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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JUDGMENT APPEALED FROM

On July 7, 2017, this Court granted Respondents-Appellants' application for leave to appeal the Court of Appeals' October 8, 2015 decision (App 5a, Ex B), which reversed the Charlevoix County Probate Court's November 6, 2013 grant of summary disposition to Respondents (App 2a, Ex A).

QUESTIONS PRESENTED FOR REVIEW

Petitioner-Appellee Mark Papazian, a Michigan lawyer, violated Michigan Rule of Professional Conduct 1.8(c) by preparing a will and trust for an unrelated client under which Petitioner and his children were to receive over $16 million. The question in this case is whether Petitioner may inherit the money despite his ethical breach.

The probate court answered no.
Respondents answer no.
The Court of Appeals answered yes.
Petitioner answers yes.

In its order granting leave to appeal, the Court directed the parties to include among the issues to be briefed:

1. whether the rebuttable presumption of undue influence set forth in *In re Powers Estate*, 375 Mich 150 (1965), when used as a means to determine the testator's intent, is a workable rule that sufficiently protects the testator when the testator's lawyer violates MRPC 1.8(c);

2. whether this Court's adoption of MRPC 1.8(c) warrants overruling *In re Powers Estate*; and

3. if *In re Powers Estate* is overruled, whether a violation of MRPC 1.8(c) should bear on the validity of the gift provided to the testator's lawyer under the testamentary instrument; and if so, how?

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioner is a member of the State Bar of Michigan who prepared a will and trust for an unrelated client under which he and his children were to receive over $16 million in assets. This violated Michigan Rule of Professional Conduct 1.8(c), which unmistakably provides that a lawyer "shall not" do this, under any circumstances. The question in this case is what happens next.

Petitioner says this Court's hands are tied. He argues that all the Court can do is refer him to the Attorney Grievance Commission, which could perhaps suspend or disbar him, but the Court cannot keep him from inheriting the $16 million. Petitioner argues that under this Court's 1965 decision in *In re Powers Estate*—which was decided long before the enactment of MRPC 1.8(c)—he is permitted to proceed to trial to attempt to convince a jury that, despite his ethical breach, he did not "unduly influence" the decedent to leave him the money. Petitioner argues that the Court cannot as a matter of law keep him from walking off with the $16 million because this would "usurp" the Legislature's prerogative to enact statutes governing the validity of wills and trusts.

Respondents submit that this is a fundamental misunderstanding of the Court's constitutional power to regulate the practice of law and the conduct of members of the Bar. The Constitution of 1963 grants the Supreme Court *exclusive* authority to regulate the practice of law in Michigan. Const 1963, art 6, § 5. The Legislature has affirmed that this power is exclusively judicial and not legislative, acknowledging the Supreme Court's supreme authority to adopt rules and regulations concerning the "conduct and activities of the state bar of Michigan and its members." MCL 600.904. This Court has held that this core constitutional authority gives the

Court the "duty and responsibility to regulate and discipline members of the bar of this state." *Grievance Adm'r v Fieger*, 476 Mich 231, 240; 719 NW2d 123, 131 (2006).

Respondents submit that the Court has the duty and responsibility to exercise that authority here by refusing to allow Petitioner to profit from his unethical conduct. The Court's plenary authority to *adopt* the rules of professional conduct necessarily entails the authority to *enforce* them. Indeed, because the Court has exclusive authority in this realm, the Court is the *only* body constitutionally empowered to enforce the MRPC. The Legislature could not enact a statute addressing a lawyer's ability to inherit under a will or trust prepared in violation of MRPC 1.8(c) without encroaching upon this Court's constitutional powers. This would be in effect a legislative override of MRPC 1.8(c)—drafting exceptions or end-runs into what is otherwise an absolute rule. The ball is in this Court's court, so to speak, not the Legislature's. So when a lawyer comes to this Court having unabashedly violated one of the Court's clear ethical rules, the Court does not have to send him on his way with a chance at recovering $16 million. The Court is well within its authority to enforce Rule 1.8(c) by ordering, as a sanction for violating the rule, that Petitioner is not entitled to inherit under the instruments he prepared.

This result is consistent with statutory law and the longstanding principle that courts may not and will not enforce provisions in a legal document that violate public policy. This Court and the Court of Appeals have made clear that the MRPC are "definitive indicators of public policy," that a lawyer who violates the MRPC therefore violates public policy, and that a legal provision that violates the MRPC is unenforceable as a matter of law. See, *e.g.*, *Terrien v Zwit*, 467 Mich 56, 67 n 11; 648 NW2d 602 (2002). And the Legislature has made doubly clear in the Estates and Protected Individuals Code (EPIC) that the *courts* play a central role in invalidating estate documents that violate public policy. The Legislature provides, for example, that a trust is

unenforceable to the extent that its purposes are "*found by a court* to be unlawful or contrary to public policy." MCL 700.7410(1). Refusing to let Petitioner profit from his violation of MRPC 1.8(c) would not "usurp" the Legislature's role, as Petitioner argues. Rather, the Court simply would be exercising authority squarely granted and affirmed by both the Constitution and the Legislature itself.

The Court asked the parties to address whether the *In re Powers Estate* regime—where a lawyer who prepares a self-dealing will is permitted to inherit if she overcomes a "presumption" of undue influence—is still a workable rule, or whether the case should be overruled in light of MRPC 1.8(c). The Court of Appeals majority here (over a dissent), showed laudable restraint by holding that it was bound to follow *Powers* unless and until this Court expressly overruled it. As discussed in detail below, Respondents submit that this was not quite right, despite the commendable instinct, in light of this Court's subsequent enactment of MRPC 1.8(c). But Respondents now ask the Court to overrule *Powers* expressly, to the extent it is not already dead letter, because the *Powers* presumption is not at all workable.

The central flaw of following the *Powers* regime post-MRPC is that it creates an *incentive* for lawyers to violate Rule 1.8(c), by creating a path for the lawyer to inherit despite the rule's clear prohibition. Rule 1.8(c) expressly provides that lawyers "shall not" prepare estate documents for an unrelated client that leave a substantial testamentary gift to the lawyer. No exceptions. But *Powers*, in effect, would draft an exception into Rule 1.8(c): a lawyer "shall not" do this, "*unless*" the lawyer can prove that he or she did not unduly influence the decedent. The *Powers* regime would thus usher back in the very problem the Court sought to put an end to once and for all by making MRPC 1.8(c) an absolute prohibition.

In the end, this case is about this Court's power to enforce its own rules of professional conduct, and its duty to enforce them effectively to protect the public from unscrupulous lawyers. The public would find it pretty extraordinary if an unethical lawyer could walk into a Michigan court—the Michigan Supreme Court, no less—admit an ethical violation, and walk away with a chance at winning millions of dollars. Petitioner here argues at length that his violation of MRPC 1.8(c) should be excused, and that he can show that the decedent really, truly intended to leave him this money. Respondents have their doubts, to say the least, but these sorts of factual disputes are rightly made irrelevant by MRPC 1.8(c), in this case and the next 100 like it. Rule 1.8(c) is an absolute bar on this sort of lawyer self-dealing, and this Court should enforce the rule accordingly: A lawyer who violates MRPC 1.8(c) may *never* inherit under the offending documents.

Respondents respectfully ask the Court to reverse the Court of Appeals' decision to the contrary and affirm the probate court's grant of summary disposition to Respondents.

STATEMENT OF THE MATERIAL PROCEEDINGS AND FACTS

I. Petitioner Prepared a Will and Trust for an Unrelated Client Under Which He and His Children Were to Receive Substantial Gifts

The dispositive fact in this case is not in dispute. Petitioner Mark Papazian, a Michigan lawyer subject to the Michigan Rules of Professional Conduct, prepared a will and trust for decedent Robert Mardigian under which Petitioner and his two children were to receive approximately $16 million in assets. (*See* App 58a, Ex G, Last Will and Testament of Robert Mardigian dated June 8, 2011; App 48a, Ex F, Amendment and Restatement of the Robert Douglas Mardigian Revocable Trust dated August 13, 2010.) The will Petitioner prepared contained bequests of personal property to Petitioner—including a jet ski and a pontoon boat—and provided that the bulk of the remaining estate poured over to a revocable trust. (App 58a, Ex

G.) The revocable trust, which Petitioner also prepared, then provided that Petitioner and his children would receive the bulk of Mr. Mardigian's multi-million-dollar estate. (App 48a, Ex F.) Petitioner prepared both instruments, and both contained substantial gifts to Petitioner and his children.

The circumstances leading up to this ethical violation were quite suspicious. In early versions of Mr. Mardigian's will—versions Petitioner did not prepare—there were no gifts to Petitioner. The next versions left the bulk of the estate to another friend and his children, with a (relatively) smaller gift to Petitioner. (See App 17a, Ex C, 2003 Estate Planning Document, Ex M to 12/14/12 MSD; App 31a, Ex D, 2004 Unsigned First Codicil and Trust, Ex D to 8/21/13 MSD.) Then, in 2007, Petitioner took control of the will and, lo and behold, the old friend was phased out and Petitioner and his children were subbed in as the primary beneficiaries. (See App 43a, Ex E, 2007 Unsigned First Codicil, Ex G to 6/25/12 Response to Petitioner's MSD.) Petitioner's stake thereafter grew with each iteration, ultimately culminating in the operative estate documents here, where the old friend has been phased out completely, Petitioner is designated the sole personal representative and has control over distribution of all assets, and Petitioner and his children are to receive the bulk of the $16 million estate. (App 48a, Ex F, App 58a, Ex G.)

