



The Law Society of
Upper Canada

Barreau
du Haut-Canada

Rule 28: Non-discrimination

What lawyers need to know about

Recruitment and Hiring

Spring 1995

Number 2

Introduction

This is the second in a series of bulletins provided by the Law Society of Upper Canada to assist lawyers in complying with Rule 28 of the Rules of Professional Conduct, and with the Ontario *Human Rights Code* and related legislation.

The purpose of this bulletin is to provide guidance to lawyers hiring new employees and to assist them in eliminating discriminatory practices. It is important to recognize that even a sole practitioner with one part-time clerical assistant has employment obligations under Rule 28. Law firms¹ of all sizes should review their employment practices, including recruitment, hiring, and terms and conditions of work, in light of the obligations imposed by Rule 28.

QuickFacts

- 1994 and 1995 Law Society Placement Office surveys of incoming bar admission course students revealed that aboriginal and visible minority students were over-represented among students who were without articling placements as of September of the year in which they would be expected to commence articles.
- A 1992 survey of black law students, articling students and recently called lawyers sponsored by the Law Society found that 50 per cent of respondents thought they were channelled into particular areas of practice or types of law. (*Survey of Black Law Students, Articling Students and Lawyers*)
- In response to complaints from students in 1992, the Law Society conducted a survey of students in 1993 and 1994 concerning inappropriate comments made and questions asked at articling interviews. Students reported that they were asked questions and subjected to offensive remarks concerning age, sex, family status, parenting obligations, sexual orientation, heritage and country of origin, among others. (See LSUC, *Guidelines for 1995 Articling Interviews*)

- In 1994, many lawyers who responded to a consultation on Rule 28 indicated that they were not knowledgeable about human rights law, and in some cases, asserted the right to follow practices that violate the *Human Rights Code*.

Tips on Advertising and Firm Employment Procedures

Advertise vacancies openly: do not recruit using only informal contacts.

Word-of-mouth recruitment is likely to exclude people from groups not already represented in your firm and those who may not have social contacts with lawyers. Keep in mind that members of ethnic minorities, especially recent immigrants or first generation Canadians, may not have extensive social contacts among professional groups.

Draw up a job description for every position in your firm, including articling positions.

The job description will enable you to give all candidates the same information about job requirements. It should focus on the actual work performed at present in that job, and the necessary skills. If the job requirements are likely to change within the year, those changes should be specified as clearly as possible. When creating the job description distinguish between those tasks and skills which are *essential* and those which are *desirable*.

Base your advertisement on the job description.

The advertisement should describe the work of the firm, the job requirements and the essential skills. Avoid describing a "desired" applicant. Do not indicate qualifications by a prohibited ground of discrimination in advertising a job vacancy: for example, by advertising for a "young, dynamic" junior.

Tips on Screening Applicants

If you use an application form, use the same form for all applicants.

The application form should relate closely to the job description. It should solicit information about the skills and experience that are essential to the job. Do not include questions that elicit information, either directly or indirectly, about personal characteristics such as sex, age, marital status, creed, ethnicity, etc. A standard application form will allow you to judge all

Prohibited grounds of discrimination

Rule 28 prohibits discrimination on any of the following grounds:

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| • race | • ancestry |
| • place of origin | • colour |
| • ethnic origin | • citizenship |
| • creed | • sex |
| • sexual orientation | • age |
| • record of offences | • marital status |
| • family status | • disability |

The Ontario *Human Rights Code* defines a number of the grounds of discrimination listed in Rule 28. For example, the types of offences at issue in respect of the term "record of offences" are limited to pardoned criminal offences and provincial offences. The definition of grounds of discrimination is discussed in Bulletin No. 1 in this series.

candidates on the basis of answers to the same questions. Once interviews have taken place and you have selected a candidate, make sure all application forms and/or resumes are kept on file in your firm. This practice will assist in protecting your firm in the event a claim of unlawful discrimination is made to a tribunal by a dissatisfied applicant.

If you plan to "screen" resumes to create an interview list, draw up a checklist to help the resume-evaluation process.

Again, the checklist should relate closely to the job description. Avoid attaching value to particular hobbies or cultural interests. These vary considerably from community to community, and are not relevant to job skills. The person who conducts the screening should also be aware of the common tendency to look for higher qualifications for minority applicants than for others, and efforts should be made to avoid this. Identify and check all assumptions. Get information about equivalency of foreign credentials rather than assuming that they are inferior. Note the criteria each applicant met. This provides a record of why you selected or rejected an applicant for an interview.

