

## THE LAW SOCIETY OF UPPER CANADA

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# GUIDE TO DEVELOPING A LAW FIRM POLICY REGARDING ACCOMMODATION REQUIREMENTS

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<b><u>INTRODUCTION</u></b>	

Many barriers to the equal participation of members of Francophone, Aboriginal and equality-seeking communities<sup>1</sup> in the legal profession exist because of inadvertence or lack of awareness of special needs, and not because people have deliberately sought to

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<sup>1</sup> The Law Society defines members of “equality-seeking communities” as people who consider themselves a member of such a community by virtue of, but not limited to, ethnicity, ancestry, place of origin, colour, citizenship, race, religion or creed, disability, sexual orientation, marital status, same-sex partnership status, age, family status and/or gender.

discriminate. Law firms and the legal profession have the responsibility to remove barriers and to adopt proactive measures to attain equality and inclusiveness. The Ontario *Human Rights Code*<sup>2</sup> (the *Code*) and the *Rules of Professional Conduct*<sup>3</sup> require these changes in order to give meaning to the rights to equality and freedom from discrimination.

The duty to accommodate applies to all the grounds enumerated in the *Code*. However, in the context of employment and the provision of services, the most common requests for accommodation are based on disability, family responsibilities, pregnancy and/or creed.

Historically, persons with disabilities have borne virtually all the costs, both financial and personal, of their special needs. Accommodation means that law firms should adopt a proactive approach in undertaking systemic accessibility audits, developing action plans and implementing the necessary changes to make facilities, procedures and services accessible to members, staff and clients with disabilities. Accommodation can also be understood as a means of removing the barriers that prevent persons with disabilities from enjoying equality of opportunity in a way that is sensitive to their individual circumstances so that we all may benefit from their active participation in the community.

For persons with family responsibilities, male as well as female working parents increasingly expect to play an active role in child rearing. With the aging of the population, most employees face the likelihood that their parents will require some care. Advances in medicine and in technology allow for the practice of law by many who previously would have found this impossible. A firm that recognizes and responds to these new realities will enhance its ability to recruit and retain lawyers of its choice. The costs of recruitment and training can as a result be reduced, and lower turnover among lawyers means better realization of the firm's investment in its intellectual capital. The firm develops a reputation as progressive.

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<sup>2</sup> R.S.O. 1990, c. H.19.

<sup>3</sup> Adopted by Convocation of the Law Society of Upper Canada on June 22, 2000, effective November 1, 2000, available online: [http://www.lsuc.on.ca/services/RulesProfCondpge\\_en.jsp](http://www.lsuc.on.ca/services/RulesProfCondpge_en.jsp).

The duty to accommodate also arises in the context of religious and spiritual beliefs and practices. Requests for accommodation of religious and spiritual practices may affect break policies, flexible scheduling, rescheduling, religious leaves and dress codes. In March 2005, the Law Society of Upper Canada recognized the importance of respecting religious and spiritual beliefs by unanimously adopting *A Statement of Principles of the Law Society of Upper Canada on Respect for Religious and Spiritual Beliefs*. The statement of principles condemns all forms of religious intolerance and undertakes to promote and support religious understanding and respect both inside and outside the legal profession.

Benefits of adopting an accommodation policy include the following:

1. Systemic accessibility audits and implementation of action plans assist in promoting public relations with the community.
2. The firm states its commitment to address key barriers that affect equality in employment and in the provision of services.
3. The policy is an indication that the firm strives to provide a workplace and services free of discrimination.
4. The policy is a proactive way of providing the means for members, staff and clients who require accommodation, thereby enlisting the resources of a diverse workforce and providing services to a diverse community.
5. The firm gains from the improved morale and loyalty encouraged by the arrangements.
6. All members and staff of the firm can work to their full potential.
7. Absenteeism is reduced.
8. Members and staff of the firm can schedule their lives to facilitate family responsibilities or religious beliefs and practices.

The purpose of this Guide is to assist law firms in accommodating differences that arise from the personal characteristics enumerated in the *Code* and under Rule 5.04 of the *Rules of Professional Conduct*.

The document is divided into the following parts:

- Part I – Background information including why law firms need written policies and information about the legal profession.
- Part II – Effective implementation and review of the policy
- Part III - Model policy
- Part IV - Legal requirements and professional responsibility
- Part V - Glossary of terms
- Part VI- *Rules of Professional Conduct*

## PART I – BACKGROUND

### WHY LAW FIRMS NEED WRITTEN POLICIES

The Ontario Human Rights Commission has stated that “[t]he best defence against human rights complaints is to be fully informed and aware of the responsibilities and protections included in the *Code*”.<sup>4</sup> Law firms can achieve this by developing written policies on equality issues, including an accommodation policy and procedures that provide for accessibility audits and a process whereby individual needs can be identified and accommodated. It is advantageous to a firm to adopt written policies for a number of reasons:

1. Written policies encourage respect for the dignity of all individuals working at the law firm.
2. Written policies show that the law firm’s management takes seriously its legal and professional obligations. They also minimize the risk of workplace harassment or discrimination and of harm to individuals working at the firm
3. Many firms provide benefits over and above those mandated by law but do so on an *ad hoc* basis. Relying on a discretionary system often causes concern among individuals working at the firm about whether decisions are being made on an even-handed, consistent basis. A written policy is indicative of a firm’s commitment to transparency in the provision of employment and social benefits.
4. A written policy reflects the tenor of a firm’s culture. It can signal to those working at the firm that inquiries about its policies and benefits are encouraged and may be made without risk of embarrassment.
5. Written policies on equality issues encourage respect for and acceptance of individuals from diverse groups, such as those protected under the *Code* and the *Rules*. In the context of employment, both the *Code* and the *Rules* protect against harassment and discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, same-sex partnership status or disability.<sup>5</sup> The *Code* and the *Rules* also impose a duty to accommodate.
6. The existence of written policies allows the law firm to communicate its commitment to equality principles to people outside of the law firm, such as prospective recruits and clients. Written policies may also have value as a recruitment tool that serves to signal the firm’s commitment to a discrimination and harassment-free workplace.
7. A carefully drafted written policy may reduce the necessity of an individual seeking external legal remedies, as well as the risk that a law firm will be held liable for such unlawful harassment or discrimination.

<sup>4</sup>*Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, November 23, 2000) at 41, available online: <http://www.ohrc.on.ca/english/publications/disability-policy.pdf>.

<sup>5</sup> While the *Code* does not specifically prohibit harassment on the ground of sexual orientation, the Ontario Human Rights Commission accepts such complaints as discrimination because of sexual orientation. See *Policy on Discrimination and Harassment Because of Sexual Orientation* (Toronto: Ontario Human Rights Commission, January 11, 2000) at 9, available online:

8. Written policies may provide the necessary focus for education programs on preventing and responding to subtle or systemic workplace harassment and discrimination.

## **THE LEGAL PROFESSION**

Tremendous progress has been made in the last decade to increase diversity and promote equality in the legal profession. However, studies undertaken by the Law Society of Upper Canada and other organizations indicate that individuals from Francophone, Aboriginal, or equality-seeking communities still face challenges in the legal profession:

1. In 1991, Professor Fiona Kay published a survey of lawyers called to the Bar between 1975 and 1990.<sup>4</sup> Seventy percent of women respondents said they experienced sex discrimination in the course of their work as lawyers. Ten percent of the respondents reported having personally experienced racial or ethnic discrimination in the course of their work as lawyers and seventeen percent reported occurrences of racial or ethnic discrimination against others. Six years later, Professor Kay undertook a second survey with the same cohort of lawyers. Her report *Barriers and Opportunities Within Law* compared the success of male and female lawyers and once again confirmed the existence of inequality within the legal profession.<sup>5</sup> Professor Kay surveyed the same cohort of lawyers six years later. The report *Turning Points and Transitions*<sup>6</sup>, released in 2004, revealed considerable advancement in the career mobility of both men and women involved in the survey, but also noted that significant gaps remain between men and women in salaries, promotion opportunities, and levels of job satisfaction.
2. In 2001, the Law Society conducted a survey of students who had undergone articling recruitment for 2001-2002 to evaluate the frequency that firms asked inappropriate or discriminatory questions. Thirty percent of the students indicated a belief that their membership or association with a group influenced the questions asked during interviews. One-fifth of the respondents reported that they were asked questions and subjected to offensive remarks that constituted

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<sup>4</sup> F.M. Kay, *Transitions in the Ontario Legal Profession, A Survey of Lawyers Called to the Bar Between 1975 and 1990* (Toronto: Law Society of Upper Canada, 1991).

<sup>5</sup> F.M. Kay, N. Dautovich and C. Marlor, *Barriers and Opportunities Within Law: Women in a Changing Legal Profession. A Longitudinal Survey of Ontario Lawyers 1990-1996* (Toronto: Law Society of Upper Canada, November 1996).

