. 14. By July 28, 2014, the Board had received

Judge Pendleton's initial response. Tr. 229. In it, Judge Pendleton explained that he had sold the Anoka condo on November 27, 2013 and temporarily stayed at his wife's Minnetonka home thereafter while he worked to resolve his son's school issues. Ex. 21. The Board's July 3, 2014 letter ordered Judge Pendleton to appear for questioning under oath on August 15, 2014. Ex. 22. Mr. Vasaly estimated that the appearance would take less than an hour and urged Judge Pendleton to call with questions or to discuss "any aspect" of his upcoming appearance. *Id.*

On August 1, 2014, Judge Pendleton called Mr. Vasaly to discuss his upcoming testimony. Tr. 104, 226-27. Judge Pendleton inquired about the subject matter of the Board's anticipated questions. *Id.* Judge Pendleton specifically asked what he was being accused of and what ethics violations were being alleged. Tr. 105. Vasaly replied that the Board's questions would be limited to the issue of Judge Pendleton's residency within his judicial district. *Id.* Notably, Vasaly concedes that he never informed Judge Pendleton that the Board was investigating the Affidavit of Candidacy. Tr. 226.

The day before Judge Pendleton's appearance, Mr. Vasaly sent the following email message:

> Judge Pendleton, in my July 31 letter I estimated that your meeting with the Board tomorrow would probably last less than an hour, but I think that might be an underestimate. It's hard to predict how long these kinds of meetings take.

Ex. 26. Vasaly offered no explanation for needing more time nor did he use the opportunity to inform Judge Pendleton of his interest in the Affidavit of Candidacy. This begs the

question: Why did Mr. Vasaly deem it sufficiently important to inform Judge Pendleton that his testimony would last longer than originally predicted while not telling him why? This nondisclosure is particularly disturbing since Vasaly had obtained the original affidavit as part of his preparation, considered it to be "a very serious matter," and fully intended to ask Judge Pendleton about the affidavit during his testimony the next day. Tr. 226, 230.

Judge Pendleton appeared before the full Board at its August 15, 2014 meeting unaccompanied by counsel. He testified for nearly an hour and a half, answering each question posed to him to the best of his ability and without objection. Tr. 106. When he was unexpectedly confronted with the Affidavit of Candidacy, Judge Pendleton immediately admitted that the residence address was incorrect, *id.*, and acknowledged "I should not have filled it out that way." Ex. 27 at 35. Ultimately, the election affidavit became the centerpiece of the Board's case against Judge Pendleton.

By consistently refusing to inform Judge Pendleton of potential charges related to the Affidavit of Candidacy before examining him under oath about it, the Board violated the notice demanded by Rule 6(d)(2) and lured Judge Pendleton into a "trap" like that in *Ruffalo*. In both cases, the result was sworn testimony containing incriminatory admissions regarding unsuspected misconduct. Here, as in *Ruffalo*, the Board's actions spurned fair notice, were fundamentally unfair, and deprived Judge Pendleton of due process. 390 U.S. at 552.

D. The Board's improper inquiry into Judge Pendleton's sex life was likewise improper.

The Board's August 15 interrogation of Judge Pendleton was further tainted by

improper questioning about his sexual history. Shortly before ambushing Judge Pendleton with the Affidavit of Candidacy, Mr. Vasaly asked the following series of personal questions:

Mr. Vasaly:	When did you remarry?
Judge Pendleton:	I remarried in September of 2007.
Mr. Vasaly:	And when did you begin your relationship with your current wife?
Judge Pendleton:	Well, I've known her since we were teenagers. So I guess I'm not sure what you're asking.
Mr. Vasaly:	When did you begin an *intimate relationship* with your present wife?
Judge Pendleton:	I'd say after the divorce proceedings were commenced. Would have been the summer of 2006, during the time I was staying in the hotel.

Ex. 27 at 29 (emphasis added).

