Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 21-114
District Docket No. IIB-2016-0041E

In the Matter of	:
Madeline M. Marzano-Lesnevich	:
An Attorney at Law	:

Decision

Argued: October 21, 2021

Decided: December 1, 2021

Christopher J. Koller appeared on behalf of the District IIB Ethics Committee.

Patrick B. Minter appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before us on a recommendation for a two-year suspension filed by the District IIB Ethics Committee (the DEC).

The formal ethics complaint charged respondent with having violated RPC 1.15(a) (failing to safeguard the property of clients or third persons that is

in the lawyer's possession in connection with a representation); RPC 1.15(b) (failing to promptly notify a third party of receipt of property in which that party has an interest); RPC 3.3(a)(2) (failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal, or fraudulent act); RPC 3.4(a) (unlawfully obstructing another party's access to evidence or concealment of a document having potential evidentiary value); RPC 4.1(a)(2) (knowingly failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client); RPC 8.4(a) (violating or attempting to violate the Rules of Professional Conduct, knowingly assisting or inducing another to do so, or doing so through the acts of another); and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice).

For the reasons set forth below, we determine to impose a censure.

Respondent earned admission to the New Jersey bar in 1989 and has no disciplinary history. She maintains a practice of law in Hackensack, New Jersey.

This case comes before the us following more than a decade of contentious litigation concerning events that occurred in 2004 and 2005, which culminated in the Court issuing a decision finding, by a preponderance of the evidence, that respondent committed legal malpractice in her representation of Maria Jose Carrascosa. Innes v. Marzano-Lesnevich, 224 N.J. 584 (2016).

As discussed further below, despite the existence of two reported Appellate Division decisions, as well as the Court's decision, our de novo review is based on evidence properly admitted and considered during the nine-day ethics hearing held in this matter. Indeed, in her verified answer to the amended complaint, respondent admitted many of the facts as alleged. However, respondent maintained that her actions resulted from her belief that an October 8, 2004 agreement (the Agreement) between her client, Carrascosa, and Carracosa's former spouse, Peter Innes, had been repudiated before respondent was retained.

Carrascosa and Innes were married in Spain in 1999. The parties entered into a prenuptial agreement in Spain, which subsequently was registered in New Jersey. Carrascosa was an attorney licensed to practice law in the European Union.

On April 17, 2000, Carrascosa and Innes had a child, Victoria, who was born in New Jersey. Victoria enjoyed dual citizenship with the United States and Spain. As such, she and her parents regularly traveled to Spain. Victoria's maternal grandparents lived in Spain, but frequently traveled to the United States.

In April or May 2004, Innes and Carrascosa's marriage began to break down. Although Innes and Carrascosa separated, and Carrascosa purchased a

new home, Innes moved in with Carrascosa and Victoria to help Victoria settle into the new home. However, after two to three weeks, when Victoria was settled into her new environment, Innes moved into his own apartment. Innes testified that, prior to the breakdown of his marriage, he had a very positive and involved relationship with Victoria and had even moved his office to the first floor of the couple's high-rise condominium building so that he could spend more time with his daughter.

Eventually, Carrascosa retained Mitchell A. Liebowitz, Esq., to represent her in connection with her separation from Innes. In turn, Innes retained Peter F. Van Aulen, Esq. Eventually, with the input of their clients, Liebowitz and Van Aulen negotiated the Agreement, which addressed parenting time; parenting restrictions; travel restrictions; and the employment of a parenting coordinator.

The Agreement provided that Innes would have parenting time with Victoria every other weekend, plus one evening during the week, which would be expanded after two weekends. The Agreement also provided that no third parties were to stay overnight where Victoria was residing. Furthermore, the Agreement provided that:

> Neither Ms. Carrascosa nor Mr. Innes may travel outside of the United States with Victoria without the written permission of the other party. To that end, Victoria's United States and Spanish passport shall be

> held in trust by Mitchell A. Liebowitz, Esq. Victoria's Spanish passport has been lost and not replaced, and its loss was reported to the Spanish Consulate in New York. Ms. Carascosa [sic] will file an application for a replacement Spanish passport within 20 days of today.
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> [Ex.P-3.][1]

The Agreement also contained the following provision regarding Victoria's travel:

> Neither Ms [sic] Carrascosa nor Mr. Innes may travel outside of a radius of 90 miles from Ft. Lee, New Jersey with Victoria without the written permission of the other party. However, for the first two weekends during which Mr. Innes has parenting time with Victoria, he shall be limited to a 30-mile radius from Ft. Lee.
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> [Ibid.]

Finally, the Agreement provided that the parties wished to resolve their issues amicably, via a mediator, and agreed to mutually select a parenting coordinator. In accord with the Agreement, Carrascosa provided Liebowitz with Victoria's United States passport.

Two days later, on October 10, 2004, Carrascosa sent Liebowitz an e-mail stating that "this is not going to work. This visitation schedule is not good for Victoria at all." Carrascosa claimed that Innes returned Victoria wearing the same clothes and that Victoria allegedly slept in the same bed as Innes and a

[1] "Ex." Refers to the presenter's exhibits admitted during the ethics hearing.

"new mommy." Carrascosa stated that having two mothers would be confusing to Victoria and that she wanted a psychologist to evaluate the child. Carrascosa also stated that she was not going to give up "on [her] jurisdiction" and expressed her belief that Innes belonged in prison. Carrascosa informed Liebowitz that she wanted to invoke her prenuptial agreement and "leave [Innes] totally broke." Carrascosa further wrote that she wanted to "leave [Innes] in the middle of the street so that he cannot get close to Victoria at any levels. He is dirt as a person and a very evil and calculative monster."

Despite Carrascosa's claims, she continued to permit Innes to have parenting time with Victoria, in accordance with the Agreement. However, beginning in mid-November 2004, Carrascosa refused to permit Innes to exercise parenting time with Victoria. Thus, November 2, 2004 was the last date Innes had parenting time.[2]

Ultimately, Carrascosa terminated Liebowitz's services, via a November 19, 2004 e-mail. Carrascosa informed Liebowitz that she had retained the firm Lesnevich & Marzano-Lesnevich (LML) and that respondent would contact him

[2] During the ethics hearing, Innes testified that November 2, 2004 was the last date he had parenting time with his daughter, that there have been very few occasions in the intervening years in which he was able to communicate with his daughter, and that those occasions largely were limited to social media.

to request the release of her complete file, including Victoria's United States passport.

It was LML's practice that respondent or Amanda Trigg, Esq., a partner at LML, would conduct an initial client consultation. Accordingly, respondent met with Carrascosa on November 17, 2004 to discuss the case. During that initial meeting, Carrascosa informed respondent that she had given Victoria's passport to Liebowitz, in accordance with the Agreement. Carrascosa also claimed that the Agreement had been repudiated, but that she had not sought to obtain Victoria's passport back from Liebowitz.

Following the consultation, Carrascosa left LML's office, but returned later to sign a retainer agreement and to provide documents to the firm. During that visit, Carrascosa met with Sarah Tremml,[3] an associate at LML, but they did not substantively discuss the case. Tremml did not examine the documents Carrascosa provided but, rather, merely accepted the documents and assisted Carrascosa with executing the retainer agreement.

On November 18, 2004 respondent met with Tremml and Francesca Marzano-Lesnevich,[4] another associate at LML, to discuss the case for the first

[3] Following the conclusion of LML's representation of Carrascosa, Tremml married, and her name is now Sarah Jacobs.

[4] Because respondent and her daughter, Francesca Marzano-Lesnevich, share a last name, this decision will use the name "Francesca" to differentiate between the two. Furthermore, Francesca married subsequent to the conclusion of LML's representation of Carrascosa, and

time. At the time, Francesca had been admitted to the bar for approximately one week and, thus, was the third attorney on the case, responsible for "arranging things, scheduling things."

During the meeting, Tremml, who characterized herself a "meticulous" note-taker, wrote down information Carrascosa provided during the meeting. Tremml's notes reflected the claim that the Agreement was negotiated against Carrascosa's wishes, that she felt compelled to agree to it, and that she felt that it was "horrific" to Victoria. The notes also reflected a claim that Victoria's Spanish passport had been stolen and the fact that her United States passport was held by Liebowitz. "GET BACK" was written and placed within a square in Tremml's notes.

On November 19, 2004, Tremml sent a letter to Liebowitz, via facsimile and regular mail, informing him that Carrascosa had retained LML and requesting that Carrascosa's file be immediately made available. That same date, Tremml sent Van Aulen a letter, via facsimile and regular mail, informing him that Carrascosa had retained the LML and that Victoria would not be made available that weekend for Innes' parenting time.

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is now known as Francesca O'Cathain.

A few days later, on November 22, 2004, Francesca accompanied Carrascosa to the Bergen County Superior Court to assist her in applying for a Temporary Restraining Order (TRO) against Innes. Francesca explained that, while at the courthouse, she merely listened to the testimony Carrascosa gave to the court's domestic violence hearing officer. Carrascosa claimed to the hearing officer that Innes had broken into her home multiple times; that he was physically abusive three times during their relationship; that he was verbally abusive on a regular basis; and that he had stolen Carrascosa's Social Security Card and Victoria's Spanish passport. The Honorable George W. Parsons, Jr., J.S.C., granted Carrascosa's TRO application and prohibited Innes from having contact with Victoria, pending a final hearing scheduled for December 7, 2004.

After LML sent Van Aulen the November 19, 2004 letter, Van Aulen called respondent. He informed respondent that he had just received her letter and respondent testified that he told her "we have an agreement," to which respondent replied, "there is no agreement." Respondent testified that she believed Van Aulen was merely referring to a parenting time schedule and "had no idea whether it referred to . . . [the Agreement]." Respondent conceded that she was unaware of any other agreement that Innes and Carrascosa entered into, other than the Agreement.

On November 23, 2004, Liebowitz sent Tremml a letter, via facsimile, stating that he had received LML's November 19, 2004 letter. Liebowitz stated "as you may know, I am holding [Victoria's] United States Passport. I would prefer if you arranged for the original file to be picked up by messenger with the messenger acknowledging receipt of the passport." Liebowitz also stated that a condition precedent to his release of the file was LML's payment of $21.96, representing copying costs.

On November 24, 2004, Tremml sent Van Aulen another letter, via facsimile and regular mail. In the letter, Tremml stated that it was LML's:

> understanding that a parenting time arrangement was negotiated and memorialized in a letter from Mitchell Leibowitz, Esq. to you on October 8, 2004. Notwithstanding Ms. Carascosa's [sic] signature on such agreement, Ms. Carascosca [sic] has grave concerns regarding [Victoria's] ongoing parenting time with Mr. Innes.
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> [Ex.P-12.]

Tremml recounted Carrascosa's allegation that Innes had shared a bed with Victoria and an unknown female. Additionally, despite the existence of a TRO prohibiting contact between Victoria and Innes, as well as Innes and Carrascosa, Tremml wrote that "discussions regarding Mr. Innes' parenting time can nevertheless move forward, despite the entry of the Temporary Restraining Order."