<sup>6</sup> F. M. Kay, C. Masuch, & P. Curry, *Turning Points and Transitions: Women's Careers in the Legal Profession* (Toronto: Law Society of Upper Canada, September 2004). Available online: [http://www.lsuc.on.ca/equity/pdf/oct2604\\_turning\\_points.pdf](http://www.lsuc.on.ca/equity/pdf/oct2604_turning_points.pdf).

sexual harassment or discrimination on the basis of sex, marital status, socioeconomic status and political affiliation among others. In order to address this issue, the Law Society publishes guidelines for the legal profession on hiring practices.<sup>7</sup>

3. Each year, a high percentage of candidates for articling find articling placements by the end of the articling term. For example, ninety seven percent of all 2003 Bar Admission Course students had secured an articling placement by the end of the articling term in June 2004. However, the articling placement rate for students who self-identified as being from a Francophone, Aboriginal and/or an equalityseeking community (Disability, Gay/Lesbian, Mature, Visible Minority) remained at 90%.<sup>10</sup>
4. In 2004, the Law Society released the results of a study that looked at evidence from the Canadian Census for the purpose of comparing the representation of various communities in the legal profession as compared to the general population. This study documented the increasing diversity of the legal profession, but noted at the same time that a number of issues remain. The representation of Aboriginal and visible minority lawyers within the Ontario legal profession is still below their representation in the Ontario population. In addition, although women are now entering the legal profession in larger numbers than ever before, some gender disparity continues, especially at later points in the careers of lawyers.<sup>8</sup>
5. In 2004, the Law Society released a report, *Diversity and Change: The Contemporary Legal Profession in Ontario*<sup>9</sup>, which focused on the entry and advancement of diverse groups into the legal profession. The report noted that racialized community members remain underrepresented across work settings relative to their representation in the Canadian population. The report indicated that racialized lawyers are slightly more likely to practice criminal, immigration

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<sup>7</sup> *Summary of Student Hiring Practice Guidelines*, May 2003, available online:

<http://education.lsuc.on.ca/Assets/PDF/apo/polSummaryStuHirePractGuidelines2003.pdf>.<sup>10</sup>

*Placement Report 2003/2004 of Students Enrolled in the 46th BAC 2003* (Toronto: Law Society of Upper Canada, July 2004), available online:

<http://education.lsuc.on.ca/Assets/PDF/apo/repPlacementReport2003-04.pdf>.

<sup>8</sup> M. Ornstein, *The Changing Face of the Ontario Legal Profession, 1971-2001* (Toronto: Law Society of Upper Canada, October 2004), available online: [http://www.lsuc.on.ca/news/pdf/convoc04\\_ornstein.pdf](http://www.lsuc.on.ca/news/pdf/convoc04_ornstein.pdf). See also earlier report: Michael Ornstein, Director of the Institute for Social Research of York University, *Lawyers in Ontario: Evidence from the 1996 Census, A Report for the Law Society of Upper Canada* (Toronto: Law Society of Upper Canada, January 2001).

<sup>9</sup> F. M. Kay, C. Masuch, & P. Curry, *Diversity and Change: The Contemporary Legal Profession in Ontario* (Toronto: Law Society of Upper Canada, September 2004), available online: [http://www.lsuc.on.ca/equity/pdf/oct2604\\_diversity\\_and\\_change.pdf](http://www.lsuc.on.ca/equity/pdf/oct2604_diversity_and_change.pdf).

and poverty law. However, racialized lawyers had approximately the same likelihood of practicing civil litigation and corporate and commercial law as nonracialized lawyers. The same report noted that women and racialized lawyers are less likely than men and non-racialized lawyers to have earnings at the higher end of the income range, and that men and non-racialized lawyers are more likely to occupy senior positions and to be partners. Both reports highlighted concerns around the need for better work-life balance and flexible workplaces.

6. The Discrimination and Harassment Counsel (DHC) Program was established by Convocation in 1999 to provide services to individuals who allege harassment or discrimination by a lawyer. In her Semi-Annual Report to Convocation for the period of July 1 to December 31, 2004, the DHC noted that 234 individuals contacted the DHC. Sixty-seven per cent of contacts (157 contacts) were within the mandate of the DHC, and of those, 50 per cent were complaints regarding harassment or discrimination. Members of the public accounted for 53 per cent of complaints received by the DHC, and lawyers accounted for 47 per cent. Women accounted for 65 per cent of complaints received by the DHC.<sup>10</sup>

In light of the above-noted studies, the Law Society has undertaken initiatives to promote equality and diversity within the legal profession. The position of the Law Society is summarized in the *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession*.<sup>11</sup>

### **MODEL POLICIES DEVELOPED BY THE LAW SOCIETY**

In the last decade, the Law Society has adopted a number of model policies to promote equality within the legal profession. **All model policies are available on hard copy in French and English by contacting the Equity Initiatives Department at (416) 947-3300 ext 2153 or 1668-7380 ext. 2153 or [equity@lsuc.on.ca](mailto:equity@lsuc.on.ca).** These include:

### **GUIDE TO DEVELOPING A POLICY REGARDING WORKPLACE EQUITY IN LAW FIRMS<sup>12</sup>**

To assist law firms in meeting their obligation to avoid discrimination in employment practices, this guide outlines a model policy for the promotion of workplace equity. The guide includes reference to employment practice topics in the areas of recruitment,

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<sup>10</sup> C. Petersen, *Report of the Activities of the Discrimination and Harassment Counsel for the Law Society of Upper Canada for the Period of July 1 to December 31, 2004* (Toronto: Law Society of Upper Canada, 2004). Semi-Annual Reports available online: <http://www.dhcounsel.on.ca/>.

<sup>11</sup> *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession* (Toronto: Law Society of Upper Canada, 1997), available online: [http://www.lsuc.on.ca/equity/pdf/bicentennial\\_nov0503.pdf](http://www.lsuc.on.ca/equity/pdf/bicentennial_nov0503.pdf).

<sup>12</sup> *Guide to Developing a Policy Regarding Flexible Work Arrangements* (Toronto: Law Society of Upper Canada, updated March 2003).



interviewing job candidates, hiring and promotion, the right to equal opportunities at work, professional development, accommodation, evaluation, mentors and compensation.

Available at <http://www.lsuc.on.ca/equity/models.jsp>

Available in French at [http://www.lsuc.on.ca/equity/pdf/policy1\\_fr.pdf](http://www.lsuc.on.ca/equity/pdf/policy1_fr.pdf)

## **ACCOMMODATION OF CREED AND RELIGIOUS BELIEFS, GENDER RELATED ACCOMMODATION AND ACCOMMODATION FOR PERSONS WITH DISABILITIES:**

### **LEGAL DEVELOPMENTS AND BEST PRACTICES<sup>13</sup>**

This document is a companion piece to this *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements*. It includes a summary of best practices and a comprehensive legal analysis of the duty to accommodate. Available online:

[http://www.lsuc.on.ca/equity/pdf/mar1705\\_developments\\_best\\_practices.pdf](http://www.lsuc.on.ca/equity/pdf/mar1705_developments_best_practices.pdf)

### **GUIDE TO DEVELOPING A POLICY REGARDING FLEXIBLE WORK ARRANGEMENTS<sup>14</sup>**

One means of fulfilling an employer's legal duty to accommodate employees with family responsibilities or disabilities is through the adoption of flexible work arrangements. This guide outlines various alternate work arrangements for both associates and partners of law firms in addition to outlining responses to the challenges presented by each option.

Available at <http://www.lsuc.on.ca/equity/models.jsp>

Available in French at [http://www.lsuc.on.ca/equity/pdf/policy2\\_fr.PDF](http://www.lsuc.on.ca/equity/pdf/policy2_fr.PDF)

### **PREVENTING AND RESPONDING TO WORKPLACE HARASSMENT AND DISCRIMINATION: A GUIDE TO DEVELOPING A POLICY FOR LAW FIRMS<sup>15</sup>**

The Law Society published this document in 2002 to guide law firms in taking a proactive approach and having an effective complaints mechanism in place so that they, as employers, can limit their vicarious liability for discrimination and harassment in the workplace. The guide includes an overview of legal requirements, a discussion of policy and implementation issues, a sample model policy for law firms, and step by step

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<sup>13</sup> *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities: Legal Developments and Best Practices* (Toronto: Law Society of Upper Canada, March 2001).

<sup>14</sup> *Guide to Developing a Policy Regarding Workplace Equity in Law Firms* (Toronto: Law Society of Upper Canada, updated March 2003).

<sup>15</sup> *Preventing and Responding to Workplace Harassment and Discrimination: A Guide to Developing a Policy for Law Firms* (Toronto: Law Society of Upper Canada, March 2002).

complaints procedures for both medium/large and small law firms. Model forms are provided for convenience.

Available at <http://www.lsuc.on.ca/equity/models.jsp>

Available in French at [http://www.lsuc.on.ca/equity/pdf/modelharassment3\\_fr.pdf](http://www.lsuc.on.ca/equity/pdf/modelharassment3_fr.pdf)  
**SEXUAL ORIENTATION AND GENDER IDENTITY: CREATING AN INCLUSIVE  
WORK ENVIRONMENT, A MODEL POLICY FOR LAW FIRMS AND OTHER  
ORGANIZATIONS** <sup>16</sup>

The Law Society published this document in 2004 to assist law firms in fostering a work environment in which employment and pension benefits are conferred in a nondiscriminatory manner and in which participation in the social culture of the firm is a viable option for all individuals working there. The Law Society of Upper Canada envisions that adoption and implementation of this policy will contribute to law firms becoming a place in which an individual's choice to keep confidential or to disclose information about his or her sexual orientation or gender identity neither results in discrimination or harassment nor detracts from either the individual's dignity and selfworth or value to the firm.