The record shows Mr. Mardigian had second thoughts about all of this. On June 22, 2011, Mr. Mardigian marked up a copy of his trust and, among other things, wrote, "ALL VOID – This Will not acceptable." (See App 65a, Ex H, June 2011 Revocation, Ex A to 12/14/12 MSD.) He then dated and signed this note. (*Id.*) Right up until his death, Mr. Mardigian continued to rethink his estate planning, saying things like, "there's a lot of changes I want to make," "I'm still thinking about things," and, at the hospital before his death, that he "wanted

more time to think about his estate planning." (See App 88a, Ex K, Bonventre Deposition, Ex 3 to Papazian's 1/14/13 Combined Response to Mardigians' MSD.)

Suspicious circumstances continued even after Mr. Mardigian's death. After Petitioner filed this action to admit the will and trust into probate, he ducked and weaved for months about whether he had prepared the estate documents. Petitioner first asserted that one of his law partners was the one who made the changes to the decedent's trust documents. (App 84a, Ex J, Petitioner's MSD dated May 16, 2012 at 3-4.) After his partner adamantly denied it, Petitioner backed away from that theory. Then he argued for a while that his *secretary* was the one who actually typed the documents, attempting to suggest, perhaps, that this meant he did not "prepare" the will or trust in violation of MRPC 1.8(c). Petitioner also suggested at various points that other law firms and professionals played roles in preparing or reviewing the various estate-planning documents, attempting to suggest, perhaps, that this involvement somehow scrubbed the stain of his violation of MRPC 1.8(c). (See, *e.g.*, App 86a.)

It is no longer genuinely disputed, however, that Petitioner did indeed prepare the relevant will and trust documents for Mr. Mardigian. Mr. Papazian admitted he did so in his deposition. (*See* App 92a, Ex L; Papazian dep at 368. "Q: [Y]ou admit drafting . . . the Last Will? A: Yes, I do admit that.") And his counsel admitted in open court that "there is no factual dispute" that Petitioner prepared the operative will and trust documents. (App 96a, Ex M, Tr Nov 6, 2013 at 42.)

There is therefore no genuine issue of material fact that Petitioner prepared the will and trust under which he and his children were to receive $16 million.

II. Petitioner Sought an Order from the Probate Court Declaring that the Will He Prepared in Violation of MRPC 1.8(c) was Nonetheless "Valid." The Probate Court Held that Because Petitioner Violated MRPC 1.8(c), the Offending Provisions of the Will and Trust Were Void as a Matter of Law as Against Public Policy.

Petitioner initiated this action in the Charlevoix County Probate Court in February 2012. He affirmatively asked the court to declare that the will and trust he prepared in violation of MRPC 1.8(c) were "valid" and enforceable. Specifically, in his February 22, 2012 Amended Petition for Admission for Probate, he asked the court to enter "An order determining that [the will] is valid and admitted to probate." (App Ex 81a, Ex I.)

Respondents are family members and friends of the decedent who will inherit Mr. Mardigian's estate if the gifts to Petitioner and his children are disallowed. This is because the will and trust contained contingency clauses providing that if any provision failed (like the unenforceable provisions leaving substantial gifts to Petitioner and his children), the assets would revert to Mr. Mardigian's family members and friends. (*See* App 58a, Ex G, Will § III; App 48a Ex F, Trust § 4.)[1]

Respondents moved for summary disposition under MCR 2.116(C)(10) on the grounds that (1) there was no genuine issue of material fact that Petitioner prepared the will and trust under which he and his children were to receive $16 million in assets; (2) Petitioner violated MRPC 1.8(c) in so doing; and therefore (3) the gifts to Petitioner and his children were void as against public policy as a matter of law. Petitioner countered that there supposedly is not a "per se" bar to such gifts under Michigan law, and that he was entitled to proceed to a jury trial to attempt to prove that he did not exert "undue influence" over the decedent.

[1] Appellants have entered into a contingent settlement agreement pending the outcome of this appeal.

On November 6, 2013, the probate court granted summary disposition to Respondents. The court held that because Petitioner violated Rule 1.8(c) when he drafted the will and trust, the offending gifts were void as against public policy. The court reasoned:

> [T]he Court is prepared to find that, based on there being no factual dispute about [Petitioner preparing the estate documents], that the Court would not accept the Will and Trust prepared by the attorney that benefits himself and his family for the purposes of probate and eventual enforcement . . . . The court . . . makes that decision based on that being not permitted under the Rules of Professional Responsibility. And *the Court would be disinclined to enforce such a document in the court of this state.*

(App 96a, Ex M, Tr Nov 6, 2013 at p 43; emphasis added.)

III. The Court of Appeals Reversed in a 2-1 Published Decision

The Court of Appeals reversed. The panel majority (Wilder, J., and Stephens, J.) acknowledged that "appellees rightly recognize that MRPC 1.8(c) expressly prohibits the conduct at issue here." (App 51, Ex B, Slip Op at 4.) The majority held, however, that it was bound to follow this Court's decision in *In re Powers Estate*, 375 Mich 150; 134 NW2d 148 (1965), a pre-MRPC decision in which the Court stated it was "irrelevant" that an attorney had drafted a will under which he was set to inherit. The *Powers* Court held that the lawyer could proceed to a jury trial to attempt to convince the jury that he did not "unduly influence" the testator. *Id.* at 176.

The panel majority held that *Powers* continued to control despite this Court's subsequent enactment of Rule 1.8(c) in 1988 because although Petitioner's "violation of MRPC 1.8(c) is clearly unethical conduct, it is not *clearly* conduct against public policy." (App 17a, Ex B, Slip Op at 5; emphasis in original.) Hence, held the panel, "[u]nder *Powers*, we are required to remand for further proceedings, where appellant could be required to overcome the presumption of undue influence arising from the attorney-client relationship in order to receive the devises left to him and his family." (*Id.* at 4.) The panel majority held that this was so even if other cases

"may have correctly foretold the outcome to be reached by our Supreme Court should it decide to consider a case with such facts as are presented here," because "we lack the authority to overrule *Powers*[.]" (*Id.*)

The Court of Appeals dissent (Servitto, J.) noted that "*Powers* was decided long before the 1988 enactment of the MRPC," and "MRPC 1.8(c) now specifically prohibits this conduct." (App 5a, Ex B, Dissent at 1.) And "[b]ecause 'the Legislature delegated the determination of public policy regarding the activities of the State Bar of Michigan to the judiciary pursuant to MCL 600.904 . . . conduct that violates the attorney discipline rules set forth in the rules of professional conduct violates public policy.'" (*Id.* at 2; quoting *Speicher v Columbia Twp Bd of Election Com'rs*, 299 Mich App 86, 91; 832 NW2d 392 (2012).) "Thus, once the trial court has found the terms of a trust or instrument of disposition to be contrary to public policy the legal effect of the instrument is a foregone conclusion and the meaning of the instrument is no longer open to interpretation or subject to dispute concerning intent." (*Id.* at 3.) The dissent would have affirmed the probate court's grant of summary disposition to Respondents. (*Id.*)

Respondents filed an application for leave to appeal to this Court, and the Court scheduled a mini oral argument on the application. Following the MOAA, the Court on July 7, 2017 granted the application for leave to appeal and ordered further briefing and argument.

ARGUMENT

I. The Power to Adopt MRPC 1.8(c) Entails the Power to Enforce It: The Court Should Enforce Its Rule By Ordering that No Michigan Lawyer May Inherit Under a Will or Trust He Prepared in Violation of MRPC 1.8(c)

Under the Court of Appeals' decision, a Michigan lawyer may violate MRPC 1.8(c) and still inherit under the documents he prepared in violation of the rule. Respondents ask this Court to reverse because (*A*) MRPC 1.8(c) absolutely forbids this conduct; (*B*) this Court has plenary constitutional authority to regulate the practice of law and the conduct of members of the Bar;

(*C*) this plenary authority to adopt MRCP 1.8(c) necessarily entails the power to *enforce* the rule by refusing to allow an unethical lawyer to profit from his unethical conduct; (*D*) the Legislature has expressly invited the Court to invalidate trust provisions like these ones whose purposes violate public policy; (*E*) even without a Legislative invitation, this Court will never permit an unethical lawyer to enforce a provision of a legal document that was prepared in violation of the MRPCs and Michigan public policy; and (*F*) Petitioner's argument that the Court's only recourse is to refer the matter to the Attorney Grievance Commission is meritless.

A. MRPC 1.8(c) is an absolute prohibition: a lawyer "shall not," under any circumstances, prepare estate documents for an unrelated client that leave the lawyer a substantial gift.

