



The Law Society of  
Upper Canada | Barreau  
du Haut-Canada

## Rule 28: Non-discrimination

*What lawyers need to know about*

# Law Relevant to Rule 28

Spring 1995

Number 1

### Introduction

This is the first 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.

This bulletin provides a **general** overview of the legal and professional obligations to avoid discrimination, ensure equal opportunity and provide reasonable accommodation. Other bulletins in the series specifically address recruitment and hiring, as well as relations with employees, partners, other members of the legal community and clients, and offer practice tips to assist lawyers in fulfilling their responsibilities under Rule 28.

### Background

By adopting Rule 28, the Law Society has joined other professions that have also incorporated into their code of professional conduct the legal obligations that arise from the Ontario *Human Rights Code* and related legislation.

### Rule 28: Non-Discrimination

*The lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and specifically to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status or disability with respect to professional employment of other lawyers, articulated students, or any other person or in professional dealings with other members of the profession or any other person.*

-Rules of Professional Conduct,  
The Law Society of Upper Canada, 1994

### QuickFacts

- 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*.

- While eight per cent of the adult population in Ontario comprises visible minorities, just three per cent of lawyers are members of visible minority groups. (*Access to Legal Education in Canada: Databook 1990*)
- 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*)
- Fifty-nine per cent of respondents to the above survey believe that certain areas of practice are effectively closed to black lawyers. The areas of law cited most often as not being open to black lawyers are corporate/commercial law and related areas of business law such as securities and taxation law.
- In 1991, the Law Society published a survey of lawyers called to the bar between 1975 and 1990. Seventy per cent of women respondents said they experienced sex discrimination in the course of their work as lawyers. (*Transitions in the Ontario Legal Profession*)
- Ten per cent of respondents to the same survey reported having personally experienced racial or ethnic discrimination in the course of their work as lawyers, and 17 per cent reported occurrences of racial or ethnic discrimination against others.
- 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*)

### What are lawyers' responsibilities under Rule 28?

Rule 28 requires that lawyers extend equal treatment without discrimination to:

- employees of their firm<sup>1</sup>
- clients and others with whom they have professional dealings
- members of the Law Society in the course of their professional relations

### How will Rule 28 be interpreted?

Rule 28 will be interpreted according to the provisions of the Ontario *Human Rights Code*, RSO 1990 and related case law.



## "Discrimination" as defined under Rule 28

There is no statutory definition of discrimination. Supreme Court of Canada jurisprudence defines discrimination as including:

- Differentiation on prohibited grounds. Lawyers who refuse to hire employees of a particular race, sex, creed, sexual orientation, etc. would be differentiating on the basis of prohibited grounds.
- Constructive discrimination. An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly "neutral" rule or policy creates an adverse effect on a group protected by Rule 28, there is a duty to accommodate. For example, while a requirement that all articling students have a driver's licence to permit them to travel wherever their job requires may seem reasonable, that requirement effectively excludes from employment persons with disabilities that prevent them from obtaining a licence. In such a case, the law firm would be required to alter or eliminate the requirement in order to accommodate the student unless the necessary accommodation would cause undue hardship<sup>2</sup>. The governing statutory provision on constructive discrimination is found in s.11 of the *Human Rights Code*.
- Harassment on a prohibited ground<sup>3</sup>. Harassment is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" on the basis of any ground set out in Rule 28. This could include, for example, repeatedly subjecting a client or colleague to jokes based on race or creed.
- Failure to prevent or curb discrimination. A lawyer is required to take reasonable steps to prevent or stop discrimination by any staff or agent who is subject to the lawyer's direction or control.

## Defining the grounds of discrimination noted in Rule 28

The Ontario *Human Rights Code* defines a number of the grounds of discrimination listed in Rule 28. For example,

**Age** is defined as an age that is eighteen years or more, except in subsection 5(1) where age means an age that is eighteen years or more and less than sixty-five years.

The term **disability** is not used in the *Code*, but discrimination on the ground of **handicap** is prohibited. Handicap is broadly defined in s.10 of the *Code* to include both physical and mental disabilities.

**Family status** is defined as the status of being in a parent and child relationship.

**Marital status** is defined as the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage.

**Record of offences** is defined such that a prospective employer may not discriminate on the basis of a **pardoned** criminal offence (a pardon must have been granted under the *Criminal Records Act* (Canada) and not revoked), or provincial offences.

The right to equal treatment without discrimination because of **sex** includes the right to equal treatment without discrimination because a woman is or may become pregnant.

## How can lawyers meet their obligations under Rule 28?

- Establish and review policies. Law firms of all sizes should develop written policies in key areas such as recruitment, hiring, promotion to partnership and provision of services. Existing policies should be reviewed to ensure they conform to the requirements imposed by Rule 28. Policies should be approved by senior members of the firm, and should be made known to all members of the firm.
- Monitor the implementation of policies. Making day-to-day practices reflect the duty of equal treatment and reasonable accommodation requires that any issue of policy application be considered individually. A policy may require modification to reflect an individual situation. Final decisions in individual cases require the attention of senior members of the firm.
- Establish a complaints procedure. Decide in advance on a process for responding to questions and resolving complaints. The final answer on any issue should reflect the position of the firm as a whole. Large firms may wish to assign this responsibility to their managing partner or committee. Small firms will want at least one senior partner involved. Determine who in the firm should deal with questions or complaints about discrimination from clients, employees or applicants for employment. Make sure that all employees know who is responsible at the first instance, and are familiar with the procedure.
- Address questions or problems promptly. An immediate response to questions or problems reinforces the firm's commitment to its non-discrimination policies, and prevents a simple problem from escalating.

## How will the Law Society assist lawyers to meet their responsibilities?

This series of bulletins will offer practice tips for meeting the obligations noted above. In addition, the Law Society will produce model non-discrimination policies for law firm use.

Question about compliance with Rule 28 may be referred to Stephen Traviss, senior counsel, Professional Conduct at (416) 947-3349 or to Patricia Rogerson, Director of the Practice Advisory Service at (416) 947-3369. Members outside of the local 416 area can reach either of these departments by dialling toll-free 1-800-668-7380.

## What happens if a complaint under Rule 28 is made against a lawyer?

Rule 28 is a Rule of Professional Conduct. The normal disciplinary process will be triggered upon receipt of a complaint. Should this occur, a file will be opened and an investigation will be launched by the Society's complaints department.

## Footnotes

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> Sexual harassment is also prohibited under Rule 27.