Available at <http://www.lsuc.on.ca/equity/models.jsp>

Available in French at [http://www.lsuc.on.ca/equity/pdf/aug0604\\_samesexmodel\\_fr.pdf](http://www.lsuc.on.ca/equity/pdf/aug0604_samesexmodel_fr.pdf)

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<sup>16</sup> *Sexual Orientation and Gender Identity: Creating an Inclusive Work Environment, A Model Policy for Law Firms and other Organizations* (Toronto: Law Society of Upper Canada, 2004).

## **PART II- EFFECTIVE IMPLEMENTATION AND REVIEW OF THE POLICY**

### ***ESTABLISHING A DRAFTING COMMITTEE***

The starting point is to establish a committee to draft the policy. The membership of the committee should be diverse. To the extent possible, the committee should be composed of partners and employees of both sexes and of differing age, ability, ethnic origin, marital and partnership status, gender identity and sexual orientation. If there are lawyers or individuals in the law firm with expertise in the relevant employment and discrimination law, one or more should be included.

It is most important that the committee include respected individuals of the law firm who appreciate the importance of the issues to be addressed and who will be able to communicate these matters to others within the law firm. The composition of the committee is critical to the credibility of the process and the policies that are produced.

### ***DEVELOPING A POLICY***

Committee members should educate themselves about the applicable law and become familiar with existing firm practices and policies that may be relevant.

A consultative process should be followed.

The committee should circulate a draft policy throughout the law firm for comments. This step is important because it generates support and allows for useful insight. It is important to explain the rationale for introducing such a policy, as well as the effect of the proposed policy on existing arrangements.

### ***IMPLEMENTING THE POLICY***

The initial presentation of the policy and a clear statement of management support are critical to its success.

Once the policy is adopted, it should be distributed to all individuals working at the law firm with a covering memorandum emphasizing the strong support of management. The letter should outline that the right to be free from harassment or discrimination in the workplace is protected by human rights legislation, and is an important value within Canadian society. It is essential that individuals working at the law firm understand the negative impact that harassment and discrimination has on the dignity of employees as well as on workplace productivity and the importance of accommodating differences.

Factors that may cause opposition within the workplace should be identified, and discussed frankly. One example may be the misconception that such policies outlaw personal relationships between members of the law firm, and create a “chilling” antisocial atmosphere or that accommodations are always costly measures. These concerns should be recognized and addressed at the outset through discussion of the purposes and goals of workplace policies.

The initial presentation of the policy combined with a clear statement of senior and managing partners’ support are critical to its success.

***COMMUNICATING THE POLICY***

If the law firm has a handbook of policies or if policies are available on-line, the law firm’s accommodation policy should be included. If the law firm does not have a handbook of policies, or if it does not make its policies available on-line, the law firm may wish to distribute copies of the policy directly to each individual working at the firm, and/or post copies of the policy in a common area.

The policy should be made available to all individuals who are interviewed for a position at the firm. Such a practice will make a strong statement about the firm’s support for the policy and its objectives. Further, the Code applies to the provision of terms and conditions of employment, recruiting, application forms, interviews and promotions. Firms may also wish to publicize the existence of the policy in their recruitment materials.

***REVIEWING, EVALUATING AND REVISING THE POLICY***

A committee of the law firm should have the responsibility to review and revise the policy on a periodic basis. The committee will also attempt to identify barriers that might affect members of the Aboriginal, Francophone and equality-seeking communities. The first review should take place after there has been sufficient time to evaluate its operation. The committee should maintain a confidential accommodation-related information collection process.

The mandate of the committee should include an evaluation of whether the policy has been fairly implemented.

The goal of the review process is to ensure that the policy meets the needs of the law firm and of its members, staff and clients.

Individuals in the law firm should be encouraged to communicate their comments on the policy to the committee, either on an ongoing basis, or during the course of the review.

\*\*\*\*\* The pages that follow are a precedent for a policy that firms may adapt for their own use. In some cases, a firm may wish to add details or examples from the endnotes to the actual text of its own policy.

The precedent addresses the most common situation: a firm composed of partners, associates, and other staff who are not subject to a collective agreement. Where a workplace is governed by a collective agreement, modifications may need to be made to the policy, and possibly to the collective agreement.

The Accommodation Policy is simply that: a precedent. It is intended to provide guidance, rather than to represent the ultimate or ideal policy. A firm will need to design its own policy, tailoring the recommended model to its own circumstances.

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## **PART III – MODEL POLICY**

### **ACCOMMODATION POLICY FOR [NAME OF FIRM]<sup>17</sup> STATEMENT OF PRINCIPLES**

1. The firm is committed to providing services and a working environment in which all individuals are treated with respect and dignity. Each individual has the right to receive services and to work in a professional atmosphere that promotes equal opportunities and prohibits discriminatory practices.
2. Discrimination in employment or in the delivery of services on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, same-sex partnership status or disability is illegal. The Ontario *Human Rights Code* and Rules 5.03 (Sexual Harassment) and 5.04 (Discrimination) of the Law Society of Upper Canada *Rules of Professional Conduct* prohibit discrimination.
3. The firm acknowledges that treating people identically is not synonymous with treating them equally. Substantive equality requires the accommodation with dignity of differences that arise from the personal characteristics cited in the *Code*. If a requirement, qualification or practice creates difficulty for an individual because of factors related to the grounds listed in the *Code*, the duty to accommodate arises up to the point of undue hardship.
4. The *Code* views the firm as a single employer, and “undue hardship” will be assessed in a manner consistent with the resources of the entire firm.

### **PURPOSES**

5. The purposes of this policy are to:
  - a. Set the principles and the practice guidelines in respect of accommodation;
  - b. Set out in written form the procedures and strategies for accommodation for the firm as an employer and as a service provider;
  - c. Ensure conformity with other firm policies and procedures.

### **APPLICATION OF THE POLICY**

6. This policy applies to all members and staff of the firm, persons seeking services and persons applying for employment.

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<sup>17</sup> When drafting its own policy, a legal organization may wish to substitute “the Organization”, “the NonProfit Organization”: “the Legal Clinic” or other relevant terminology where the words “the firm” appear throughout the document.

7. For the purpose of this policy, “members of the firm” includes associates, partners, articling students and law clerks.
8. For the purpose of this policy, “persons seeking services” will be referred to as “clients of the firm”.
9. This policy applies to all firm locations. The nature of the specific accommodations may vary from site to site.
10. The policy applies to the workplace (including recruiting, application forms, interviews, promotions and leaves of absence) and to services offered by the firm.

### **SCOPE OF THE DUTY TO ACCOMMODATE**

11. The duty to accommodate applies to all grounds of discrimination under the *Code*: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age (in the context of employment, between age 18 and 65), record of offences (in the context of employment only), marital status, family status, same-sex partnership status or disability.
12. The following grounds are raised more frequently in the context of accommodation and are defined below:
  - a. Disability
  - b. Creed/religion
  - c. Pregnancy
  - d. Family responsibilities or family status
13. **Creed or religion** means the sincerely held and/or observed religious or spiritual beliefs and practices. It is a professed system of faith, beliefs and observances or worship. A belief in a God or gods, or a single Supreme Being or deity is not a requisite.
14. **Family status** means the status of being in a parent and child relationship.
15. **Disability** means that the person has or has had, or is believed to have or has had:
  - a. Any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness;<sup>18</sup>

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<sup>18</sup> Includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device.

- b. A condition of mental impairment or a developmental disability;
  - c. A learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language;
  - d. A mental disorder; or
  - e. An injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*.
16. Accommodation will not be provided if it imposes undue hardship on the firm. This determination will be made on a case-by-case basis, by following the procedures established below.
17. A one-time expenditure for some forms of accommodation may be too onerous on the firm. Therefore, in certain situations, accommodation may be provided on an interim basis or may be phased-in, providing the time frame is reasonable. The appropriateness of an interim or phased-in accommodation depends on an undue hardship analysis of the particular case.

#### **CONFIDENTIALITY**

18. To protect the interests of the requester, all those considering requests for accommodation will hold in strict confidence all information concerning the request for accommodation, including records of the request, contents of meetings, interviews and other relevant material and shall not divulge any information relating to the request unless expressly authorized by the requester or required by law to do so.

#### **THE ACCOMMODATION COMMITTEE**

19. An Accommodation Committee is appointed by [the Executive Committee of the law firm]. The members of the Accommodation Committee is appointed for a term of [3] years, renewable by the [Executive Committee of the law firm]. The Accommodation Committee has [no less than three members of the firm. To the extent possible, the committee should be composed of partners, associates, and other staff of both sexes and of differing age, race, ethnic origin, family status, sexual orientation, and religion, as well as individuals with disabilities.]
20. The Accommodation Committee will, when necessary, consult with the [name of health and safety committee of the law firm], or other concerned third party, in its implementation of the policy. The Accommodation Committee will uphold the duty of confidentiality as required by this policy.



## **ORGANIZATIONAL STRATEGIES**

21. The Accommodation Committee of the firm will undertake regular systemic accessibility audits of the firm including its policies, procedures and practices, its structural, architectural and environmental elements and its equipment (including technological and communication equipment).
22. The firm will implement the necessary changes to make facilities, procedures and services accessible to members, staff and clients of the firm by developing and implementing accessibility plans.
23. The Accommodation Committee of the firm will maintain written records concerning its planning sessions and its accommodation practices.