On December 6, 2004, on the advice of respondent, Carrascosa dismissed the TRO against Innes. Respondent asserted that she offered this advice because she felt that there was not enough evidence to corroborate the allegations in the TRO and, thus, the final hearing would become a "he-said, she-said trial." Therefore, respondent believed arranging a conference among the parties would be a better solution.

Two days later, at Liebowitz's request, LML arranged for Aztec Messenger Service to retrieve Carrascosa's file from Liebowitz. Victoria's United States passport was "loose" in the file.

Despite the effort LML expended to receive Carrascosa's file from Liebowitz, and despite LML's November 24, 2004 letter to Van Aulen, respondent, Tremml, and Francesca each claimed to have not looked at the file upon receipt. In fact, they asserted that no one at LML examined the file until respondent met with Carrascosa, on December 17, 2004. Francesca testified that, despite LML's possession of the file, she never looked at it until the commencement of the malpractice lawsuit against respondent.

Van Aulen testified that he was aware that Carrascosa's file had been transferred to respondent and assumed that, once respondent accepted the file, along with the passport, she would have notified him if she did not wish to serve as successor trustee of the passport, pursuant to the Agreement.

On December 8, 2004, Francesca sent a letter to Van Aulen, via facsimile and regular mail. The letter reflected that the two had communicated by telephone earlier that day concerning the selection of a parenting coordinator. Francesca also informed Van Aulen that she had been advised that he was contemplating filing an Order to Show Cause to facilitate parenting time for Innes. Francesca invited Van Aulen and Innes to participate in a settlement conference to "expedite [the] matter and avoid unnecessary litigation." The settlement conference originally was scheduled for December 17, 2004 but occurred on December 23, 2004.

In the interim, unbeknownst to respondent, on December 10, 2004, Van Aulen filed a complaint for divorce on behalf of Innes. Van Aulen testified that he did not serve respondent with a copy of the divorce complaint until December 28, 2004 because he did not want it to interfere with any progress that could have resulted from the settlement conference.

To prepare for the December 17, 2004, settlement conference, respondent met with Carrascosa at LML's office. Respondent testified that, because the file she received from Liebowitz was small, she first reviewed it during the meeting. She did so by emptying the file contents, including Victoria's United States passport, onto the table where she and Carrascosa were sitting. As she reviewed the documents contained in the file, respondent questioned Carrascosa,

including concerning the Agreement. At some point during the meeting, Carrascosa saw the passport and said to respondent that the passport must belong to Victoria. Respondent then picked up the passport and looked at it. Respondent testified that the passport had Victoria's name on it and a picture of the child as a baby. Carrascosa then asked respondent if she could see it and respondent said "yes." Respondent testified that she could not say that she gave the passport to Carrascosa, or whether she permitted Carrascosa to take the passport, but conceded that the result was the same – Carrascosa took possession of the passport and left LML's office with the passport. Francesca testified that "we all just knew" that respondent had given the passport to Carrascosa during the meeting. Indeed, Tremml testified that it was her understanding, based on what respondent told her, that respondent had given the passport to Carrascosa. Respondent also portrayed herself as ignorant that she was trustee of the passport, and thus "gave it" to Carrascosa.

Van Aulen and Innes appeared at LML's office on December 17, 2004, one hour late to the settlement conference, which resulted in its cancellation. Van Aulen testified that respondent never told him the Agreement had been repudiated, and that she did not tell him on December 17, 2004, when they spoke, that she had just given Victoria's passport to Carrascosa. Likewise, Van

Aulen never told respondent that his client granted Carrascosa permission to travel outside the United States with Victoria.

At the December 23, 2004, settlement conference, Van Aulen and respondent had an argument. Tremml heard Van Aulen shout that Carrascosa was "not abiding by the [A]greement either. Neither of them are that's why we met here today in order to try to come to a new settlement." The parties did not come to any new agreement at the conference and, although Van Aulen offered to supervise a visit between Innes and Victoria for the upcoming Christmas holiday, Carrascosa refused to permit visitation. Ultimately, five days after the settlement conference, Van Aulen served respondent with Innes' complaint for divorce.

Additionally, on January 19, 2005, Van Aulen filed on behalf of Innes a notice of motion for joint custody and enforcement of the visitation schedule. Innes sought enforcement of the visitation schedule as set forth in the Agreement; joint custody of Victoria; liberal telephone contact with Victoria; access to her school and medical records; and an order requiring Carrascosa to keep Innes apprised of Victoria's activities inside and outside of school. Although not specifically pled in the motion, in his certification attached to the motion, Innes referenced the ways in which he had attempted to abide by the Agreement, but asserted that Carrascosa was on a "crusade to keep [him] from

seeing [his] daughter." Innes also stated that he was "afraid" of what Carrascosa would do next, stating that:

> the agreement dated October 8, 2004 stated that neither party would travel outside of the United States with Victoria. [Carrascosa] is from Spain and her parents live in Spain. I am afraid that if [she] is forced to allow me to see our daughter, she might flee the country. Therefore, I ask the Court not only to grant me visitation in accordance with the October 8, 2004 visitation agreement, but also restrict [Carrascosa] from taking Victoria outside the United States.
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> [Ex.P-19.]

The motion was made returnable on February 4, 2005. However, on January 20, 2005, Tremml sent the court a letter to request a one-month adjournment of the hearing. In her letter, Tremml advised the court that Carrascosa was planning to leave the country on a "pre-planned pre-paid trip" and that she was not going to return to the United States until February 2, 2005. Tremml claimed it would have been impossible to communicate with Carrascosa to prepare her cross-motion while she was out of the country. In requesting the adjournment, Tremml noted that LML was attempting to obtain documents from Spain to prove that there were already pending court proceedings in that country that concerned the parties' divorce and custody issues. As an additional basis for adjournment, Tremml also represented that LML's "entire office" was scheduled to attend the New Jersey Family Law Retreat, in New Orleans,

Louisiana, beginning February 8, 2005, four days after the hearing was scheduled.

The court denied LML's adjournment request. Consequently, respondent filed a notice of appearance in the divorce action to contest solely the issue of jurisdiction. However, respondent noted that, if New Jersey assumed jurisdiction over the case, she reserved the right to amend her notice of appearance to file a substantive answer to Innes' complaint for divorce.

On January 27, 2005, at 2:46 a.m., Carrascosa sent an e-mail to Francesca and Tremml stating "this is in principle Victoria's travel schedule." Carrascosa stated that, in the event she was successful in her action before the court in Spain, Victoria would "need to remain in Spain until May – June as estimated timing to resolve all actions in process before all three instances Ecclesiastical, Civil and Criminal." Carrascosa also wrote that she wanted Innes and his mother "behind bars and [she would] make sure thats [sic] where they end up." Using the future tense, Carrascosa also explained in her e-mail that Victoria would fly with her maternal grandparents from Newark Liberty International Airport to Heathrow Airport on January 13, 2005, and from Heathrow Airport to Valencia, Spain, on January 14, 2005. Finally, using the future tense again, Carrascosa explained to LML that she had to "be in Spain on [January] 25th, so hope to

leave with British or Continental on [January] 24th," which was at least two days before she sent the e-mail to LML.

Later that day, Carrascosa sent an e-mail to Francesca and Tremml containing flight information for Victoria, with a subject line indicating "Re-SENDING – FW Your British Airways eTicket Receipt." In the e-mail, Carrascosa wrote "PLEASE DO NOT GIVE [INNES] ACCESS TO THIS [sic] RESERVATION CODES…OR MINE. I WOULD NOT LIKE TO BE ARRESTED WITH FALSE CLAIMS OF KIDNAPPING…" The eTicket indicated that, on January 12, 2005, Carrascosa had purchased a round-trip flight for Victoria to travel from Heathrow Airport on January 14, 2005, to Valencia, Spain. Victoria was scheduled to return to Heathrow Airport on February 2, 2005.

On January 28, 2005, Carrascosa sent another e-mail to Francesca and Tremml containing her flight information. The e-mail reflected that, on November 5, 2004, Carrascosa purchased a ticket for a round-trip flight on Continental Airlines to travel from Newark, New Jersey to Madrid, Spain. Carrascosa was scheduled to depart from Newark Liberty International Airport on November 29, 2004 and to return on December 12, 2004. The e-mail also reflected that, on December 9, 2004, Carrascosa's credit card was charged a $200 change fee and, on December 11, 2004, she was charged $270, reflecting

the difference in airfare. Thus, Carrascosa returned to Newark, New Jersey on December 16, 2004.

On February 2, 2005, Carrascosa sent an e-mail to respondent claiming that Spain had jurisdiction over her divorce and custody disputes. Carrascosa informed respondent that Victoria was already in Spain. Carrascosa stated that she wanted Victoria:

> in the USA with [her] at home as soon as possible, but that day will be the day [Innes] and his mother are before the Competent Authorities and behind bars. [Victoria] is [her] daughter, [she] gave birth to her and [she was] not bringing her to the USA until a. the authorities of the Courts in Spain authorize [her] to, b. [Innes] is being criminally prosecuted.
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> [Ex.P-22.]

Carrascosa further stated that she could assure respondent that "if Spain would not have resolved in Victoria's protection and her favor, [she] would have taken off and taken [her] child to a geographical frame where she would be safe." Finally, Carrascosa informed respondent that she would return to the United States that Friday and:

> if [she gets] arrested because of false accusations of kidnapping, then so be it! but [sic] my child will not step foot in the US until those criminals [Innes and his mother] are behind bars. I am sorry but that is my decision and that is final, and over any judges in the US, Spain and the rest of the Universe.
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> [Ibid.]

In an undated response to Carrascosa's e-mail, despite knowledge that Victoria already was in Spain, Francesca informed Carrascosa that she had "read the part where [she] stated that [she] might have to remove Victoria to a safe place. Please be aware that NJ has anti-removal laws. Please also be aware that you must follow all Court Orders."

At the February 4, 2005, motion hearing before Judge Parsons, respondent informed the court that she had received an order from a Spanish court but had not had time to translate it. Respondent provided Van Aulen with a copy of the order a few minutes before the hearing began.

Additionally, at the beginning of the hearing, Van Aulen informed the court that "they had an agreement in October to have visitation. We have an agreement to appoint a parent moderator picked by the defendant's present attorney. I didn't pick it. I gave them – " to which respondent interjected "Excuse me. Not me, I wasn't in this case." Respondent did not, however, argue that she believed the agreement did not exist or that it had been repudiated prior to Carrascosa retaining her.

The court questioned how there could be comity with Spain when the Spanish court did not have personal jurisdiction over Innes; therefore, Judge Parsons determined that New Jersey had jurisdiction over the case. Respondent then requested a stay of the proceedings, which the court denied.

Later in the hearing, during an ongoing discussion regarding jurisdiction, the court noted that Victoria had been living in New Jersey for more than six months; in response, Van Aulen offered that the last time Victoria had been in Spain was more than one year prior. Respondent simply replied "That's not true. That's not true." Without expanding on what was untrue, respondent then discussed service by the Spanish Ecclesiastical Church messenger.

