STATE OF MICHIGAN
IN THE SUPREME COURT

In the matter of:
Estate of Robert D. Mardigian, Deceased
(a.k.a. Robert Douglas Mardigian, deceased)

Case No. 152655
Court of Appeals Case No. 319023

Mark S. Papazian,
Petitioner-Appellee,
v.

Charlevoix County Probate Court
Case No. 12-011738-DE
Case No. 12-011765-TV
Hon. Frederick R. Mulhauser (P28895)

Melissa Goldberg Ryburn, Susan V. Lucken, Nancy Varbedian, Edward Mardigian, Grant Mardigian, and Matthew Mardigian
Respondents-Appellants.

_____/

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RESPONDENTS/APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

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Petitioner admits that he violated MRPC 1.8(c). Should he walk out of this Court with a chance at winning $16 million under the documents he prepared in violation of the rule? Respondents submit that the answer should be a clear and resounding no.

1. This Court has the power to enforce its own ethics rules as it sees fit.

The premise of Petitioner's position is that, although this Court has plenary constitutional authority to discipline all Michigan lawyers, the Court's plenary authority is somehow limited when it comes to disciplining him. The Court, says Petitioner, can send him to the Attorney Grievance Commission for consideration of limited measures like suspending or disbarring him, but the Court has no power whatsoever to keep him from inheriting $16 million under estate documents that he prepared in violation of MRPC 1.8(c). (See Petitioner's Br at 9, 47.)

But plenary means plenary. It means "full; entire; complete; absolute." (Webster's New Twentieth Century Dictionary Unabridged, 2d ed.) It means this Court's exclusive constitutional authority to regulate the practice of law and the "conduct and activities of the state Bar of Michigan and its members" is *complete and absolute*. Const 1963 art 6, § 5; MCL 600.904. Nowhere in the text of the Constitution (or of MCL 600.904) is there any suggestion that the Supreme Court's authority to regulate the practice of law is complete and absolute except when it comes to the types of discipline it can dole out to Petitioner. If the Court wishes to prevent Petitioner from inheriting $16 million as the fruit of his ethical violation, the Court is well within its constitutional power to do so.

Petitioner is, of course, correct that the standard forum for lawyer disciplinary matters is the Attorney Grievance Commission. But it is a different story when the lawyer comes to a *court* asking it to affirmatively enforce a legal document that he prepared in violation of the MRPCs. That is the lesson from *Abrams*, *Speicher*, *Evans & Luptak*, and *Morris & Doherty*, where, in

each case, the courts quickly recognized that it would be "*absurd* if an attorney were allowed to enforce an unethical [legal instrument] *through court action*, even though the attorney potentially is subject to professional discipline" for preparing it. See *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002) (emphasis added). In none of these cases did the court feel that it had to look the other way and enforce the instrument while simply punting the ethical issue to the AGC. Instead, in all of these cases the courts recognized that they had the duty and responsibility to void the violating provisions of the legal instrument to keep the lawyer from walking out of their courtrooms profiting from his ethical misconduct. *See id.* Otherwise, courts would be forced to put their stamp of approval on an ethical violation.[1]

In short, this Court should reject Petitioner's effort to use his pending disciplinary proceeding (see Petitioner's Br at 16) to *shelter* from this Court's plenary authority to discipline him and regulate the practice of law. Petitioner's game plan here seems pretty clear. In this Court, he argues that the Court's authority to discipline him is limited, even though it is plenary—the Court can't touch the $16 million. And then in the AGC he will argue that *its* authority is limited—it can suspend or disbar him, but it can't touch the $16 million either. Petitioner's position would thereby transform this Court's plenary, exclusive constitutional authority to regulate the practice of law and the conduct and discipline of all members of the Bar into a limited, impotent one that could never get to the root of the problem the Court aimed to solve in MRPC 1.8(c).

[1] This reasoning also addresses Justice Larsen's hypothetical, which Petitioner discusses on page 24 of his brief. The legal instrument is void *to the extent it purports to benefit the lawyer* who prepared it in violation of the MRCPs and brought it to the court for enforcement. The instrument otherwise stands. This was exactly what Respondents answered at oral argument (*see* 155b: "the provisions that violate the ethical rules are void, not the contract as a whole"), and it is consistent with Respondents' position here: the specific provisions of the will and trust that purport to benefit Petitioner are void, not the will and trust as a whole.

2. Any legislation addressing whether a lawyer can inherit despite a violation of MRPC 1.8(c) would be unconstitutional.

Petitioner argues that the Court should punt not just to the grievance commission, but also to the Legislature. Petitioner argues that it is the Legislature's job to enact substantive law governing the validity of estate documents, and that the reason the Legislature has not passed a statute governing whether a lawyer can inherit when he violates MRPC 1.8(c) is because the Legislature is content with the *Powers* "undue influence" regime. (See Ptr's Br at 6-7, 23.)