## **PROCEDURE TO REQUEST AN INDIVIDUALIZED ACCOMMODATION**

### **Responsibilities of the Individual Requesting an Accommodation**

24. To make a request for an accommodation under this policy, an individual must follow the following procedure:
  - a. An employee will make the request for accommodation to his or her immediate manager. A client will make the request for accommodation to the service provider.
  - b. Whenever possible, the requester will provide the notice of the request in writing and allow a reasonable time for reply.
  - c. The requester is encouraged to identify the ground or grounds, for example disability, religion or family responsibility/status, under which he or she is requesting the accommodation.
  - d. The requester will explain why the accommodation is required and provide enough information to confirm the existence of a need for accommodation and the measures of accommodation required.<sup>19</sup>
  - e. The requester will provide suitable verifiable information concerning the ground(s) at issue (e.g. appropriate documentation and assessment of a disability), as requested by the immediate manager or service provider.
  - f. A requester who requests an accommodation because of a disability and believes that he or she is capable of doing the essential requirements of the position or function should indicate this to the immediate manager or service provider.
  - g. The requester will act in good faith and cooperate in obtaining necessary information and will participate in discussions about solutions.

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<sup>19</sup> There may be circumstances where a person is unable, due to the nature of his or her disability, to identify or communicate accommodation needs. This issue sometimes arises with respect to persons with mental illnesses. In circumstances where a person is clearly unwell, it may be appropriate to offer assistance and accommodation, even in the absence of an accommodation request.

- h. The requester will meet agreed upon performance standards once accommodation is provided.

### **Responsibilities of Individuals who Consider the Request**

- 25. When someone requests an accommodation under this policy, the person considering the request has the responsibility to assess the need for accommodation. He or she will follow the procedures listed below.
  - a. The person considering the request will respect the dignity of the employee requesting the accommodation. This means acting in a manner that recognizes the privacy, confidentiality, comfort, autonomy, and self-esteem of the employee.
  - b. The person considering the request will accept an employee's request for accommodation in good faith unless there are legitimate reasons for acting otherwise.
  - c. The person considering the request will consult the employee and consider any suggestions offered by him or her in arriving at a strategy for accommodation.
  - d. The person considering the request will request only information that is reasonably necessary to make the accommodation.
  - e. The person considering the request will deal with accommodation requests in a timely way.
  - f. The person considering the request will consider alternatives if the request cannot be fully accommodated.
  - g. The person considering the request will obtain expert opinion or advice when required.
  - h. When a person with a disability indicates that he or she is capable of doing the essential requirements of the position or function, the person considering the request, with the input of the requester, will determine what is "essential" to the position or function and identify possible alternatives to perform the position in a satisfactory way. The person considering the request will establish on an objective basis whether the person's disability renders him or her incapable of fulfilling the essential requirements of the position or function. If the requester cannot perform the essential requirements, the person considering the request will explore how to accommodate the requester to enable performance of the essential requirements of the position or function.
  - i. The person considering the request will maintain confidentiality as defined in this policy.
  - j. The person considering the request will maintain a record of accommodation requests and actions taken.
  - k. The person considering a request may dispense or alter a requirement or practice of the firm if it was adopted for a purpose that is not connected to

the function, it is not imposed honestly or in good faith or it is not reasonably necessary to the accomplishment of the function.

26. The person considering the request will refer the accommodation request, with the consent of the requester, to the Accommodation Committee in the following circumstances:
  - a. When the person considering the request is of the opinion that the accommodation request should be rejected;
  - b. When the person considering the request is uncertain as to whether the accommodation should be granted; or
  - c. When the person considering the request requires advice on how to accommodate the requesting individual.
27. The requester may refer, at any stage of the process, his or her request for accommodation to the Accommodation Committee.
28. All requests presented to the Accommodation Committee should be made in writing.<sup>20</sup> All documentation and information collected by the person considering the request will be transferred, with the express consent of the requester, to the Accommodation Committee.
29. The Accommodation Committee may grant a request, deny a request or propose an alternative to the request.

### **Undue Hardship**

30. Accommodation will be offered to the point of undue hardship.
31. The Managing Partner will make all decisions regarding whether the accommodation creates undue hardship for the firm. In such cases, all documentation and information collected by the person considering the request and/or the Accommodation Committee will be transferred, with the express consent of the requester, to the Managing Partner.
32. If the Managing Partner believes there is undue hardship, he or she must present evidence showing that the financial cost of the accommodation (even with outside sources of funding) or health and safety risks would create undue hardship. In that case he or she will provide details, in writing, of the cost of accommodation or the health and safety reasons that have lead her or him to conclude that there is undue hardship. The evidence required to prove

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<sup>20</sup> While it is preferable that accommodation requests be made in writing, an accommodation request should not be disregarded if the person seeking accommodation is not able to communicate it in the preferred format.

undue hardship must be objective, real, direct, and, in the case of cost, quantifiable.

33. If the accommodation is not possible because of undue hardship, the Managing Partner will explain this clearly to the requester and be prepared to demonstrate why this is so.
34. If the Accommodation Committee or the Managing Partner denies a request, the requester may file a complaint under the firm's discrimination and harassment policy<sup>21</sup>.

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<sup>21</sup> If a complaint cannot be settled through the internal procedure, the requester should be informed that a complaint may be filed with the Ontario Human Rights Commission.

## **PART IV - LEGAL REQUIREMENTS AND PROFESSIONAL RESPONSIBILITIES**

### **THE LEGAL DUTY TO ACCOMMODATE**

Under the Ontario *Human Rights Code* (the *Code*)<sup>22</sup>, every person has a right to equal treatment with respect to employment or the provision of services without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age<sup>23</sup>, record of offences<sup>24</sup>, marital status, same-sex partnership status, family status or disability.

Although the *Code* does not explicitly identify “language” as a prohibited ground of discrimination, the Commission does accept complaints under a number of related grounds, such as ancestry, ethnic origin, place of origin and in some circumstances, race. In the Commission’s experience, language can be an element of a complaint based on any of these grounds.<sup>25</sup>

In 2000, the Law Society of Upper Canada adopted Rule 5.04 of the *Rules of Professional Conduct* that provides that law firms have a legal and professional duty not to discriminate (on any of the prohibited grounds enumerated in the *Code* and in Rule 5.04):

A 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 *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.<sup>26</sup>

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<sup>22</sup> R.S.O. 1990, c. H. 19, section 1 (services) and subsection 5(1) (employment).

<sup>23</sup> In the context of employment, age means the age of 18 or more and less than 65 years old. In the context of services, age means the age of 18 or more.

<sup>24</sup> Applies in the context of employment but not in the provision of services. “Record of offences” is defined in the *Code*, *supra* note 1, as a conviction for a criminal offence for which a pardon has been granted or a conviction under any provincial enactment.

<sup>25</sup> *Discrimination and Language* (1996), Ontario Human Rights Commission Policy.

<sup>26</sup> The personal characteristics noted in the *Code*, *supra* note 1, are: “race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status, or disability”. Rule 5.04 does not include same-sex partnership status but specifies that a lawyer has a special responsibility to respect the requirements of human rights law.

Rule 5.04 provides that discrimination in employment or in professional dealings fails to meet professional standards. The terms “employer” and “employment” are defined broadly; pursuant to both human rights legislation and Rule 5.04 of the *Rules of Professional Conduct*, law firms have a duty to accommodate that extends to professional employment of other lawyers, articled students, or any other person, from administrative staff to partners. Although the *Code* does not refer specifically to volunteers, the Human Rights Commission is of the view that “equal treatment with respect to employment” in section 5 of the *Code* can be interpreted to protect anyone in a work context.<sup>27</sup> This would include volunteers and co-op students. The term “employment” covers recruitment, interviewing, hiring, promotion, evaluation, compensation, professional development and admission to partnership.

The *Code* also provides the right to equal treatment, without discrimination, with respect to services, goods and facilities.<sup>28</sup> Rule 5.04 states that a lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in Rule 5.04.

The commentary to Rule 5.04 imposes a duty to accommodate:

The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the applications of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the accommodation of differences that arise from the personal characteristics cited in rule 5.04.<sup>29</sup>

The nature of accommodation as well as the extent to which the duty to accommodate might apply in any individual case are developing areas of human rights law. For years, courts and tribunals have defined discrimination in terms of “direct”, “adverse effect”<sup>30</sup> or “systemic”.<sup>31</sup>

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<sup>27</sup> *Human Rights at Work* (Toronto: Ontario Human Rights Commission, 1999) at 35, available online: <http://www.ohrc.on.ca/english/publications/hr-at-work.shtml>.

<sup>28</sup> Section 1 of the *Code*, *supra* note 1.

<sup>29</sup> Available online at <http://www.lsuc.on.ca/lawyer-conduct-rules/>.

<sup>30</sup> Adverse effect discrimination has also been termed “indirect” or “constructive” discrimination.

<sup>31</sup> The terms have usually been defined in the context of employment. It is recognized that the definitions also apply to the service-provision context.

“Direct discrimination” exists where an employer or serviced provider adopts a practice or rule that on its face discriminates on a prohibited ground.

“Adverse effect discrimination” means that an employer or service provider, for genuine business reasons, adopts a rule or standard which is on its face neutral, and which will apply equally to all employees or service user, but which has a discriminatory effect upon a prohibited ground on one employee or service user or a group of persons in that it imposes, because of some special characteristic of the person or group, obligations, penalties or restrictive conditions not imposed on other persons.