Mr. Vasaly admits that Judge Pendleton's personal sex life was totally irrelevant to the Board's investigation. Tr. 238. Nonetheless, he testified: "I chose the words 'intimate relationship' because that's the term used in the Code of Judicial Conduct throughout the Code." Tr. 241. The Code defines an "intimate relationship" as one "involving sexual relations as defined in Rule 1.8(j)(1) of the Rules of Professional Conduct." MRPC 1.8(j)(1), in turn, explains that "'sexual relations' means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts

of the lawyer." *Id.* Given these definitions, the import of Mr. Vasaly's questions is obvious.[7]

Nearly thirty years ago, the Minnesota Supreme Court expressly prohibited the Board from delving into details of a judge's sexual relations without a compelling need for such information. *In re Agerter*, 353 N.W.2d 908, 914-15 (Minn. 1984). Noting that judges' private sex lives concern the "most intimate of human activities and relationships," the court warned the Board not to ask sexually-related questions unless the case involved public affairs that engendered community concern or involved commercialized sex. *Id. Agerter* appropriately recognized that:

> Even in the confidential setting of a Board hearing, to be required to reveal intimacies of one's private sex life can be, at best, distasteful, and, at worst, humiliating, distressful and demeaning.

Id. And so it was here. Judge Pendleton was shocked, embarrassed and humiliated by Mr.

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[7]Mr. Vasaly's explanation for his question is both convoluted and unconvincing. In denying that he was seeking information about Judge Pendleton's sexual relations, Vasaly testified:

> Q: Is it your testimony that you weren't, by using the words "intimate relationship," referring to a sexual relationship?
>
> A: I guess—well, first of all, you're talking about something that took place within a split-second when I'm asked to define a term. So looking back on it, I think that—I think that the term has both a legal definition and sort of a common definition, and I guess that the way I would use the term would be to refer to a relationship that typically would involve sexual intimacy, but not necessarily and, conversely, not all relationships that involve sexual intimacy are necessarily intimate relationships. So I would say that the two—there is a great deal of overlap between the two, but they are not identical terms.

Tr. 239.

Vasaly's questions about his sexual history. Tr. 110. Judge Pendleton recalls pausing and looking around the meeting room from one Board member to the next, "waiting to see if somebody was going to stop it," before reluctantly answering because "he didn't want to be perceived as being uncooperative." *Id.*

The wholesale absence of any public interest justifying the Board's blatant and unwarranted intrusion into Judge Pendleton's private affairs is beyond cavil. Equally remarkable is the Board's dismissive approach to the issue. Mr. Vasaly professed familiarity with the *Agerter* decision, stating that "[i]t's an opinion I've been familiar with for many years" before flippantly remarking "but I don't think I've read it in the current century." Tr. 238. During the public hearing, Board counsel sought to prevent Judge Pendleton from recounting the sex-based questioning, contending the issue is irrelevant to these proceedings. Tr. 107. At bottom, the Board's decision to ask Judge Pendleton questions about his sexual relationship with his wife is indisputably irrelevant and wholly improper. Since *Agerter*'s admonition has fallen on deaf ears, a clear message needs to be sent that improper inquiry into a judge's sexual affairs remains an inexcusable affront to personal privacy that will not be tolerated.

E. By failing to timely disclose hearing evidence and arguing matters not charged in the Complaint, the Board deprived Judge Pendleton of due process.

The Board's efforts to unfairly surprise and ambush Judge Pendleton continued with the disclosure of new evidence on the evening before trial and the submission of evidence

and arguments that were hidden throughout the course of pretrial discovery and never charged in the Complaint.

1. Judge Pendleton's bankruptcy petition

The Board's formal complaint made two discrete charges: (a) that Judge Pendleton failed to reside in the Tenth District from November 26, 2013 through July 31, 2014 and (b) that he knowingly made a false statement by listing the Anoka condo as his residence on a May 22, 2014 affidavit of candidacy. Nothing in the complaint questioned Judge Pendleton's living arrangements before November 2013. When the Board sought (and was generally denied) permission to serve interrogatories and compel pre-hearing discovery from third parties, its requests were limited to the period from October 2013 to August 1, 2014. In a similar vein, none of the hearing exhibits disclosed by the Board before the hearing challenged Judge Pendleton's living arrangements before 2013. Finally, nothing in the Board's pre-hearing letter to the Panel or discussions among counsel leading up to the hearing forewarned Judge Pendleton of the Board's intention to put him on trial for a purported longstanding "pattern" of living outside the district and repeatedly lying about his living arrangements.