But the real reason the Legislature has not acted is more fundamental: Any such statute would be unconstitutional. Regulating the practice of law is the Supreme Court's *exclusive* constitutional domain. Const 1963 art 6, § 5; MCL 600.904. So if the Legislature enacted a statute that said a lawyer could inherit despite violating MRCP 1.8(c), the statute would be an unconstitutional violation of the separation of powers. It would infringe upon this Court's exclusive authority to enact and enforce its rules of practice. Const 1963, art 2, § 2. The same is true for the supposed "legislative proposal for a statutory forfeiture of a gift in an estate planning document to the drafting attorney" that Petitioner says the Probate Section is mulling. (See Petitioner's Br at 32.) Those statutes would exercise "powers belonging to another branch"—judicial powers to regulate the practice of law and the conduct of lawyers—an exercise that is expressly forbidden by the Constitution. Const 1963, art 2, § 2.

Petitioner is fundamentally wrong about the nature of that judicial power. Petitioner argues that rules of practice like the MRPCs are just "ethical cannons" that can never regulate "substance." (See Petitioner's Br at 2, 45.) But while Petitioner is right that a rule of *procedure* (like a court rule) may not regulate substance, *see McDougall v Schanz*, 461 Mich 15; 597 NW2d 463 (1999), this Court's power to enact and enforce rules of *practice* is not so cabined. See *Grievance Adm'r v Fieger*, 476 Mich 231, 240; 719 NW2d 123 (2006). A quick flip through the

MRPCs proves the point. These are not purely procedural house rules that govern attorney conduct in the courtroom. Instead, the MRPCs reach out into the real world to regulate a sweeping array of real-world lawyer behavior, from attorney advertising and contact with prospective clients to comments on a radio show. See MRPC 7.2, 7.3, 3.5(c), 6.5(a); see *Fieger*, 476 Mich at 240. These are all matters of substance, not procedure, and this Court acts well within its constitutional authority in regulating all of them. *Fieger*, 476 Mich at 240. Rule 1.8(c) is of a piece: it regulates the real-world interaction between a lawyer and a client choosing where to leave her assets at death, and the real-world temptation for a lawyer to wet his beak during these interactions with a substantial gift to himself. The power to regulate this interaction and the consequences that flow to the lawyer from it are camped squarely within this Court's plenary constitutional authority to regulate the practice of law and the conduct of all lawyers in this State.[2]

So it would be a fruitless exercise for this Court to wait for the Probate Section to draft up some legislation (it has come up with nothing in the five years this case has been pending) in the hopes that the Legislature might someday ride to the rescue. (Petitioner's Br at 32.) The power to police Rule 1.8(c) rests squarely with this Court.[3]

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[2] Indeed, Petitioner's view of this Court's authority to enforce MRPC 1.8(c) runs afoul of the constitutional-doubt canon, which provides that a statute (MRPCs are interpreted like statutes) "should be interpreted in a way that avoids placing its constitutionality in doubt." (See Scalia and Garner, *Reading Law* at p. 247.) Under Petitioner's view, the Court may not fully enforce MRPC 1.8(c) without unconstitutionally infringing upon the Legislature's authority to enact substantive law, a view that the Court under the constitutional-doubt canon should avoid.

[3] Petitioner cites legislation from other states that have enacted legislation governing attorney gifts in estate documents. (Petitioner's Br at 37.) But those states operate under different constitutional schemes than Michigan does. The Florida constitution, for example, expressly subordinates the Florida Supreme Court's role to the role of the Florida legislature, providing that the Florida Supreme Court's adoption of rules for practice and procedure are subject to "repeal[]" by the Legislature. Fla Const 1968, art V § 2(a). And Connecticut's constitution

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3. The Legislature has expressly invited courts to invalidate trust provisions whose purposes violate public policy. The trust's purpose here of leaving money to a lawyer who violated MRPC 1.8(c) is contrary to public policy.

Indeed, where the Legislature *has* acted, it has given every indication that it wants the *courts* to decide whether certain provisions in a will or trust are invalid because they are contrary to Michigan public policy. See MCL 700.7410(1), 7404, 2705. The Legislature expressly provides that a trust terminates to the extent its purposes are "found by a court to be unlawful or contrary to public policy." MCL 700.7410(1). As set forth in detail in Respondents' opening brief, it is black-letter law that when an attorney violates the MRPCs in preparing an instrument, the offending provisions violate public policy and are therefore void as a matter of law. (See Respondent's Br at 19, 21-26.) Courts simply will never enforce a provision of a legal instrument that was drawn in violation of the MRPCs and that is therefore contrary to public policy to the extent it purports to benefit the lawyer. (*See id.*)

Petitioner asks the Court to read restrictively the Legislature's statutory invitation to void will and trust provisions whose "purposes" violate public policy. He argues that there was only one relevant "purpose" of the trust here, and it was pure—after all, there is nothing wrong with Mr. Mardigian wanting to "leave money to his best friend." (Petitioner's Br at 8.) Indeed, that there is nothing wrong with leaving one's money to a friend is such an obvious point that, as Petitioner highlights several times in his brief, Respondents' counsel readily conceded it at oral argument earlier this year. (See *id.* at 2, 39.) (Respondents humbly submit that this is the sort of ready concession that the Court should always expect and encourage from counsel.)