For over a century, this Court has "bluntly warned" lawyers not to draft wills for unrelated clients that contain substantial testamentary gifts to the lawyer. See *Abrey v Duffield*, 149 Mich 248, 259; 112 NW 936 (1907); *In re Powers Estate*, 375 Mich 150, 181; 134 NW2d 148, 164 (1965). Michigan courts have repeated the warning over the years, and have held that it is "generally recognized by the profession as contrary to the spirit of its code of ethics for a lawyer to draft a will making dispositions of property in his favor." *Estate of Karabatian v Hnot*, 17 Mich App 541; 170 NW2d 166 (1969). For decades, however, these warnings were delivered forbearingly: lawyers *shouldn't* do this, but if they did there was still a path for them to inherit under the documents they prepared in violation of the spirit of their ethical code. In *Powers Estate*, for example, the ethical-spirit violation created only a "presumption of undue influence," and one that the lawyer could attempt to overcome at a jury trial. *In re Powers Estate*, 375 Mich at 181.

This regime continued for more than two decades following *Powers*. Neither the Michigan Canons of Professional Ethics (which applied prior to 1971) nor the Michigan Code of Professional Responsibility (which applied from 1971-1988) contained an express prohibition of

a lawyer preparing a will or trust containing a gift to the lawyer. Canons 6 and 11 and Disciplinary Rules 5-105 contained general attorney conflict of interest rules, but none contained an express prohibition of this conduct. Thus, the *Powers* rule persisted: lawyers were "bluntly warned" not to do this, but no rule expressly forbade it.[2]

In 1988, this Court turned the repeated warnings against this conduct into an absolute prohibition. This Court enacted the Michigan Rules of Professional Conduct in 1988 pursuant to a Constitutional grant of authority to establish rules of practice and procedure, Const 1963, art 6, § 5, and a Legislative affirmation that the Court has exclusive authority to "adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members," MCL 600.904. Among the rules the Court enacted were MRPC 1.7 and 1.8, which address conflicts of interest. MRPC 1.7 is titled, "Conflict of Interest: General Rule," and, naturally, sets forth the general rules governing attorney conflicts. MRPC 1.8 is titled, "Conflict of Interest: Prohibited Transactions," and contains a list of specific forbidden conflict situations. These include entering into business transactions with a client except under certain conditions (1.8(a)), using information relating to a representation to the disadvantage of a client (1.8(b)), accepting compensation for representing a client from someone other than the client except under certain conditions (1.8(f)), and others.

MRPC 1.8(c) is among these prohibitions, and flatly prohibits lawyers from preparing a will or trust (or any other legal document) for an unrelated client under which the lawyer will receive a substantial gift. The rule provides in full:

[2] Indeed, prior to the enactment of the MRPC, the ethics rules functioned much like the common-law evidentiary rules that applied prior to the enactment of the Michigan Rules of Evidence—on a case-by-case basis, guided by prior decisions of the Court.

> A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

Unlike under the fuzzy *Powers* regime, the new rule makes no mention of undue influence and does not suggest that there is *any* path for a lawyer to inherit under a will he prepares for an unrelated client. The rule is absolute—a lawyer "shall not" do this, no exceptions.

Some conflicts under MRPC 1.7 and 1.8 are waivable. MRPC 1.7(a), for example, provides that a lawyer "shall not represent a client if the representation of that client will be directly adverse to another client, *unless* . . . each client consents after consultation." (Emphasis added.) MRPC 1.8(a) likewise provides that a lawyer "shall not enter into a business transaction with a client . . . *unless* . . . the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and . . . the client consents in writing." (Emphasis added.) See also, *e.g.*, MRPC 1.7(b), 1.8(f).

MRPC 1.8(c), on the other hand, is *not* waivable. It is an absolute prohibition, and may not be cured by waiver or consent. See MRPC 1.8(c). So even if a client purported to execute a waiver stating that he or she was aware that a substantial gift to the lawyer drafting the will violated the ethics rules and the client nonetheless wished to waive any conflict, the waiver would not be enforceable. Even if the client executed a waiver stating *expressly* that there was no undue influence or that the client waived any presumption of undue influence, this would not be enforceable. Rule 1.8(c) is a bright-line rule: a lawyer "shall not" do this, under any circumstances.

For over 25 years, therefore, the MRPC have flatly barred attorneys from preparing estate-planning documents for unrelated clients under which the attorney receives a substantial testamentary gift. No exceptions. It does not matter if the attorney is good friends with the

client. It does not matter if the attorney does not exert "undue influence" over the client. Lawyers simply "shall not" do it. For over 25 years, in other words, Rule 1.8(c) has flatly prohibited the exact thing Petitioner did here: He prepared a will and trust for an unrelated client giving him and his children substantial testamentary gifts. In short, there is no genuine dispute that Petitioner's admitted conduct violated Rule 1.8(c).[3]

B. The Supreme Court has plenary power to regulate the "practice" of law and the "conduct," "activities," and "discipline" of the members of the State Bar.

Petitioner's central argument in this case is that, despite his violation of Rule 1.8(c), courts do not have the full authority to *enforce* the rule by preventing him from inheriting. Specifically, Petitioner argues that the courts have limited authority only to discipline him, not to invalidate the gifts. Petitioner argues that invalidating the gifts would "usurp" the Legislature's prerogative to enact statutes governing the validity of wills and trusts. (See, *e.g.*, Petitioner's Resp to App for Leave at 16-17.) Unless and until the Legislature acts, Petitioner argues, this Court's hands are tied.

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[3] Petitioner has argued that appellants are wrong to "*assume*" he violated Rule 1.8(c), and he instructs the Court to "note that there has been no admission of any violation." (Appellee's Response to Application at 2 n 3; emphasis was Petitioner's.) But there is no assumption necessary; Petitioner *has* admitted a violation. Petitioner admitted, under oath, that he prepared the will: "Q: [Y]ou admit drafting . . . the Last Will? A: Yes, I do admit that." (App 92a, Ex L, Papazian dep at 368.) And then his lawyer admitted in open court that "there is no factual dispute" on this point as to both the will and trust. (App 96a, Ex M, Tr. Nov. 6, 2013 at 42.) Indeed, after faulting appellants for "assum[ing]" a violation of Rule 1.8(c), Petitioner then admits the violation again a few pages later in the same brief. He admits that the decedent asked him to update his estate documents and "Mr. Papazian eventually agreed to do so." (Resp to App at 7.) And he admits that "[t]he estate documents at issue here are Bobby's June 8, 2011 Will [Ex 9] and his August 13, 2010 Trust [Ex 8]," and "Mr. Papazian drafted portions of each of them"—the "portions" being the operative parts leaving the $16 million to him and his children and making himself trustee. (*Id.*; see also *id.* at 2, admitting he "participated in re-drafting estate documents" for the decedent.)

Petitioner's argument fundamentally misunderstands the Supreme Court's role under our Constitution. The Constitution of 1963 grants this Court *plenary* authority over "practice and procedure" in all courts of this State. Const 1963, art 6, § 5. This is the Court's *exclusive* domain: "It is beyond question that the authority to determine rules of practice and procedure rests exclusively with this Court." *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999). The Court's "primacy" in these matters is guaranteed by the Constitution, *id.*, which provides that "[t]he powers of government are divided into three branches: legislative, executive and judicial," and that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 2, § 2.

The vesting of this "exclusive rule-making authority in matters of practice and procedure" in the judiciary means the legislature "'may not meddle or interfere'" in matters of practice or procedure without this Court's acquiescence or consent. *McDougall*, 461 Mich at 27 (quoting *Perin v Peuler (On Rehearing)*, 373 Mich 531, 541; 130 NW2d 4 (1964)). This is the Supreme Court's turf. And indeed, the Legislature has expressly affirmed the Court's supremacy and exclusive authority in this realm. In MCL 600.904, the Legislature affirmed the Supreme Court's supreme authority to adopt rules and regulations concerning the "conduct and activities of the state bar of Michigan and its members," as well as "the discipline, suspension, and disbarment of its members for misconduct[.]" MCL 600.904. This Court has recognized that its constitutional supremacy in this realm "give[s] this Court the *duty and responsibility* to regulate and discipline the members of the bar of this state." *Grievance Adm'r v Fieger*, 476 Mich 231, 240; 719 NW2d 123, 131 (2006) (emphasis added); see also *People v LaLone*, 432 Mich 103, 134-35; 437 NW2d 611, 624 (1989) ("Article 6, § 5 of the Michigan Constitution . . . enables

this Court to stand as the *final arbiter of the rules of practice and procedure*.") (Archer, J., concurring; emphasis added).