R. Bd. Jud. Stds. 9(b)(1) mandates that "[c]ounsel for the board and the judge *shall* exchange: (1) non-privileged evidence relevant to the Formal complaint [and] documents to be presented at the hearing . . . ." *Id.* (emphasis supplied). Under R. Bd. Jud. Stds. 9(e), discovery must be completed within 60 days after a judge responds to a formal complaint.

Judge Pendleton filed his answer on October 29, 2014, making the discovery deadline December 29, 2014. The Panel's December 10, 2014 Scheduling Order expressly confirmed this deadline, providing:

> In this case, discovery shall close on December 29, 2014. By this date, the parties shall exchange all materials required to be disclosed under RBJS 9(b) and 9(c).

Id.

Attorney Phil Cole originally represented the Board in these proceedings. On November 17, 2009, the Board replaced Mr. Cole with William Egan, who continues to serve as Board counsel. Mr. Egan made the Board's initial Rule 9 disclosures on November 19, 2014 and Mr. Egan's office handled the exchange of all subsequent discovery.

The contested hearing in this matter convened on January 22, 2015. Approximately 7:05 p.m. on January 21, 2015, *the night before the hearing*, Mr. Egan sent an email to Judge Pendleton's lawyers transmitting a partial copy of a 2009 bankruptcy petition in which Judge Pendleton listed various addresses he had "occupied" during the three-year period preceding the bankruptcy. Egan confirmed that the Board possessed the document for more than two months and that it should have been disclosed, stating:

> In preparing for tomorrow's hearing, I came across the attached, which was in Phil Cole's file. I do not have at my ready disposal a record of what he produced to you prior to my involvement, but if he did not produce this, I think it may fall under Rule 9(b). Even though this is a public record, I thought it

best to send it to you. Please forgive the late hour of the transmission.[8]

Judge Pendleton's lawyers reviewed the surprise disclosure, informed Egan that the bankruptcy schedule had never been disclosed, asked about its intended use, and warned that they would vigorously object to any use of the information given its tardy disclosure. Mr. Egan assured them: "[w]e'll only use it if necessary for impeachment purposes."

At the hearing the next day, the Board radically changed its theory of its case, arguing for the first time that Judge Pendleton had a history or "pattern" of living outside his judicial district. When the Board sought to elicit testimony from Judge Pendleton about his prior residence history during its case-in-chief, Judge Pendleton's counsel objected. Tr. 38. The Panel's presiding officer noted the complaint's limited focus on the stay with Kim and questioned the relevance of the inquiry. *Id.* Despite his promise to Judge Pendleton's lawyers just hours before not to use the new information as affirmative evidence, Board counsel responded that his questions were permitted by Minn. R. Evid. 404(b). The hearing transcript reflects the following exchange:

> MR. KELLEY: Your Honor, I'm hesitant to object, but I'm wondering about the relevance to the charges we have before us in the complaint.
>
> JUDGE TOUSSAINT: Count III of the complaint says that from July 12th [sic] until November 27th, Judge Pendleton owned a condominium in the Tenth Judicial District. Count V recounts periods in 2013. Count VII

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[8]Copies of the email exchange between counsel were provided to the panel and appended to Judge Pendleton's post-hearing brief but the panel made no findings respecting the matter in its opinion despite discussing other "Board Investigation Facts." *See* Panel Opinion at ¶¶ 33-41.

says–no, Count VI says Judge Pendleton rented an apartment on August 1, 2014. Count VII says that from November 26th, 2013 to July 31, Judge Pendleton resided at the Minnetonka residence. How are you going to respond to the relevancy objection?

MR. EGAN: *We have reason to believe that this is not the first time that Judge Pendleton lived outside the Tenth Judicial District for extended periods of time.*

JUDGE TOUSSAINT: Well, tell me, *did you allege that in the complaint?*

MR. EGAN: *No, we did not.*

JUDGE TOUSSAINT: *Well, then why is that relevant?*

MR. EGAN: *To show that the substantive–that the time that's in the complaint is in conformity with prior practice.*

JUDGE TOUSSAINT: *So this is a 404(b) issue?*

MR. EGAN: *Yes.*

JUDGE TOUSSAINT: To go to the issue of intent?

MR. EGAN: Pardon me?

