



The Law Society of
Upper Canada

Barreau
du Haut-Canada

Rule 28: Non-discrimination

What lawyers need to know about

Partnership and Relations with Other Lawyers

Summer 1996

Number 4

Introduction

This is the fourth 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 concerning the impact of Rule 28 on relations between partners and between members of the legal profession generally.

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 violated the *Human Rights Code*.
- While eight per cent of the adult population in Ontario comprises visible minorities, only three per cent of lawyers are members of visible minority groups. (*Access to Legal Education in Canada: Databook 1990*)
- 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 believed 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 were 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 experienced racial or ethnic discrimination against themselves in the course of their work as lawyers, and 17 per cent reported occurrences of racial or ethnic discrimination against others.

A More Inclusive Practice of Law

Law firms are beginning to appreciate that, in difficult economic times, they must change the way they do business to survive and prosper. A firm that wants to attract and keep the best legal talent cannot afford policies and practices that effectively exclude lawyers for reasons that have nothing to do with excellence. The "Tips" set out

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.

below reflect a more flexible and inclusive approach to doing business which has been pioneered by innovative business corporations in recent years. Generally, the experience has been that more inclusive and equitable business practices are also financially very rewarding since a firm that is representative of the population has a constant flow of new ideas, skills and approaches, and appeals to a broader client base.

Equity within law firms may also be promoted by clients' expectations, express or implied. An example of an express expectation is the Federal Department of Justice's 1996 written Policy on Workplace Equity for Legal Agents. According to the terms of that policy, law firms who act as standing agents of the Justice Department must implement employment equity measures as a condition of their appointment. The particulars vary with the size of the law firm. The measures are directed toward fair representation of, and full participation in the workplace by women, aboriginal peoples, members of visible minority groups and persons with disabilities.

Tips on the Process of Admission into Partnership

- **When recruiting for partnership from outside the firm, recruit openly.**

Word-of-mouth recruitment is likely to exclude people from groups not already represented in your firm. Keep in mind that members of ethnic minorities, especially recent immigrants or first generation Canadians, may not have extensive social contacts within the legal community.

- **Develop written criteria for admission into partnership, if you do not have them already.**

Without written criteria, members of the firm who aspire to partnership have no clear direction as to how to make themselves attractive candidates for partnership. Further, a decision to invite a specific individual into the partnership can be perceived as arbitrary and unfair unless the criteria are clearly understood. Criteria for partnership should be directly and objectively related to the type of work done by the firm and to any existing plans for the future work of the firm.

- **Review the criteria you use to decide who will be admitted to partnership.**

Consider the effect of seemingly "neutral" criteria. Most criteria are proposed with the present compo-

sition of the workplace in mind, and law firms do not at present reflect the working population of Ontario. Some criteria, while applied to everyone, can effectively bar entry to the partnership or pose additional hardships on employees of one sex, or of a particular creed, ethnicity, marital or family status, or on those who have (or develop) disabilities. An example is criteria relating to seniority or billable hours that effectively penalize lawyers who need maternity leave or have child-care or elder-care obligations.

The maintenance of a criterion with a discriminatory effect breaches Rule 28, unless changing or eliminating the criterion would cause undue hardship.¹

When you have revised your criteria, date the document and agree upon a date for the next review and revision. Ideally, the criteria should be reviewed at regular intervals, and whenever there are significant changes in the work or size of the firm, or in legislation that affects employment.

- **Ensure that your selection is objectively reasonable, considering the work of the firm and its corresponding needs.**

Keep a record of why you chose to admit any particular individual into partnership. When faced with candidates for partnership whose qualifications are approximately equal, partners 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 meet the needs of the firm. Putting your deliberation in writing promotes objectively reasonable decision-making.

Tips on Issues That Arise in the Operation of the Partnership

- **Ensure that opportunities for committee work are shared and credited fairly.**

Avoid the common mistake of making committee appointments on the basis of stereotypic assumptions as to the capabilities or interests of persons of a particular sex, race, ethnicity, creed or age. Keep in mind also that the work of some committees is perceived as being more important than others. It is a good practice to review and revise committee appoint-

ments at regular intervals. It is a bad sign if any committee is consistently dominated by one group within the firm.

- **Ensure that all members of the firm can participate in any business development activities sponsored by the firm.**

Business-promotion activities sponsored by firms vary widely in nature, but are often geared toward recreational activities enjoyed by the majority of the original members of a firm, who are predominately men of Anglo/European ethnic origin. Occasionally, firms specifically limit participation in business development activities (for example, by confining invitations to men only, or by making it clear that the presence of women is not wanted). More often, the problem is the nature of the activity, which may be so narrow in focus as to effectively exclude or actively offend non-majority clients or members of the firm (an example is parties held in bars or strip clubs).

