EXHIBIT 1

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IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE HONORABLE RENA HUGHES, EIGHTH JUDICIAL DISTRICT COURT, FAMILY DIVISION, DEPARTMENT J., COUNTY OF CLARK, STATE OF NEVADA

Case No. 76117

/

Appeal from the Nevada Commission on Judicial Discipline

RESPONDENT'S SUR-REPLY

I) INTRODUCTION

This brief responds only to the new Tobiasson-related arguments that Judge Hughes raised in her Reply Brief. *See* Reply, pp. 21-27. It does not address any other arguments raised in the Reply Brief.

II) LAW

A. Judge Hughes Bears The Heavy Burden Of Showing Definite Proof Of Actual Prejudice

The Nevada Supreme Court has held that absent due process concerns, relief from any procedural violations occurring during the investigatory stage may be obtained only by a showing of actual prejudice. *See* Jones v. Nev. Comm'n on Jud. Discipline, 130 Nev. 99, 107, 318 P.3d 1078, 1084 (2014)..

The Jones Court relied upon the reasoning of the California Supreme Court in Ryan v. Comm'n On Judicial Performance, 45 Cal.3d 518, 528–29, 754 P.2d 724, 729 (1988), as modified on denial of reh'g (June 30, 1988). The Ryan Court stated:

> While the language of rule 910 specifies a judge's right to conduct an adequate defense, it also indicates that the right attaches once formal proceedings are instituted. A judge does not have the same right while the Commission is conducting its preliminary investigation.
>
> As we stated in McCartney, during the preliminary investigation stage the Commission has not yet begun its adjudicatory function, 'but is merely attempting to examine citizen complaints in a purely investigatory manner.' During this investigatory period the Commission must have the freedom to collect accurate and untainted information.
>
> ...

> Simply stated, a judge does not have the right to defend against a proceeding that has not yet been brought.

Id. (internal citation omitted).

The Ryan Court concluded that the judge had failed to meet his burden of showing actual prejudice and relied upon McCartney v. Comm'n On Judicial Qualifications, 12 Cal.3d 512, 519, 526 P.2d 268, 272–73 (1974) (Court held that the judge must show that he suffered actual prejudice by the alleged due process violation), *overruled on other grounds by* Spruance v. Comm'n On Judicial Qualifications, 13 Cal.3d 778, 532 P.2d 1209 (1975).

Courts also require that the proof of prejudice must be definite and not speculative. United States v. Birney, 686 F.2d 102, 106 (2d Cir. 1982). Without definite proof as to this essential element, no due process claim is stated. *Id. See also* United States v. Swacker, 628 F.2d 1250, 1254 (9th Cir.1980); United States v. Elsbery, 602 F.2d 1054, 1059 (2nd Cir.), *cert. denied*, 444 U.S. 994, 100 S.Ct. 529, 62 L.Ed.2d 425 (1979); United States v. Hauff, 395 F.2d 555, 556-57 (7th Cir.), *cert. denied*, 393 U.S. 843, 89 S.Ct. 124, 21 L.Ed.2d 113 (1968).

B. The Harmless Error Standard Applies In This Case

This Court adopted the harmless error rule in determining whether there was substantial evidence to support the Commission's decision. *See* In re Fine, 116 Nev. 1001, 1020–21, 13 P.3d 400, 413 (2000). The Fine Court stated:

> Even if the Commission considered these incidents as additional charges, we conclude that the Commission would have reached the same decision irrespective of whether or not it had considered these two incidents. As mentioned above, substantial evidence was presented against Judge Fine. Accordingly, we conclude that if the Commission did err by adding additional counts on the basis of such evidence, any error was harmless. *See, e.g.,* In re Inquiry Concerning a Judge, J. Q. C. No. 77-16, 357 So. 2d 172 (Fla. 1978) (holding that improper notice of hearing and charges was harmless error).

Id. (emphasis added).

The harmless error rule "recognizes that a litigant is not entitled to a perfect trial for, indeed, few trials are perfect. In recognition of this fact, the harmless error rule establishes a sound and common-sense policy of not reversing a judgment unless the error or errors can be said to have contributed in a substantial way to bring about the adverse judgment." *See* In re Lowery, 999 S.W.2d 639, 651 (Tex. Rev. Trib. 1998)(Texas Supreme Court upheld State Commission on Judicial Conduct's decision and applied harmless error rule).

In fact, the vast majority of jurisdictions apply the harmless error rule to their review of judicial commission decisions. *See e.g,.* In Re Petition of Doe, 70 F.3d 56, 60 (8th Cir. 1995); In re Inquiry Concerning a Judge, J. Q. C. No. 77-16, 357 So. 2d 172, 176 (Fla. 1978); In re Rose, 144 S.W.3d 661 (Tex. Rev. Trib. 2004); In re Hughes, 874 So.2d 746 (2004); In re Seitz, 441 Mich. 590 (1993); and Matter of Jenkins, 437 Mich. 15, 465 N.W.2d 317 (1991).