JUDGE TOUSSAINT: To go to the issue of intent?

MR. EGAN: Yes.

JUDGE TOUSSAINT: How do you want to respond to that?

MR. KELLEY: There is no disclosure of anything such as that, Your Honor, and there has been no amendment to the complaint. We still think it's irrelevant.

JUDGE TOUSSAINT: Overruled.

Tr. 38-40 (emphasis added).

Minnesota evidentiary law has long prohibited parties from using evidence of other acts "to prove the character of a person in order to show action in conformity therewith." *See* Minn. R. Evid. 404(b); *State v. Loebach*, 310 N.W.2d 58, 63 (Minn. 1981)(explaining basic reasons for excluding character evidence to prove a party acted in conformity therewith). Board counsel conceded just such an improper purpose when he told the Panel that the prior living arrangements were being offered to show that the residency violation charged in the Board's complaint "is in conformity with prior practice." Tr. 39. The rules of evidence expressly prohibit this type of use of character evidence.

In certain instances, evidence of extraneous acts can be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Typically, other-acts testimony is offered in criminal cases only after the prosecutor gives specific, advance notice of intent to use the evidence and describes its intended purpose. *Id.* The notice requirement serves to prevent surprise and to give the opposing party sufficient time to prepare his defense. *State v. Grilli*, 304 Minn. 80, 86, 230 N.W.2d 445, 450 (1975). Here, the Board gave Judge Pendleton no notice of its intent to use the new information and made no effort to articulate a permissible use under any Rule 404(b) exception.

The Hawaii Supreme Court has offered this explanation of the fairness considerations underpinning mandatory disclosure:

> By precluding parties from introducing . . . 404(b) evidence during trial and surprising the opposing party without good cause, this notice requirement

> protects the parties . . . from falling prey to opposing counsel's trial tactics and strategies that do not promote a fair trial. The adversary system of trial is not a poker game in which players enjoy an absolute right to conceal their cards until played.

State v. Pond, 118 Hawaii 452, 466-67, 193 P.2d 368, 382-83 (2008). Unfortunately, the Board's actions throughout this case reveal poker-style gamesmanship with the Board depriving Judge Pendleton of required notice so that it could ambush him with concealed evidence and uncharged allegations.

The Board admits having the bankruptcy petition in hand long before November 17, 2014. Yet, the Board inexplicably failed to reveal it as part of the required disclosures that were exchanged on November 19, 2014. The Board understood its Rule 9 disclosure obligations and made supplemental disclosure of other information after the November 19, 2014 deadline but never said nothing about residence history.

The case was thoroughly investigated and actively litigated in the months leading up to trial. The Board had multiple lawyers staffing the case. More than once, Judge Pendleton's lawyers asked Board counsel to confirm that everything in the Board's file had been disclosed and to provide supplemental disclosure. Left without a plausible explanation for its non-disclosure, the Board suggests that the bankruptcy petition lay unnoticed in its files until the eve of the hearing, when it was finally discovered, ostensibly causing the Board to revamp overnight its entire theory of prosecution. Although convenient, this explanation rings hollow and strains credibility beyond logical limits when laid beside the Board's trial-by-ambush tactics that first surfaced during the investigation. Due process and fundamental

fairness demand much more from the Board.

2. Tenth District Administration records

The Board also violated disclosure obligations established by Board rules and the Panel's scheduling order with respect to exhibits 33 through 45. As noted above, a December 29, 2014 discovery deadline applied to this case. In late November 2014, the Board sought permission from the Panel to conduct wide-ranging discovery concerning Judge Pendleton's living arrangements between October 1, 2013 and August 1, 2014. The Board motion sought an order directing the Tenth District Court Administrator to produce records reflecting Judge Pendleton's residence address. The Board contended that these judicial records were beyond the reach of a traditional subpoena and could only be obtained by court order. The Board argued that "[a]bsent the issuance of the requested order," the District records "would be unavailable." *See* Board Discovery Memo. 14-15.

The Panel's December 10, 2014 order denied the Board's request for a compulsion order directed to the District Administrator. The same order directed the parties to exchange hearing exhibits by December 29, 2014. Exhibits were exchanged and counsel for both sides stipulated to 32 joint hearing exhibits before trial. The Board's discovery argument proved disingenuous at best. After losing the motion, the Board proceeded to obtain the district records by subpoena.

