



THE LAW SOCIETY OF UPPER CANADA

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**GUIDE TO DEVELOPING A POLICY  
REGARDING  
WORKPLACE EQUITY IN LAW FIRMS**

Updated March, 2003

# INTRODUCTION

The purpose of this Guide is to assist law firms to avoid discrimination in regards to both members of the firm and qualified candidates for employment, thereby meeting their obligations under the *Human Rights Code* and the *Rules of Professional Conduct*. The following introductory material summarizes relevant background studies, discusses law firms' legal and professional responsibility to avoid discrimination within employment, and lists some of the benefits of flexible work arrangements to law firms.

## 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>1</sup>” It is now well established that the adoption of effective policies and procedures to promote equity and diversity and the design and delivery of education programs for employees and members of employment organizations such as law firms have the potential of limiting harm and consequently reducing liability of employers<sup>2</sup>.

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 staff and members of the law firm.
2. Written policies show that the law firm’s management takes seriously its legal and professional obligations.
3. Written policies on workplace equity encourage respect for and acceptance of staff and members of the law firm from a diversity of groups, such as those protected under the *Ontario Human Rights Code* and the *Rules of Professional Conduct*. In the context of employment, the *Human Rights Code* protects 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. The *Ontario Human Rights Code* and the *Rules of Professional Conduct* also impose a duty to accommodate.
4. The existence of written policies allows the law firm to communicate its commitment to equity principles to people outside of the law firm, such as prospective recruits and clients.
5. Written policies minimize the risk of workplace harassment or discrimination and of harm to individual employees, as well as the risk that a law firm will be held liable for such unlawful harassment or discrimination.

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<sup>1</sup>*Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, November 23, 2000) at 41.

<sup>2</sup> For example, see *Ferguson v. Meunch Works Ltd.* (1997), 33 C.H.R.R. D/87 (B. C. H. R. T.).

6. Written policies on workplace equity issues help to attract gifted individuals from equity-seeking communities. The development of written policies may also assist in retaining lawyers who will thereby know that the firm is taking active steps to address their concerns.
7. Written policies may provide the necessary focus for education programs on preventing and responding to workplace harassment and discrimination.

## **BARRIERS TO EQUALITY IN THE LEGAL PROFESSION**

In most professions, there is evidence that equality-seeking communities face serious barriers to equality. The legal profession is no exception. Since 1989, the Law Society of Upper Canada has undertaken and reviewed studies that are indicative of inequality within the profession:

1. Statistics analysed by the Law Society's Special Committee on Equity in Legal Education and Practice in 1990 indicated that racialized communities were seriously under-represented in the legal profession in relation to their populations in Ontario<sup>3</sup>.
2. In 1991, the Law Society 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.
3. A 1992 survey of Black law students, articling students and recently-called lawyers sponsored by the Law Society<sup>5</sup> found that fifty percent of respondents thought they were channelled into particular areas of practice or types of law. Fifty-nine percent of respondents to the 1992 survey believed that certain areas of practice were effectively closed to Black lawyers. The areas of law cited most often as not being open to Black lawyers were corporate/commercial law and related areas of business law such as securities and taxation.
4. In response to complaints from students in 1992, the Law Society conducted a survey of students in 1993 and 1994 concerning inappropriate comments made and questions asked at articling interviews. Students reported that they were asked questions and subjected to offensive remarks concerning age, sex, family status, parenting obligations, sexual orientation, heritage and country of origin, among others.
5. The 1993 report of the Canadian Bar Association's Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and*

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<sup>3</sup> Report of the Special Committee on Equity in Legal Education and Practice adopted by Convocation in February 1991.

<sup>4</sup> *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> Felix N. Weekes and A. Elliot Spears, *Survey of Black Law Students, Black Articling Students, and Recently Called Black Lawyers* (Toronto: Law Society of Upper Canada, July-August 1992).

*Accountability*<sup>6</sup> describes the barriers to equality faced by women in the legal profession. It also demonstrates that these barriers are multiplied for women who face additional forms of discrimination on the basis of race, ethnic origin, sexual orientation or disability. The report urges the profession to remove the barriers and, as one way of doing so, recommends the adoption of model employment policies.