Finally, NRCP 61 provides that the court, at every stage of a proceeding, should disregard errors that do not affect a party's substantial rights.

III) ARGUMENT

By Answering Interrogatory #3, Judge Hughes Did Not Suffer Actual Prejudice, And Thus The Interrogatory Answers Should Not Be Struck

In Tobiasson, this Court held that the Commission lacks authority to demand that a judge answer questions under oath during the investigative stage; however, the Commission was free to request that a judge voluntarily answer written questions during the investigative stage. Moreover, the Court noted that a judge owes an ethical duty to "cooperate and be candid and honest" with the Commission. Tobiasson at p. 4. Thus, Judge Hughes must show that she was "actually prejudiced" not merely by answering the written questions, but instead she must show that her due process rights were actually prejudiced because she answered the written questions "under oath."

Judge Hughes claims that she suffered actual prejudice because she answered Interrogatory #3 with a detailed two-page explanation. *See* Reply, p. 25. Judge Hughes stated that she provided a detailed explanation because she wanted to comply with the Judicial Code requirements that she "cooperate and be candid and honest." *Id.* Importantly, Judge Hughes does not suggest that the "under oath" requirement caused her to modify her answers in any manner.

Instead, she claims that she was actually prejudiced because the Prosecuting

Officer argued in his closing argument that Judge Hughes' hearing testimony was not credible and that "[w]ithout the under oath answers to interrogatories, the Prosecuting Officer would not have been able to make those arguments regarding Judge Hughes' credibility." *Id.*

This claim is meritless. Witnesses are routinely impeached by prior inconsistent statements which were not made under oath. The Nevada Rules of Evidence clearly permit impeachment by prior inconsistent statements not made under oath. *See* NRS 50.135 and 51.035. Thus, any untruthful or conflicting statements made by a judge to a Commission investigator during an investigative interview, or in response to a complaint under NRS 1.4667(3), can still be used for impeachment purses during a trial, which would be true irrespective of whether they were made under oath or not.

Additionally, even without an express oath, the Judge is required by the Code to be candid and honest with the Commission. Rule 2.16. Thus, the impeachment or evidentiary value of her answers to written questions was not materially increased because she was under oath.

Moreover, as the record clearly demonstrates, the Commission did not rely solely on Judge Hughes answers to written questions in determining that she violated the Code. Substantial evidence showed that Judge Hughes' hearing testimony was not only inconsistent with her answers to written questions, but her testimony was also inconsistent with (1) the JAVS recordings of the Judge's statements in open

court on June 15, 2016 (*See* Appellant's Appendix at p. 763); (2) Judge Hughes' written orders and/or minutes dated June 8, June 14, and June 15, 2016 (*See* Appellant's Appendix at pp. 343-351; pp. 600-604; pp. 605-610; pp. 611-613; and pp. 614-619), where Judge Hughes held Ms. Silva in contempt without a hearing and punished her for contempt by taking away custody of her daughter; and (3) the taped interview with the Commission's investigator where Judge Hughes admitted that she found the mother in contempt for failing to facilitate visitation. *See* Appellant's Appendix at p. 364.

Furthermore, even if there was any harm as a result of her answers being "under oath" as opposed to being "candid and honest", it was harmless error, and did not have any substantial impact on the Commission's determination that she violated the Code. *See* In re Fine, 116 Nev. at 1020-1021, 13 P.3d at 413 (court found error to be harmless where other substantial evidence supported the Commission's determination).

The only practical difference between answering written questions "under oath" and being required to answer written questions "candidly and honestly" is that the Judge potentially could have been charged with perjury for violating her oath. No additional charge for not being candid and honest with the Commission under Code Rule 2.16 was added to the Formal Statement of Charges. With there being no additional charges filed, and no argument or comment that Judge Hughes violated

her oath when answering the written questions, no harm occurred.

It should be noted that the evidence demonstrated, and the Prosecuting Officer argued, that the Judge's hearing testimony that she never held Ms. Silva in contempt was not credible and that her answers to written questions along with the JAVS video recording, the written orders and minutes, and the investigator's interview show that she did, in fact, hold Ms. Silva in contempt. *See* Appellant's Appendix, Prosecuting Officer's Closing Argument, pp. 498-505. Accordingly, the fact that Judge Hughes' answers to written questions were made under oath did not cause her to suffer actual prejudice. Even if actual prejudice were found to exist, it was harmless error at most and, therefore, the written questions should not be struck.