Just three days before the hearing, on January 20, 2015, Board counsel disclosed 13 new exhibits pertaining to judges' personal address information maintained by the Tenth

District Administrator. When the tardy exhibits were offered by the Board at the hearing, Judge Pendleton objected. The objections were overruled and several of the exhibits were received into evidence. *See* Exhibits 33, 40–45.

3. Newfound Board theories and arguments

In the *Karasov* appeal, the Minnesota Supreme Court refused to consider misconduct not referred to in the Board's formal complaint. The court explained that considering evidence beyond that specified in the complaint "raises potential due process concerns, based on a failure to provide [the respondent judge] with adequate notice of the charges of judicial misconduct." 805 N.W.2d at 270, n.11 (citing *In re Kirby*, 354 N.W.2d 410, 415 (Minn. 1984)).

The Board's post-hearing argument alleged a multitude of charges found nowhere within the four corners of the complaint. The new accusations included claims that Judge Pendleton engaged in a deliberate pattern of concealing his actual residence address, was not candid in communications with the Board and Tenth District administration, displayed a "long-running pattern" of concealing his residence, lived outside the district in 2008, "affirmatively misled the Board" when describing his living arrangements and gave the Board a false explanation regarding his affidavit of candidacy.

All of these charges are conspicuously missing from the formal complaint. At no point before the hearing was Judge Pendleton ever given clear and sufficient warning of the Board's intent to seek discipline based on any of these claims. Consequently, he had no

opportunity to anticipate the Board's newfound arguments or to prepare and present his defense against the undisclosed charges.

Due process demanded that the panel limit its consideration of the Board's arguments to only those charged in the formal complaint. Unfortunately, the panel seized on several of the Board's newly minted (and previously undisclosed) arguments in making its findings. Examples include the panel's focus on Judge Pendleton's living arrangements in 2008 (Panel Opinion at ¶¶ 4, 8) and his communications with District Administrator Moriarity *Id.* at ¶¶ 28-29. The precise role these findings played in the panel's ultimate conclusions cannot be determined. We know, however, that the panel based its finding of a residency violation at least in part on a belief that Judge Pendleton's failure to disclose his living situation to others, including presumably Mr. Moriarity, "belies Judge Pendleton's assertion that he intended to remain a resident of the 10th Judicial District." Panel Opinion at ¶ 42.

The numerous due process violations brought to light in this case have implications that go far beyond the mistreatment suffered by Judge Pendleton. Although the Board itself is ethically bound to follow its own rules and afford to all judges due process and fundamental fairness, to whom does the Board answer to? The Panel appointed by the Supreme Court to hear disputed cases has no authority to address or rule on allegations of misconduct or violations of Due Process. Only the Supreme Court has the authority and power to oversee the conduct of the Board. Thus, misconduct and violations committed by the Board during their investigations of judges are only brought to light if the aggrieved

judge is willing to endure the consequences of appealing their case to the Supreme Court. Why does this so rarely happen? In addition to the financial hardship of having to pay for escalating legal fees, whenever a judge dares challenge the recommendations of the Board there is almost always a barrage of embarrassing and humiliating public press releases and news articles. Many judges are willing to accept almost any recommendation and overlook a multitude of Board misconduct in order to avoid the anticipated public humiliation that always accompanies high profile judicial appeals.

For all the above reasons, if the Supreme Court fails to recognize and take action to curb obvious and blatant Board misconduct, then every future judge that becomes the subject of an ethics investigation will have no meaningful judicial remedy and will find themselves at the mercy of a Board that has no fear of oversight.

In summary, the Board's assumption of an adversary posture and repeated misconduct combined to deprive Judge Pendleton of sufficient notice of the evidence and charges against him to allow him an opportunity to anticipate, prepare and present his defense. The resulting due process violation should be both recognized and harshly rebuked by this Court.

IV. THE PANEL'S RECOMMENDED SANCTIONS ARE UNWARRANTED.

Following the hearing, the Board urged the panel to recommend suspending Judge Pendleton without pay for 8 months. Although no precedent exists for the Board's extraordinary request, at least one panel member voted to recommend double the suspension sought by the Board. *See* Panel Opinion at 17, n.2 (noting the panel's division "on the

appropriate suspension, with proposals ranging from 6 to 16 months"). Ultimately, the panel recommended that this Court impose a censure, an unpaid suspension of at least six months, consider ordering other conditions or civil penalties as it deems appropriate.

