STATE OF MINNESOTA

IN SUPREME COURT

A14-1871

Inquiry into the Conduct of the
Honorable Alan F. Pendleton

REPLY BRIEF OF APPELLANT JUDGE ALAN PENDLETON

Douglas A. Kelley, #54525
Steven E. Wolter, #170707
KELLEY, WOLTER & SCOTT, P.A.
Centre Village Offices
431 South 7th Street
Suite 2530
Minneapolis, MN 55415
(612) 371-9090

Attorneys for Appellant Judge
Alan Pendleton

William J. Egan, #166029
Aaron Mills Scott, #33943X
OPPENHEIMER WOLFF &
DONNELLY LLP
Campbell Mithun Tower, Suite 2000
222 South Ninth Street
Minneapolis, MN 55402-3338
(612) 607-7000

Attorneys for the Minnesota Board on
Judicial Standards

TABLE OF CONTENTS

TABLE OF AUTHORITIES

DECISIONS

STATUTES AND RULES

SECONDARY SOURCES

ARGUMENT

I. THE TOTALITY OF THE CIRCUMSTANCES DEMONSTRATE THAT THE BOARD DEPRIVED JUDGE PENDLETON OF DUE PROCESS THROUGHOUT THE INVESTIGATION AND PROSECUTION OF THIS CASE.

Judges are "guaranteed due process of law in a disciplinary investigation and hearing." *In re Kirby*, 354 N.W.2d 410, 415 (Minn. 1984). Although due process has been characterized as " a variable and elusive concept, in its basic essence [it] means a fair process." Rubin G. Cohn, "The Limited Due Process Rights of Judges in Disciplinary Proceedings," 63 JUDICATURE 232, 235 (1979); *see also Kirby*, 354 N.W.2d at 416 (recognizing "fundamental fairness" as the touchstone of due process). As long ago as 1979, Professor Cohn noted: "[i]t is not an exaggeration to suggest that in most states today the [judicial] disciplinary agencies are viewed by judges with attitudes ranging from apprehension to grave concern." *Id.* at 232. To alleviate those concerns, he advocated "urgent sensitivity respecting the investigative and adjudicative procedures employed by such agencies." *Id.* at 233.

During testimony at the public hearing in this matter, Board Executive Secretary Tom Vasaly discussed past criticism leveled against the Board by other judges who considered the Board's practices to be secretive and unfair. Tr. 221. Vasaly stated: "I know that there was great deal of dissatisfaction among some judges with the Board and I thought that their—I thought that many of their concerns were valid." *Id.* Vasaly pledged his personal commitment to fairness and transparency during judicial disciplinary investigations and

opined, "I think we [the Board] should be attempting to provide a fairness and respect that far exceeds the due process standards." Tr. 223-24.

The 2009 changes to the Board's rules were prompted by fairness concerns. The Advisory Committee's report accompanying the proposed amendments (that were adopted by this Court) advocated separating the Board's rules enforcement and adjudicatory functions to avoid "issues about fundamental fairness and due process." Report of the Advisory Committee of the Board on Judicial Standards, Minn. Supreme Court File No. C4-85-697 (Mar. 14, 2008), available on the Board's website at http://bjs.cit-net.com/code-rules-reports at 1. Among the "highlights" to the revised rules were amendments to Rule 6 designed to make "[t]he investigation stage . . . more robust by providing for notice to the judge when the board has authorized an investigation and allowing the judge an opportunity to both respond to the [initial] complaint [received by the Board] in writing and to appear before the board or a panel of the board to answer questions about the alleged conduct." *Id.* at 2. The Committee envisioned withholding notice of an investigation to an affected judge only upon "extraordinary and specific reasons" for nondisclosure, including cases posing a risk of retaliation against the person making complaint to the Board. *Id.* As the record makes abundantly clear, no extraordinary circumstances justified the Board's decision to deprive Judge Pendleton of notice and opportunity to respond to all accusations of wrongdoing during the investigation stage of these proceedings.

The Board argues that this Court's opinion in *Karasov* concluded that due process does

not require notice of a judicial discipline investigation. While the Court rejected Judge Karasov's notice-based arguments, *In re Conduct of Karasov*, 805 N.W.2d 255, 274 (Minn. 2011), that case differed from this one in two major respects.