“Systemic discrimination” means practices or attitudes that have, whether by design or impact, the effect of limiting an individual’s or a group’s right to the opportunities generally available because of attributed rather than actual characteristics.

The *Code* prohibits adverse effect discrimination. However, under section 11 of the *Code*, an employer may justify a workplace rule that has the effect of discriminating against a person or group of persons on a prohibited ground, including disability, by showing that the rule is a *bona fide* occupational requirement and that the needs of the person or group cannot be accommodated without undue hardship.<sup>35</sup>

Section 17 of the *Code* also creates an obligation to accommodate persons with disabilities. Section 17 states that there is no violation of the *Code* if a person with disabilities is incapable of performing or fulfilling the essential duties or requirements of a function. However, this defence is not available unless it can be shown that the needs of the person cannot be accommodated without undue hardship.<sup>36</sup>

<sup>35</sup> Section 11 of the *Code*, *supra* note 1, imposes a duty to accommodate:

(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

- (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
- (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue

hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

<sup>36</sup> Section 17 of the *Code* imposes a duty to accommodate persons with disabilities:

Section 17 recognizes that discrimination based on disability can be based on society's failure to accommodate actual differences and emphasizes the need for individual accommodation.

The Supreme Court applies the following three-step analysis when considering whether a standard is discriminatory<sup>37</sup>:

Once a plaintiff establishes that the standard is *prima facie* discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard is a *bona fide* occupational requirement or has a *bona fide* and reasonable justification. In order to establish this justification, the defendant must prove that:

- It adopted the standard for a purpose or goal rationally connected to the function being performed;
- It adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal ; and
- The standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.<sup>38</sup>

In Ontario, the Court of Appeal has adopted the three-step analysis set out by the Supreme Court of Canada, which means that, in cases of *prima facie* discrimination based on disability, an individual may rely on section 11 or 17 of the *Code*. In cases of *prima facie* discrimination based on other grounds, an

(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

(2) The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Section 17 applies to cases involving services as well as employment. See *Youth Bowling Council of Ontario v. McLoed* (1991), 14 C.H.R.R. D/120 (Ont. Div. Ct.).

<sup>37</sup> *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 (the Meiorin case). The test in Meiorin was developed in the employment context. In *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (the Grismer case), the Supreme Court of Canada confirmed that the unified approach to adjudicating discrimination claims adopted in Meiorin applied to all claims of discrimination, including claims related to the provision of services.



<sup>38</sup> See Grismer, *ibid.* at par. 20 (the test is applied in the context of the provision of services) and Meiorin, *ibid.* at par. 54 (the test is applied in the employment context).  
individual may rely on section 11 of the *Code*. Under either section, to justify the workplace or service related rules, the three steps of the analysis must be satisfied.<sup>39</sup>

## **RESPONSIBILITIES WHEN REQUESTING AN ACCOMMODATION**

A person who is seeking an accommodation should make the request to the person responsible for considering requests for accommodation within the organization. Such request should, whenever possible, be made in writing. The requester should, when necessary, provide suitable verifiable information concerning the personal characteristic or ground at issue, explain why the accommodation is required and provide enough information to confirm the existence of a need for accommodation and the measures of accommodation required.<sup>40</sup>

When the person seeking accommodation (the requester) is a person with a disability and he or she believes that he or she is capable of doing the essential requirements of the function being performed, the person considering the request will determine what is “essential” to the function, with the input of the requester.<sup>41</sup> The requester should be given an opportunity to provide input as to the essential requirements of the function and be allowed to identify possible alternatives to perform the function in a satisfactory way. If necessary, the person considering the request may re-assign non-essential requirements to someone else, or use some alternate method.

The person considering the request will establish on an objective basis, for example by testing the requester or by giving him or her an opportunity to try to perform the function, whether the person’s disability renders her or him incapable of fulfilling the essential requirements of the function. The person considering the

<sup>39</sup>*Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (Ont. C.A.).

<sup>40</sup> The Ontario Human Rights Commission suggests that the person seeking accommodation should:

- Advise the accommodation provider of the disability (although the accommodation provider does not have the right to know what the disability is);
- Make her or his needs known to the best of his or her ability; ○ Answer questions or provide information regarding relevant restrictions or limitations, including information from health care professionals, where appropriate, and as needed;
- Participate in discussions regarding possible accommodation solution; and\
- Work with the accommodation provider on an ongoing basis to manage the accommodation process.

See *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, November 23, 2000).

<sup>41</sup> The Human Rights Commission has interpreted the term “essential” to mean that which is needed to make a thing what it is; very important; necessary. Synonyms are indispensable, requisite, vital. Thus, peripheral or incidental, non-core or non-essential aspects of a function are not essential. *Policy and Guidelines on Disability and the Duty to Accommodate, ibid.* at 19. request will make those decisions based upon a fair and accurate assessment of the ability of the requester and not based upon a stereotype or misconception.

If the requester cannot perform the essential requirements, the person considering the request will explore how to accommodate the requester to enable performance of the essential requirements of the function.

When a requirement or practice results in exclusion or restriction and it was not adopted for a purpose rationally connected to the function being performed, it was not adopted in an honest and good faith belief that it was necessary to the fulfillment of the purpose; or it is not reasonably necessary to the accomplishment of the legitimate purpose, the requirement or practice may be dispensed or altered.

If the requirement or practice was adopted for a purpose rationally connected to the function being performed, was adopted honestly and in good faith and is reasonably necessary to the law firm’s purpose, or if a person with a disability cannot perform the essential requirement of the function, the next step is to consider whether the individual who experiences disadvantage because of the requirement or practice can be accommodated without imposing undue hardship on the law firm.

The person considering the request has the duty to assess the need for accommodation based on the needs of the individual or of the group of which the person is a member, keeping in mind that not all members of a group have the same needs.<sup>42</sup>

The person considering the request will consult with the requester and consider any suggestions offered by the requester, in arriving at a timely individual-based strategy.<sup>43</sup> The person considering the request may consult more widely in

<sup>42</sup> Individuals may seek accommodation for reasons such as religious practices or observances that do not conform to established dogma, or they may seek to observe practice, which is not shared by all members of the creed. Dress codes, dietary laws, etc. are examples of religious practices that are sincerely observed but may not be followed by all practitioners of a creed. [Name of firm] has a duty to reasonably accommodate such requests.

<sup>43</sup>The Human Rights Commission states that the person responsible for considering the request should: ○ Take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated, and canvass various forms of possible accommodation and alternative solutions, as part of the duty to accommodate;

- Keep a record of the accommodation request and action taken;
- Maintain confidentiality;
- Grant accommodation requests in a timely manner.

Each person should be assessed according to his or her own personal abilities instead of being judged against presumed group characteristics. The following non-exhaustive factors should be considered in the course of the analysis:

- Whether the person responsible for accommodation investigated alternative approaches that do not have discriminatory effect;

attempting to devise the most suitable strategy for any accommodation that may be offered more generally.

A number of accommodation strategies may be used to fulfill a law firm's obligation. In the interest of both prompt attention to the needs of an individual, and the need to explore the utility of various accommodation strategies, an interim or experimental strategy may be implemented.

- Reasons why viable alternatives were not implemented;
- Ability to have differing standards that reflect group or individual differences and capabilities;

- Whether persons responsible for accommodation can meet their legitimate objectives in a less discriminatory manner;
- Whether the standard is properly designed to ensure the desired qualification is met without placing undue burden on those to whom it applies; and
- Whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.

See *Policy and Guidelines on Disability and the Duty to Accommodate*, *supra* note 15 at 18 and at 24.

## **THE DUTY TO ACCOMMODATE APPLIES TO THE POINT OF UNDUE HARDSHIP**

An employer or service provider has a duty to accommodate to the extent of undue hardship. The definition of “undue hardship” has been the subject of much debate. Some follow the definition of undue hardship adopted by the Ontario Human Rights Commission’s Guidelines on accommodation<sup>44</sup> others follow the three-step procedure adopted by the Supreme Court of Canada in *Meiorin*<sup>45</sup>.

The *Code* states, “undue hardship on the employer or on the service provider will be assessed by considering the cost, outside sources of funding, if any, and health and safety requirements”.<sup>46</sup>

The *Code* specifically sets out three considerations. Several factors are therefore excluded from considerations that are frequently raised by respondents. These

are business inconvenience<sup>32</sup>, employee morale<sup>33</sup>, customer preference<sup>34</sup>, and collective agreements or contracts<sup>35</sup>.

<sup>44</sup> See *Policy and Guidelines on Disability and the Duty to Accommodate*, *supra* note 15. <sup>45</sup> Meiorin, *supra* note 12.

<sup>46</sup> Sections 11 (constructive discrimination) and 17 (accommodation for persons with disabilities) of the *Code*, *supra* note 1, both use the same factors in assessing undue hardship: cost, outside sources of funding and health and safety requirements.

Although “cost”, “outside sources of funding” and “health and safety requirements” are not defined in the *Code*, the Human Rights Commission has interpreted those terms.

“Costs” will amount to undue hardship if they are: ○

Quantifiable;

- Shown to be related to the accommodation; and
- So substantial that they would alter the essential nature of [the law firm], or so significant that they would substantially affect its viability.<sup>36</sup>

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<sup>32</sup> The Ontario Human Rights Commission is of the view that:

“Business inconvenience” is not a defence to the duty to accommodate. If there are demonstrable costs attributable to decreased productivity, efficiency or effectiveness, they can be taken into account in assessing undue hardship under the cost standard, providing they are quantifiable and demonstrably related to the proposed accommodation.