A public reprimand will suffice to meet the goals of judicial discipline under the facts of this case. Judge Pendleton will accept a censure. He objects to the other recommended sanctions as unwarranted given the peculiar facts and circumstances of this case.

Judicial disciplinary proceedings strive not to punish respondent judges but rather "to protect the public by insuring the integrity of the judicial system." *In re Miera*, 426 N.W.2d 850, 858 (Minn. 1988). *Miera* instructs that sanctions "must be designed to announce [the Court's] recognition that misconduct has occurred, and [its] resolve that similar conduct by this or other judges will not be condoned in the future." *Id.* The Court independently reviews the record developed below and affords no particular deference to the panel's recommendation en route to determining what sanction, if any, "is just and proper." R. Bd. Jud. Stds. 14(e); *In re Blakely*, 772 N.W.2d 516, 523 (Minn. 2009).

In Minnesota, unpaid suspensions have been reserved for instances of extremely serious judicial misconduct that served to undermine public trust and confidence in the integrity of the judiciary. The high-water mark includes 6-month suspensions without pay assessed against former district judges Patricia Karasov and Timothy Blakely. Judge Blakely engaged in a kickback scheme in which he ordered litigants to use his personal divorce attorney to mediate their claims in exchange for forgiveness of Judge Blakely's personal fee

obligation exceeding $64,000. Judge Karasov's sanction was driven by her lack of candor, in violation of Rule 2.16 of the Code, during the Board's investigation and subsequent testimony at her disciplinary hearing. 805 N.W.2d 276 ("By failing to be candid and honest with the Board and its agents, Judge Karasov has engaged in conduct that threatens a basic tenet essential to the integrity of the judicial system").

As shown above, the alleged residence violation in this case is far less egregious than that in *Karasov*. Moreover, other cases involving false statements in the election context confirm that a censure or public reprimand is the appropriate sanction. *See, e.g., In re Inquiry Concerning McCormick*, 639 N.W.2d 12 (Iowa 2002)(imposing public reprimand for judge's false statements to judicial commission about campaign signs); *In re Gorsuch*, 76 S.D. 191, 75 N.W.2d 644 (1956)(reprimanding judge for improperly suggesting that opposing candidate's supporters were trying to buy favorable treatment for their interests); *Cf. In re Kaiser*, 111 Wash.2d 275, 759 P.2d 392 (1988)(imposing censure for similar statements impugning integrity of opponent's supporters in light of respondent's prior disciplinary history).

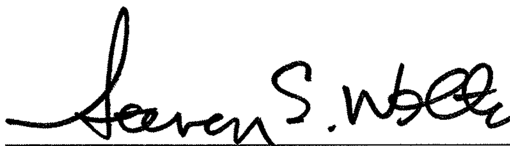
Judge Pendleton's lack of intent to violate the law and ethics rules as he understood them coupled with the due process deprivations permeating the Board's investigation and prosecution of this case justify a sanction no greater than a public reprimand. Therefore, the panel's suggestion for the longest unpaid suspension in Minnesota history should be rejected.

CONCLUSION

For all of the foregoing reasons, the Court should reject the panel's findings that Judge Pendleton violated Article VI, Section 4 of the Minnesota Constitution and Rules 1.1, 1.2 and 2.1 of the Code by temporarily staying outside the Tenth District while he worked diligently to resolve and unexpected and unforeseen family emergency. It should likewise find that Judge Pendleton did not violate Rule 4.1(a)(9) of the Code by filing an affidavit of candidacy listing his former residential address. Under the totality of the circumstances, the Court should impose no sanction greater than a censure for any appearance of impropriety the Judge Pendleton regretfully created by filing the affidavit.

Respectfully submitted,

KELLEY, WOLTER & SCOTT, P.A.



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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3 for a brief produced with a proportional font. The length of this brief, excluding the table of contents and authorities, is 13,978 words. This brief was prepared using WordPerfect X5, Times New Roman font face size 13.

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