First, under the Board rules in place during the Karasov investigation, notice was discretionary with the Board. *Id.* (citing the 2008 version of Rule 6(c)(1), that provided: "[n]otice that an investigation has been authorized *may be given* to the judge whose conduct . . . is being investigated")(emphasis in original). Effective July 1, 2009, the Board rules changed and, going forward, the Board was required to give judges notice of pending disciplinary investigations. The new rule, which governs this case, demands that:

> Within ten (10) business days after an investigation has been authorized by the board, the executive secretary *shall* give the following notice to the judge whose conduct is being investigated:
>
> (I) a specific statement of the allegations and possible violations of the Code of Judicial Conduct being investigated, including notice that the investigation can be expanded if appropriate.

Rule 6(d)(1)(emphasis supplied). As discussed above, the amendment was rooted in a desire by the rules committee to make the investigative phase more "robust" by affording judges notice and a meaningful opportunity to respond to accusations of misconduct before a formal complaint was prepared.

Second, while some courts have held that investigative notice is not absolutely required, *see Karasov*, 805 N.W.2d at 273-74 (citing decisions), none of those cases addressed the situation presented here, where a disciplinary board ignored a mandatory-notice rule akin to current Board Rule 6(d)(1) and elicited sworn testimony from the subject of its

investigation about unnoticed allegations of misconduct.[1]

Determining whether a judge has been afforded due process turns on the totality of the relevant circumstances. Here, the Board's actions, including untimely disclosure of hearing evidence, improperly eliciting sworn admissions about undisclosed allegations of misconduct, unwarranted intrusion into Judge Pendleton's intimate affairs and repeated failure to follow established procedural rules all, taken together, combined to deprive Judge Pendleton of fundamental fairness.

A. The Board's untimely disclosures of hearing evidence prejudiced Judge Pendleton.

1. Tenth District records

Board Rule 9(e) mandates completion of all discovery in judicial disciplinary matters proceedings within 60 days after a judge answers a formal complaint. Judge Pendleton served his answer on October 29, 2014, making the discovery deadline December 29, 2014. Board Rule 9(b) required both sides to exchange all relevant evidence and hearing exhibits by that date. All parties understood the December 29 deadline. Indeed, when the Board moved for

---

[1] *Sec. & Exch. Comm'n v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 104 S.Ct. 2720, 81 L.Ed.2d 615 (1984) held that a target of an SEC investigation need not receive notice of investigatory subpoenas directed to third parties. *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960) refused to give those "indirectly affected" by a fact-finding investigation the "full panoply" of due process rights attendant to judicial proceedings, including the right to confront and cross-examine witnesses, because to do so would completely disrupt the investigative process. *Gold v. Sec. & Exch. Comm'n*, 48 F.3d 987 (7th Cir. 1995) involved a licensing action against a registered associate of a securities brokerage who neither responded to SEC inquiry letters or was ever interviewed.

authority to conduct extraordinary discovery on November 26, 2014, it noted the "mandatory exchange of information" obligation under Rule 9(b) and asked Judge Pendleton to respond to its motion in just five business days to accommodate the impending deadline. *Id.* at 1, n.1 and 6.

The panel's December 10, 2014 Scheduling Order and Order on Discovery Motions reaffirmed the December 29, 2014 deadline and specifically ordered that "[b]y this date, the parties shall exchange all materials required to be disclosed under RBJS 9(b) and (c)." *Id.* at 2. The parties exchanged exhibit lists and witness lists on December 29. At that time, the Board disclosed its intent to call just two hearing witnesses: Judge Pendleton and Tenth District Administrator Michael Moriarity. In an amended witness list filed the next day, the Board revealed that Mr. Moriarity was expected to testify that the district maintained a database of judges' addresses and that Judge Pendleton failed to notify district administration of his "change of address" between November 27, 2013 and August 1, 2014. Neither list disclosed anything about expected exhibits from Mr. Moriarity.

In its November discovery motion, the Board had asked the panel to order the Tenth District Court Administration to produce documents regarding Judge Pendleton's address information during the foregoing time period. The panel's discovery order denied the Board's request. The order invited the parties to address any "evidentiary and procedural issues" in prehearing letters due on January 15, 2014, one week before the hearing. The Board's prehearing submission made no mention of additional hearing exhibits being sought from Mr.

Moriarity or the district court administration office.