The constitutional grant of authority to regulate "practice" is much broader than the grant to regulate "procedure." This Court in *McDougall* held that rules of "procedure" must be limited to regulating "purely procedural matters," and not substantive law. 461 Mich at 27.[4] This is because procedure and substance are mutually exclusive; if a rule regulates substance then it is by definition not procedural, and thus the Supreme Court by definition would be impermissibly stepping outside of its constitutional authority to adopt rules of procedure. See *id.* Not so with rules of "practice," which by definition reach out into the real world and regulate real-world conduct of lawyers. Just by way of example, the Court in *Fieger* held that MRPC 3.5(c) and MRPC 6.5(a)—rules of practice—permissibly regulated undignified and discourteous conduct by attorneys toward the courts. 476 Mich at 235. This is obviously a substantive matter—the rules regulate what a lawyer may and may not say publicly about judges or others involved in the legal process, even outside the courtroom (in Mr. Fieger's case, it was on his radio show). Indeed, the MRPC regulate a wide array of substantive areas that fall under the Supreme Court's constitutional authority to regulate "practice," including attorney advertising (MRPC 7.2), communicating with prospective clients (MRPC 7.3), and others. Indeed, the comments to the MRPC state that the Supreme Court considered adopting a rule "to amend Rule 1.8 to limit sexual relationships between lawyers and clients." See Comment to MRPC 1.8, "*Sexual Relations with Clients*." (The Court, "[a]fter careful study," declined to adopt an express rule

[4] The Court in *McDougall* expressly declined to reach any issues regarding the word "practice" and limited its opinion to the scope of the Court's authority to adopt rules of "procedure": "To the extent that the term 'practice' encompasses more than in-court 'procedure,' that issue is not before us." 461 Mich at 27 n 12.

governing such conduct not because it was outside its authority to adopt rules of practice but because its other rules, including conflict rules, already protected clients in this area. See *id.*) This is obviously quite a substantive matter.

In short, the Supreme Court has broad, substantive, plenary constitutional authority to regulate the practice of law and the conduct and discipline of all members of the State Bar. The next question is whether that authority permits this Court to enforce MRPC 1.8(c) by preventing a lawyer who violates the rule from inheriting under the offending documents.

C. The Supreme Court's constitutional power to regulate the practice of law and the conduct and activities of the members of the State Bar firmly encompasses the authority to *enforce* MRPC 1.8(c) by preventing an unethical lawyer from profiting from his unethical conduct.

It is well within this Court's constitutional power to keep Petitioner from profiting $16 million from his violation of MRPC 1.8(c). As relevant here, the Supreme Court reigns supreme in the regulation of the "practice" of law and the "conduct," "activities," and "discipline" of members of the State Bar. Const 1963, art 6, § 5; MCL 600.904. If the disputed conduct falls within *any one* of these categories, it is within the Supreme Court's exclusive purview. The Legislature could not regulate in these areas *even if it wanted to*. The Supreme Court has the final, and only, word in this arena. See Const 1963, art 2, § 2.

Under the plain meaning of these terms, the Supreme Court's authority sweeps wide and burrows deep. The definition of *practice* is "the exercise of a profession or occupation, as the *practice* of law." Webster's New Twentieth Century Dictionary Unabridged, 2d Edition. This means the Supreme Court may regulate anything to do with the exercise of the legal profession. *Conduct* means "personal behavior; deportment; way that one acts." *Id.* This means the Supreme Court may regulate the personal behavior of lawyers, their deportment, and the way they act. *Activities* mean "any specific action or pursuit." *Id.* This means the Supreme Court

may regulate the specific actions and pursuits of lawyers. *Discipline* means "to chastise, to punish," or "to keep in subjection; to regulate; to govern." *Id.* This means the Supreme Court may punish lawyers for violating the ethics rules.

This Court's power thus encompasses not just the authority to *adopt* MRPC 1.8(c) but to *enforce* it as well. The Court said in MRPC 1.8(c) that a lawyer "shall not" prepare a will or trust for an unrelated client giving the lawyer a substantial testamentary gift. The Court is now empowered to enforce that rule according to its terms, by refusing to allow a lawyer to inherit under the documents he prepared in violation of the rule. This power is squarely conferred by the constitutional grant of authority to regulate the practice of law and the conduct, activities, and discipline of all lawyers in the State.

In short, contrary to Petitioner's argument and the Court of Appeals majority's holding, when a Michigan lawyer walks into a Michigan courtroom having admitted a violation of MRPC 1.8(c), the court does not have to send him on his way with a chance at recovering millions of dollars. The court has the "duty and responsibility" to enforce the MRPCs by refusing to permit an unethical lawyer to profit from his ethical violation.

D. The Legislature in EPIC expressly invited the courts to invalidate a will or trust to the extent it is contrary to public policy.

The Legislature confirmed in EPIC that this is the correct result. Petitioner argues that "the state legislature is vested with the power to enact statutes governing the validity of will and trusts," and the "fact that the Michigan legislature has chosen *not* to enact a statute barring gifts to a non-family member scrivener is pivotal here[.]" (Resp to App at 16-17.) "[T]his Court," says Petitioner, should not "usurp" the Legislature's role. (*Id.* at 19.)

But this argument first fails for the reasons set forth above. This Court reigns supreme in the realm of the practice of law and the regulation of attorney conduct. The Legislature could

not regulate in this area even if it wanted to. If the Legislature passed a statute that said, for example, "A lawyer who violates MRPC 1.8(c) may inherit if he obtains a waiver from the client and proves that he did not exert undue influence," the statute would be unconstitutional. This would be, in effect, a legislative override of MRPC 1.8(c), drafting exceptions into a rule of practice that this Court made absolute. The Legislature likewise could not enact a statute that says "A lawyer who violates MRPC 1.8(c) may *not* inherit under the offending documents." This would unconstitutionally infringe upon the Supreme Court's plenary authority to enact rules of practice. See Const 1963, art 2, § 2 ("No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."). Consider, for example, what would happen if this Court changed its mind and wished to amend MRPC 1.8(c) to add a waiver exception. If the Legislature had in the meantime enacted a statute precluding waiver, would the Court's hands be tied? No, the Court's rule would control, since the Court has plenary authority to adopt rules of practice. The statute would yield to the rule of practice.

This is likely why the Legislature has wisely steered clear of enacting any statute expressly governing whether a lawyer can inherit under a will or trust he prepared in violation of MRPC 1.8(c). The Supreme Court has said a lawyer "shall not" prepare such a document, and it is not the Legislature's prerogative to alter that rule or meddle with this Court's enforcement of it. If the Court punted to the Legislature here, the Legislature would be constitutionally required to punt it right back.

Petitioner's argument also fails, however, because—far from staking out any turf in this area—the Legislature has expressly affirmed the *courts'* role in policing it. The Legislature provides in MCL 700.7410(1) that "a trust terminates to the extent . . . the purposes of the

trust . . . are *found by a court* to be unlawful or contrary to public policy." (Emphasis added.) MCL 700.7404 likewise provides that "[a] trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve." See also MCL 700.2705 ("The meaning and legal effect of a governing instrument other than a trust are determined by the local law of the state selected in the governing instrument, unless the application of that law is contrary to . . . another public policy of this state otherwise applicable to the disposition."). Thus the Legislature expressly invites the *courts* to determine whether a will or trust provision violates public policy and to invalidate the will or trust to the extent its purposes are contrary to public policy.

Petitioner is therefore wrong that the courts would "usurp" the Legislature's role by invalidating estate documents drawn in violation of MRPC 1.8(c). In *Terrien v Zwit*, 467 Mich 56, 67 n 11; 648 NW2d 602 (2002), this Court stated that "public rules of professional conduct may [] constitute *definitive indicators* of public policy." (Emphasis added.) Likewise, in *Abrams v Susan Feldstein, PC*, 456 Mich 867; 569 NW2d 160 (1997), the Court expressly "agree[d]" with the dissent from the Court of Appeals stating that "conduct that violates attorney discipline rules offends Michigan public policy." Thus when Petitioner violated MRPC 1.8(c), he thereby violated Michigan public policy. Under the plain language of MCL 700.7410(1) and MCL 700.7404, the provisions in the trust documents that Petitioner prepared in violation of MRPC 1.8(c)—specifically, the provisions that purport to give him and his children $16 million—are unenforceable as against public policy.[5]

[5] Here, as previously noted, the will has a pour-over provision, so even if the will were somehow found to be valid as to any bequest to Petitioner, the other assets all pour over into trust and are distributed by the terms of the trust. But any distributions to Petitioner and his sons in the trust are unenforceable under MCR 700.7410(1) and 7404.

Petitioner responds that MCL 700.7410(1) and 700.7404 permit a court to invalidate a trust document only to the extent its "purposes" are contrary to public policy, and the "purpose" of leaving him money was supposedly not contrary to public policy. After all, argues Petitioner, there was nothing wrong with the decedent leaving his fortune to his friend. But this is an overly restrictive reading of the word "purposes" that does not comport with the word's plain meaning. *Purposes* mean "the reasons for which something is done or created." Webster's New Twentieth Century Dictionary Unabridged, 2d Edition. This trust, like many trusts, had a number of such "purposes." One was to establish a trust for the decedent's dog. (*See* App 48a, Ex F, 8/13/2010 Amended Trust at p 9, § 2.) One was to leave some money to the sons of the decedent's "beloved brother," Respondent Ed Mardigian. (*Id.* at p 8, § 1(a), (b).) One was to leave money to the decedent's heirs if any provision failed. (*Id.* at p 12, § 4.) All of these are valid and permissible purposes that all should be given effect. But one of the purposes of the trust, under any plain definition of the term, was to leave money to an attorney who had violated Rule 1.8(c) in preparing it. This is plainly a "reason for which [the trust was] created"—indeed, it is the *primary* reason and primary purpose, since the provisions relating to Petitioner and his children purported to leave them the vast majority of the $16 million estate. But leaving a substantial gift to a lawyer who prepared the instrument in violation of MRPC 1.8(c) is an impermissible purpose because it is contrary to Michigan public policy. It is therefore well within this Court's authority to find these gifts unenforceable as against public policy under MCL 700.7410(1) and 700.7404.