The court then inquired about the Agreement. When the court questioned whether the visitation schedule as set forth in the Agreement was a court order, respondent stated "it was an agreement between the counsel with – I don't happen to have a copy." The court then inquired why Innes should not have visitation with Victoria, to which respondent stated "[y]our Honor, what happened was, the parties separated. There had been a lot of problems during the course of the marriage. They had separated several times. There are many claims of abuse by Ms. Carrascosa against Mr. Innes." Respondent also alleged that Innes had been using marijuana in the presence of Victoria. Respondent did not, however, assert the position that Innes did not have visitation because the Agreement had been repudiated.

The court then recessed to hear another matter. After going back on the record in Innes v. Carrascosa, respondent asked the court to reconsider and reserve on its decision concerning the court's denial of her request for a stay.

Respondent also asked that the court schedule a conference call with the Spanish court, stating that it was her understanding, based on her limited ability to understand the Spanish language in the order, that the Spanish courts had assumed jurisdiction over the case and ordered Victoria not to be removed from Spain, and that the matter was very complicated because Spain had many different courts and tribunals involved in the same action.

The court was amenable to participating in a conference call with the Spanish court to discuss jurisdiction, but explained "I think what the real issue is do I give him visitation today?" Respondent replied "Your Honor, may I just address something? Before we even get to the visitation issue [. . .] the proceedings in Spain started back in June [. . .] through the process that must be done in case. There is what's called a due diligence process that must be placed before the Ecclesiastical Tribunal." Judge Parsons replied that he had an action pending before the New Jersey court for visitation and that there was "an agreement" between the parties. Judge Parsons acknowledged Carrascosa's allegation that Innes had used marijuana and noted that, when drug-tested by the court that day, Innes tested negative, so he was "enforcing the visitation schedule." Van Aulen expressed his concern "that – is the child here or did the

defendant remove the child from this country?" Respondent stated "the child is in Spain," to which the court's reply was "What?"[5]

When respondent clarified that there was an order from Spain stating that Victoria could not be removed from that country, the court explained "Oh, I know what you said the order said, but that didn't mean the child was there." Van Aulen then informed the court that he was going to advise his client to contact the Bergen County Prosecutor's Office and requested an order from the New Jersey court directing Victoria's immediate return to New Jersey. The court then questioned how Victoria traveled to Spain, to which respondent replied "I don't know if she went with her mother or if she went with her grandparents, who had been babysitting her. And I know her grandparents had been babysitting her."

Van Aulen reiterated his request for an order directing Victoria's return to New Jersey and requested from the court "an order that once she's here that

[5] Despite no mention of an in-chambers conference on the record at the February 4, 2005 hearing, during the ethics hearing, respondent stated that she and Van Aulen had an in-chambers discussion wherein she told Judge Parsons that Victoria was in Spain. Although respondent testified that she believed she informed Van Aulen of Victoria's travel to Spain prior the hearing, she could not recall exactly when. Respondent also testified that she believed she "might" have told Judge Parsons during the in-chambers discussion that the Agreement had been repudiated. When questioned whether she believed the surprise Van Aulen expressed on the record when he learned Victoria was in Spain, was him "somehow playing dumb" for the purposes of the hearing, respondent testified that she did not believe that Van Aulen was "playing dumb," but rather, attorneys "argue for the purposes of [their] clients in court. And [they] talk privately in chambers or with each other."

her passport is given up to myself or to the Court until this matter is resolved. That was an original parenting agreement that the passport would be held by one of the parties." Respondent did not then inform the court that the Agreement had been repudiated, that there was no requirement that the passport be held in accordance with the Agreement, or that she did not feel the Agreement had required her to hold Victoria's passport in trust once she received the file containing the passport. Rather, respondent asserted to the court that Carrascosa needed her own passport because she was a practicing attorney in the European Union with ongoing cases in Spain and Panama.

Following the hearing, the court entered an order which required Victoria's immediate return to the United States and required the parties to abide by the Agreement upon Victoria's return. There is no evidence in the record that respondent contested Judge Parsons' order on the basis that there was no Agreement, due to its purported repudiation. At a subsequent hearing, on March 22, 2005, Judge Parsons ordered that, if Carrascosa failed to return Victoria to the United States within three weeks, the court would issue a warrant for her arrest.

On May 2, 2005, on notice to Van Aulen and Carrascosa, respondent filed a notice of motion to be relieved as Carrascosa's counsel. Respondent sought to be relieved as counsel effective April 21, 2005, the last time she had

communication with Carrascosa. In her certification in support of the motion, respondent asserted that "since the commencement of our representation [Carrascosa] has repeatedly failed to follow our advice, has repeatedly failed to follow a prudent course of action and has failed to obey Court Orders. She has arbitrarily violated the terms of our retainer agreement." On May 13, 2005, the court granted the unopposed motion.

Carrascosa failed to comply with the court's orders to return Victoria to the United States. Innes v. Carrascosa, 391 N.J. Super 453, 497 (2007). On August 23, 2006, the court dissolved the marriage between Innes and Carrascosa and awarded Innes sole legal and residential custody of Victoria. Innes, 391 N.J. Super. at 476. Additionally, on December 19, 2006, a grand jury in Bergen County indicted Carrascosa, charging her with eight counts of second-degree interference with custody, contrary to N.J.S.A. 2C:13-4a(1), N.J.S.A. 2C:13-4a(2), and N.J.S.A. 2C:13-4a(4), and one count of fourth-degree contempt, contrary to N.J.S.A. 2C:29-9a. When Carrascosa ultimately returned to the United States without Victoria, she was convicted, incarcerated, and served six years in prison for her crimes. Innes v. Marzano-Lesnevich, 224 N.J. 584, 589 n.3 (2016).

In October 2007, Innes filed a lawsuit against respondent for legal malpractice, alleging that she had negligently released Victoria's passport to

Carrascosa. Innes v. Marzano-Lesnevich, 224 N.J. 584 (2016). Following a jury trial, Innes was awarded $813,100.20 in damages. Id. Innes also recovered legal fees from respondent. Innes, 224 N.J. at 586. Respondent appealed the matter, and later, after granting certification, the Court reversed the determination of the trial court and the Appellate Division and remanded the matter for a finding as to whether respondent "intentionally breached [her] fiduciary obligation to Innes by releasing Victoria's United States passport to Carrascosa without Innes' permission." Id. The balance of the Court's decision concerned the application of the "American Rule," which provides that litigants must bear the cost of their own attorneys' fees, in New Jersey. Id. at 592.

However, the Court rejected respondent's assertion that she was not bound by the Agreement, finding, by a preponderance of the evidence, that respondent's contention was "without legal or factual support." Id. at n.4. The Court noted that respondent had acknowledged reading the Agreement prior to releasing Victoria's passport to Carrascosa, concluding "therefore, [respondent] knew about the Agreement and the obligations it imposed upon [her]" under RPC 1.15(a) and RPC 1.15(b). Id. Following the Court's remand, the parties negotiated a settlement and, thus, the issue of intent was never litigated.[6]

[6] According to the New Jersey eCourts system, on July 14, 2016, the court recorded a lien against respondent, LML, and Carrascosa for their failure to pay the $813,100.20 judgment Innes obtained following the malpractice trial. At the August 7, 2019, ethics hearing,

At the ethics hearing, respondent was asked whether she reported the malpractice claim to her insurance company in order to have the company provide representation. Respondent explained she did not because she believed the lawsuit "would go nowhere" and that she did nothing wrong. Respondent explained she wrote a letter to Innes' attorney in the malpractice case and "explained the facts of the case totally believing, and still believing, in effect, that I did nothing wrong." Respondent was asked to clarify whether at the time of the ethics proceeding she still believed she did nothing wrong, and she explained:

> I accept the decision of the Appellate Division, I wish there were things done differently, not only by me, but by Mr. Liebowitz and Mr. Van Aulen. But do I think that I committed an act intentionally violating the Rules of Professional Conduct? My God, no.
>
> [8T153.][7]

Respondent further asserted that she believed her actions were "in accordance with custom and practice." She testified that, in hindsight, she wished

> that [she] had done certain things, [she wished she] had demanded that Mitchell Liebowitz talk to [her, she wished she] had demanded questions be answered by Van Aulen, [she wished] that Mitch Liebowitz had

respondent testified that the judgment was "being satisfied," but was not yet fully satisfied. At oral argument before us, respondent clarified that she was on a payment plan and would satisfy the judgment by April 2023.

[7] "8T" refers to the transcript of the ethics hearing, dated August 7, 2019.

> gotten on the phone or written [her] a letter, which is the proper way to do things when you turn over a file, that says what is the status of the absolute case that we said that there was an agreement that you – that Mitch Liebowitz would have gotten Van Aulen and myself on the phone and said, can I transfer this passport? Do you all agree? One hundred percent. Hindsight is everything. I wish it were all done differently. [. . .] But not just by myself.
>
> [8T155.]

During the ethics hearing, a panel member informed respondent that acceptance of responsibility and expression of remorse is something the panel would consider and questioned whether respondent wished to add anything to her answer about having made a mistake. Respondent replied that:

> to think that [she] played any part in Mr. Innes not seeing his daughter all those years, is something [she] live[s] with on a daily basis. [She] went up to Mr. Innes after the jury found that [she] had – gave their verdict [. . .] and [she] said to him, I am so sorry that this happened to you. [. . .] It's very painful to think that you might have been the cause of someone else's sorrow.
>
> [8T220-8T221.]

The panel member then explained to respondent that saying "I'm sorry that I did what I did, it was wrong and [. . .] you have my sincerest apology" is different than saying "I'm sorry this happened to you." Respondent agreed with the panel member and stated that she was "not saying that I'm sorry this happened to Mr. Innes, I'm saying I'm sorry I was any part of this happening to him."

Respondent testified at length about how the publicity from the reported decisions had negatively impacted her practice, including the loss of clients, the loss of a firm partner, and a substantial financial impact. Respondent also testified that, by virtue of her status in national matrimonial law organizations, she has been mortified that the malpractice case has been the subject of "many seminars." Respondent asserted her belief that, if we were to suspend her for her conduct, her firm, or at the very least the matrimonial department, would close.

Following the ethics hearing, the hearing panel issued its report, finding that respondent violated RPC 1.15(a); RPC 4.1(a)(2); RPC 8.4(a); and RPC 8.4(d).[8] The panel found that the presenter had not proven, by clear and convincing evidence, that respondent violated RPC 3.3(a)(2) or RPC 3.4(a).

Prior to the commencement of the hearing, the presenter had filed a motion in limine to bar the proffered reports and testimony of Carl D. Poplar, Esq. and Edward S. Snyder, Esq. The presenter argued that Poplar, who respondent offered as an expert in the field of legal ethics, and Snyder, who was offered as an expert regarding the practice of family law, could not offer to the panel any testimony that was outside the competence of the panel, in contravention of N.J.R.E. 702 and State v. J.L.G., 234 N.J. 265 (2018).