At 8:48 p.m. on January 19, 2015, barely 36 hours before the hearing, Board counsel sent an email to Judge Pendleton's lawyers transmitting incomplete copies of 13 new documents that the Board sought to introduce at the hearing. Board counsel stated:

> I just got this email from Mr. Moriarity. We have been trying to get these documents for some time. I am expecting to get the attachments to these emails, and at least a couple of additional emails. We can discuss these exhibits once they have been produced in full.

The complete exhibits were produced the next day, one day before the hearing, and the Board filed its supplemental exhibit list designating new exhibits 33 through 46 at 4:35 that afternoon.

Judge Pendleton refused to stipulate to admission of the untimely exhibits. When the Board offered them at the hearing, Judge Pendleton objected. Tr. 151. After the panel sought clarification regarding the timing of the document production, Mr. Moriarity revealed that he received the Board's subpoena less than a week before the hearing, on "Wednesday or Thursday of last week" (January 14 or 15, 2015). Tr. 155. The Board gave no explanation why it did not subpoena the district documents sooner.

Several of the tardy exhibits were received into evidence over Judge Pendleton's objection. *See* Exhibits 33 and 40-45. The panel made multiple findings based on those exhibits (Findings 27-29) and presumably relied on them, to some degree or another, in concluding that "Judge Pendleton's failure to disclose his living situation during this time period . . . belies Judge Pendleton's assertion that he intended to remain a resident of the 10th

Judicial District." Resp. Add. at 10-11, 15-16 (¶¶27-29, 42). Given the unmistakable weight accorded this untimely evidence, the Board's failure to produce it in accordance with Board rules and the scheduling order in this case prevented Judge Pendleton from investigating and vetting the evidence and deprived him of due process.

2. Judge Pendleton's 2008 bankruptcy petition

Our opening brief fully describes the circumstances surrounding the Board's even later production of information from Judge Pendleton's 2008 bankruptcy filing, that involved historical address information. Appellant's Br. 43-49. The bankruptcy petition, produced by Board counsel less than 14 hours before the hearing began, prompted a sea change in the Board's theory of the case and, along with the district records discussed above, ushered in the Board's newfound and uncharged claim of a "pattern" of residency violations and concealment.

The Board acknowledges receiving the bankruptcy petition as part of "the Board's investigation" sometime "in October 2014." Resp. Br. at 41. No specific date has been disclosed for receipt of the document. This is significant since Judge Pendleton requested a copy of the Board's complete file on October 6, 2014 pursuant to Board Rule 5(h). He demanded, among other things "all documents gathered by the Board as part of its investigation." Mr. Vasaly produced the Board's file to Judge Pendleton's counsel on October 7, 2014. The bankruptcy petition was not included with the Board's response.

The Board concedes that it did not produce the petition until "the eve of trial" in this

case. Resp. Br. at 41. It admits the production was untimely, stating: "The Board acknowledges that the document should have been reviewed and produced earlier," before suggesting that any error attributable to its nondisclosure is merely harmless. *Id.* at 41-42.

Discovery serves to prevent trial by ambush. Due process demands sufficient notice of alleged misconduct to afford those accused the opportunity to present their defense. Recognizing these considerations, other courts have refused to impose discipline based on facts not clearly disclosed in a disciplinary board's complaint. *See, e.g., In re Doyle*, 163 Ill.2d 451, 581 N.E.2d 669 (1991). In *Doyle*, the Illinois Supreme Court held that an Illinois attorney could not be disciplined for misconduct not alleged in the complaint against him. The court explained that in the disciplinary context,

> a 'complaint must contain factual allegations of every fact which must be proved in order for the [disciplinary board] to be entitled to judgment on the complaint, and a judgment cannot be rendered on facts demonstrated by evidence at trial unless those facts shown were alleged in the complaint.'

Id., 144 Ill.2d at 471, 581 N.E.2d at 678 (quoting *In re Beatty*, 118 Ill.2d 489, 499, 517 N.E.2d 1065 (1987)).

Here, nothing in the Board's complaint or its pretrial disclosures warned Judge Pendleton that the Board was looking at his living arrangements outside the period November 26, 2013 through July 31, 2014. It was not until Board counsel alleged a "pattern of concealment" during his opening statement, Tr. 15, that Judge Pendleton learned the Board was claiming a "pattern" of hiding his residence from court administration and others. The panel's presiding officer noted the limited scope of the misconduct charged in the complaint

and asked Board counsel why such information was relevant after Judge Pendleton objected to the line of inquiry. Tr. 38-40. Ultimately, however, the panel overruled the objection, allowed testimony and received exhibits regarding events not charged in the complaint before making findings and recommendations based on the undisclosed accusations. As a result, Judge Pendleton was severely prejudiced and denied due process.