See *Policy and Guidelines on Disability and the Duty to Accommodate*, *supra* note 15 at 28.

<sup>33</sup> The Ontario Human Rights Commission is of the view that:

In some cases, accommodating an employee may generate negative reactions from coworkers who are either unaware of the reason for the accommodation or who believe that the employee is receiving an undue benefit [...] However, it is not acceptable to allow discriminatory attitudes to fester into workplace hostilities that poison the environment. See *Policy and Guidelines on Disability and the Duty to Accommodate*, *supra* note 15 at 28.

<sup>34</sup> Third-party preference does not constitute a justification for discriminatory acts. ( See *Policy and Guidelines on Disability and the Duty to Accommodate*, *supra* note 15 at 28).

<sup>35</sup> Collective agreements or contractual arrangements cannot act as a bar to providing accommodation. (See *Policy and Guidelines on Disability and the Duty to Accommodate*, *supra* note 15 at 28).

<sup>36</sup> Taken from *Policy and Guidelines on Disability and the Duty to Accommodate*, *supra* note 15 at 30.

The Human Rights Commission initially produced guidelines in 1989 after the ground of disability was included in the *Human Rights Code* in 1982. In April 1999, the Commission undertook consultations with stakeholders to review the *Guidelines for Assessing Accommodation*

Law firms should make use of outside resources, such as funds available to an individual requesting an accommodation; funds that would assist employers and service providers defray the cost of accommodation or funding programs to improve accessibility, in order to meet the duty to accommodate. Law firms must demonstrate that they have made use of outside resources before claiming undue hardship.

Undue hardship may also exist where an accommodation creates a potential conflict with a “health or safety” requirement. The health or safety requirement may be contained in a law or regulation, or it may be a rule, practice or procedure. The Human Rights Commission suggests that:

Where a health and safety requirement creates a barrier for a person with a disability, the accommodation provider should assess whether the requirement can be waived or modified [...] The employer is required to show an objective assessment of the risk as well as demonstrate how the alternative measure provides equal opportunity to the person with a disability [...] Health and safety risks will amount to undue hardship if the degree of risk that remains after the accommodation has been made outweighs the benefits of enhancing equality for persons with disabilities.<sup>37</sup> Although the duty to accommodate arises in respect of every personal characteristic noted in Rule 5.04 and the *Code*, the most common requests for accommodation are based on the following grounds: creed and religious beliefs, gender, family status and disability.

## **ACCOMMODATION OF CREED AND RELIGIOUS BELIEFS**

The Ontario Human Rights Commission has adopted the following definition of creed:

The term creed is interpreted to mean “religious creed” or “religion”. It is defined as a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite [...] Religion [includes] non-deistic bodies of faith, such as the spiritual faiths/practices of Aboriginal cultures,

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*Requirements for Persons with Disabilities*. In November 2000, the Commission adopted its new policy document (released on March 22, 2001), which reiterates and explains the Commission’s interpretation of the concept of “undue hardship”.

The 1989 guidelines and the *Policy and Guidelines on Disability and the Duty to Accommodate* are influential on adjudicators and have been adopted by the Ontario Workers’ Compensation Board and by the Ontario Workers’ Compensation Appeals Tribunal.

<sup>37</sup> *Policy and Guidelines on Disability and the Duty to Accommodate*, *supra* note 15 at 34.

as well as *bona fide* newer religions [...] religions that incite hatred or violence against other individuals or groups or practices and observances that purport to have a religious basis but which contravene [...] criminal law [are not protected].<sup>38</sup>

The definition of creed encompasses the faith of a community but also that of an individual. Personal religious beliefs, and practices or observances, even if they are not essential elements of the creed, provided they are sincerely held.

The Supreme Court of Canada has recently affirmed that an expansive definition of freedom religion under human rights legislation that focuses on personal choice, individual freedom, and autonomy is appropriate. “It is the religious or spiritual essence of an action, not any mandatory or perceived as mandatory nature of its observance that attracts protection.”<sup>39</sup>

Typically, in the context of creed, issues of accommodation arise with regard to break policies<sup>40</sup>, flexible scheduling<sup>56</sup>, rescheduling, religious leave<sup>57</sup> and dress codes<sup>58</sup>.

Law firms are encouraged to allow employees holy days off for religious observance without suffering any financial loss, unless this would result in undue hardship on the firm. This approach is consistent with the understanding that accommodation is a means of removing the barriers that prevent persons from enjoying equality of opportunity in a way that is sensitive to their individual circumstances.<sup>59</sup> An employee who is required to use vacation days, unpaid

<sup>56</sup>The purpose of this measure is to allow a flexible work schedule for employees, or to allow for substitution or rescheduling of days when an employee’s religious beliefs do not permit him or her to work certain hours. For example, Seventh Day Adventists and members of the Jewish faith observe the Sabbath from sundown Friday to sundown Saturday. Observant members of these religions cannot work at these times.

Flexible scheduling may include: alternative arrival and departure times on the days when the person cannot work for the entire period, or use of lunch times in exchange for early departure or staggered work hours. Where the person has already used up paid holy days to which he or she

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<sup>38</sup> Taken from *Policy on Creed and the Accommodation of Religious Observances* (Toronto: Ontario Human Rights Commission, October 20, 1996) at 2, available online: <http://www.ohrc.on.ca/english/publications/creed-religion-policy.shtml>.

<sup>39</sup> *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, 2004 S.C.C. 47.

<sup>40</sup> For example, some religions require that their members observe periods of prayer at particular times during a day. This practice may conflict with an employer’s regular work hours or daily routines in the workplace. The employer has a duty to accommodate the employee’s needs, short of undue hardship, by providing accommodations such as modified break policies, flexible hours and/or providing a private area for devotions.

is entitled, the employer should also consider permitting the employee to make up lost time or to use floating days off.

<sup>57</sup>When an employee requests time off to observe a holy day, the employer has an obligation to accommodate the employee. The extent of the accommodation required is an issue that comes up frequently. The Supreme Court of Canada has suggested that equality of treatment requires *at a minimum* that employees receive paid religious days off, to the extent of the number of religious Christian days that are also statutory holidays, namely two days (Christmas and Good Friday) and three days when the employer makes Easter Monday a holiday (*Chambly v. Bergevin*, [1994] 2 S.C.R. 525).

<sup>58</sup> Dress codes include cases where an employer insists that its employees be clean-shaven and wear a cap. That condition may discriminate on the basis of creed if an employee is a Sikh and his religion requires him to wear a turban and has a rule against cutting body hair.

<sup>59</sup> However, tribunals have accepted that employers can fulfil their duty to accommodate the religious needs of employees by providing appropriate scheduling changes in lieu of leave with pay, without first demonstrating that a leave of absence with pay would result in undue hardship. See *Ontario v. Grievance Settlement Board* (2000), 50 O.R. (3d) 560 (Ont. C.A.).

Although the Court of Appeal reversed the Divisional Court and the Grievance Settlement Board in *Ontario v. Grievance Settlement Board*, the decision of the Board is more in line with the right to equality entrenched in the *Human Rights Code*. The Board was of the view that the employee had a right to have recognized holy days off for religious observance without suffering any financial loss:

To the extent that the Grievor has been subjected to adverse effect discrimination so as to be entitled to accommodation by the Employer, in the absence of a demonstration that granting the days requested for religious observance with pay would have imposed undue hardship on the Employer, the Grievor would not be required to use vacation days, unpaid leave etc. in order to be able to observe his holy days [...] Requiring the Grievor to use his vacation benefits would have had the effect of imposing a financial burden on him to observe his holy days, something members of the majority religion were not required to do. (Quoted by the Court of Appeal in *Ontario v. Grievance Settlement Board* (2000), 50 O.R. (3d) 560 at para. 24.)

leave or who has to change his or her work schedule in order to observe his or her holy days is suffering a burden for observing his or her religion, something members of the majority religion are not required to do.

Law firms are also encouraged to adopt policies that allow for flexibility in the number of days off for religious observance. Case law has suggested that employers should, *at a minimum*, provide employees with paid religious days off to the extent of the number of religious Christian days that are also statutory holidays.<sup>41</sup> However, it is not necessary to limit the number of days off for religious observance to the same number of religious Christian days already allowed by the firm. The fact that the dominant Christian religion has only two or three mandatory holy days does not mean that equal treatment without discrimination will follow if every other religion is given two or three days off with pay to observe only some of their holy days.

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<sup>41</sup> *Chambly v. Bergevin*, [1994] 2 S.C.R. 525.



In order to accommodate an individual, the needs of the individual and of the religious group to which an individual belongs to should be determined. Law firms should look to the accepted religious practices and observances that are part of a given religion or creed and individual beliefs that are sincerely held.

## **ACCOMMODATION BASED ON GENDER OR FAMILY STATUS**

Family responsibilities arise mainly out of the parent-child relationship. The responsibilities that most affect the workplace arise from the birth or adoption of children, and the need to care for children and elderly parents and other relatives.