Create a written description of the selection procedure, and follow it with every applicant.

Describing the selection procedure in writing increases the likelihood of a fair, consistent and effective process. It is a good practice to send applicants copies of the job description and the description of the selection process.

Tips on Interviewing

Prepare a standard list of interview questions, related to the job description. For each question, draft a list of the points that should be addressed in an "ideal" answer.

The use of a standard list ensures that only job-related questions are asked. An employment interview is not the place for questions that reflect the questioner's curiosity about the applicant's ethnic origin or other personal circumstances. A standard list also provides a basis for comparing candidates fairly and objectively. Individual answers can be followed up by *relevant* supplementary questions.

A pre-prepared outline of an "ideal" answer to each question assists the interview panel to evaluate candidates' answers, and compare candidates, fairly and objectively.

Ensure that any interview questions that touch upon prohibited grounds of discrimination are strictly job-related.

In advertising a job vacancy, an employer may not indicate qualifications by a prohibited ground of discrimination. However, where discrimination on a particular ground is permitted because of an exception under the *Human Rights Code*, such questions may be raised at an interview. For example, you may ask whether an applicant has been convicted of a criminal offence for which a pardon has not been granted. You may ask applicants not yet called in Ontario about Canadian citizenship or permanent residency. It is a good idea to ask all applicants (not just people who are visibly disabled) what accommodation, if any, they would need to meet any of the job requirements as specified. If your firm has an anti-nepotism policy, you may inquire about the applicant's possible relationship to another employee as that employee's spouse, child or parent. This is in contrast to questions about applicant's marital status by itself. Since marital status has no relevance to employment within a law firm, questions about marital sta-

tus alone should not be asked.

Do not make jokes or other remarks as a way of testing an applicant's ability to cope with discrimination.

It is safe to assume that minority applicants who have the skills you want in a law firm have coped successfully with discrimination in the past. Further, since applicants do not know you well, they have no reason to assume you are joking.

Do not interview applicants on your own.

A panel of at least two interviewers is likely to reduce the possible incidence of discrimination. For consistency, the panel should be the same people throughout the process.

Tips on Selecting Applicants

If you do reference checks, confine your questions to job-related issues.

Do not forget that a referee's answer may reflect conscious or unconscious discriminatory attitudes rather than an objective evaluation of the candidate's skills, experience and performance. Pursue ambiguous answers with this in mind.

In comparing applicants' suitability for the position, keep in mind the duty of reasonable accommodation.

If an applicant cannot perform all or part of an essential job requirement because of a personal characteristic listed in the Ontario *Human Rights Code*, the employer has a duty to accommodate. Only if the applicant cannot do the essential task with reasonable accommodation may the employer refuse to hire on this basis. A range of appropriate accommodation measures may be considered. An accommodation is considered reasonable unless it would cause undue hardship².

Ensure that your selection is objectively reasonable, considering the job and its requirements.

Keep a record of why you chose the successful applicant. When faced with applicants whose qualifications are approximately equal, employers sometimes choose on the basis of "fit", hiring the candidate with whom they feel most comfortable. Avoid this. Ask yourself why you feel comfortable or uncomfortable, and how closely your level of comfort relates to the applicant's ability to do the job. Putting your deliberation in writing promotes objectively reasonable decision-making.

Further Information

Model policies on Rule 28 issues will be produced by the Law Society and made available to lawyers.

Further information about the application of Rule 28 or members' ethical and professional obligations is available by contacting:

Professional Conduct
Stephen Traviss,
Senior Counsel
(416) 947-3349 or
1-800-668-7380

Practise Advisory Service
Patricia Rogerson,
Director
(416) 947-3369 or
1-800-668-7380

Footnotes

¹ The term "firm" will be used to refer to all the types of employment situations in which members of the Law Society may find themselves, including associations, partnerships, sole practice, corporate legal departments, government ministries and agencies, legal clinics, etc.

² The legal requirement of reasonable accommodation, and the point at which hardship resulting from accommodation can be considered "undue", are developing areas of human rights law. Another Bulletin in this series will provide an outline of the requirements in the context of Rule 28 obligations.