B. The Board improperly questioned Judge Pendleton during his August 15, 2014 appearance

1. Surprise questions regarding undisclosed misconduct allegations.

Due process contemplates that every judge receive sufficient notice of charges against him to prepare and present a defense. *Karasov*, 805 N.W.2d at 270 (citing *Kirby*, 354 N.W.2d at 415). The Board concedes that the only notice it ever gave Judge Pendleton regarding the nature and scope of its investigation was its July 15, 2014 letter, which disclosed only that the Board was considering potential violations of the Minnesota Constitution and Rule 1.1 and 1.2 of the Code based on a report that Judge Pendleton may have been living in Minnetonka "for significant periods of time over the last several years." Ex. 20. The Board never notified Judge Pendleton that it would consider whether his May 28, 2014 affidavit of candidacy violated the Code of Judicial Conduct. Tr. 210, 226.

By letter dated July 31, 2014, the Board ordered Judge Pendleton to appear and give sworn testimony on August 15, 2014. Ex. 22. Although Board Rule 6(d)(6) demands that the

Board give Judge Pendleton twenty days advance notice, the Board gave him just fifteen.[2] Mr. Vasaly knew well before Judge Pendleton's appearance that the affidavit listed an old residential address, which Vasaly deemed "a very serious matter" about which he sought sworn testimony. Tr. 226. Despite repeated communications with Judge Pendleton about the subject matter of his upcoming examination, Vasaly intentionally chose not to inform Judge Pendleton that the Board's investigation included the affidavit. This is particularly troubling insofar as Judge Pendleton specifically asked Mr. Vasaly before the appearance what he was being accused of and what ethics violations were being alleged and Vasaly responded that the Board's questions would be limited to Judge Pendleton's residence within the Tenth District. Tr. 105, 227. Contrary to those assurances, Mr. Vasaly waited to spring the affidavit on Judge Pendleton without warning in the hope of obtaining damaging admissions of judicial misconduct.

The Board contends that notice was unnecessary because it told Judge Pendleton it was investigating his residence and, it contends, new notice is not required for every "subtopic of interest" that arises as the investigation goes where the facts lead. Resp. Br. 36. While the

---

[2]The Board argues that abbreviated notice was permitted by Rule 6(e), which permits expedited proceedings in cases where an accused judge is up for reelection. Resp. Br. 40-41. Significantly, however, there is nothing in the record suggesting that the Board invoked that rule during its investigation. The obvious purpose of the election-based rule would be to accelerate consideration of a complaint against a sitting judge that might affect an upcoming election. Here, the Board acted with no particular haste. Indeed, the Board filed its formal complaint and Judge Pendleton's response just 4 days before the November 2, 2014 general election.

Board rules may not contemplate serial notices of investigative concerns, due process demands that a judge know the charges against him before he testifies at length under oath. *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). As *Ruffalo* instructs, allowing the Board to add new charges after a judge gives testimony that cannot be taken back or expunged amounts to an improper trap and a denial of due process. 390 U.S. at 551. By obtaining Judge Pendleton's testimony without warning that he would have to answer to charges of filing a false affidavit in violation of Rules 1.1, 1.2 and 4.1(a)(9) of the Code, the Board effectively deprived Judge Pendleton of any ability to defend against those charges.[3]

The remedy for a *Ruffalo* violation is refusal to permit a disciplinary board to add new charges based on inculpatory testimony about an unnoticed charge. *See, e.g., Bar Assoc. v. Johnson*, 447 F.2d 169 (3rd Cir. 1971). In his post-hearing brief, Judge Pendleton urged the panel to recommend that this Court dismiss Count 2 of the Formal Complaint on due process grounds. *Id.* at 7-8. The panel reached no conclusions regarding the merits of Judge Pendleton's due process arguments, deferring those issues for this Court's consideration. *See* Respondent's Addendum ("Resp. Add.") at 12, n.1. Judge Pendleton renews his request for

---

[3]The Board makes much of the fact that *Ruffalo* addressed a complaint amendment sought after an adjudicatory hearing, as opposed to a due process violation during the investigatory phase of a proceeding. Resp. Br. 36-37. Timing is immaterial, however, since in either case the forbidden trap yields similar results, obtaining admissions to uncharged misconduct about which the respondent was given no warning. Presumably, the absence of reported cases addressing *Ruffalo*-based due process challenges in the investigatory phase emanates not from judicial blessing of such tactics but instead the exercise of proper restraint by other disciplinary boards, refusing to elicit sworn admissions from investigation subjects about alleged misconduct for which no notice has been given.

dismissal of Count 2 on due process grounds.