6. In 1996, the Law Society published *Barriers and Opportunities Within Law*, a longitudinal study that compared the success of male and female lawyers called to the Ontario Bar between 1975 and 1990. The report once again confirmed the existence of inequality within the legal profession<sup>7</sup>.
7. The Law Society Placement Office surveys for the years 1994-1995 through to 1998-1999, and for 2000-2001 of incoming bar admission course students revealed that Aboriginal students, racialized students and students with disabilities were over-represented among students who were without articling placements as of September of the year in which they would be expected to commence articles.
8. The Discrimination & Harassment Counsel program, established by Convocation in 1999 to provide services to individuals who allege harassment or discrimination by a lawyer, has reported receiving 582 calls, representing 469 individuals, within 14 months of operation. The overwhelming number of calls received fell within the mandate of the program<sup>8</sup>.
9. In February 2000, the Council of the Canadian Bar Association approved unanimously the report entitled *Racial Equality in the Canadian Legal Profession* which describes significant barriers that prevent people from certain racialized communities from becoming members of the legal profession. It notes that lawyers from racialized communities are often denied opportunities to move up the corporate ladder to partner or senior management positions. The report also examines how “systemic racism permeates the culture of the legal profession, frustrating its best efforts to render justice”<sup>9</sup>.
10. In 2001, the Law Society commissioned Michael Ornstein, Director of the Institute of Social Research of York University, to prepare a demographic survey of the legal profession in Ontario<sup>10</sup>. Using the 1996 Canadian Census, the report shows that 7.3 percent of lawyers in Ontario are non-white, compared to 17.5 percent of the population. Although in 1996 30.1 percent of lawyers in Ontario were women, only

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<sup>6</sup>Canadian Bar Association, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993).

<sup>7</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>8</sup>Discrimination & Harassment Counsel, *Discrimination & Harassment Counsel Program* (Toronto: Law Society of Upper Canada, December 2000).

<sup>9</sup>Introductory statement by Professor Joanne St. Lewis, Co-Chair of the Working Group on Racial Equality in the Legal Profession in *Racial Equality in the Canadian Legal Profession*, (Ottawa: Canadian Bar Association, 2000) at iii.

<sup>10</sup>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).

7.8 percent of lawyers between 55 and 64 and 18 percent of lawyers between 45 and 55 were women. The report also notes that the mean annual earnings of non-white lawyers and of women is generally much lower than the mean annual earnings of white male lawyers.

In light of the above-noted studies, the Law Society has undertaken initiatives to promote equality within the legal profession, in accordance with its mandate. The position of the Law Society has been summarized in its *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. In 1996, the Law Society of Upper Canada adopted the present *Guide to Developing a Policy Regarding Workplace Equity in Law Firms*<sup>12</sup> (updated in March 2003) and the *Guide to Developing a Policy Regarding Flexible Work Arrangements* (updated in March 2003). The policies are adaptations of the model policies created by the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, and are updated and tailored to reflect Ontario human rights legislation and the *Rules of Professional Conduct*<sup>13</sup>. The CBA's model policy on alternative work arrangements draws upon two other sample policies: the policy prepared by the American Bar Association's Commission on Women in the Profession, which was published in *Lawyers and Balanced Lives: A Guide to Drafting and Implementing Workplace Policies for Lawyers* (Chicago: American Bar Association, 1990), and the policy prepared by the Women's Bar Association of the District of Columbia entitled *Guidelines on Alternative Work Schedules*.

In 2001-2002, the Law Society of Upper Canada published a document entitled *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities; Legal Developments and Best Practices*<sup>14</sup> which provides best practices and a legal analysis of the duty to accommodate. The Law Society also adopted a *Guide to Developing a Law Firm Policy Regarding*

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<sup>11</sup> *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession* (Toronto: Law Society of Upper Canada, 1997).

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

<sup>13</sup> The Canadian Bar Association Task Force prepared model policies on alternative (flexible) work arrangements, parental leave, sexual harassment, and workplace equity which were published (August 1993) as Appendix 2 of the *Touchstones Report*, *supra* note 6. The model policy on workplace equity, in particular those parts dealing with recruitment, interviewing and hiring, drew upon the recruitment guidelines prepared by the University of Victoria Faculty of Law (reproduced in *Gender Equality in the Legal Profession* (Vancouver: Law Society of British Columbia, 1992).

<sup>14</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).

*Accommodation Requirements*<sup>15</sup> based in part on the Human Rights Commission's *Policy on Creed and the Accommodation of Religious Observances*<sup>16</sup> and *Policy and Guidelines on Disability and the Duty to Accommodate*<sup>17</sup>, and the model policy entitled *Preventing and Responding to Workplace Harassment and Discrimination: A Guide to Developing a Policy for Law Firms*.

## THE LAW AND PROFESSIONAL RESPONSIBILITIES

Studies such as those cited above suggest the existence of discrimination in the legal profession.

Subsection 5(1) of the *Human Rights Code* R.S.O. 1990, c. H.19 prohibits discrimination in employment:

Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences<sup>18</sup>, marital status, same-sex partnership status, family status or disability.

