

THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

JAMES CHARLES PROBER

- and -

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

REASONS FOR DECISION

Hearing Date: November 28, 2022

Appearances for the Law Society of Manitoba:

Ayli Klein

Appearances for James Charles Prober:

Richard Wolson, K.C.

Discipline Committee Panel:

Katherine L. Bueti

Douglas Bedford

Maureen Morrison (Public Representative)

Introduction

1. This virtual hearing before a Panel of the Discipline Committee of the Law Society of Manitoba (the "Society"), pursuant to the provisions of *The Legal Profession Act*, was conducted in Winnipeg on November 28, 2022. The Discipline Committee Panel consisted of Katherine L. Bueti, Douglas Bedford, and the Public Representative, Maureen Morrison. The Society was represented by Ayli Klein. The member was represented by Richard Wolson, K.C. and the member was present.

2. This hearing was required as the result of a Citation issued on October 21, 2021 (the "Citation" is included in Exhibit 1) against Mr. Prober which set forth 2 counts of Professional Misconduct. In the event, the Society proceeded on the first count only in accordance with an Agreed Statement of Facts and joint recommendation. Mr. Prober acknowledged that he had failed in his obligation to be courteous and civil with all persons involved in his representation of one Peter Nygard. He admitted that he had made reckless and unfounded assertions touching on the integrity and motives of a number of women who claim that Peter Nygard sexually assaulted them. For the reasons set out hereafter, the Panel accepts the joint recommendation to reprimand Mr. Prober and to order him to pay a contribution to costs of \$4,000.00.

Jurisdiction

3. At the commencement of this discipline hearing Jurisdiction, service and Panel composition were admitted by the member. The hearing was an open hearing. Numerous non-party attendees were present for the hearing.

Preliminary Matters

4. Mr. Prober is a member of the Society, having been called to the bar in 1970.
5. Mr. Prober has no discipline history with the Society.

Findings of Misconduct

Facts

6. The facts of this case are filed in the Agreed Statement of Facts (Exhibit 1). These facts detail that Mr. Prober while representing Peter Nygard engaged in a pattern of inappropriate comments made to media outlets over a four-month period which constitute the Professional Misconduct charges.

7. Mr. Prober's Professional Misconduct charges occurred in a public forum. From February 14, 2020 through July 6, 2020, Mr. Prober made multiple harmful comments to numerous media outlets.

8. Mr. Prober made derogatory and unfounded comments to the media about the complainants in the Peter Nygard case. He said their statements about their interactions with his client were "completely false", that they were being paid for "false evidence" and had 'jumped' on "the money train, the gravy train". These comments perpetuated long discredited rape myths about complainants in sexual assault cases. They were hurtful and indeed harmed the complainants in question as was stated in two statements read to the Panel (Exhibits 2 and 3).

Admission

9. Mr. Prober admitted the facts contained in the Agreed Statement of Facts. No other evidence or submissions were made on the issue of Professional Misconduct other than that the admitted conduct constituted:

a. Professional Misconduct for breach of Rule 7.2-1 of the *Code of Professional Conduct* as alleged in the Particulars under Charge 1 of the Citation.

10. The Panel was also provided a Book of Authorities of the Society. Neither party called any witnesses. As noted above, two Victim Impact Statements were read by two individuals.

11. Upon formal entry of the guilty plea, the Society withdrew Charge 2 of the Citation and withdrew the allegation of Breach of Rule 7.5-2 of the Citation contained in Charge 2. Both parties recommended a reprimand and \$4,000.00 costs.

12. Mr. Prober has successfully completed the Society's course *Trauma Informed Lawyering* since July 2020.

13. Mr. Prober provided some appropriate, apologetic, thoughtful, and insightful comments. Specifically, he said that his comments were "harsh, harmful and hurtful".

14. Mr. Prober has been a member in good standing for over 52 years. This is a key, mitigating consideration in our conclusion that Mr. Prober will not reoffend and that there is no risk to the public in his continuing to practise.

Joint Recommendation

15. The Panel recognizes that the joint recommendation was put forth by experienced counsel after lengthy discussions. Their experience merits serious consideration and respect by this Panel.

16. The caselaw recognizes that a joint recommendation should not be interfered with unless it would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. The threshold for this test is very high. (See *The Law Society of Manitoba v. Sullivan*, 2018 MBL 9 which, in turn, cites the Supreme Court of Canada in *Anthony-Cook v. Her Majesty the Queen*, 2016 SCC 43.)