It is worth highlighting that the "public policy" provisions of MCL 700.7410(1) and 700.7404 are *separate* from MCL 700.7406, which provides that "[a] trust is void to the extent its creation was induced by fraud, duress, or undue influence." In other words, the Legislature

instructs that a trust provision can be void *either* if a court finds its purposes violate public policy *or* if it was induced by undue influence. The Legislature in these provisions has thus set up two separate ways that a trust can be invalidated. Even if a lawyer does *not* exert undue influence over the decedent under MCL 700.7406, the trust is *still* unenforceable to the extent a court finds that its purposes are contrary to public policy under MCL 700.7410(1) and 700.7404. So even if Petitioner here did *not* exert undue influence over the decedent, the trust provisions that benefit him are still unenforceable under MCL 700.7410(1) and 700.7404 because Petitioner violated MRPC 1.8(c), and thereby Michigan public policy, in preparing them.

In sum, the Legislature has expressly affirmed the *courts'* power to invalidate testamentary instruments when they are contrary to public policy. There's no "usurping" here; the Court would simply be accepting the Legislature's express *invitation* to refuse to enforce provisions in a trust whose purpose—leaving millions of dollars to a lawyer who violated MRPC 1.8(c)—is contrary to public policy.

E. When an attorney violates the MRPC in preparing a legal instrument, the offending provisions are void and unenforceable as against public policy to the extent the attorney attempts to benefit from them.

Even *without* the express statutory invitation to invalidate estate provisions that violate public policy, the courts would still be empowered to invalidate the gifts to Petitioner. The premise of Petitioner's argument is that the *consequence* of his violation of MRPC 1.8(c) remains an open question—that it remains an open question whether a court may enforce a legal instrument prepared in violation of the MRPC. The Court of Appeals agreed with this premise, holding that the will and trust were not necessarily void as a matter of law as against public policy even though Petitioner had violated MRPC 1.8(c). The panel majority stated that "while the violation of MRPC 1.8(c) is clearly unethical conduct, it is not *clearly* conduct against public policy." (App 5a, Ex B, Slip Op at 5.)

Respectfully, the Court of Appeals was wrong here. Under controlling law from this Court, (1) the MRPCs are "definitive indicators" of Michigan public policy; (2) an attorney who violates the MRPCs therefore violates Michigan public policy; and (3) Michigan courts simply may not and will not enforce provisions of a legal instrument that violate public policy. Michigan law does not permit Petitioner to attempt to argue to a jury that, despite his violation of the ethics rules and Michigan public policy, the $16 million gifts might somehow still be enforceable. The gifts are *void* as a matter of law because they violate public policy.

Specifically, and as quoted above, this Court in *Terrien v Zwit* stated that "public rules of professional conduct may [] constitute *definitive indicators* of public policy." 467 Mich at 67 n 11. Likewise, the Court in *Abrams* "agree[d]" with the dissent from the Court of Appeals stating that "conduct that violates attorney discipline rules offends Michigan public policy." 456 Mich at 867. Following these decisions, the Court of Appeals has in turn made clear that "the Legislature delegated the determination of public policy regarding the activities of the State Bar of Michigan to the judiciary pursuant to MCL 600.904; thus, *conduct that violates the attorney discipline rules set forth in the rules of professional conduct violates public policy.*" *Speicher v Columbia Twp Bd of Election Comm'rs*, 299 Mich App 86, 92; 832 NW2d 392, 395 (2012) (emphasis added).

In short, it is settled law that when a lawyer violates the MRPCs in preparing a legal instrument, the lawyer thereby violates Michigan public policy. Thus, when Petitioner violated MRPC 1.8(c) in preparing the will and trust, he thereby violated Michigan public policy.

Equally well-established is the principle that when a bequest in a testamentary instrument violates public policy, it is *void* as a matter of law. This Court has said so repeatedly, for decades. In *La Fond v City of Detroit*, 357 Mich 362, 363; 98 NW2d 530 (1959), this Court held

that a bequest of a residuary estate to the City of Detroit for a "playfield for white children" was void as against public policy. In *Billings v Marshall Furnace Co*, 210 Mich 1, 5; 177 NW 222, 223 (1920), the Court held that a paragraph in a will in which the testator attempted to "perpetuate certain persons in office and control of the company without regard to the rights of minority stockholders" was "contrary to public policy and void." And in *Farr v Whitefield*, 322 Mich 275, 281; 33 NW2d 791, 794 (1948), the Court held that a provision in a will providing that if the testator's minor children contested the will, the gifts to them were forfeited, was "contrary to public policy and void." The Court stated that "Any provision in a will which, in its application, comes in conflict with the organic or statutory law of the state . . . must be deemed to be illegal and void, as being against public policy." *Id.*[6]

In short, Michigan courts simply will not enforce a testamentary provision that is against public policy. This is because "[t]he primary goal of the Court in construing a will is to effectuate, *to the extent consistent with the law*, the intent of the testator." *In re Raymond's Estate*, 483 Mich 48, 52; 764 NW2d 1 (2009) (emphasis added). And it is a bright-line rule that when a provision in a will violates Michigan public policy it is *inconsistent* with the law and "*must* be deemed to be illegal and void." *Farr*, 322 Mich at 281 (emphasis added).

Several Court of Appeals decisions confirm that bright-line rule specifically as applied to violations of the MRPC. In three published decisions, the Court of Appeals has held that when an attorney violates the MRPC in creating an instrument, the offending provisions of the

[6] These decisions also provide authority for the proposition that it is only the specific provisions that violate public policy that are void, not the entire instrument. In *LaFond*, for example, the Court voided only the offending residuary clause of the will; in *Billings* the Court voided only the specific paragraph of the will that violated public policy. So here, only the offending bequests to Petitioner and his children are void, and the remainder of the will and trust are enforceable in accordance with Mr. Mardigian's testamentary intent.

instrument are void as against public policy to the extent the lawyer attempts to benefit from them. In *Evans & Luptak, PLC v Lizza*, 251 Mich App 187; 650 NW2d 364 (2002), the Court of Appeals refused to enforce an unethical referral-fee contract. The court reasoned that "Michigan has a long tradition of judicial oversight of the ethical conduct of its court officers," and "our courts have taken affirmative action to enforce our ethical standards and rules regarding counsel." *Id.* at 194. Following this Court's decision in *Abrams*, which "agree[d]" with and adopted the dissent from the Court of Appeals in the case, the Court of Appeals stated that it "should refuse to aid either party to an unjust contract where, as here, enforcing the agreement would further a purpose that violates public policy." *Id.* at 196. "It would be *absurd* if an attorney were allowed to enforce an unethical fee agreement through court action, even though the attorney potentially is subject to professional discipline for entering into the agreement." *Id.* (emphasis added). The Court of Appeals held that based on "binding precedent" from this Court, "it is clear the Supreme Court agreed with the fundamental principle that contracts that violate our ethical rules violate our public policy and therefore are unenforceable." *Id.* at 196.

Similarly, in *Morris & Doherty, PC v Lockwood*, 259 Mich App 38; 672 NW2d 884 (2003), the court refused to enforce a referral-fee agreement between a lawyer and an "inactive" member of the Bar. The Court held that "a referral fee agreement between an attorney and an inactive attorney is not enforceable" because MRPC 5.4(a) provides that "A lawyer or law firm shall not share legal fees with a nonlawyer." 259 Mich App at 45. The Court reasoned that "[a]lthough, as a general rule, courts must provide competent parties the utmost liberty to engage in contractual relations, a contract is valid only if it involves a proper subject matter." *Id.* at 54 (internal citation and quotation marks omitted). And "[a] proposed contract is concerned with a proper subject matter only if the contract performance requirements are not *contrary to public*

policy." *Id.* (emphasis in original). The Court stated that Michigan's public policy is stated, among other places, in its "public rules of professional conduct." *Id.* The Court concluded that the agreement violated several provisions of the MRPC, and "[t]hus, as a matter of public policy, the contract is void ab initio." *Id.* at 60. "[T]he contract does not contain a proper subject matter, and is not enforceable because it violates Michigan's public policy." *Id.* at 61.