[8] The hearing panel report was silent as to the RPC 1.15(b) charge contained in the formal ethics complaint.

Regarding Poplar's expert report, although Poplar wrote that it was not his intent to suggest to the panel what the ultimate findings of fact or conclusions of law should be, the presenter argued that was precisely what Poplar did. For example, Poplar discussed each of the five counts of the formal ethics complaint and opined that respondent had not violated any of the charged RPCs based on his analysis of the facts as alleged and existing case law. Consequently, the presenter argued that to permit Poplar to offer his opinion would be tantamount to Poplar usurping the function of the ethics panel hearing the case.

Snyder's opinion was premised on the assertion that the Agreement was repudiated and that all parties were acting in accord with a repudiation of the Agreement. In his report, Snyder opined that respondent "acted in conformity with reasonable, customary and acceptable practices" when she relied on Carrascosa's representation that the Agreement had been repudiated. Snyder asserted that the Agreement was executed more than one month before respondent was retained and that, after the parties signed the Agreement, Carrascosa sent an e-mail to Liebowitz "informing him that the Agreement was 'not going to work' and that the visitation scheduled was 'not good for Victoria at all." Snyder asserted that, after Carrascosa sent that e-mail, the "burden was then on Liebowitz" to notify Van Aulen that the Agreement had been repudiated. Snyder claimed that Liebowitz had failed to dispatch that obligation.

Snyder opined that, in the practice of matrimonial law, "clients routinely change their minds about agreements entered prior to the filing of a Complaint for Divorce [. . .] and such agreements are routinely terminated and repudiated either expressly or impliedly before being memorialized in an order of the court." Additionally, Snyder opined that, if prohibiting Victoria from traveling internationally "was such an important" issue, her passport should have been surrendered to the Superior Court.

Snyder faulted Liebowitz for drafting an Agreement that merely stated that Victoria's passport would be "held in trust," without offering the terms of the trust, such as the circumstances surrounding when and to whom the passport could be released. Snyder also noted that the Agreement should have provided a provision for the responsibilities of successor trustees.

Snyder also opined that the conduct of Van Aulen and Liebowitz supported respondent's belief that the Agreement had been repudiated, and that respondent's conduct was, thus, in conformity with reasonable and customary practices in matrimonial law.

Furthermore, Snyder opined that, based upon the circumstances of the parties' separation, Carrascosa was Victoria's de facto primary caretaker. See Beck v. Beck, 86 N.J. 480 (1981) (granting the parent with primary physical

custody of a child the responsibility for "minor" daily decisions concerning the child).

Regarding Snyder's expert report, the presenter argued that Snyder's expert opinion was that respondent's conduct met a preponderance of the evidence standard. The presenter noted that much of Snyder's report emphasized that respondent had acted in conformity with "reasonable, customary and acceptable practices" in family law, which falls short of the clear and convincing standard required in ethics proceedings. Moreover, the presenter argued that Snyder mischaracterized some of the facts of the case to support his contentions. For example, Snyder wrote that Carrascosa's October 10, 2004 e-mail to Liebowitz said "the Agreement is not going to work" when the plain language of the e-mail stated that the visitation schedule was not going to work.

The presenter also argued that, like Poplar's opinions, the opinions Snyder offered were opinions regarding ultimate issues to be determined by the panel. Finally, the presenter noted that the expert reports were not produced in a timely fashion or in accordance with the September 17, 2018 prehearing order and, thus, should be excluded.

In opposition to the presenter's motion, respondent's counsel, Justin P. Walder, Esq., noted that the presenter had not questioned the expertise of either Poplar or Snyder. Walder argued that the members of the panel were not experts

"as to the acceptable and customary standards in professional ethics and in the practices of family law" and, thus, the expert testimony of Poplar and Snyder would provide the panel with "potentially" useful information. Walder also argued that N.J.R.E. 704[9] explicitly permits expert testimony that goes to the ultimate issue to be determined by the panel. Walder further argued that the panel should be permitted to hear and consider the testimony of Poplar and Snyder, and then make its determination based upon all the information provided during the hearing.

Although no formal motion is included in the record, in respondent's June 6, 2018 prehearing memorandum, Walder noted that one of the issues for the DEC's determination was "the preclusive factual impact, if any" of the reported Appellate Division decisions and Court's decision in this matter.

To that end, on July 11, 2018, Walder provided the panel chair with a letter brief addressing the issue of the doctrine of collateral estoppel as it related to the presenter's obligation to prove clearly and convincingly that respondent

[9] N.J.R.E. 704 provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." See also State v. Berry, 140 N.J. 280, 298 (1995) ("[t]he evidentiary rules allowing admission of expert testimony on ultimate issues repudiate the common-law rule precluding such testimony because it invaded the jury's province. Although admissible, such testimony may be excluded if its probative value is substantially outweighed by the risk of undue prejudice" (internal citations omitted)).

violated the Rules of Professional Conduct. Walder argued that the presenter must prove his case by clear and convincing evidence and noted that the decisions in the malpractice case against respondent were determined by a preponderance of the evidence. Although the evidence presented at the malpractice trial and the ethics hearing may be similar, or the same, Walder argued that the determinations of the jury in the malpractice case were irrelevant and impermissible in the ethics proceeding. Walder asserted that, in the malpractice case, there was no finding that respondent acted intentionally or knowingly. Rather, the "only" issue submitted to the jury at the conclusion of the civil trial was whether respondent negligently released Victoria's passport to Carrascosa.

Walder argued that the Restatement (Second) of Judgments § 28 (1982) listed five exceptions to the doctrine of collateral estoppel and that the presenter had not satisfied any of the exceptions in his attempt to use the prior decisions in the ethics matter. Thus, Walder argued, the presenter was foreclosed from using the civil litigation determinations, under a preclusion theory, in the ethics proceeding.

Thereafter, on August 7, 2018, Walder wrote a second letter to the hearing panel chair objecting to the use of the decisions in the ethics matter. Walder argued that, in In re Barrett, 234 N.J. 81 (2018), the Court held that the prior

court decisions had "no preclusive effect" on the ethics matter. Walder argued that, because the prior court cases were decided based on a preponderance of the evidence standard, under Barrett, no aspect of those cases were permitted to be used during the ethics hearing and, thus, the panel could not take judicial notice of the decisions.[10]

On November 6, 2018, hearing panel chair Kevin C. Corriston, Esq. heard argument on the presenter's motion to bar the expert testimony of Poplar and Snyder, and on the issue of whether the presenter would be permitted to use the prior reported decisions to establish facts in the ethics matter.

Preliminarily, at the hearing, Walder questioned whether, under R. 1:20-6(4)(b), Corriston could issue a ruling on the prehearing motions without the input of the other panel members, who were not present at the hearing. Walder suggested that, prior to Corriston issuing a ruling, the other panel members "ought to at least have the opportunity to review the full record and agree or disagree" with his decisions. Corriston informed the parties that he had consulted with Trenton (presumably the OAE) and determined that he could, under the Rule, resolve prehearing issues in the absence of the other panel members.

[10] The Court subsequently vacated its decision in Barrett, without discussion.

Regarding the two prehearing issues – the admissibility of expert testimony and the use of prior civil litigation – the presenter then reiterated the arguments he set forth in his brief. Likewise, Walder relied upon the arguments he had set forth in his brief. Walder suggested that, notwithstanding that the experts both opined on the ultimate issue to be determined in the case, the panel could ascribe to the testimony whatever weight it felt was appropriate, but that it was unreasonable to preclude the testimony in the first place. Walder also argued that the only way for the panel to determine how "the trusteeships works in the real world of family law and how successor trusteeships work when you're not dealing with an order of the court" was to hear Snyder's testimony and to consider his report. Walder suggested that to consider the facts of this case without the benefit of Snyder's report would be to decide the matter in a "vacuum."

Regarding whether the prior decisions in respondent's malpractice case could be used as evidence in respondent's ethics matter, Walder argued that, because the facts of the prior cases were determined by the jury on a preponderance of the evidence standard, they could not be used, under a preclusion theory, in the ethics hearing. When Corriston questioned Walder whether the panel could use, for example, a portion of the prior decisions stating what a witness had testified to, instead of re-litigating the matter, Walder

emphatically stated that the panel was not permitted to consider any part of the prior decisions, because they were decided at a lower burden of proof than is required in an ethics case. When Corriston attempted to distinguish between a decision restating the testimony given during the trial and a decision offering legal conclusions, Walder argued that the panel may not consider either. Walder noted that the presenter could confront witnesses in the ethics hearing with testimony he or she may have given during the malpractice hearing, but that it would be impermissible to simply adopt the prior statements given under oath, because that testimony was given in a trial which required a lower standard of proof.

After hearing argument on the two issues, Corriston determined that Poplar's expert testimony regarding the state of attorney ethics law in New Jersey was unnecessary because that would be akin to "telling a judge [. . .] on a bench trial you want to bring in an expert on [. . .] jurisprudence." Moreover, Corriston did not believe Snyder's report or testimony would help the trier of fact in this case because the report was more applicable to a malpractice case and not an ethics matter.

Corriston ruled that both experts would be barred from testifying and that their reports would not be admitted into evidence. Corriston told the parties that he would explain his ruling in a written decision.

Regarding whether the panel could consider the prior reported decisions, Corriston's ruling was that the panel would consider all the issues in the case under the clear and convincing standard and that his:

> preferred position would be to actually confront the respondent with a – with a transcript, but to the extent that the presenter has difficulty or there's disagreement or there's – for instance, if – if the customs agent, he's not subpoenaed, he's not there, it's not a transcript of him, I think we can rely upon the findings of fact in the reported decisions.
>
> [1T57.][11]

Corriston explained that he saw no issue with "falling back" upon the factual determinations made by the Court in the reported decisions.

The record reflects that, in an e-mail dated November 16, 2018, Corriston informed the parties that the presenter's motion to bar the expert testimony was granted and Walder's "motion to hold respondent's prior civil matter inadmissible is granted." Corriston wrote that he would be "rendering a written opinion as soon as [he could]." The same day, Corriston issued a written order barring the reports and testimony of Poplar and Snyder. Although twice promised, the record does not contain any written decision or order regarding the use of the malpractice cases in the ethics matter.[12]

[11] "1T" refers to the transcript of the motion hearing, dated November 6, 2018.

[12] By letter dated May 8, 2019, respondent's counsel requested reconsideration of Corriston's

Following the resolution of the prehearing motions, the panel heard testimony from respondent, Liebowitz; Van Aulen; Tremml; Francesca; and six character witnesses. On May 13, 2020, the DEC issued its report.