IV) CONCLUSION

This Court's decision regarding the impact, if any, of the Tobiasson ruling upon this case could potentially have a profound impact on all of the Commission's pending cases, as it was the practice of the Commission to require under oath answers to written questions in all of its cases. The Commission will, of course, abide by the Tobiasson ruling from this point forward but it cannot undo the past.

Judge Hughes failed to meet her high burden of demonstrating that the use of under oath answers caused her to suffer definite, actual, and substantial prejudice to her due process rights. Procedural due process means that a party had the opportunity to be heard "at a meaningful time and in a meaningful manner."

Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (internal quotations omitted), *quoting* Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). Clearly, Judge Hughes was accorded the opportunity to be heard at a meaningful time and in a meaningful manner.

At most, the Commission's consideration of the fact that Judge Hughes' answers to written questions were under oath was harmless error, if at all, because there is substantial evidence to support the Commission's determination that Judge Hughes violated the Code. Accordingly, this Court should confirm the Commission's imposition of discipline and findings that Judge Hughes violated the Code, determine whether additional discipline would be appropriate under the circumstances (e.g., appointment of a mentor), and not strike the written questions and answers as requested by Judge Hughes.

Dated this 5th day of June, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the following formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more and contains 2,280 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter

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relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of June, 2019.

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CERTIFICATE OF SERVICE BY ELECTRONIC FILING

I hereby certify that I am an employee of the LAW OFFICE OF THOMAS C. BRADLEY, and that on the 5th day of June, 2019, I did serve by way of electronic filing, a true and correct copy of the above and foregoing **RESPONDENT'S SUR-RELY** on the following:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE HONORABLE RENA HUGHES, EIGHTH JUDICIAL DISTRICT COURT, FAMILY DIVISION, DEPARTMENT J., COUNTY OF CLARK, STATE OF NEVADA
_____/

Case No. 76117

Appeal from the Nevada Commission on Judicial Discipline

MOTION FOR LEAVE TO FILE SUR-REPLY

The Nevada Commission on Judicial Discipline hereby moves pursuant to NRAP 27 for leave to file a Sur-reply. The Sur-reply is attached as Exhibit "1." This Motion is based upon the following Points and Authorities, the attached Exhibit hereto and the record before the Court.

Dated this 5th day of June, 2019.

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POINTS AND AUTHORITIES

I. LAW

The decision to grant or deny leave to file a sur-reply is committed to the sound discretion of the Court. If the movant raises arguments for the first time in his reply to the non-movant's opposition, the Court will either ignore those arguments in resolving the motion or provide the non-movant an opportunity to respond to those arguments by granting leave to file a sur-reply. *See* Flynn v. Veazey Const. Corp., 310 F.Supp.2d 186, 189 (D.D.C. 2004); *see also* Herbert v. Nat'l Acad. of Scis., 974 F.2d 192, 195 (D.C.Cir.1992) (acknowledging that consideration of arguments raised for the first time in a reply would be "manifestly unfair" to the respondent).

Sur-replies may be allowed in the appropriate circumstances, especially "[w]hen new submissions and/or arguments are included in a reply brief, and a nonmovant's ability to respond to the new evidence has been vitiated." Seay v. Tenn. Valley Auth., 339 F.3d 454, 481 (6th Cir.2003).

Sur-replies typically will be permitted where a party wishes to inform the Court of a new decision or rule implicating the motion under review. Fedrick v. Mercedes-Benz USA, LLC, 366 F.Supp.2d 1190, 1196-97 (N.D. Ga. 2005) (stating "valid reason for ... additional briefing exists ... where the movant raises new arguments in its reply brief"). *See also* Atlanta Fiberglass USA, LLC v. KPI, Co.,

911 F. Supp.2d 1247, 1262 (N.D. Ga. 2012).

II. NEWLY DECIDED CASE

After the Commission filed its Answering Brief on March 21, 2019, this Court decided Tobiasson v NCJD, Case No. 77551, on May 10, 2019. In her Reply, Judge Hughes relied on the decision in Tobiasson and made numerous arguments based upon the case, including a motion to strike. *See* Reply, pp. 21-27. Accordingly, the Commission respectfully requests leave to file the attached Sur-reply which is strictly limited to a response to the new Tobiasson arguments raised by Judge Hughes.

III. CONCLUSION

This Court should grant the Commission's Motion for Leave to File a Sur-reply.

Dated this 5th day of June, 2019.

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CERTIFICATE OF SERVICE BY ELECTRONIC FILING

I hereby certify that I am an employee of the LAW OFFICE OF THOMAS C. BRADLEY, and that on the 5th day of June, 2019, I did serve by way of electronic filing, a true and correct copy of the above and foregoing **MOTION FOR LEAVE TO FILE SUR-REPLY** on the following:

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