Historically, lack of accommodation of family responsibilities in the legal profession has had a great adverse impact on women. The “culture” of lawyers’ workplaces was shaped for and by a profession exclusive of women. The components of the culture include: long and irregular hours of work; assumptions about the availability of domestic labour to support a lawyer’s activities at work; and promotional policies based on an extremely long working day and the maintenance of large numbers of billable hours as well as increased responsibility. The culture of the workplace assumed that a lawyer would not have family responsibilities requiring significant time commitments. In turn, that workplace culture reflected a surrounding culture in which women were expected to take responsibility for all of the domestic labour arising out of family responsibilities. The hidden corollary to these assumptions was that women would not be lawyers.

The Ontario Human Rights Commission, in a document entitled *Human Rights at Work*,<sup>42</sup> considers the meaning and scope of ‘family status’ under the *Code*. With regards to family care obligations, the Ontario Human Rights Commission states “employers have a corollary duty to accommodate employees, short of undue hardship, because of their child-care and/or eldercare responsibilities. Employers share social responsibility to provide a workplace that is reasonably flexible to meet the needs of employees with family responsibilities.”<sup>43</sup>

Although there have been relatively few reported cases that discuss the scope of protected family care obligations under the Ontario *Code*, the British Columbia Court of Appeal has recently considered this issue. In *Health Services Assn. of British Columbia v. Campbell River and North Island Transition Society*,<sup>44</sup> the British Columbia court confirmed that at least some family care obligations would be protected under the ground of ‘family status’, but at the same time also noted

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<sup>42</sup> *Human Rights At Work* (Toronto: Ontario Human Rights Commission and the Human Resources Professional Association of Ontario, 2004), *supra* note 5.

<sup>43</sup> *Ibid.* at 26.

<sup>44</sup> [2004] BCJ No. 922, 2004 BCCA 260.

that not necessarily all of the everyday obligations of care within a parent and child relationship warrant protection. Specifically, a prima facie case of discrimination is present where a requirement or standard is imposed that results “in a serious interference with a substantial parental or other family duty or obligation of the employee”.<sup>45</sup>

Although most case law has included family responsibilities under the category of family status<sup>46</sup>, if the purpose of accommodating employees or clients is to redress inequalities, family responsibilities usually contribute to inequality based on gender. Even with the entrance of women into the workforce, it is recognized that women still disproportionately bear the burden of child-care in society.<sup>66</sup> While for most men the responsibility of children does not impact on the number of hours they work or affect their ability to work, a woman’s ability even to participate in the work force may be completely contingent on her ability to acquire child care. Much of the burden remains on the shoulders of women. While this may not be as accurate when family responsibilities include taking care of other members of the family, such as parents, it nevertheless seems appropriate to discuss the issue of family responsibilities under the title of accommodation of gender.

The following are some of the negative consequences experienced by women in the legal profession who have children<sup>47</sup>:

- Loss of income;
- Limitations on advancement;
- Delay in promotion/admission to partnership;
- Segregation into less remunerative and “low profile” areas of practice;
- Difficulty in obtaining access to higher profile files;
- Unwillingness on the part of employers and colleagues to accommodate the demands of family responsibilities;
- Questioning and testing of commitment to work.

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<sup>45</sup> *Ibid.* at para. 39.

<sup>46</sup> *Broere v. W.P. London and Associates Ltd* (1987), 8 C.H.R.R. D/4189 (Ont. Bd. of Inq.)

<sup>66</sup> *Symes v. Canada*, [1993] 4 S.C.R. 695.

<sup>47</sup> For reports and surveys on women in the legal profession see: M. Ornstein, *The Changing Face of the Ontario Legal Profession, 1971-2001* (Toronto: Law Society of Upper Canada, October 2004) available online at [http://www.lsuc.on.ca/news/pdf/convoc04\\_ornstein.pdf](http://www.lsuc.on.ca/news/pdf/convoc04_ornstein.pdf); F. M. Kay, C. Masuch, & P. Curry, *Turning Points and Transitions: Women’s Careers in the Legal Profession* (Toronto: Law Society of Upper Canada, September 2004). Available online: [http://www.lsuc.on.ca/equity/pdf/oct2604\\_turning\\_points.pdf](http://www.lsuc.on.ca/equity/pdf/oct2604_turning_points.pdf); F. M. Kay, C. Masuch, & P. Curry, *Diversity and Change: The Contemporary Legal Profession in Ontario* (Toronto: Law Society of Upper Canada, September 2004), available online: [http://www.lsuc.on.ca/equity/pdf/oct2604\\_diversity\\_and\\_change.pdf](http://www.lsuc.on.ca/equity/pdf/oct2604_diversity_and_change.pdf).

There has been some societal change, to the extent that more men are taking on work that arises from family responsibilities. However, this change is slow to create real difference, and the burden of family responsibilities continues to fall predominately on women. Lack of accommodation therefore remains a sex discrimination issue, in addition to having a discriminatory impact on the ground of family status.<sup>48</sup>

There are many methods by which law firms can accommodate the needs of members who have family responsibilities. The methods may vary with the size and resources of a law firm. The adoption of a flexible work arrangement policy is one method. Other methods that law firms may wish to consider include:

- Family leave policies, which acknowledge and respect the need for leave of absence for reasons of childbirth or adoption, as well as other incidents of intensive family needs such as disability or serious illness within the family. Such policies provide appropriate time frames and compensation and permit members of the firm to return to work without reduction in compensation, seniority or quality of work assignments.
- Assistance with childcare, which may include provision of daycare at the workplace, child care referral services, assistance with child care fees and provision for emergency child care needs.

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<sup>48</sup> “Family status” is defined in the *Code*, *supra* note 1, at s. 10 as “the status of being in a parent and child relationship”.

- Assistance with elder care, which may include elder care referral services, assistance with elder care fees and provision for emergency elder care needs.

## **ACCOMMODATION OF DISABILITY**

Disability is defined in the *Code* as follows:

- (a) Any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- (b) A condition of mental impairment or a developmental disability,
- (c) A learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) A mental disorder, or
- (e) An injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997; ("handicap")<sup>49</sup>.

Case law has found that the term disability includes alcoholism, cancer, AIDS, hypertension, back pains, diabetes, injuries, allergies and asthma, depression and anxiety, cerebral palsy, malformation of fingers and developmental disability. The term "disability" is interpreted:

- To recognize that discriminatory acts may be based as much on perceptions, myths and stereotypes as on the existence of actual functional limitations;
- To protect persons who have a disability, persons who had a disability but no longer suffer from it, persons believed to have a disability whether they

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<sup>49</sup> Section 10 of the *Code*, *supra* note 1. Rule 5.04 of the *Rules of Professional Conduct* adopts the *Code*'s definition of disability.

- do or not, and persons believed to have had a disability, whether they did or not may require accommodation;
- To include mental illness, developmental disabilities and learning disabilities;  
To include minor illnesses or infirmities if a person can show that she was treated unfairly because of the perception of a disability;
- To mean a physical disability, infirmity, malformation or disfigurement under the *Code* that is brought on by one of the named causes enumerated in the *Code*: bodily injury, illness or birth defect;
- To include a person who starts his or her employment career with a disability, or who becomes disabled at any time during that career. The need for accommodation of disability can arise at any time, for anyone in the firm;
- As an equality-based term that takes into account evolving biomedical, social and technological developments. The focus is on the effects of the distinction experienced by the person.

The definition of disability in the *Code* includes non-evident disabilities and mental disability. The Human Rights Commission talks about the particular issues raised by such disabilities:

Regardless of whether a disability is evident or non-evident, a great deal of discrimination faced by persons with disabilities is underpinned by social constructs of “normality” which in turn tend to reinforce obstacles to integration rather than encourage ways to ensure full participation. Because these disabilities are not “seen”, many of them are not well understood in society. This can lead to stereotypes, stigma and prejudice [...]

Persons with mental disabilities face a high degree of stigmatization and significant barriers to employment opportunities. Stigmatization can foster a climate that exacerbates stress, and may trigger or worsen the person’s condition. It may also mean that someone who has a problem and needs help may not seek it, for fear of being labelled.<sup>50</sup>

In the context of the legal profession, the Law Society of British Columbia has conducted a survey of lawyers and law students with disabilities regarding barriers related to entering and practising in the legal profession. The survey results indicate that lawyers with disabilities experience ongoing discrimination, prejudice, negative attitudes and physical access barriers in a profession that is largely driven by the economic bottom line. Respondents reported the following:

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<sup>50</sup> *Policy and Guidelines on Disability and the Duty to Accommodate*, supra note 15 at 10.

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- They had great difficulty in finding employment;
- They had to work in settings where accommodations were not provided and the atmosphere was not supportive;
- Employers are usually reluctant to have a lawyer who has a disability on staff because of the economic bottom line that drives the legal profession;
- Disclosure of disability leads to discrimination;  
There are still various structural barriers throughout the judicial system that make it difficult to move in and around buildings, understand what is being communicated or read small-print documents;
- There are barriers that make it difficult for lawyers with disabilities to participate socially and network during events.

Respondents also noted that there are a number of barriers to legal services for members of the public, such as financial barriers, systemic access barriers and barriers in legal aid. Systems to help people needing legal services are usually designed for the able-bodied, and if any accommodations are made, it is as an afterthought. Respondents expressed concern about how prejudice against people with disabilities impacts on access to and fair treatment in the judicial system<sup>71</sup>. For example, ignorance of mental disability is still reflected in the legal system. Some respondents expressed concerns about access to and operation of legal aid and access to the right lawyers.