In its report, the DEC adopted the factual background of the case as set forth in Innes v. Marzano-Lesnevich, 224 N.J. 584 (2016), Innes v. Marzano-Lesnevich, 435 N.J. Super. 198 (App. Div. 2014), and Innes v. Carrascosa, 391 N.J. Super. 453 (App. Div. 2007). The DEC also referenced an unreported District of New Jersey summary judgment decision, issued on September 11, 2015, in which the Honorable Esther Salas, U.S.D.J., ruled that respondent's malpractice insurance carrier was not required to pay a judgment Innes obtained against her. See, Innes v. Saint Paul Fire and Marine Ins. Co., et al, 2015 U.S. Dist. LEXIS 121753, Civil Action No. 12-234 (D.N.J. 2015).

Despite adopting the factual background of the three reported decisions concerning the Innes case, the DEC stated that it considered the matter anew, in accordance with In re Barrett, 234 N.J. 81 (2018), and applied a clear and convincing standard of proof to come to its determination that respondent

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determination to bar the expert reports and testimony of Poplar and Snyder. Corriston heard argument regarding the motion for reconsideration on May 14, 2019. On the record, Corriston denied the motion for consideration for failure to satisfy the two prongs of Cummings v. Bahr, 295 N.J. Super 374 (App. Div. 1996). Corriston determined that respondent had failed to demonstrate that the prior decision was based on a palpably incorrect or irrational basis or that he did not consider the significance of competent evidence. Thus, Corriston determined that respondent was not entitled to reconsideration, and even if she was, the expert reports would not offer specialized knowledge outside the knowledge of the panel.

committed misconduct. In so doing, the DEC reasoned that the facts of this case already had been proven under a preponderance of the evidence standard and thus, would not need to be proven again. However, the DEC noted "any deviation from the facts previously determined by the courts were weighed by the Panel, if in conflict, anew."

The DEC found that Van Aulen's testimony at the ethics hearing was credible. The DEC particularly credited Van Aulen's testimony that he had no understanding with respondent that the Agreement had been repudiated. The DEC also found that he anticipated that respondent would hold Victoria's passport in trust, despite Carrascosa's retention of new counsel.

The DEC also found Liebowitz's testimony credible. The DEC credited Liebowitz's testimony that he was concerned about the significance of the passport under the Agreement and his testimony that there was no indication from Carrascosa or respondent that the Agreement had been repudiated. Indeed, the DEC found that Liebowitz was particularly concerned about the importance of the passport and consequently sent it separate from the rest of the file, by a messenger hired by respondent's law firm. Liebowitz even required the messenger to sign for the passport.

Francesca also testified at the ethics hearing. The DEC noted Francesca's concession that no one from LML communicated to Liebowitz that the

Agreement had been repudiated. However, the DEC did not find Francesca's testimony credible. The DEC rejected Francesca's testimony that she had never read the Agreement, noting that if she had never read it, she would not have been able to send the December 8, 2004 letter, which specifically referenced a parenting coordinator. The DEC also rejected Francesca's testimony that, even in retrospect, she believed that respondent was not required to hold Victoria's passport in trust. However, the DEC acknowledged that, at the time in question, Francesca was an inexperienced attorney and likely did not understand the significance of Victoria's passport.

Innes also testified at the hearing. He recounted the circumstances surrounding his separation and ultimate divorce from Carrascosa. Innes testified that he had a positive relationship with Victoria, and that believed the Agreement remained in effect. The DEC credited Innes' testimony surrounding his participation in a Hague Convention on the Civil Aspects of International Child Abduction petition in Spain, an issue that the Appellate Division ultimately analyzed. See Innes v. Carrascosa, 391 N.J. Super 453 (2007).

In finding Innes' testimony credible, the DEC noted he was "extremely measured given all the circumstances" and was "genuinely affected by the loss of any paternal relationship with Victoria."

Respondent testified extensively at the hearing. The DEC did not find respondent's testimony credible; rather, the DEC found respondent's testimony to be "evasive." The DEC was troubled by respondent's failure to fully describe or explain how Carrascosa came into possession of Victoria's United States passport. The DEC did not believe respondent's explanation that she could not recall whether she gave the passport to Carrascosa or permitted her to take the child's passport.

Importantly, the DEC rejected respondent's repeated assertions that the Agreement had been repudiated. The DEC noted that it did not find that respondent was being truthful when she testified:

> she actually believed that this contract [the Agreement] had been voided and therefore the entirety of same was no longer in effect. The rudimentary laws of contract belie this position. Even if the contract was, in fact, repudiated or Respondent truly believed it to be so, there is still no basis for the Panel to believe that Respondent failed to appreciate that she was holding the passport in trust.
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> [HPR,p25.][13]

The DEC also was confounded by respondent's position that she was not required to hold the passport in trust, "given the tortuous [sic] legal history of this matter." The DEC reasoned that, given respondent's "extensive knowledge

[13] "HPR" refers to the hearing panel report, dated May 13, 2020.

of family law," she should have recognized that she was obligated to hold the passport in trust. The DEC further noted that, if there was any doubt in respondent's mind concerning who was obligated to hold the passport once she received it, she should have contacted Liebowitz to determine whether she was expected to hold Victoria's United States passport in accordance with the Agreement, considering her role as Carrascosa's new counsel.

Tremml also testified at the hearing. The DEC found Tremml's testimony generally credible but found that her memory was vague and faulty and was ultimately unhelpful in determining the issues at hand.

Also at the ethics hearing, respondent presented the character testimony of Edward O'Donnell, Esq.; Amanda Trigg, Esq.; Richard H. Weiner, Esq.; Jeralyn Lawrence, Esq.; Christine Fitzgerald, Esq.; and Barbara Lazar. Additionally, respondent presented forty-four letters attesting to her reputation and character. The DEC credited the testimony of these witnesses that respondent's reputation in the legal community and service to the bar has been stellar.

Indeed, respondent was the immediate past president of the American Academy of Matrimonial Lawyers. Respondent's presidency followed an array of prior positions within the organization. Respondent also served as a member

of the Board of Directors of the organization's foundation. Respondent was a fellow with the International Academy of Family Lawyers.

Within New Jersey, respondent was a former member of the Court's Family Practice Committee, and served on the General Procedures and Rules subcommittee, as well as the Custody and Parenting Time subcommittee. Respondent also was the chair of the New Jersey State Bar Association's (NJSBA) Family Law Section from 2004 through 2005. In 2015, respondent was also awarded the Saul A. Tischler Lifetime Achievement Award from the NJSBA. Respondent's curriculum vitae also documents numerous lectures she has provided on a myriad of family law subjects, along with the many publications she has authored.

Ultimately, the DEC found that respondent violated RPC 1.15(a), but was silent regarding the allegation that respondent also violated RPC 1.15(b). The DEC noted that it did not believe respondent's assertions that the Agreement had been repudiated and did not believe that respondent thought it was proper to release the passport to Carrascosa.

The DEC also found that the presenter had established, by clear and convincing evidence, that respondent violated RPC 4.1(a)(2) by failing to advise Van Aulen that Victoria's Spanish passport was not lost or stolen but, rather, was in Carrascosa's possession. The DEC reasoned that respondent's failure to

correct her client's misrepresentations when she learned, in mid-December, 2004, that Carrascosa possessed the Spanish passport, constituted a violation of the Rule. Furthermore, the DEC found that when respondent learned, on either January 27, 2005 or February 2, 2005, that Victoria had been taken to Spain, she failed to immediately advise Van Aulen, as she was obligated to do. The DEC found that respondent, therefore, assisted a criminal or fraudulent act by her client when she failed to inform Van Aulen of Victoria's whereabouts, in violation of RPC 4.1(a)(2).

The DEC also found that respondent's actions constituted a violation of RPC 8.4(d) because her release of Victoria's passport to Carrascosa enabled Carrascosa to remove the child to Spain, which rendered "moot any effort by the [New Jersey] court to have it's [sic] orders regarding parenting time and custody enforced." The DEC agreed with the presenter that significant judicial resources were expended in an effort to facilitate Victoria's return to the United States, which "directly resulted" from respondent providing the passport to Carrascosa.

Finally, the DEC found that respondent violated RPC 8.4(a) by virtue of her RPC 1.15(a), RPC 4.1(a)(2), and RPC 8.4(d) violations.

The DEC found that the presenter had not established by clear and convincing evidence that respondent violated RPC 3.3(a)(2). The DEC was not convinced that respondent knew, at the time of Carrascosa's TRO application,

that her statements regarding the Spanish passport were false. The DEC also did not find that respondent knowingly made misrepresentations to the court in connection with the TRO application, and was satisfied that respondent advised the court, at the February 4, 2005 hearing, that Victoria was in Spain.

The DEC also found that the presenter did not prove, by clear and convincing evidence, that respondent acted intentionally to unlawfully obstruct Van Aulen's access to evidence, or that she assisted Carrascosa to do so, notwithstanding the existence of the Agreement. Thus, the DEC did not find an RPC 3.4(a) violation.

In addition, the DEC considered arguments from counsel regarding the applicability of Meisels v. Fox Rothschild LLP, 240 N.J. 286 (2020) (addressing the concept of the reliance of third parties on an attorney serving as a fiduciary and applying RPC constructs; the Court held that a law firm cannot not breach a fiduciary duty when it is not aware and did not have a basis on which it reasonably should have been aware of a plaintiff or claim, and there was no established relationship between the law firm and the plaintiff on which a fiduciary duty was anchored; the Court further held that an attorney's duty to a third party not in privity with the attorney is construed within considerations of reasonableness). The DEC determined that the case was inapplicable to the facts

underpinning respondent's misconduct, because she had knowledge of the terms of the Agreement and, thus, owed Innes a duty to safeguard the passport.

After consideration of the facts, the DEC examined, regarding mitigation, respondent's long and unblemished disciplinary record. The DEC found respondent's excellent reputation to be her strongest mitigating factor. However, the DEC did not distinguish respondent's stellar reputation from her accomplishments; accolades; awards; and service to the bar.

The DEC found that respondent's misconduct was an isolated incident, but determined that, although respondent did not commit the misconduct for financial gain, she was clearly interested in placating Carrascosa in order to keep her as a client.

Additionally, the DEC accorded some mitigation to the negative effects respondent and LML suffered as a result of the three adverse, published decisions addressing respondent's conduct. However, the DEC found that respondent had not endured personal pain and did not present any evidence that she had satisfied the judgment Innes obtained against her.

In considering the passage of time that had elapsed since respondent's misconduct occurred, the DEC noted that, although respondent was correct in her argument that any action taken against her for her 2004 misconduct would be punitive, the purpose of discipline is to protect the public. As such, the DEC

found "respondent's attitude and lack of remorse deeply concerns the Panel as it respects the protection of the public."

Although respondent argued that her show of remorse should be a mitigating factor, the DEC did not find that respondent was truly remorseful regarding her actions and thus, did not consider remorse in mitigation. To the contrary, it found her lack of remorse to be an aggravating factor.

The DEC also found respondent's belief that she had no obligation to obtain Innes' permission before releasing the passport to Carrascosa, even fifteen years after the events, to be a significant aggravating factor. The DEC also found the devastating impact respondent's actions had on Innes and his relationship with Victoria to be a significant aggravating factor.