2. Improper regarding Judge Pendleton's sex life

During Judge Pendleton's August 15, 2014 appearance before the Board, Mr. Vasaly asked Judge Pendleton under oath when he began "an intimate relationship" with his current wife. Ex. 27 at 29. Presumably recognizing that "intimate relationship" is term of art meaning sexual relations, the Board no longer argues, as it did below, that Judge Pendleton was not being asked about his sex life. Instead, the Board seeks to justify its imprudent questioning by admitting that its "question could have been worded more precisely, but it was unplanned; it arose in response to the judge's request for clarification." Resp. Br. 39. The Board is expressly precluded from inquiring about a judge's sexual activity unless it first shows a compelling need for such information. *In re Agerter*, 353 N.W.2d 908, 914-15 (Minn. 1984). The Board does not even attempt to urge such grounds were present here. Instead, it accuses Judge Pendleton of inviting the question when he asked Vasaly "I guess I'm not sure what you're asking." Ex. 27 at 29.

The Board misreads *Agerter* as allowing its improper questioning because the impermissible intrusion into Judge Pendleton's private affairs occurred within the context of a private meeting with the Board. Resp. Br. 39-40. That matters not since *Agerter* instructs that "[e]ven in the confidential setting of a Board hearing, to be required to reveal the intimacies of one's private sex life can be, at best, distasteful, and at worst, humiliating, distressful and demeaning." 353 N.W.2d at 915.

Having sought unsuccessfully to keep testimony about the *Agerter* problem out of the hearing record, Tr. 107-109, the Board now argues that Judge Pendleton's stipulation to the transcript from the Board appearance as a hearing exhibit and his testimony about the Board's misconduct waives his right to object. Resp. Br. 39-40. The Board wants it both ways; it wishes to ask improper questions with impunity within the confines of its boardroom then preclude later judicial examination of its tactics. The warning in *Agerter* could not have been clearer. The Board's disregard of its admonition lends additional proof that the proceedings against Judge Pendleton were neither fair nor regular.

II. THE PANEL'S IMPROPER INFERENCES AND INCONSISTENT TREATMENT OF MATERIAL FACTS DO NOT SUPPORT ITS FINDING OF A RESIDENCY VIOLATION.

The panel correctly found that Judge Pendleton intended to find replacement housing in the Tenth District and was actively looking for an apartment until his search was disrupted by his son's drug problem at school. Both the Board and the panel place particular importance on the "indefinite" nature of the timeline for making the school transfer decision and the purported lack of a specific deadline for same. During the hearing Judge Pendleton testified that it was impossible to set a deadline because of the host of factors that colored the decision including his son's progress with tutoring and counseling, his lack of drug use and his conduct at school and home. Tr. 127-28. As he explained, Judge Pendleton did not consider his temporary stay in Minnetonka to be "indefinite" because he knew the decision would be made, at the very latest, by the end of the school year. *Id.* Significantly, once Judge

Pendleton and his former wife decided that their son would remain at Anoka High School, Judge Pendleton obtained a new apartment nearby in just 3 days.

In finding that Judge Pendleton abandoned his district residence between January 15, 2014 and June 2, 2014, the panel focuses on a singular issue: whether Judge Pendleton was actively looking for replacement housing. Resp. Add., ¶ 42. In contrast, so long as he was seeking replacement housing, the panel found no violation. Resp. Add., ¶ 43 (finding no residency violation for the periods November 27, 2013 through January 14, 2014 and June 3, 2014 through July 31, 2014 because "[d]uring those periods, the evidence reflects that Judge Pendleton was actively pursuing replacement housing in the 10th Judicial District"). When Judge Pendleton temporarily suspended his housing search to focus on helping his son, the panel found he abandoned his Tenth District residence. Resp. Add., ¶ 42.