Likewise, in *Speicher v Columbia Twp Bd of Election Comm'rs*, 299 Mich App 86, 92; 832 NW2d 392, 395 (2012), the Court of Appeals, following both *Evans & Luptak* and *Morris & Doherty*, rejected an attorney's post-judgment request to recover attorney fees, because the requested fees violated MRPC 1.5(a). The court held that MRPC 1.5(a) "reflects this state's policy concerning fee agreements" and "is a public policy restraint on illegal or clearly excessive fees." *Id.* at 93. The Court reasoned, as quoted above, that "conduct that violates attorney discipline rules set forth in the rules of professional conduct violates public policy." *Id.* at 92.[7]

[7] In *Estate of Karabatian v Hnot*, 17 Mich App 541; 170 NW2d 166 (1969), the Court of Appeals expressly held that when a lawyer who is unrelated to the decedent drafts a will that contains a bequest to the lawyer, the bequest is against public policy and therefore void as a matter of law. The lawyer in *Karabatian* drafted a will "in which the attorney was to receive a bequest for $10,000." 17 Mich App at 542. "Using a different scrivener, Karabatian subsequently made another will in which he left the attorney nothing." *Id.* The attorney contested admission of the later will to probate, claiming that Karabatian was a victim of an "insane delusion," and argued that he should recover under the earlier will. *Id.* The probate court granted a directed verdict against the attorney, and the Court of Appeals affirmed. *Id.* The Court of Appeals noted that "[l]ong ago in *Abrey v Duffield* (1907), 149 Mich 248, 259; 112 NW 936, 940, our Supreme Court condemned the practice followed by" the attorney: "Although there is no statute to invalidate a bequest to a scrivener, the reasons are, at least, as strong for such a statute as in the case of the subscribing witness. I believe it to be *generally recognized by the profession as contrary to the spirit of its code of ethics for a lawyer to draft a will making dispositions of property in his favor*, and this court has held that such dispositions are properly looked upon with suspicion." 17 Mich App at 546 (emphasis added). The court cited *Powers*, where this Court "bluntly warned the profession against such conduct." *Id.*; citing 375 Mich at 181. The *Karabatian* court stated: "Apparently warnings do not suffice. If an attorney's conduct so violates the spirit of the lawyer's code of ethics, it also runs contrary to the public policy of this state." 17 Mich App at 546-47. The Court held that "[t]he bequest to [the attorney] being void, he has no standing to contest the later will." *Id.* at 547.

The rule from all of these cases is clear: When an attorney violates the MRPC, he or she violates Michigan public policy, and courts simply will not enforce provisions in a legal instrument that violate public policy by purporting to benefit the unethical lawyer. The provisions are void ab initio as a matter of law.[8]

The Court of Appeals majority in this case attempted to distinguish these cases on the ground that they involved contracts, while "[a] will is generally *not* a contract." (App 51, Ex B, Slip Op at 5.) Respectfully, this misses the point. The point of these cases is that a court has an *affirmative obligation* to enforce the MRPC by refusing to permit a lawyer to profit from a violation of the rules. Thus, when a lawyer comes to the court asking it to enforce an instrument he prepared in violation of the MRPC, the court simply cannot and will not enforce it to the extent the lawyer would profit. The offending provisions are void as a matter of law. And since there is then no legally enforceable provision to interpret, factual questions such as the intent of the contracting parties or the intent of the testator are simply not in play. A court cannot interpret or enforce a void legal provision—it is void.

Moreover, the Court of Appeals majority's distinction between wills and contracts would create a bizarre incongruity in MRPC 1.8(c). Rule 1.8(c) precludes a lawyer from preparing *any* "legal instrument" for an unrelated client that gives the lawyer "*any* substantial gift," including *but not limited to* a "testamentary gift." Rule 1.8(c), in other words, applies to both contracts *and* wills. If a lawyer prepares a contract for an unrelated client that gives the lawyer a substantial gift, he violates Rule 1.8(c). If a lawyer prepares a will for an unrelated client that gives the lawyer a substantial gift, he violates Rule 1.8(c). Nothing in the plain language of Rule 1.8(c)

[8] See also *Polen v Melonakos*, 222 Mich App 20, 25-26, 27 (1997) ("an attorney who engaged in disciplinable misconduct prejudicial to his client or conduct contrary to public policy would be ineligible for such recovery").

suggests that completely different standards govern whether the lawyer can receive the gift, depending on the nature of the legal instrument. The rule instead treats all "legal instrument[s]" the same. The Court of Appeals majority therefore was wrong to hold that there is a relevant difference between wills and contracts that would affect a lawyer's ability to receive the substantial gift despite his violation of the rule.[9]

Petitioner also argues that the "MRPCs are not the *only* source of Michigan public policy," and that MRPC 1.8(c) should not "trump" countervailing policies such as the goal to effectuate the testator's intent. (Appellee's Resp to App at 5, 22-26.) Petitioner argues that the proper course is to "balance" these competing policies through a trial in which the jury presumes undue influence but Petitioner is able to try his hand at rebutting that presumption. (See *id.* at 26.) The fatal flaw in this argument is that there is no legally enforceable expression of the testator's intent here with respect to the gifts to Petitioner and his children. When Petitioner's pen hit the paper, so to speak, and he prepared these provisions in violation of Rule 1.8(c), the offending provisions were void ab initio as against public policy. See, *e.g.*, *Morris & Doherty*, 259 Mich App at 60 (because the attorney violated the MRPC, the offending instrument was "void ab initio" "as a matter of public policy"). Thus, there is no competing public policy to balance—the first step is determining whether the Court has before it a legally valid expression of the testator's intent, and Petitioner's argument fails at this first step. As the Court of Appeals dissent correctly noted, when Petitioner violated MRPC 1.8(c), the legal effect of the offending provisions was a "foregone conclusion." (App 5a, Ex B, Dissent at 3.)

[9] Moreover, a trust typically *is* considered a contract between the grantor and settlor of the trust and the trustee. Mr. Mardigian's trust, for example, states that it is an "AGREEMENT OF TRUST" and states that "the parties AGREE to the following terms, trusts and conditions." (App 48a, Ex F, Trust at p 1.)

Petitioner also argues that the Court of Appeals decisions above are distinguishable because "there were no countervailing public policies" in any of those cases. (Resp to App at 26.) That is incorrect. In *Evans & Luptak* and *Morris & Doherty*, for example, there was a *strong* countervailing public policy of effectuating the contracting parties' intent by enforcing the plain terms of their contracts. *Evans*, 251 Mich App at 194-96; *Morris*, 259 Mich App at 60. Indeed, "[t]he *primary* goal in the construction or interpretation of any contract is to honor the intent of the parties." *Klapp v United Ins Group*, 468 Mich 459, 473; 663 NW2d 447 (2003) (quoting *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994)) (emphasis added). But the court in those cases did not "balance" this policy against the policy of enforcing the MRPC or throw it to a jury to sort out; the court in each case held that because the lawyer prepared the contract in violation of the MRPC, the contract provisions that benefited the lawyer were void ab initio, end of story.

The same analysis applies in estate proceedings, where "the primary rule of construction of wills is to reach the intent of the testator." *In re Lawton's Estate*, 347 Mich 143, 145; 79 NW2d 463 (1956). When a general policy (effectuating a testator's or contracting party's intent) is faced with a specific policy that covers the precise conduct at issue (don't prepare a will or contract in violation of MRPC 1.8(c) or 5.4(a)), the specific policy controls. Indeed, as these cases recognize, it would be "*absurd* if an attorney were allowed to enforce" a legal instrument prepared in violation of the MRPC "through court action[.]" *Evans*, 251 Mich App at 196 (emphasis added). As the dissent below noted, "While the majority correctly notes that a will is not a contract, it would nonetheless be equally absurd to allow appellant to benefit from his actions in the instant case where he would be also subject to such discipline for them." (App 5a, Ex B, Dissent at 2.)

This is the only workable rule. Petitioner affirmatively placed the will and trust that he prepared in violation of Rule 1.8(c) before a Michigan court and affirmatively asked the court to declare them valid. That is the relief he seeks: "An order determining that [the will] is valid and admitted to probate." (See App 82a, Feb 22, 2012 Amended Petition for Probate.) And that is the relief a Michigan court would have to grant him if he were to succeed in this action, *even if* the case were to proceed to a jury trial on the factual question of whether Petitioner "unduly influenced" the decedent. The probate court, the Court of Appeals, and ultimately this Court would have to quite literally sign off on Petitioner's ethical violation by entering and affirming a judgment that declared to the Michigan public that a will prepared in violation of the MRPC was nonetheless "valid" and enforceable. This is not a tenable view of Michigan law.

F. Michigan courts have the authority and obligation to enforce public policy by refusing to enforce instruments drawn in violation of the MRPC. Courts cannot simply leave the matter to the Attorney Grievance Commission.

Petitioner argues that courts must take a blind eye to his blatant ethical violation because "MRPC Rule 1.0(b) expressly states that the Rules of Professional Conduct do not give rise to a cause of action for enforcement of a rule or for failure to comply with a prohibition imposed by the rule." (Resp to App at 18; emphasis is Petitioner's.) Petitioner argues that "[t]o the extent that one believes that a testamentary gift may violate Rule 1.8(c), that allegation should be lodged with, and resolved by, the attorney grievance committee, not the Probate Court." (*Id.*)

Courts have repeatedly rejected that argument, and for good reason. In *Evans & Luptak,* for example, the plaintiff made this same argument: "plaintiff argues that the MRPC may not be used as a defense to plaintiff's breach of contract action because the rules expressly provide that they do not give rise to a cause of action for enforcement of a rule or for damages caused by a failure to comply with an ethical obligation." 251 Mich App at 192. The plaintiff further

argued, as Petitioner does here, that "the Michigan Rules of Professional Conduct are not rules of substantive law and therefore are inapplicable in court proceedings." *Id.* at 194.