Thus, the DEC found that the aggravating factors substantially outweighed the mitigating factors and found that respondent's

> continued and uninterrupted practice of law presents a danger to the public. The Respondent's utter remorselessness and her refusal to accept responsibility for, or even acknowledge her errors is a significant aggravating factor and weighs heavily in the Panel's recommendation. The damage done by Respondent's actions are [sic] not capable of being mitigated by monetary compensation.
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> [HPR,p36.]

Although the presenter had recommended the imposition of a one-year suspension, the DEC concluded that a two-year suspension was more

appropriate. The DEC relied on In re Valore, 169 N.J. 225 (2001) (six-month suspension for an attorney who improperly released escrow funds); In re Hasbrouck, 186 N.J. 72 (2006) (three-month suspension for an attorney who released $600,000 to his client in violation of a court order requiring him to hold the funds in escrow); In re Feranda, 154 N.J. 4 (1998) (six-month suspension for an attorney who prematurely released his client's funds to a seller in a real estate closing, causing his client to lose $125,000); In re Moore, 175 N.J. 100 (2003) (one-year suspension for an attorney who failed to safeguard funds in which the attorney and a third party claimed an interest, among other RPC violations); and In re Susser, 152 N.J. 37 (1997) (three-year suspension for an attorney who released $5,000 held in escrow without authorization).

In his submission to us, the presenter argued that the DEC correctly determined that respondent violated RPC 1.15(a), emphasizing that respondent knew what the Agreement stated regarding Victoria's United States passport but, nevertheless, turned it over to Carrascosa. The presenter argued that respondent's testimony at her malpractice deposition – that she knew the passport belonged to both Innes and Carrascosa – was evidence that Innes was a "third person" under RPC 1.15(a). The presenter argued that respondent's failure to inform Van Aulen at the aborted December 17, 2004 meeting, the December 23, 2004 meeting, or any time before the February 4, 2005 motion

hearing, was evidence that respondent knew that releasing the passport was improper, in violation of the Agreement, and violated her duty to Innes. The presenter also argued that a violation of RPC 1.15(a) need not be intentional.

The presenter asserted that respondent violated RPC 4.1(a)(2) by failing to inform Van Aulen that Carrascosa had lied in connection with the TRO application. The presenter relied upon the testimony respondent provided during the malpractice case, which differed from the testimony she provided during the ethics proceeding. The presenter questioned why respondent would believe her memory was more accurate in 2019, when she testified with certainty that she did not learn of Carrascosa's misrepresentations until December 17, 2004, than when she testified in 2008 that she learned of Carrascosa's misrepresentations between November 17 and December 2, 2004, but likely on November 22, 2004. The presenter alleged that respondent's difference in recollection was intended to support her position that she learned of Carrascosa's perjury after the TRO had been withdrawn. The presenter also argued that Carrascosa's lies regarding the passport and Innes breaking into her home led to the issuance of the TRO and thus, the court-ordered prohibition of parenting time between Innes and Victoria. The presenter also argued that respondent violated RPC 4.1(a)(2) by not immediately advising Van Aulen that Carrascosa had taken Victoria to Spain

when she learned of her client's action on either January 27, 2005 or February 2, 2005.

The presenter agreed with the DEC's finding that respondent's release of Victoria's United States passport to Carrascosa resulted in a violation of RPC 8.4(d), because Carrascosa's abduction of Victoria rendered all New Jersey court orders unenforceable. The inability of the court to enforce its orders, thus, resulted in the unnecessary expenditure of significant judicial resources, to no avail.

The presenter disagreed with the DEC's determination that there was no clear and convincing evidence of an RPC 3.3(a)(2) or RPC 3.4(a) violation because, he asserted, respondent knew that Carrascosa committed perjury on the TRO application but failed to advise Van Aulen or the court of Carrascosa's actions. Moreover, the presenter argued that respondent's failure to advise Van Aulen that Carrascosa had lied on the TRO application unlawfully obstructed his access to evidence because, had Van Aulen known that Carrascosa possessed the Spanish passport, he would have filed an Order to Show Cause to enforce the Agreement.

Finally, the presenter argued that, by virtue of respondent's RPC violations, the DEC correctly found that respondent had violated RPC 8.4(a).

The presenter argued that, although the DEC found that respondent's reputation and good character were mitigating factors, at the time she provided the passport to Carrascosa, respondent was a certified matrimonial law attorney, and thus, should have exercised greater care and judgment. The presenter also argued that the DEC correctly found the aggravating factors outweighed any mitigating factors. The presenter noted that the passage of time between respondent's misconduct in 2004 and the ethics proceeding in 2019 was not due to a delay in the disciplinary process; rather, the delay was mandated, under the disciplinary Rules, due to the ongoing civil litigation and corresponding appellate process. See R. 1:20-3(f). Therefore, the presenter agreed with the DEC's recommendation that a two-year suspension be imposed for respondent's misconduct.

During oral argument before us, the presenter emphasized the DEC's finding that respondent was not credible and was evasive in her testimony. He relied upon his submission to us and maintained that respondent's claim that the Agreement had been repudiated was the result of her failure to take responsibility for releasing Victoria's passport.

The presenter asserted that respondent's actions were generally unprecedented, since most of our prior decisions finding an RPC 1.15(a) violation concerned an attorney's failure to safeguard funds, rather than

property. The presenter contended that the loss of relationship between Innes and Victoria should be considered a significant aggravating factor because they have lost time together and their relationship was never repaired. The presenter maintained that the loss of the father/daughter relationship was foreseeable because respondent had reason to believe Carrascosa would flee to Spain if she had Victoria's passport.

In respondent's submission, she argued that her conduct did not violate the Rules of Professional Conduct and requested dismissal of the amended complaint; however, she alternatively argued that, should we find an RPC violation, the discipline imposed should be no more than a reprimand.

Preliminarily, respondent argued that the DEC – improperly and contrary to its prior ruling – incorporated the facts as set forth in the malpractice litigation. Respondent argued that, in so doing, the DEC effectively lowered the burden of proof in the ethics matter from a clear and convincing standard to a preponderance of the evidence standard, which was "extremely prejudicial" to respondent. Respondent accused the DEC of prejudging the case, not based on the proofs provided at the ethics hearing but, rather, by the conclusions drawn by the Superior Court in the civil case, which were by a fair preponderance of the evidence.

Respondent also argued that the panel chair's decision to bar expert testimony regarding respondent's conduct was a procedural error that deprived the DEC of the opportunity to consider testimony concerning the viability of a parenting time agreement that had been repudiated; standard practices in matrimonial law concerning foreign parties; standard practices regarding substitution of attorneys in matrimonial cases; and ownership rights of Victoria's passport. Respondent argued that the absence of expert testimony regarding the practice of matrimonial law influenced the panel's ultimate determination in this matter.

With respect to the DEC's findings, respondent argued that, absent any request or agreement by respondent to hold Victoria's passport, she could not be found liable for violating RPC 1.15. Respondent argued that neither subsection (a) nor (b) of RPC 1.15 apply in this case because she was not a party to the Agreement and did not agree to serve as trustee of the passport. Respondent also argued that when Carrascosa retained LML, she told respondent that the Agreement had been repudiated. That information, in addition to the alleged inaction by Liebowitz and Van Aulen, led respondent to reasonably believe there was no agreement and that the passport belonged to Carrascosa. Respondent emphasized that neither Liebowitz nor Van Aulen said

anything to her about the passport, beyond Liebowitz's November 23, 2004 letter.

Respondent argued that, because she had no prior knowledge that Carrascosa would abscond with Victoria, she did not violate RPC 4.1(a)(2). Respondent stated that Carrascosa had only retained LML a few months prior to leaving the country and reasoned that it would be illogical to conclude that respondent would jeopardize her career as a respected matrimonial law attorney to assist a "virtual stranger" with kidnapping a child. Respondent also argued that she did not intend to assist Carrascosa with committing a criminal or fraudulent act.

Respondent further argued that her conduct was not prejudicial to the administration of justice. Respondent noted that the expenditure of judicial resources was the result of Carrascosa's actions – not respondent's actions. Because respondent did not know Carrascosa planned to take Victoria to Spain, she was not Carrascosa's co-conspirator and, therefore, respondent argued, the inability of the court to enforce its orders was caused by Carrascosa.

Finally, respondent argued that, because she did not violate any RPCs, no evidence exists that she violated RPC 8.4(a).

Additionally, respondent argued that the DEC improperly weighed the mitigating and aggravating factors present in this case. Respondent noted that

the DEC heard testimony from several witnesses and received forty-four character letters attesting to respondent's good character and reputation, but only "paid lip service" to this mitigating factor. Likewise, respondent accused the DEC of not appropriately weighing her unblemished disciplinary record.

Furthermore, respondent noted that the DEC considered, as one factor, her good reputation, character, and service to the community, in contravention of In re Convery, 166 N.J. 298, 308 (2001), which recognized as separate mitigating factors an attorney's service to the community and good reputation.

Moreover, respondent argued that the events in question happened approximately seventeen years ago and that there is little likelihood of a repeat offense. Respondent emphasized her remorse and argued that the DEC incorrectly determined that she lacked remorse. Respondent accused the DEC of conflating respondent's decision to defend herself in the ethics action with the notion of remorse. Respondent suggested that, if we were to find that respondent lacked remorse, such a finding would be tantamount to forcing every attorney facing possible discipline to choose between defending the merits of their case or risk accepting lack of remorse as an aggravating factor.

Finally, respondent suggested that the panel improperly placed the blame on respondent for the harm done to Innes and Victoria's relationship. Respondent conceded that the relationship was harmed, but argued that it was

Carrascosa who caused the harm, noting that Carrascosa made a series of calculated decisions to deprive Innes of the ability to see Victoria, which culminated in her serving six years in prison for her interference with his custodial rights.

Respondent argued that, although she believed she did not violate the RPCs, if we were to determine discipline was warranted, we should consider cases arising from the improper release of trust or escrow funds, which generally have resulted in the imposition of either an admonition or reprimand. See, e.g., In re Casci, 231 N.J. 136 (2017) (reprimand for an attorney who disbursed settlement funds in violation of a court order); In the Matter of Annette Patricia Alfano, DRB 15-079 (May 27, 2015) (admonition for an attorney who improperly disbursed escrow funds entrusted to her by third parties based on her "former client's instructions alone" and "without the express authorization of the parties who had escrowed the funds"); In re Bassetti, 213 N.J. 41 (2013) (reprimand for an attorney who released escrow funds in violation of a contract without a reasonable belief that the disbursement was permitted; we noted the distinguishing factor between imposing an admonition or a reprimand is often the reasonableness of the attorney's belief that the disbursement was permitted); In the Matter of Michael D. Landis, DRB 09-395 (March 19, 2010) (admonition for an attorney who released escrowed funds to his client without the opposing

party's consent in violation of a contract); and In re Holland, 164 N.J. 246 (2000) (reprimand for an attorney who disbursed a disputed fee in violation of a court order).