Resolving intent demands consideration of many critical indicia. The panel mistakenly stated that Judge Pendleton "presented no evidence corroborating [his] intent" to remain a Tenth District resident between January 15, 2014 and June 2, 2014. Resp. Add., ¶ 42. The panel made no finding whatsoever regarding Judge Pendleton's contemporaneous statement to his movers as he left the Anoka condo that he would contact them "soon to move back to Anoka." Ex. 12. Unlike the situation in *Karasov*, Judge Pendleton's personal possessions remained in storage until he moved into the Anoka county apartment where he currently resides. *Cf., Karasov*, 805 N.W.2d 266, n.7 (finding evidence that Judge Karasov moved all of her belongings to her lake home to be "highly probative" of her intent to "remain and

reside" there).

The panel also gave short shrift to the fact that Judge Pendleton committed to rent a replacement apartment *before* the Board ever commenced its investigation into his residency. Resp. Add., ¶ 42 ("The 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").

All of these facts represent highly relevant and critically important evidence of Judge Pendleton's intent that were summarily dismissed or not even considered by the panel in reaching its conclusions.

The panel likewise placed undue reliance on the fact that Judge Pendleton did not discuss his living arrangements with other judges, district administration or representatives of the Board. The panel found he "kept very private the fact he did not have a home in the 10th Judicial District between November 27, 2013, and August 1, 2014." Resp. Add., ¶ 25. The Board labels Judge Pendleton's understandable silence an intentional "concealment of his residency." Resp. Br. 20. Both the Board and panel equate Judge Pendleton's unwillingness to disclose deeply troubling and intensely personal family issues to others to some type of orchestrated nondisclosure.

Notably, however, the facts at bar differ greatly from *Karasov*, where the respondent judge's affirmative statements to others demonstrated her intent not to live within her judicial district. 805 N.W.2d at 267 (discussing Judge Karasov's statements to her daughter that she

only planned to stay at her daughter's in-district apartment on bowling-league nights and during inclement weather and statements to a prospective landlord that the judge was not going to be a "real" renter but was only looking to use the landlord's "address"). Unlike Judge Karasov, Judge Pendleton made no statements at all confirming his intent to establish a new residence outside his district. There is a big difference between not telling people about personal matters and making affirmative admissions to others. The panel has treated both the same. Basing a finding that Judge Pendleton abandoned his district residence on his understandable silence to discuss personal family matters is both wrong and establishes a dangerous precedent for future judicial disciplinary matters.

III. IN FILLING OUT HIS ELECTION AFFIDAVIT, JUDGE PENDLETON DID NOT INTEND TO DECEIVE THE GENERAL PUBLIC.

The Board argues that Judge Pendleton's listing of his former Anoka condo address on a May 22, 2015 Affidavit of Candidacy was "part of a long-running pattern" of concealing out-of-district residence. Resp. Br. 26. Judge Pendleton has consistently acknowledged his mistake in writing down an inaccurate address, the appearance of impropriety it created, and his willingness to accept an appropriate sanction for his actions. The suggestion that he maliciously set out to defraud and deceive the electorate is mistaken. If, as the Board opines, he wished to conceal "his true residence address," Judge Pendleton could have simply left the address section blank. He was legally entitled to refrain from listing an address and had nothing to gain from making a false (and easily disproved) statement regarding where he lived.

His split-second decision to list an outdated address was careless and inappropriate. It undoubtedly created a perception of judicial impropriety. It was not a malicious and Machiavellian effort to deceive the public.

IV. JUDGE PENDLETON SHOULD NOT BE SUSPENDED.

The Board seeks an unprecedented sanction in this matter, asking that Judge Pendleton be placed on unpaid suspension for at least 8 months. Resp. Br. 51. The Board argues that Judge Pendleton has not accepted responsibility for his actions and implores the Court to punish Judge Pendleton for vigorously defending himself by "attacking the Board" regarding its due process violations. Resp. Br. 49. The purpose of judicial discipline is not to punish individual judges but instead to preserve the integrity of the judicial system. *In re Miera*, 426 N.W.2d 850, 858 (Minn. 1988). Moreover, judges like all other litigants have every right to defend themselves within the confines of the law and applicable rules of procedure.