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contains no provision with regard to the judiciary's authority to enact its own rules of professional conduct. *See* Conn Const 1965.

But that is not the only "purpose" encompassed by MCL 700.7410(1) and 7404. A will or trust can have many purposes, and the Legislature instructs that a trust terminates to the extent *any* of the "purposes of the trust" (plural) are contrary to public policy, not only when the "testator's purpose" is contrary to public policy. See MCL 700.7410(1) ("a trust terminates to the extent . . . the purposes of the trust . . . are found by a court to be unlawful or contrary to public policy"). So one of the purposes of the trust could be perfectly legitimate, yet another could violate public policy. The statutory scheme directs that this inquiry is both forward-looking—from the perspective of the trust at creation—and backward looking—from the perspective of the court reviewing the instrument. *Compare* MCL 700.7404 (a trust "may be *created*" only to the extent its purposes are not contrary to public policy) *with* MCL 700.7410(1) (a trust "*terminates*" to the extent any of its purposes are "found by a court" to be contrary to public policy). So the question here is whether, sitting here today and reviewing this trust, the Court finds that any of its purposes are contrary to public policy. And one of the purposes of this trust, under the plain meaning of that term, is to give $16 million to a lawyer who prepared the trust in violation of MRPC 1.8(c). Indeed, that is the *dominant* purpose of this trust—the great bulk of the trust assets purport to go to this lawyer and his children. But leaving a substantial gift to a lawyer who prepared the trust in violation of MRPC 1.8(c) is an impermissible purpose because it is contrary to Michigan public policy.[4] The Court should find that this purpose of the trust violates public policy and that the trust therefore terminates to the extent it benefits the

[4] This is what Respondent's counsel argued at oral argument, as well: that it was a "very narrow reading of purpose" to assume it only meant the testator's intent to leave his money to his friend, when another "purpose of this will is to dispose of this property to an unethical lawyer who prepared a will in violation of the rules of professional conduct." (See Petitioner's App 152b.)

lawyer—leaving the assets to be distributed, as the decedent expressly provided in the case of such a contingency, to Respondents. (See App 58a, Will § III; App 48a, Trust § 4.)

These provisions are separate from MCL 700.7406, which says a trust is "void to the extent its creation was induced by fraud, duress, or undue influence." So the Legislature *expressly* contemplated that courts would invalidate trust provisions that either were induced by undue influence *or* that are contrary to public policy. In other words, a trust or will provision can violate public policy even if it was *not* induced by undue influence. Even if Petitioner did not unduly influence the decedent, the trust and will provisions that benefit him are *still* void as against public policy because he prepared them in violation of MRPC 1.8(c). MCL 700.7410(1); MCL 700.7404; MCL 700.2705.

4. Bright-line enforcement of MRPC 1.8(c) is the only workable rule.

Petitioner argues that "MRPC 1.8(c) does not prohibit an attorney from *taking* under an instrument that the attorney drafts, it prohibits *drafting* the instrument." (Petitioner's Br at 34.) That's an argument only a lawyer could love. If a law says you "shall not" do something and then you do it anyway, you don't get to keep the fruits of your violation. If a law said, for example, "you shall not forge a check," nobody would argue that the law prohibits the drafting but not the taking. The ordinary Michigander understands that when the Michigan Supreme Court says you "shall not" do something and then you do it anyway, there is no scenario where you walk away with $16 million.

This highlights the fundamental flaw in Petitioner's position and the *Powers* regime he defends. In the world Petitioner envisions, a lawyer can openly violate MRPC 1.8(c) and still have a path to inheriting millions of dollars. Worse than that, perhaps, along the way the Michigan courts must affirmatively declare to the public that a will and trust prepared in violation of MRPC 1.8(c) is *valid and enforceable*. (That is the relief Petitioner seeks in this

case: an order from the courts declaring that the will and trust he prepared in violation of MRPC 1.8(c) are "valid" and enforceable. See App 81a.) So the Michigan courts (including this Court) would have to not only allow the lawyer to profit millions of dollars from his ethical breach, but also place their own stamp of approval on this ethically repugnant process. Why would a court of law willingly endorse this regime?