During oral argument before us, respondent asserted that the DEC's findings were unjust, unwarranted, and against the purpose of the attorney disciplinary system. Respondent maintained that the totality of her mitigating factors strongly outweighed any aggravating factors present, and that no discipline should be imposed.

Moreover, respondent argued that In re Hoffman, 247 N.J. 197 (2021), was directly on point because in that matter, although we recommended the imposition of a reprimand, the Court did not impose discipline on an attorney with an unblemished record who had been practicing for more than forty years. It had also been sixteen years since Hoffman committed the misconduct, which we found to be a significant mitigating factor.

Respondent again asserted that the DEC erred in finding that her decision to defend herself in the ethics action equated to a lack of remorse. Respondent argued that she had a "devastating amount of remorse" for her actions and felt "horrendous" each day about her conduct. Nevertheless, respondent contended that it was unforeseeable that Carrascosa, a licensed attorney, would kidnap her own child and that Spain, a NATO nation, would ignore its obligations under

the Hague Convention, to which it is a signatory.

Lastly, respondent asserted that the DEC reached its conclusions based upon a preponderance of the evidence standard, rather than the clear and convincing standard required in ethics actions.

Finally, the OAE filed an unopposed motion for a protective order in this matter due to the record containing personal identifiers and other information surrounding the minor child, Victoria. The motion sought an order sealing the record from any individual or entity other than the OAE; the Board; the Court; and respondent.

* * *

Following a de novo review of the record, we find that the DEC's determination that respondent violated RPC 1.15(a) is supported by clear and convincing evidence. We also agree with the DEC's conclusion that the presenter did not prove, by clear and convincing evidence, that respondent violated RPC 3.3(a)(2) or RPC 3.4(a). Recognizing that the DEC made no finding with regard to RPC 1.15(b), we find, by clear and convincing evidence, that respondent violated that Rule. Finally, we disagree with the DEC's conclusion that there is clear and convincing evidence to support the finding that respondent violated RPC 4.1(a)(2), RPC 8.4(a), and RPC 8.4(d).

Before turning to respondent's misconduct, we must resolve three preliminary issues: (1) whether the DEC properly excluded the expert testimony of Poplar and Snyder; (2) whether the DEC properly relied upon the trial court's factual analysis of respondent's conduct as set forth in Innes v. Carrascosa, 391 N.J. Super. 453 (App. Div. 2007); Innes v. Marzano-Lesnevich, 435 N.J. Super. 198 (App. Div. 2014); and Innes v. Marzano-Lesnevich, 224 N.J. 584 (2016); and (3) whether to issue a protective order in this matter.

We find that the panel chair properly excluded Poplar's expert report and proffered testimony. Poplar's opinion constituted an analysis of the facts surrounding respondent's misconduct and analyzed each allegation of the formal ethics complaint to conclude, based upon our prior decisions, that respondent had not violated any of the Rules of Professional Conduct.

Poplar's report was inadmissible under N.J.R.E. 702 because he offered no scientific, technical, or other specialized knowledge that would have assisted the DEC or us in determining whether respondent committed misconduct. Indeed, an analysis of the facts as it relates to case law is the function of the DEC, the Board, and, ultimately, the Court. See R. 1:20-6(a)(C)(3)(B); R. 1:20-15(e); and R. 1:20-15(f).

Inherent in the Rules outlining the functions of the DEC and the Board is the Court's recognition that both entities have the specialized knowledge

required to assess allegations of unethical conduct and to make recommendations regarding the appropriate quantum of discipline. Therefore, any opinions offered by Poplar regarding what we or the DEC may or may not do are in contravention of N.J.R.E. 702[14] and N.J.R.E. 704.

However, the DEC erred when it excluded Snyder's proffered report, as an expert in the field of matrimonial law, because his report contained opinions, based on his specialized knowledge, regarding the practices of matrimonial lawyers. However, because we review the record of an ethics proceeding de novo, we may consider the report now. Following our review, we find that the exclusion of Snyder's report below was harmless error. See R. 1:20-15(e)(3).

After considering the contents of Snyder's report, we do not afford great weight to his opinions. Snyder essentially concluded that, in all the actions respondent took in her representation of Carrascosa, she acted in conformity with customary and acceptable practices in the field of matrimonial law. However, Snyder accepted, without scrutiny, respondent's after-the-fact assertion that Carrascosa had informed her the Agreement was repudiated. Assuming, arguendo, that Carrascosa had told respondent the Agreement was

[14] N.J.R.E. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise."

repudiated by virtue of her e-mail to Liebowitz, which merely stated the visitation schedule was not good for Victoria, Snyder failed to address why all other parties involved in the case acted as if the Agreement were in full force and effect. Instead, Snyder accepted, as true, respondent's unsubstantiated, unilateral assertion that all individuals in the case had acted as if the Agreement was not in effect.

As a result of his unquestioning acceptance of respondent's assertions, Snyder's report failed to address what would have been customary practice in matrimonial law when a client claims to their attorney an agreement was unilaterally terminated but external facts contradict that assertion. The only opinion Snyder offered that attempted to reach that analysis was his opinion that "clients routinely change their minds about agreements [. . .] for one reason or another and such agreements are routinely terminated and repudiated either expressly or impliedly before being memorialized in an order of the court."

In offering this opinion, Snyder did not claim that a client could, as respondent would have us believe, unilaterally nullify a negotiated agreement between a mother and a father in a custody case because one aspect of the agreement created friction, in the opinion of one party. It is no surprise Snyder did not offer that opinion, which would defy logic. Therefore, because Snyder's

report does not offer any information to help the trier of fact to understand a key fact at issue in this case, we ascribe it minimal weight.

Secondly, the panel chair ruled, prior to the hearing, that the presenter would be required to prove the facts of his case because the reported decisions were based on a preponderance of the evidence. There is no question that, in an ethics hearing, misconduct must be proven by clear and convincing evidence. R. 1:20-6(c)(2)(B). Yet, in the hearing panel report, the DEC improperly, and contrary to its preliminary ruling, relied upon the facts found by the Court, which were adduced at trial under a preponderance of the evidence standard. However, a disciplinary hearing is not a civil case, and the findings of a court in a civil case are not binding in an ethics proceeding. See Brundage v. Estate of Carambio, 394 N.J. Super. 292, 300 (App. Div. 2007), rev'd on other grounds, 195 N.J. 575 (2008). But see In re Hecker, 109 N.J. 539 (1988) (no violation of an attorney's due process rights when the amount of an attorney's overbilling was established by a civil jury trial based on the preponderance of the evidence standard).

In respondent's malpractice case, the issue before the court was whether she negligently released Victoria's passport to Carrascosa – the issue was not whether respondent violated the Rules of Professional Conduct. Although there may be overlap in the facts necessary to prove negligence in a civil case and a

Rule violation in an ethics matter, in the malpractice case, respondent was not provided the opportunity to develop the factual background and legal defenses required in an ethics matter.

Nevertheless, under R. 1:20-15(e)(3), we reviewed the record in this matter de novo. Under that standard, we find, exclusively from the clear and convincing evidence produced at the ethics hearing, that respondent committed misconduct in connection with her representation of Carrascosa.

Indeed, as it relates to the facts of this case, as established by the evidence produced during the nine-day ethics hearing, we find that respondent violated RPC 1.15(a) and RPC 1.15(b).

Specifically, RPC 1.15(a) requires an attorney to identify, hold, and safeguard the property of "clients or third persons." RPC 1.15(b) requires an attorney to promptly notify a client or third person upon receipt of "other property in which a client or third person has an interest." RPC 1.15(b) also requires an attorney to deliver property to a client or third person except as provided by an agreement.

Here, there is no question that the Agreement provided for Liebowitz to hold Victoria's passport in trust. Carrascosa provided the passport to Liebowitz. She later fired Liebowitz and retained respondent. Respondent knew about the Agreement. In fact, she wrote to Van Aulen about one week after she was

retained, acknowledging the existence of the Agreement and, later, paid for a messenger for the sole purpose of retrieving the passport from Liebowitz. Additionally, the importance of the passport also was reflected in Tremml's notes following her November 18, 2004 meeting with respondent.

After respondent arranged for a messenger to retrieve the file and passport from Liebowitz, she took possession of the passport on December 8, 2004. Upon receipt of the passport, respondent had an obligation to safeguard it. If respondent did not wish to safeguard the passport, she should have returned it to Liebowitz or addressed the matter with Van Aulen. She did not. Rather, the evidence presented reflects clearly and convincingly that respondent gave the passport to Carrascosa during a discussion surrounding the Agreement.

Respondent's assertion that she was told, on November 17, 2004, that the Agreement had been repudiated is contradictory to her own actions. She sent Van Aulen a letter on November 24, 2004, indicating she was aware of the Agreement. LML subsequently sent a letter, on December 8, 2004, indicating that Francesca and Van Aulen had spoken, and LML understood that Van Aulen intended to file an Order to Show Cause to enforce the Agreement.

Finally, when provided multiple opportunities, during the February 4, 2005, hearing before Judge Parsons, to express that the Agreement had been

repudiated, respondent's position was that of an attorney who understood that the Agreement was still in effect.

Respondent's belated assertion that Carrascosa told her the Agreement was repudiated emerged as a defense to the subsequent malpractice lawsuit. Simply put, even if Carrascosa told respondent the Agreement had been repudiated, we find that it was unreasonable for respondent to assume that was true given the external factors which indicated the Agreement remained in full force and effect.

Therefore, once respondent took possession of the passport, she was obligated to take actions to safeguard the passport. She should have continued to safeguard the passport, or sought other relief. It was clear from the Agreement that returning the passport to Carrascosa was not approved by Innes, a third party whom respondent conceded had an interest in the passport. Yet, respondent did not inform Van Aulen that she took possession of the passport, or that she released it to Carrascosa. Thus, respondent's failure to safeguard the passport, and her failure to notify Van Aulen that she received the passport, clearly violated RPC 1.15(a) and RPC 1.15(b).

However, there is no clear and convincing evidence that respondent violated RPC 3.3(a)(2) or RPC 4.1(a)(2). It is not clear from the record that respondent knew Carrascosa had lied in connection with the TRO application,

and there is certainly no evidence in the record that respondent knowingly failed to disclose a material fact to assist Carrascosa commit an illegal act. Additionally, there is no evidence in the record that respondent knowingly made a false statement of material fact to Van Aulen regarding Victoria's Spanish passport because there is no evidence in the record that the two even spoke about Victoria's Spanish passport.

Likewise, respondent's failure to inform Van Aulen that Carrascosa had lied on her TRO application or that she provided Carrascosa with Victoria's United States passport did not constitute a violation of RPC 3.4(a). Respondent advised Carrascosa to dismiss the TRO because there was insufficient evidence to support Carrascosa's claims of domestic violence. Similarly, the record does not reflect that respondent acted intentionally to unlawfully obstruct Van Aulen's access to evidence.