In human rights law, the fact that there is no intent to discriminate may be of no relevance: what counts is the impact or the effect of practices, policies and behaviours on individuals.

Rule 5.04 of the *Rules of Professional Conduct* 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>19</sup>.

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<sup>15</sup> *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements* (Toronto: Law Society of Upper Canada, March 2001).

<sup>16</sup> *Policy on Creed and the Accommodation of Religious Observances* (Toronto: Ontario Human Rights Commission, October 20, 1996).

<sup>17</sup> Approved by the Ontario Human Rights Commission on November 23, 2000 and released on March 22, 2001.

<sup>18</sup> "Record of offences" is defined in the *Code* as a conviction for a criminal offence for which a pardon has been granted or a conviction under any provincial enactment.

<sup>19</sup> Although Rule 5.04 does not prohibit discrimination or harassment based on same-sex partnership status, law firms are bound by the *Code* which includes such ground.

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) with respect to employment -- which covers recruitment, interviewing, hiring, promotion, evaluation, compensation, professional development and admission to partnership. Discrimination in the practice of law breaches acceptable standards of professional conduct as well as provincial human rights law.

## **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 directing minds, partners, associates, and staff of both sexes and of differing age, race, ethnic origin, family status, sexual orientation, and religion, as well as individuals with disabilities. If there are lawyers or individuals in the law firm with expertise in the relevant employment and human rights law, one or more should be included.

It is most important that the committee include respected staff and members of the firm who appreciate the importance of the issues to be addressed and who will be able to communicate these matters to others within .

The composition of the committee is critical to the credibility of the process and the policies produced.

### **Developing the 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, which includes diverse staff and members of the firm and others with experience and expertise, should be followed. Flexible workplace and duty to accommodate policies apply to the hiring process and to articling students. Law firms should involve articling students in the consultative process.

The committee should circulate a draft policy throughout the firm for comments. This step is important because it generates support and allows for useful comment. 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 staff and members of the firm with a covering memorandum emphasizing the strong support of management.

Individuals charged with implementing and applying the policy should receive special training to ensure that they are well informed of the specifics of the firm's policy, the law, interviewing techniques and information gathering.

Workshops should be organized to inform all staff and members of the firm about the provisions of the policy and the objectives that it is intended to meet.



The workshops should emphasize the changing demographics of the legal profession and the benefits that can come to the firm from adopting a policy on flexible work arrangements.

Factors that may cause opposition within the workplace should be identified, and discussed frankly. One example may be the misconception that efforts to achieve workplace equity constitute “reverse discrimination”, or favour less capable individuals who are members of a particular group, and that it will therefore adversely affect firm quality and productivity. These myths should be recognized and addressed at the outset through discussion of the purposes behind workplace equity 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 firm has a handbook of policies or if policies are available on-line, the workplace equity policy should be included. If the firm does not have a handbook of policies, or if it does not make its policies available on-line, the firm may wish to distribute copies of the policy directly to each staff and member, and/or post copies of the policy in a common area.

The policy should be made available to all prospective members of the firm at the initial interview stage. Such a practice will make a strong statement about the firm’s support for the policy and its objectives. Further, the *Human Rights 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 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 staff and members of the firm identified by personal characteristics listed in the *Code*. The first review should take place after there has been sufficient time to evaluate its operation.

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 firm and of its members and employees.

Individual staff and members of the 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.

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The following pages present a precedent for a policy which firms may adapt for their own use. The footnotes contain a more detailed discussion designed to assist those who will be drafting policies within firms. In some cases, a firm may wish to add details or examples from the footnotes 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. Obviously, where a workplace is governed by a collective agreement, modifications may need to be made to the policy, and possibly to the collective agreement but note that a collective agreement may not specifically or by interpretation provide for less protection of the right to be free of discrimination than that provided by the Ontario *Human Rights Code* and the *Rules of Professional Conduct*.

The *Guide to Developing a Policy Regarding Workplace Equity in Law Firms* is simply that: a model. 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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## **POLICY FOR THE PROMOTION OF WORKPLACE EQUITY<sup>20</sup>**

### **I. STATEMENT OF PRINCIPLE**

1. [Name of firm] aims to create an environment in which every member of the firm can realize his or her potential for excellence, and diversity is welcome.

A. This policy is intended to guarantee equal opportunity for all students, legal and non-legal staff, associates, and partners and a workplace free of discrimination to all those at [name of firm] as well as to all applicants for employment with the firm.