The Board argues that the conduct at issue herein is "more serious than the *Karasov* case." Resp. Br. 50. That simply is not true. In *Karasov*, the hearing panel found that the judge's letter responding to the Board's initial inquiry was "a carefully worded and calculated attempt to evade further inquiry by the board into [her] residency status." The Karasov panel found that although the judge's failure to reside within her district was "a significant violation, justifying the imposition of a sanction," the more troubling aspect of that case involved the judge's "dissembling and her lack of good-faith cooperation with the board's investigation." This Court agreed, finding that Judge Karasov "compromised the integrity

of the judiciary through her breach of duty to cooperate and be candid and honest with the Board." 805 N.W.2d at 276. The Court noted that the case involved both affirmative misrepresentations to Board investigators and material omissions in Judge Karasov's letter to the Board that rendered her reply misleading. *Id.* It concluded: "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." *Id.*

Unlike Judge Karasov, Judge Pendleton was neither charged with nor found to have violated the Code's candor-and-cooperation provision (Rule 2.16(A). To the contrary, the hearing panel in this case affirmed Judge Pendleton's credibility. After the Board challenged discrepancies between Judge Pendleton's testimony before the Board on August 15, 2014 and his hearing testimony, the panel expressly found no intentional attempt to provide misleading testimony. It stated:

> The panel accepts Judge Pendleton's explanation that he was mistaken regarding the dates during the meeting with the board, and thus credits Judge Pendleton's unvarnished testimony regarding the efforts he made to locate a new residence between November 27, 2013, and December 20, 2013.

Resp. Add. 7, ¶ 17.

The Board further laments Judge Pendleton's purported lack of mitigation or remorse. The record amply demonstrates that all of the challenged conduct occurred during a time in which Judge Pendleton was experiencing great personal turmoil while he struggled to address an all-consuming and "extremely serious family emergency." Tr. 64. Witnesses recounted that Judge Pendleton was "distracted," "preoccupied, if not obsessed" and "wasn't there" on

account of his ongoing family issues. Tr. 190-91, 200-03. There can be no serious dispute that mitigating circumstances exist in this case.

The Board's suggestion that Judge Pendleton lacks remorse is equally perplexing. He repeatedly apologized to the Board during his August 15, 2014 appearance, stating "I'm really sorry about this," "I feel terrible" and I'm really profoundly sorry" for his "horrible lapse of judgment." Ex. 27 at 49-50. Judge Pendleton again acknowledged his mistake and the resulting appearance of impropriety it created when testifying about the affidavit of candidacy at the public hearing. Tr. 74, 146. Given this history, the Board's contention that Judge Pendleton offered no evidence of mitigation, remorse or recognition of misconduct entirely misses the mark. Resp. Br. 49.

The Board also laments a purported lack of Judge Pendleton's good character to justify the extraordinary sanction it proposes. That argument ignores a February 6, 2013 letter from the Board's former executive secretary to the chair of the Minnesota Judicial Selection Committee. Ex. 10. That letter, to which the Board stipulated, "offers the highest possible recommendation" in favor of Judge Pendleton respecting a supreme court vacancy. *Id.* The Board's representative expressed his consistent admiration and appreciation for Judge Pendleton's "sincere efforts to ensure that his personal and official actions strictly conform to ethical norms." *Id.* The panel also received evidence that Judge Pendleton was recognized by his peers as the 2012 Outstanding Judge of the Year in an award bestowed by the Minnesota District Judges Association. Tr. 80. In addition, Judge Pendleton has received

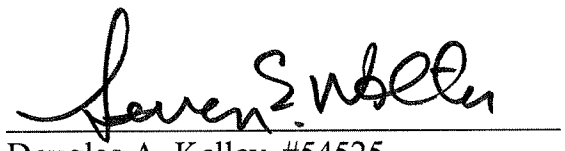
widespread recognition for his work on a judicial training blog distributed nationwide to law enforcement, judges and public and private attorneys. Tr. 79-80. Judge Pendleton's "many awards" and accomplishments were noted by the hearing panel in its first finding of fact. Resp. Add. 2.

CONCLUSION

Under the peculiar facts and circumstances of this case, a public reprimand or censure will amply meet the needs of the disciplinary process and constitute a "just and proper" sanction. *See* Board Rule 14(e).

Respectfully submitted,

KELLEY, WOLTER & SCOTT, P.A.



Dated: August 6, 2015

Douglas A. Kelley, #54525
Steven E. Wolter, #170707
Centre Village Offices, Suite 2530
431 South Seventh Street
Minneapolis, MN 55415
(612) 371-9090

Attorneys for Appellant, Judge Alan Pendleton

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 5,707 words. This brief was prepared using WordPerfect X5, Times New Roman font face size 13.

Dated: August 6, 2015