Furthermore, the evidence does not support a determination that respondent's actions were prejudicial to the administration of justice, in violation of RPC 8.4(d). Rather, the evidence reflects that the actions of respondent's client – Carrascosa – were highly prejudicial to the administration of justice and resulted in the expenditure of significant judicial resources. However, respondent does not bear disciplinary responsibility for Carrascosa's criminal misconduct. This record does not establish that respondent had

information regarding Carrascosa's intentions once she received Victoria's United States passport. Under these facts, respondent cannot be said to have violated RPC 8.4(d).

Similarly, on this record, we find ourselves unable to sustain the RPC 8.4(a) charge. RPC 8.4(a) requires clear and convincing proof that an attorney "knowingly" assisted or induced another to violate the Rules of Professional Conduct. Further, the complaint charged that respondent violated RPC 8.4(a) merely by violating other Rules of Professional Conduct, a theory that we have historically rejected. See In the Matter of John J. Robertelli, DRB 19-266 (April 30, 2020) at 26-27 ("it is redundant to apply RPC 8.4(a) to this matter, because it is subsumed by the RPCs discussed above"), dismissed on other grounds, __ N.J. __ (2021); In the Matter of Brian LeBon Calpin, DRB 19-172 (December 17, 2019) at 20 (dismissing the RPC 8.4(a) charge as "duplicative of the numerous Rules of Professional Conduct that we found respondent to have violated"), so ordered, 242 N.J. 75 (2020); and In the Matter of Carlos E. Perez, DRB 19-224 (September 23, 2019) at 2 (in which we stated that "respondent's misconduct is captured by RPC 5.5(a), and a finding of a violation of RPC 8.4(a) would be redundant"), so ordered, 240 N.J. 173 (2019). We, thus, dismiss the RPC 8.4(a) allegation.

Finally, we determine to deny the OAE's motion for a protective order in this case. There is a presumption that disciplinary proceedings are public. R. 1:20-9(c). Victoria's name and age, and the details of her identity and her parents' respective conduct, has been heavily and publicly litigated, culminating in our Court's decision in Innes v. Marzano-Lesnevich, 224 N.J. 584 (2016). To the extent that Victoria's name, age, and childhood details are already within the public domain, a protective order in this disciplinary proceeding is unnecessary.

In sum, we find that respondent violated RPC 1.15(a) and RPC 1.15(b). We dismiss the charges that respondent further violated RPC 3.3(a)(2); RPC 3.4(a); RPC 4.1(a)(2); RPC 8.4(a); and RPC 8.4(d). The only remaining issue for our determination is the appropriate quantum of discipline to be imposed for respondent's misconduct.

Typically, the type of "property" contemplated in connection with RPC 1.15(a) charges is of the sort that has material worth, such as money, securities, or art. The Annotated Rules of Professional Conduct (Annotated Rules) state that, under RPC 1.15(a), a lawyer "is responsible for safekeeping the client's property, whether money or personal property, including documents." Annotated Rules (5th ed.) 251 (2003).

In In re Chambers, 209 N.J. 417 (2012), the attorney was guilty of failure to safeguard property and other violations, for which he received a three-month

suspension. The RPC 1.15(a) charge was based on Chambers' holding five $100 bills and a travel gift certificate, in his safe, on behalf of a client who retained him to pursue an individual suspected of improperly taking funds from the client's retirement party. The gift certificate expired while in Chambers' possession and the $100 bills ultimately returned to the client were not the same bills that the client had given him.

Although Chambers succeeded in obtaining a default judgment on the client's behalf, he did not timely take steps to seek an execution. The judgment was eventually discharged in bankruptcy.

Chambers also was found guilty of gross neglect; lack of diligence; failure to communicate with the client; making false statements to a disciplinary authority; failure to cooperate with disciplinary authorities; and making a misrepresentation to his client. It was his first brush with the ethics system.

Similarly, attorneys have received admonitions or reprimands for the improper release of escrow funds, in violation of RPC 1.15(a) and (b). In In the Matter of Joseph Jerome Fell, DRB 10-328 (January 25, 2011), the attorney received an admonition after improperly releasing $325,000 in escrow funds to his client, the seller of a one-third interest in a business, without verifying that certain contingencies had been satisfied. There, no written agreement governed the release of the escrowed funds. Rather, the buyers had verbally instructed the

attorney not to release their funds to his client until all contracts and operating agreements had been fully executed and approved by the buyers' attorney.

Based on his review of a document provided to him by his client, Fell mistakenly believed that the required contingencies had been completely satisfied. He, thus, prematurely disbursed the escrow funds to his client.

In In the Matter of Michael D. Landis, DRB 09-395 (March 19, 2010), the attorney received an admonition after improperly releasing $86,500 in escrow funds to his client, the buyer under a contract of sale to purchase residential property. When his client failed to appear for the closing, the seller sent the attorney a letter claiming that his client was in breach of the contract; the attorney sent a reply, maintaining that the contract was null and void. The contract stated that, in the event of a disagreement between the parties over the disbursement of the escrow, the deposit monies could be placed with the court, until the dispute was resolved.

Despite the express language of the agreement, the attorney unilaterally set a two-week deadline for the sellers to challenge the contract. At the expiration of the two-week period, the attorney improperly disbursed the escrow monies to his client. See also In re Spizz, 140 N.J. 38 (1995) (admonition for attorney who, against a court order, released to his client funds escrowed for the fees of a former attorney, and misrepresented to the court and to the former

attorney that the funds remained in escrow; the attorney asserted that the former attorney had either abandoned or waived her claim for the fee, and thus, his obligation to hold the funds had ended); In re Holland, 164 N.J. 246 (2000) (reprimand for attorney who was required to hold, in trust, a disputed fee in which she and another attorney had an interest; instead, the attorney took the fee, in violation of a court order; the attorney claimed that she believed that a subsequent court order had entitled her to the entire fee and, thus, she had made a mistake, rather than knowingly defied a court order; those defenses were rejected); In re Milstead, 162 N.J. 96 (1999) (reprimand for attorney who disbursed escrow funds to a client, in violation of a consent order); and In re De Clement, 214 N.J. 47 (2013) (motion for discipline by consent; reprimand for attorney who failed to safeguard funds in which a client or third party had an interest, and released a portion of $75,000 he had agreed to hold in escrow, in connection with a joint venture agreement between his client and a third party, without first obtaining the third party's consent; no escrow provision governed the attorney's actions, but the $75,000 check deposited by the attorney included a notation identifying it as an escrow deposit, and the joint venture agreement identified the attorney as the "escrow attorney;" the attorney, however, was never provided a copy of the joint venture agreement, and improperly relied on his client's assurance that he was allowed to use a portion of the escrow funds

to cover expenses associated with the joint venture). As we found in De Clement, the attorneys in the above cases held reasonable, although mistaken, beliefs that, for one reason or another, the release of escrow funds was appropriate and constituted a "premature disbursement" or disbursement under a colorable dispute.

Therefore, based on New Jersey disciplinary precedent, a reprimand is the baseline sanction required for respondent's misconduct. However, in crafting the appropriate discipline in this matter, we also consider aggravating and mitigating factors.

Here, there is no dispute that respondent was aware of the Agreement; was told by her adversary there was an Agreement; had a copy of the Agreement; referenced the Agreement when she communicated with her adversary and the court; and was told by Liebowitz of the importance of Victoria's passport. Nevertheless, she gave the passport to Carrascosa. Respondent later claimed, after being sued for malpractice, that Carrascosa told her the Agreement had been repudiated; however, nothing contemporaneous with respondent's actions supports that position. Thus, unlike the attorneys in the aforementioned cases, respondent did not hold a reasonable, although mistaken, belief that she was not required to safeguard the passport. To the contrary, respondent knew there was

an Agreement requiring Carrascosa's attorney to hold the passport in trust, but she recklessly ignored that obligation.

In aggravation, no amount of funds could compensate Innes for the loss of his relationship with Victoria. Respondent's action set events in motion which allowed Carrascosa to deprive Innes of visitation for seventeen years. Unlike in a case of early disbursement, respondent cannot make financial restitution for her misconduct. Indeed, a jury awarded Innes more than $800,000 in damages, a sum that respondent has not yet satisfied, nearly five years later.

The most egregious aggravating factor in this matter is respondent's utter lack of remorse. Respondent is incorrect that she is forced to choose between expressing remorse and putting on a legal defense. Not only has lack of remorse been recognized by the Court as an aggravating factor, here, at a minimum, the Court has already found – albeit by a preponderance of the evidence – that respondent's actions had a profound negative impact on Innes' life. See, e.g., In re Pena, 164 N.J. 222, 234 (2000) (lack of remorse). Yet, at the ethics hearing, when told explicitly remorse was a factor for the DEC's consideration and asked if she wanted to add to her prior empty answer, the only "remorse" respondent could muster was that she was sorry "this" happened to Innes. Respondent also failed to take accountability for her role in giving the passport to Carrascosa, and instead blamed Liebowitz and Van Aulen for her misconduct.

However, there are multiple mitigating factors for us to consider in this case. Respondent has an unblemished history in thirty-two years at the bar. More importantly, these events occurred seventeen years ago. No one is to blame for the delay – Innes filed a malpractice claim against respondent after the conclusion of his divorce case, litigation and appeals ensued, and the OAE promptly docketed the matter for an investigation after the Court issued its April 26, 2016 opinion. See R. 1:20-3(f) ("Related Pending Litigation"). Respondent has committed no misconduct in the interim. Thus, the passage of time is a mitigating factor.

Additionally, forty-four individuals, including former judges, all attested to respondent's excellent reputation and character, and highlighted many of her contributions to the field of matrimonial law in New Jersey and nationally. Respondent has given countless lectures on the practice of family law and has published numerous articles. Thus, respondent's stellar reputation and service to the bar serve as mitigating factors.

However, we consider it unfortunate that an attorney who was so well respected in the practice of family law violated the Rules and contributed to the devastation of Innes' relationship with his four-year-old daughter and, to date, has refused to recognize the gravity of her misconduct. Her inability to recognize

that her actions were contrary to her duty to safeguard Victoria's passport places the public at continued risk of harm.

Thus, considering respondent's misconduct, and after balancing her ethics violations with the aggravating and mitigating factors present in this case, we determine that a censure is the quantum of discipline necessary to protect the public and preserve confidence in the bar.

Vice-Chair Singer and Member Rivera voted to impose a reprimand.

Members Campelo, Joseph, and Petrou voted to impose a three-month suspension.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Hon. Maurice J. Gallipoli, A.J.S.C. (Ret.),
Chair

By: 
Johanna Barba Jones
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Madeline M. Marzano-Lesnevich
Docket No. DRB 21-114

Argued: October 21, 2021

Decided: December 1, 2021

Disposition: Censure

Members	Censure	Reprimand	Three-month Suspension
Gallipoli	X		
Singer		X	
Boyer	X		
Campelo			X
Hoberman	X		
Joseph			X
Menaker	X		
Petrou			X
Rivera		X	
Total:	4	2	3

Johanna Barba Jones
Chief Counsel