Firms should keep in mind that the type of business development activities undertaken sends a message, to both the community and to the members of the firm, about the firm's values and attitudes. Limiting the firm to only a narrow range of activities limits both the firm's ability to stimulate new business and the ability of all partners to fully contribute to business development. It is good practice to review the nature of business development activities annually, seeking suggestions from all members of the firm.

- **Do not cater to discriminatory attitudes on the part of clients.**

Occasionally, clients let it be known that they do not want to deal with a woman lawyer, or a lawyer of a particular race, ethnicity or creed. Human rights jurisprudence that has been developed in the context of business dealings clearly indicates that "customer preference" is not a defence to a complaint of discrimination.

- **Monitor mentoring practices.**

Mentoring of a junior lawyer by a senior members of the firm can make a significant difference to the junior lawyer's legal career. However, mentoring often receives little thought or planning and may occur only when a senior partner is moved to "take a friendly interest" in a particular junior lawyer. The trouble with this approach is that, if the junior is suf-

ficiently different in background from the senior lawyer, "friendly interest" may not come naturally, and some junior lawyers will be deprived of a fair share of mentoring. It is important that firms actively consider and discuss mentoring activities to ensure that no one is deprived of the opportunity to learn through mentoring.

Tips on Reasonable Accommodation within Partnership

- **Be prepared to accommodate as the need arises.**

If due to disability, pregnancy, family obligations or other reasons related to grounds of discrimination listed in Rule 28, a partner cannot perform all or part of an essential requirement of the partnership agreement, the other partners have a duty to accommodate. An accommodation is considered reasonable unless it would cause undue hardship.²

A need for flexibility can arise with the admission of a new partner, or with changes in the personal circumstances of existing partners, such as disability, change of creed, or change in family responsibilities. Rule 28 requires that the firm must provide reasonable accommodation either temporarily or permanently.

- **Be creative in considering accommodation options.**

The need for accommodation may be temporary (as in the case of child or parent-care obligations) or permanent (as in the case of some forms of disability).

A range of appropriate accommodation measures may be considered. Keep in mind that the jurisprudence concerning reasonable accommodation indicates that accommodation can and should be tailored to the individual's particular situation. There need not be an attempt to craft a solution that can be offered to everyone.

Tips on Partnership Agreements

- **Address Rule 28 obligations within the agreement.**

In drafting or amending a partnership agreement, keep in mind that the terms of the agreement are affected by obligations under Rule 28, which imports the obligations imposed by the Ontario *Human Rights*

Code.³ It is good practice specifically to address the issues noted above in the partnership agreement.

- **Create and implement an anti-harassment policy.** In addition to prohibiting discrimination, Rule 28 prohibits harassment⁴ on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap. Harassment of a partner by another partner is prohibited by Rule 28.

Create an anti-harassment policy and ensure that everyone in the firm is familiar with the policy. Model policies dealing specifically with sexual harassment can be obtained from the Law Society and can be adapted for the purpose of Rule 28.

- **Establish a complaints procedure.** Tips on establishing a complaints procedure within a firm are included in Bulletin No. 3 in this series. Make sure that partners are aware that they can use the procedure to resolve problems before they escalate.

Tips on Relations with other Members of the Profession

- **Take responsibility for discouraging overtly discriminatory behaviour by and among lawyers.** Overtly discriminatory behaviour is unfortunately not unusual and occurs among lawyers as it does among other professional groups in our society. Most lawyers have witnessed incidents in which a lawyer has sexually harassed another lawyer, used a racial or religious slur, or made a homophobic remark. **We cannot eliminate these incidents by remaining silent.** In fact, if we remain silent, we give the message that such behaviour is acceptable.
- **Contribute to the elimination of systemic discrimination.** Like all professions, law has its own culture: a set of expectations, unwritten rules and modes of behaviour, much of which was shaped by the earliest participants in the profession. Some elements of our legal culture are closely related to the essentials of legal practice. However, many have nothing to do with the ability to be a good lawyer and act as active barriers to those who have not historically been mem-

bers of the profession. An individual's sex, ethnicity, race, disability and other personal characteristics influence the individual's modes of behaviour and expectations. As the legal profession becomes more representative of the general population, cultural differences must be recognised and accepted.

The practice of law can be difficult and challenging. All members of the Law Society of Upper Canada have a duty to ensure that unnecessary barriers are not placed in the way of colleagues who are in a minority position by reason of the personal characteristics listed in Rule 28.

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 and 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 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.

² See footnote 1.

³ *Human Rights Code* obligations would affect partnership agreements even if Rule 28 did not exist, pursuant to s.3 of the *Code*. There is Supreme Court of Canada authority to the effect that attempts to "contract out of" obligations under human rights legislation are of no effect.

⁴ Harassment is defined in Bulletin No. 1 of this series.