17. The recommendation put forward carefully weighs the circumstances of the charges and the background of the member. It is tailored to take into account that the best indicator of future behaviour is the member's past behaviour. In this case, the rehabilitative steps taken by the member on his own reflect that his conduct in the spring of 2020 was an aberration and an indication that he takes seriously what he did and such conduct will not be repeated.

18. The Panel recognizes the professional misconduct of the member is at the lower end of the spectrum that finds misappropriation at one extreme. It appears to be isolated, situational, and largely a reaction to publicity about his client. We also note that the member will be left with a permanent record. A finding of misconduct here is consistent with recent rulings by the Courts on the necessity to balance a lawyer's obligation to defend, fearlessly and vigorously, his, her or their client inside and outside the courtroom with the obligation to do so civilly and courteously. The obligation to defend a client fearlessly does not excuse lawyers who make baseless allegations of impropriety on the part of parties or witnesses adverse to their client.

(See *Groia v. Law Society of Upper Canada*, 2018 SCC 27). Doing so undermines the public's perception of the fairness and reliability of the fact-finding and decision-making processes of the Courts. In this matter, as Mr. Prober has acknowledged, there was no adequate factual foundation for the statements he made and, accordingly, his conduct in making them was unprofessional.

19. The recommendation meets the requirements of specific and general deterrence, rehabilitation, protection of the public, and does not bring the administration of justice into disrepute. To the extent that those who heard Mr. Prober's statements were led to question the fairness of a justice system in which a defendant's counsel could impugn complainants outside the courtroom in the absence of a proper factual foundation, we expect that this disposition will be sufficient to restore their belief in the justice system.

20. It recognizes that the member accepted responsibility at an early opportunity, is remorseful, was not going to contest this matter, and no one had to testify.

Disposition

21. Based on the admissions, the Panel has no difficulty in finding Mr. Prober guilty of the count of Professional Misconduct. The admissions show deliberate acts that constitute Professional Misconduct.

22. After carefully considering and weighing all of the facts and submissions in this matter it is the unanimous ruling of this Panel that the Society has met its onus in proving the member committed Professional Misconduct for breach of Rule 7.2-1 as described in the Particulars set out in Charge 1 of the Citation.

23. The purpose of Society Disciplinary proceedings is set out in s. 3(1) of *The Legal Profession Act*, namely to uphold and protect the public interest in the delivery of legal services with competence, integrity, and independence. In accordance with Rule 5-96(5) the Panel resolves that:

- (a) all of the acts or omissions stated in the charge have been proven to the satisfaction of the Panel; and
- (b) the acts or omissions so proved; the member is guilty of Professional Misconduct.

Penalty

24. The member has violated a basic tenet of the legal profession. He acted with a wanton and reckless disregard for the harm caused to the complainants. This is contrary to the required trust which the public places in the legal profession, and which is essential to maintain confidence in the administration of the justice system.

25. The Panel seeks to preserve the public's trust in the integrity of the legal profession and its faith in the ability of the profession to govern its own members. The public has the right to expect that those members of the profession who violate their ethical responsibilities will be sanctioned.

26. The guiding principles of sentencing in this matter are both general and specific deterrence. The objective of the Society is to protect the public. Discipline decisions are not meant to be punitive. Rather they must balance the personal mitigating factors pertinent to the member with the foregoing mandate of the Society to protect the public interest. Here the seriousness of the offence must be considered.

27. In this case the professional misconduct brings the legal system into disrepute. This affects the public's confidence in and perception of the profession. The member had an obligation to be civil and courteous in his public statements defending his client. In recklessly attacking the credibility of a number of complainants without adequate supporting facts he breached that obligation.

28. For the foregoing reasons, the Panel has unanimously determined that a reprimand, as jointly recommended, is appropriate.

Costs

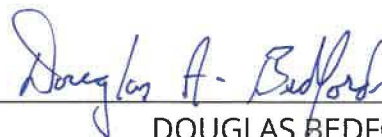
29. Both Counsel agree an order of costs against Mr. Prober is appropriate. The cost provision set out in s. 5-96(8) of the *Rules of the Law Society* is designed to ensure that the member of the profession whose misconduct caused the costs to be incurred bears the responsibility for payment, rather than the innocent members of the Society. Given the joint recommendation, there is no reason to depart from the normal rule and the Panel orders costs in the sum of \$4,000.00.

30. According to s. 5-96(8) of the *Rules of the Law Society*, this Panel is mindful that the member has personal commitments. As such, we are prepared to allow the timing of the commencement of the costs to be determined by the Chief Executive Officer of The Law Society of Manitoba.

DATED this 15th day of December, 2022.



KATHERINE L. BUETI



DOUGLAS BEDFORD



MAUREEN MORRISON