The court rejected those arguments out of hand. The court noted that "Plaintiff's argument appears to be that judges have no ethical oversight regarding their court officers and that the Attorney Grievance Commission is the exclusive authority regulating the ethical obligations of attorneys." *Id.* "In this regard, plaintiff fails to understand the proper role of the court regarding the ethical conduct of its officers." *Id.* The court noted that "Michigan has a long tradition of judicial oversight of the ethical conduct of its court officers," and the courts have long "taken affirmative action to enforce our ethical standards and rules regarding counsel." *Id.* As the court put it in *Speicher*, "courts have the authority and *obligation* to take affirmative action to enforce the ethical standards set forth by the Michigan Rules of Professional Conduct." 299 Mich App at 91 (emphasis added). Simply put, "[t]he question of civil liability for an ethics violation is distinguishable from the present issue whether the courts of this state should enforce, and thereby sanction unethical contracts." *Evans & Luptak*, 251 Mich App at 195-96 (quoting the *Abrams* lower-court dissent followed by this Court).

The same is true here. This is not a cause of action against Petitioner for his violation of MRPC 1.8(c). This is not a cause of action against Petitioner at all—this is *Petitioner's* cause of action, to admit the will he prepared in violation of MRPC 1.8(c) into probate. (See App 81a.) And the issue here is not whether someone can recover damages from Petitioner for his unethical conduct. The issue is whether the court "should enforce, and thereby sanction," the unethical bequests in the estate documents that he prepared in violation of MRPC 1.8(c) and the public policy of this state. Courts have answered that question: "It would be *absurd* if an attorney were allowed to enforce an unethical [instrument] through court action, even though the attorney

potentially is subject to professional discipline" for preparing it. *Evans & Luptak*, 251 Mich App at 196 (quoting *Abrams* dissent).

Petitioner is therefore wrong when he argues that courts might in some circumstances have to look the other way following an ethical breach and nonetheless enforce the offending instrument. Petitioner is wrong that "[t]he Probate Court cannot rest its ruling on the Rules of Professional Conduct" (Petitioner's Court of Appeals Br at 29); Petitioner is wrong that "such violations [of the MRPC] are irrelevant to the validity of the documents themselves" (*id.* at 30); and he is wrong that there is "no per se 'bar' to an attorney-scrivener taking under estate planning documents that the attorney drafted" (*id.* at 26). The probate court was *required* under controlling precedent from this Court and the Court of Appeals to refuse to enforce a bequest drawn in violation of the MRPC. Under well-established Michigan law, there is a bright-line, per se bar to an attorney receiving a substantial gift under estate-planning documents that the attorney prepared in violation of Rule 1.8(c).

II. The Court Should Overrule *In re Powers Estate* and Enforce the Plain Language of MRPC 1.8(c): When a Lawyer Violates the Rule, the Lawyer May Not Inherit

The Court asked the parties to address "whether the rebuttable presumption of undue influence set forth in *In re Powers Estate*, 375 Mich 150 (1965), when used as a means to determine the testator's intent, is a workable rule that sufficiently protects the testator when the testator's lawyer violates MRPC 1.8(c)." The Court further asked the parties to address "whether this Court's adoption of MRPC 1.8(c) warrants overruling *In re Powers Estate*," and, if *Powers* is overruled, "whether a violation of MRPC 1.8(c) should bear on the validity of the gift." Respondents answer that *Powers*' rebuttable presumption of undue influence is not a workable rule and that the Court should overrule *Powers* to the extent the case is not already dead letter in

light of MRPC 1.8(c). And the Court should enforce the plain language of MRPC 1.8(c) by holding that a violation of the rule *always* invalidates the gift to the lawyer.

A. The rebuttable presumption of undue influence set forth in *In re Powers Estate* is not a workable rule because it creates an incentive for lawyers to violate MRPC 1.8(c).

The whole point of MRPC 1.8(c) was to absolutely forbid exactly what Petitioner did here. As discussed in detail above, the rule contains no exceptions, and is not waivable by the client. The *Powers* "rebuttable presumption of undue influence" in effect drafts exceptions into the otherwise absolute rule: a lawyer shall not prepare an instrument for an unrelated client giving the lawyer any substantial gift *unless* the lawyer can prove that he did not unduly influence the client. But this exception is not in the rule, and for good reason.

The central flaw of continuing to follow the *Powers* regime after the enactment of the MRPC is that it would create an *incentive* for lawyers to violate Rule 1.8(c). The *Powers* rebuttable presumption by definition *creates a path* for a lawyer who chooses to violate MRPC 1.8(c) to nonetheless inherit under the documents he unethically prepared. A lawyer could willfully and knowingly violate MRPC 1.8(c) and then walk out of a Michigan court with millions of dollars in hand.

True enough, the presumption of undue influence means that the lawyer would face some burden at a trial to show that, despite his ethical breach, the decedent actually did wish to leave him the money. But in reality, this is a toothless protection. There are often only two people in the room when a decedent discusses where she wants her assets to go after death—the decedent and the lawyer. The decedent, of course, then passes away, leaving only the lawyer. The lawyer is thus the only one left who has any knowledge or evidence—real or fabricated—concerning the decedent's wishes. The lawyer therefore often controls all of the evidence that would come in at a trial on "undue influence."

Consider a hypothetical. Suppose a lawyer meets with a wealthy elderly client with no surviving family members. The client wants to leave her money to her church, or to charity, but she does not communicate this wish to anyone but the lawyer. The lawyer cajoles or tricks the client into leaving half of the fortune to him and half to charity. The lawyer then gets the client to sign an "undue influence waiver," slipped in amongst piles of other estate documents to sign. Would *Powers*' "presumption" of undue influence have any teeth in this situation? The lawyer would present evidence through his own testimony that he developed a wonderful relationship with the client, that the client told him that due to their wonderful relationship she wanted to benefit the lawyer, and that he most certainly—hand over heart—did not exert undue influence over the client. To buttress this evidence, the lawyer would point to the waiver, where the client in her own hand expressly disavowed any undue influence, as well as the signed, notarized, and witnessed estate documents clearly indicating that the money would go to the lawyer. On the other side of the ledger, there would be nothing—the decedent has passed and there are no other witnesses to the decedent's intent. Thus the unscrupulous lawyer would very likely be able to overcome the presumption of undue influence and inherit the tainted fortune.

This was exactly the problem MRPC 1.8(c) aimed to eliminate. Rule 1.8(c) is a clear as it can get: lawyers "shall not" do this, ever. If a client truly does want to leave her money to the lawyer, it is exceptionally easy for the lawyer to make that happen. The lawyer can just refer the client to another lawyer to prepare the estate documents. Indeed, when MRPC 1.8(c) is enforced as an absolute prohibition, the honest lawyer has every incentive to do this, to make sure that everything is on the up-and-up and there is no question that he can inherit the money. But if a lawyer foregoes this easy and honest option in favor of openly violating MRPC 1.8(c), the consequence is not that he gets to have a full-dress jury trial and a path to inheriting millions of

dollars. The consequence is that he may not inherit under any circumstances, as a matter of law. The *Powers* regime fails to enforce the plain language of MRPC 1.8(c)—and, worse than that, it creates a path for unscrupulous lawyers to inherit despite violating the rule and thereby *incentivizes* a violation—and thus the *Powers* rule is not at all workable.

Petitioner argues that his situation is different, and that he has a stronger case than the unscrupulous lawyer above because he—hand over heart—can show that his motives were clean when he left himself the $16 million. The record gives the Court plenty of reasons to be skeptical of that claim, including the suspicious circumstances that led to the MRPC-violating estate documents and Petitioner's lack of candor with the probate court about his preparation of them. But as a bigger-picture matter, MRPC 1.8(c) rightly makes these factual disputes irrelevant. The Court's concern here is to enforce a generally applicable standard that will resolve not just Petitioner's case and its specific facts, but the next 100 like it. And adopting the *Powers* standard, as shown above, will result in a regime where lawyers are incentivized to violate MRPC 1.8(c) and can get away with it. When the pot is enticing enough—when it holds, say, $16 million—lawyers will be tempted to trade their Bar cards for a chance at the fortune.

The *Powers* presumption of undue influence would roll back the bright-line protections of MRPC 1.8(c) and incentivize lawyers to violate the rule. The *Powers* regime is not at all workable post-MRPC 1.8(c).

B. The Court should overrule *Powers*.

Respondents therefore ask the Court to overrule *Powers*, to the extent it is not already dead letter. Respondents submit that the best view is that *Powers* is no longer controlling law even though this Court has not yet expressly overruled it. First, the case has been superseded by this Court's adoption of the MRPC. When *Powers* was decided in 1965, there was no rule of professional conduct that expressly barred a lawyer from preparing a will that left the lawyer a

substantial gift. As the Court of Appeals dissent noted, "*Powers* was decided long before the 1988 enactment of the MRPC, or even its predecessor, the Code of Professional Conduct, which was adopted in 1971," and "MRPC 1.8(c) now specifically prohibits this conduct." (App 5a, Ex B, Dissent at 1.) These sorts of self-dealing gifts now plainly violate MRPC 1.8(c), and, as shown above, under controlling caselaw are therefore void as a matter of law because they violate public policy. See *Terrien*, 467 Mich at 67 n 11; *LaFond*, 357 Mich at 363; *In re Raymond's Estate*, 483 Mich at 52; *Farr*, 322 Mich at 281.