Discrimination based on disability results in part on the construction of a society based solely on “mainstream attributes”.<sup>72</sup> Consequently, a fundamental rethinking of the able-bodied norm and design is necessary to truly attain substantive equality.<sup>73</sup>

<sup>71</sup>*Lawyers with Disabilities: Identifying Barriers to Equality* (Vancouver: The Law Society of British Columbia, 2001).

<sup>72</sup> *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241.

<sup>73</sup> The Supreme Court of Canada has recognized that discrimination based on disability is mostly socially constructed:

The concept of disability must therefore accommodate a multiplicity of impairments, both physical and mental, overlaid on a range of functional limitations, real or perceived, interwoven with recognition that in many important aspects of life the so-called “disabled” individual may not be impaired or limited in any way at all [...]

○

The bedrock of the appellant's argument is that many of the difficulties confronting persons with disabilities in everyday life do not flow ineluctably from the individual's condition at all but are located in the problematic response of society to that condition. A proper analysis necessitates unbundling the impairment from the reaction of society to the impairment, and a recognition that much discrimination is socially constructed [...] Exclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself. Problematic responses include, in the case of government action, legislation which discriminates in its effect against persons with disabilities, and thoughtless administrative oversight.

*Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 at para. 29 and para. 30.

Accommodations of persons with disability should focus on equal participation, maintaining the dignity of the person and inclusiveness:

Accommodation with dignity is part of a broader principle, namely, that our society should be structured and designed for inclusiveness. This principle, which is sometimes referred to as integration, emphasizes barrier-free design and equal participation of persons with varying levels of ability. Integration is also much more cost effective than building parallel service systems, although it is inevitable that there will be times when parallel services are the only option. Inclusive design and integration are also preferable to “modification of rules” or “barrier removal”, terms that, although popular, assume that the *status quo* (usually designed by able-bodied persons), simply needs an adjustment to render it acceptable. In fact, inclusive design may involve an entirely different approach. It is based on positive steps needed to ensure equal participation for those who have experienced historical disadvantage and exclusion from society’s benefits.<sup>51</sup>

Law firm accommodation policies should provide for systemic accessibility audits as well as a process whereby individual needs can be identified and accommodated.

### **SYSTEMIC ACCESSIBILITY AUDITS AND ACTION PLANS**

In order to be inclusive of persons with disabilities, it is important that law firms adopt proactive measures, such as:

- Undertaking systemic accessibility audits on a regular basis; ○ Developing accessibility plans; and
- Implementing changes to make facilities, procedures and services accessible to persons with disabilities.

The systemic accessibility audits should be organizational wide and include a review of, at the very least:

- The law firm’s policies and procedures, (such as performance appraisal process, criteria for partnership, recruitment practices and solicitor and client retainer forms and policies);
- The building design, structural elements, physical access, architectural and environmental elements, transportation and equipment; and
- The technological and communication equipment.

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<sup>51</sup> *Policy and Guidelines on Disability and the Duty to Accommodate*, supra note 15 at 6.



The systemic accessibility audits should be wide in scope and consider accessibility in employment and services. This means that law firms should be accessible even if there are no members or staff of the firm who are persons with disabilities. The audits should provide the basis for the development of long-term strategic action and implementation plans.

Accommodation in the context of disability often takes the form of physical modifications such as building design changes and equipment modifications, modified work duties, alternative work or relocation of work duties to another part of a building.<sup>52</sup> The following are examples of the types of accommodations provided by employers or service providers in this context:

- Removal of physical barriers that make it more difficult for persons with disabilities to gain access to the law firm or function within it;
- Physical modifications<sup>53</sup>; ○ Modified work duties<sup>54</sup>; ○ Alternative work; ○ Relocating work duties;
- Making all in-house communications (eg: policies, memos, manuals produced by the firm) accessible to all members of the firm<sup>55</sup>;
- Providing staff to assist members, staff and clients of the firm with disabilities<sup>56</sup>;
- Providing assistive devices<sup>57</sup>.

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<sup>52</sup> *Re Babcock and Wilcox Industries Ltd. and United Steelworkers of America, Local 2853a* (1994), 42 L.A.C. (4<sup>th</sup>) 209.

<sup>53</sup> Such accommodation must be done in a manner that respects the dignity of the person with a disability. Physical modifications can include the installation of an elevator to make a building wheelchair accessible, adding wheelchair ramps, changing lighting for those with sight impairments, changing ventilation for those with allergies etc. For an overview of best practices see *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities; Legal Developments and Best Practices* (Toronto: Law Society of Upper Canada, March 2001).

<sup>54</sup> Such as rearranging an employee's work assignments and schedule rotations in such a manner as to permit the employee to perform a suitable combination of jobs or modifying an employee's duties.

<sup>55</sup> This may include making documents available in electronic format that can be read by a computer to a person with a disability that affects his or her ability to read print.

<sup>56</sup> For example the services of a staff person to read documents, unpublished decisions etc., that might not otherwise be accessible to a lawyer, staff or client with a disability, assistance with off-site work related activities, such as attendance at a hearing.

<sup>57</sup> These may make it easier for persons with various disabilities to perform the tasks essential to a legal practice, at the workplace or at a home office.



## INDIVIDUAL ACCOMMODATIONS

Accommodating persons with disabilities also requires an individualized approach.<sup>58</sup> Each person's needs must be considered individually in order to determine what changes can be made to a situation. The law firm should consult with the person with disabilities to determine what he or she needs and how it can best be provided. The needs of persons with disabilities must be accommodated in a manner that most respects their dignity, if to do so does not create undue hardship.

Section 17 of the *Code*<sup>59</sup> provides that an employer has not infringed an employee's right under the *Code* if the individual is incapable of performing or fulfilling the essential duties or requirements of a position. However, if the employee can perform or fulfil the major functions of the position, the employer has an obligation to remove the marginal duties of the position. An individual will only be considered "incapable of performing the essential duties or requirements of a position" if the law firm cannot accommodate him/her without undue hardship.<sup>60</sup>

A law firm should determine what is essential to the performance of the job. The law firm should establish on an objective basis, by testing the employee or by giving the employee an opportunity to try to perform the job, whether the employee's disability renders her or him incapable of fulfilling the essential duties of the job. If a member or staff of the firm has a disability but is capable of performing the essential duties of the position, the law firm should re-assign the marginal duties or use an alternate method for having the duties fulfilled. If the member or staff of the firm cannot perform the essential duties, accommodation is to be explored. The person will not be incapable if she or he can be accommodated without undue hardship.

The following standards for accommodation should be considered:

- Recognition that the needs of persons with disabilities must be accommodated in the manner that most respects their dignity, to the point of undue hardship;
- There is no set formula for accommodation - each person has unique needs and it is important to consult with the person involved;

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<sup>58</sup> Emphasis will be placed here on individualized accommodation in the employment context although the law also applies to the provision of services.

<sup>59</sup> *Supra*, note 11.

<sup>60</sup> Section 17 applies to cases involving services as well as employment. See *Youth Bowling Council of Ontario v. McLoed*, *supra* note 11.

- Taking responsibility and showing willingness to explore solutions is a key part of treating people respectfully and with dignity;
- Voluntary compliance may avoid complaints under the *Code*, as well as save the time and expense needed to defend against them.<sup>61</sup>

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<sup>61</sup> *Policy and Guidelines on Disability and the Duty to Accommodate*, supra note 15 at 7.

## **PART V – GLOSSARY OF TERMS**

For the purposes of this policy:

**“Age”** means an age that is eighteen years or more and in the employment context an age that is eighteen years or more and less than sixty-five years.

**“Creed or religion”** means a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite. The existence of religious beliefs and practices are both necessary and sufficient to the meaning of creed, if the beliefs and practices are sincerely held and/or observed.

**“Cultural belief”** means the totality of ideas, beliefs, values, knowledge, habits and way of life of a group of individuals who share certain historical experiences.

**“Discrimination”** means a distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.<sup>62</sup>

**“Family status”** means the status of being in a parent and child relationship.

**“Marital status”** means the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage.

**“On the basis of a disability”** means for the reason that the person has or has had, or is believed to have or have had:

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<sup>62</sup> Discrimination includes “direct discrimination” (where an employer adopts a practice or rule which on its face discriminates on a prohibited ground); “adverse effect discrimination” (where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force) and “systemic discrimination” (practices or attitudes that have, whether by design or impact, the effect of limiting an individual’s or a group’s right to the opportunities generally available because of attributed rather than actual characteristics).

Although these definitions were developed in the context of employment, they also apply to the provision of services.

- (a) Any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- (b) A condition of mental impairment or a developmental disability,
- (c) A learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) A mental disorder, or
- (e) An injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997.

Disability may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all these factors. The focus is on the effects of the distinction, preference or exclusion experienced by the person and not on proof of physical limitations or the presence of an ailment.

**“Personal characteristic”** or **“ground”** means any of the following personal characteristic: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, same-sex partnership status or disability.

**“Race, ancestry, place of origin, colour, ethnic origin, and citizenship”** collectively describe personal characteristics of an individual associated with his or her nationality, race, and cultural or ethnic origin.

**“Record of offences”** means a conviction for an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or an offence in respect of any provincial enactment.

**“Same-sex partnership status”** means the status of living with a person of the same sex in a conjugal relationship outside marriage.