Petitioner answers that it must be this way because the testator's intent is the "polar star," and it shines the way to his treasure here. (Petitioner's Br at 2.) Petitioner laments that voiding the gifts to him "would not only be punishing [him]," but the decedent "would be punished as well." (Petitioner's Br at 47.) But it is only because of *Petitioner* that the Court does not have before it a legally valid and full expression of the testator's intent. The decedent's lawyer committed malpractice by failing to fully express the decedent's testamentary intent in legally valid provisions of a testamentary instrument. The workable solution is not to reward the lawyer who committed malpractice with millions of dollars, or to permit that lawyer to shelter behind the supposed "testamentary intent" that he stymied. Instead, the solution is to void the provisions that unlawfully purport to benefit the lawyer, and then enforce the provisions that remain. The remaining provisions here are clear: the decedent expressly provided that if any provision of his will or trust failed for any reason, he wanted his assets to go to his heirs, the Respondents here. (See App 58a, Will § III; App 48a, Trust § 4.) *That* is the only legally valid expression of the decedent's intent that exists or that will ever exist. And that is the intent that the Court should honor in this case. The decedent's intent is indeed the "polar star," but it illuminates a different path than Petitioner thinks.

The contingency clauses in the decedent's will and trust also lay to rest the idea that Respondents would receive a "windfall" that the decedent "specifically intended to prohibit" if

the gifts to Petitioner were disallowed. (Petitioner's Br at 42.) Just the opposite. The decedent specifically intended to *benefit* Respondents if any provision of his will or trust failed. (See App 58a, Will § III; App 48a, Trust § 4.)[5]

In the end, bright-line enforcement of MRPC 1.8(c) is the only workable rule. Contrary to Petitioner's assertion that this is "unworkable" (Petitioner's Br at 2), bright-line enforcement is as easy and straightforward as it gets. A lawyer who violates MRPC 1.8(c) may never inherit under the documents he or she prepares in violation of the rule. That's it. That's the whole analysis. If the Court enforces the rule according to its terms, all Michigan lawyers will know that the Court meant exactly what it said when it said lawyers "shall not" do this under any circumstances, no exceptions. See MRPC 1.8(c). And all Michigan lawyers will know that, if their friends wish to leave them money in their estate documents, it is extremely easy to make this happen: just find another lawyer to prepare the documents. Thus bright-line enforcement would incentivize the right sort of behavior and yield the right sorts of results: lawyers are incentivized to act ethically (because this is the only way for them to inherit), and then the decedent's testamentary intent is expressed fully and completely in an enforceable legal document, prepared by an independent counselor with no skin in the game, in conformity with the ethical rules.

Petitioner's proposed regime, in contrast, signals to Michigan lawyers that they can act unethically and get away with it. Indeed, Petitioner has no real answer to the hypothetical posed by Respondents in their opening brief, where a lawyer uses his unique position of confidence with an elderly client to slip in a gift to himself. He calls the scenario "impossible" (Br at 27),

[5] It is also worth noting that, despite Petitioner's smear of the decedent's brother, Ed Mardigian, the decedent expressly refers to him in his estate documents as his "beloved brother Ed Mardigian." (See App 50a.)

but it's anything but. If this Court were to announce that lawyers can violate MRPC 1.8(c) and still have a path to inherit millions of dollars, lawyers violating the rule would be not just possible but the unfortunate and perhaps commonplace reality. The *Powers* regime by definition creates a path for the lawyer to inherit despite the ethical breach, and thus by definition incentivizes the breach.

Petitioner points out that lawyers won't *always* succeed, and he cites cases where lawyers didn't quite pull off the caper. (See Petitioner's Br at 20.) But the existence of *any* path to inheriting despite a violation of the rule necessarily creates an incentive for lawyers to violate the rule. The *Powers* undue-influence regime might snag the sloppiest offenders, but by its nature, it lets some unethical lawyers through. Petitioner can debate the size of the holes in the *Powers* sieve, but it is still a sieve.

5. The Court's decision should have normal retroactive application.

In a last gasp, Petitioner argues that, if this Court overrules *Powers*, its decision should be given prospective application only. (Petitioner's Br. at 47.) This is of a kind with Petitioner's jurisprudence-of-one position in this case, where the Court's rules apply to everyone but him. This Court should apply its normal rule that "judicial decisions are to be given complete retroactive effect." *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986). In light of the clear prohibition of Petitioner's conduct in MRPC 1.8(c), it is inconceivable that he chose to violate the rule thinking *Powers* would let him inherit anyway. And if that was, in fact, his intention, this bad-faith conduct is all the more reason to keep him from profiting $16 million from his violation of MRPC 1.8(c).

Dated: October 26, 2017

Respectfully submitted,

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