Second, *Powers* has been superseded by statute. As also shown above, MCL 700.7404 and 700.7410(1) expressly bar the creation and enforcement of trust instruments whose purposes are "contrary to public policy." Under current law (and under the law in effect when Mr. Mardigian signed the amendments to his revocable trust on August 13, 2010), provisions of a trust drawn in violation of MRPC 1.8(c) are therefore void as against public policy.

Thus, Respondents submit that this is one of the rare instances in which a decision of this Court has been "clearly overruled or superseded by intervening changes in the positive law," even though this Court has not yet expressly overruled it. *Associated Builders and Contractors v City of Lansing*, 499 Mich 177, 191 n 32; 880 NW2d 765 (2016). The Court spoke unequivocally in MRPC 1.8(c): a lawyer simply "shall not" do what Petitioner did here. Any other view would threaten this Court's rulemaking powers. Under the Court of Appeals' analysis, this Court could *never* pass a rule that was inconsistent with one of its earlier decisions and have that rule take immediate effect. Even where, as here, the Court wished to pass a clear and absolute rule prohibiting certain attorney conduct (here, MRPC 1.8(c)), under the Court of Appeals' analysis this Court's hands would be tied (here, by *Powers*). The rule would not be enforceable until a lawyer violated the rule, the case worked its way all the way up through the

lower courts, and then this Court expressly overruled all of its earlier contrary precedent. This fundamentally misconstrues this Court's constitutional rulemaking power. When the Court enacts a Rule of Professional Conduct, the Rule sweeps the field before it. The Rule has the force of a statute—since the Michigan Constitution infuses in this Court exclusive legislative authority in this area—and an inconsistent earlier Court decision bows to the controlling effect of the Rule. Indeed, the Rule has *super*-statutory force, since the Court has constitutional supremacy in this realm. This means that a Rule of Professional Conduct—as a supreme expression of the Court's rulemaking power—likewise trumps an earlier court decision, just as a statute would. Here, therefore, MRPC 1.8(c)'s absolute prohibition controls. When the Court stated clearly and unequivocally in 1988 that a lawyer "shall not" prepare a will for an unrelated client leaving him- or herself a substantial testamentary gift, this meant exactly what it said, immediately when the Court said it. The Court did not include in the rule an exception providing that a lawyer shall not do it *unless* the lawyer can prove he did not exert "undue influence" over the client. A lawyer shall not do it; no exceptions. Appellants therefore submit that the best view of the law is that this Court's adoption of MRPC 1.8(c) superseded *Powers*.

Respondents acknowledge, however, that this Court has warned the Court of Appeals that "it is not authorized to anticipatorily ignore [this Court's] decisions where it determines that the foundations of a Supreme Court decision have been undermined." *Associated Builders*, 499 Mich at 191-92. The Court of Appeals here acted admirably by heeding this caution, although, as set forth above, the analysis was not quite right in light of MRPC 1.8(c). But to the extent MRPC 1.8(c) and the statutory provisions above do not already render *Powers* dead letter, this Court should overrule *Powers* expressly here. *Powers* is simply not an accurate statement of current Michigan law. *Powers* stated, for example, that the lawyer's drafting the will was

"*irrelevant*," and that the lawyer's "status as a member of the bar of Michigan adds not one centimeter, nor subtracts one from his position as a party litigant, and this question should take no time in trial." 375 Mich at 176 (emphasis added). *Nobody* could argue that this is an accurate statement of current Michigan law (or, really, that this was ever an accurate statement of Michigan law). Under no view of current Michigan law could it be said it is "irrelevant" that an attorney prepared a will for an unrelated testator under which the attorney was to receive a substantial bequest. Instead, current Michigan law instructs that the *dispositive* issue is whether the attorney prepared the will: If the attorney drafts the will, he or she violates MRPC 1.8(c), and the bequest is void as a matter of law as against public policy.

As this Court has recognized, "stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions." *Robinson v City of Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000). "When performing a stare decisis analysis, this Court should review inter alia 'whether the decision at issue defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision.'" *People v Tanner*, 496 Mich 199, 250-51; 853 NW2d 653 (2014) (quoting *Robinson*, 462 Mich at 464). "As for the reliance interest, 'the Court must ask whether the previous decision has become so embedded, so accepted, so fundamental to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations.'" *Id.*

All of these factors favor overruling *Powers* here. As set forth above, the *Powers* decision defies practical workability—it incentivizes bad behavior and could force a Michigan court to enforce a legal instrument drawn in violation of the MRPC, when this Court's precedents make clear that an instrument drawn in violation of the MRPC is *void* as a matter of

law as against public policy. Reliance interests do not justify upholding *Powers*—in light of the clear prohibition in MRPC 1.8(c), no lawyer could possibly argue with a straight face that he drafted a will for an unrelated client leaving himself a substantial gift on the hope that *Powers* might permit him to recover. And finally, changes in the law—this Court's express prohibition of this conduct in MRPC 1.8(c)—make clear that *Powers* is no longer good law. This Court should therefore expressly overrule *Powers* to make crystal clear that MRPC 1.8(c) means exactly what it says: a lawyer "shall not" do this, under any circumstance.

C. The Court should enforce the plain language of MRPC 1.8(c) by holding that a lawyer cannot violate the rule and still inherit.

Finally, the Court asked the parties to address, "if *In re Powers Estate* is overruled, whether a violation of MRPC 1.8(c) should bear on the validity of the gift provided to the testator's lawyer under the testamentary instruments; and if so, how?" The answer is that a violation of MRPC 1.8(c) automatically invalidates the gift to the lawyer, every time. The Court's authority to take this action flows from its plenary authority—discussed at length above—to regulate the practice of law and the conduct of members of the Bar. When a lawyer who has violated MRPC 1.8(c) strolls into the courtroom and asks the Court to allow him a shot at inheriting $16 million under the offending documents he prepared, the Court is well within its authority to say no.

It is worth noting that the Court could exercise this authority without even touching the underlying estate documents. It falls well within the Court's plenary authority to discipline and regulate the conduct of members of the Bar to refuse to permit a lawyer to profit from his violation of the MRPC. The Court does not have to void the estate documents themselves. The Court could simply order, as a pure disciplinary matter, that Petitioner may not inherit because he violated MRPC 1.8(c). The assets that Petitioner and his children supposedly were to inherit

would then simply revert to the estate, to be distributed to the decedent's heirs according the will and trust's contingency clauses. (See App 58a, Ex G, at p 2; App 48a, Ex F at p 12, § 4.)

Alternatively, the Court could exercise its authority to void the provisions of the will and trust that purport to benefit Petitioner and his children. These provisions are contrary to public policy—as set forth in detail above—and are therefore void as a matter of law, pursuant to MCL 700.7410(1) and MCL 700.7404 and this Court's longstanding precedent. The Court should void the provisions that purport to benefit Petitioner and his children, and thus the gifts would then likewise be distributed to the decedent's heirs according to the will and trust's contingency clauses. (See App 58a, Ex G, at p 2; App 48a, Ex F at p 12, § 4.) In this way, the Court would honor the only legally valid expression of the testator's intent that exists or will ever exist—to leave his assets to his friends and family if any other provision of his will or trust failed—while refusing to aid the lawyer who caused that failure by violating MRPC 1.8(c).

CONCLUSION AND RELIEF REQUESTED

In the end, this was a problem of Petitioner's own making. If Mr. Mardigian truly wanted to leave his money to Petitioner, it would have been *exceedingly* easy for Petitioner to make that happen. He could have simply picked up the phone or walked Mr. Mardigian down the street to another law firm to prepare the will. If that is truly where Mr. Mardigian wanted to leave his money, Petitioner had 16 million reasons to do exactly that. But having declined that easy option in favor of openly violating the ethics rules, Petitioner cannot now wrap himself in the protection of Mr. Mardigian's supposed "testamentary intent." It is because of *Petitioner* that the Court does not have before it a legally valid expression of Mr. Mardigian's testamentary intent, except under the will and trust's contingency clauses. It is only Petitioner to blame for this, and Petitioner certainly cannot now *profit* from it, to the tune of $16 million.

Petitioner argues that this is a harsh result for him in this case. But as Judge Cardozo famously stated, "Membership in the bar is a privilege burdened with conditions." See *Gentile v State Bar of Nevada*, 501 US 1030, 1066; 111 S Ct 2720 (1991). Lawyers are a special class under Michigan law, MCL 600.901, and this Court has a strong interest in ensuring that all licensed lawyers adhere to their oaths, including the oath to proceed honorably and in accordance with the ethical rules, because "[t]he license to practice law in Michigan is, among other things, a *continuing proclamation by the Supreme Court* that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court." MCR 9.103(A) (emphasis added). Petitioner fell short of his ethical duties here, and it is he who must face the full consequences.

In sum, Petitioner violated MRPC 1.8(c) by preparing a will and trust for an unrelated client that left him and his children substantial gifts. Under controlling Michigan law, Petitioner and his children may not inherit under the offending documents. This Court should expressly overrule its decision in *In re Powers Estate*, reverse the Court of Appeals' decision, and affirm the probate court's grant of summary judgment to Respondents.

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Respectfully submitted,

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