B. Discrimination on the grounds 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 prohibited by the Ontario *Human Rights Code* and by the *Rules of Professional Conduct*, and is expressly forbidden at [name of firm], in any work-related activity, or in any of the firm's employment or recruitment practices.<sup>21</sup>

C. [Name of firm] acknowledges that discrimination is often systemic; that discriminatory practices and attitudes are often entrenched as custom within workplaces, and are not recognized as harmful. [Name of firm] has undertaken a critical examination of its own practices, and will take positive measures to ensure that employment opportunities with the firm are equally available to all employees and prospective employees.

### **III. RIGHT TO EQUAL OPPORTUNITIES AT WORK**

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<sup>20</sup> The title of this policy indicates the broad perspective on workplace equality issues reflected in the policy. Rather than adopting a more narrow approach focused on discrimination in individual aspects of the employment process (such as hiring, promotion or remuneration) the policy is intended to address all aspects of employment. The model policy is essentially an anti-discrimination policy which necessarily encompasses other policies dealing with more specific instances of discrimination in employment, such as harassment, as well as policies that attempt to facilitate equal opportunities, such as parental leave and alternative work arrangement policies. The model policy prohibits discrimination and seeks to identify and rectify barriers to equal opportunities prior to a complaint being made.

<sup>21</sup> Rule 5.04 of the *Rules of Professional Conduct* states:

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, articled students, or any other person or in professional dealings with other members of the profession or any other person.

This Rule is interpreted in accordance with the provisions of the *Ontario Human Rights Code*, R.S.O. 1990, c. H. 19, and related case law. The term discrimination the grounds of discrimination are subject to statutory definition in the *Human Rights Code*, and ambiguities are interpreted broadly, in accordance with human rights jurisprudence.

A. [Name of firm] prohibits any treatment which has a discriminatory effect on anyone in respect of his or her 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.

B. Applicants for employment and employees have a legal right to equal opportunities at [name of firm].

C. The firm is committed to the identification and elimination of barriers to employment, or to success in employment, that adversely affect any member of the firm or candidate for employment with the firm, because of personal characteristics listed in Rule 5.04.

#### **IV. EMPLOYMENT DECISIONS COVERED BY THIS POLICY**

A. All employment decisions made by [name of firm] are covered by this policy. These decisions include but are not limited to:

- Job advertising.
- Recruitment.
- Hiring.
- Remuneration.
- Benefits.
- Availability of support services.
- Availability of leave.
- Professional opportunities.
- Advancement.
- Offers of partnership.

B. Any decision made in any of these areas must be made on the basis of performance-based criteria such as qualifications, experience, and merit, rather than on stereotypes or any other discriminatory considerations.

#### **V. DEFINITION OF DISCRIMINATION**

A. Rule 5.04 of the Law Society of Upper Canada's *Rules of Professional Conduct* prohibits the following:

**Differentiation on prohibited grounds.** A refusal to hire employees of a particular race, sex, creed, sexual orientation, etc. is an example of differentiation on the basis of prohibited grounds.

**Adverse effect discrimination.** An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly neutral rule or policy creates an adverse effect on a group protected by Rule 5.04, there is a duty to accommodate. For example, while a requirement that all articling

students have a driver's license to permit them to travel wherever their job requires may seem reasonable, that requirement effectively excludes from employment persons with disabilities that prevent them from obtaining a license. In such a case, a law firm is required to alter or eliminate the requirement in order to accommodate the student unless the necessary accommodation would cause undue hardship.

**Harassment on a prohibited ground.** Harassment is defined as engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome on the basis of any ground set out in Rule 5.03 or 5.04. This could include, for example, repeatedly subjecting any member of the firm to jokes based on race or creed. Sexual harassment can take the form of direct sexual demands, threats of retaliation where a sexual approach is rebuffed, and sexist practices that poison a workplace atmosphere.

**Failure to prevent discrimination.** A lawyer is required to take reasonable steps to prevent or stop discrimination by any staff or agent who is subject to the lawyer's direction or control.

**Retaliation because of a complaint of discrimination.** Retaliation is a form of discrimination which occurs when a person who has made a complaint of discrimination is subjected to adverse treatment because of the complaint.

## **VI. SPECIAL PROGRAMS EXCEPTION.**

Employment discrimination involves distinctions that have a negative impact on particular people or groups based on prohibited characteristics unrelated to the job. Where special programs make distinctions based on the same characteristics but are intended to address past restrictions and expand employment opportunities, the program is not unlawful.

## **VII. IMPLEMENTATION**

### **A. Recruitment**

1. All [name of firm] promotional materials will attempt to encourage diversity among applicants to the firm. They will:

- State that [name of firm] is an equal opportunity employer that welcomes applicants from diverse backgrounds and with non-traditional qualifications.
- List firm policies which aim to prohibit discrimination, such as workplace equity or harassment policies.
- List firm policies that have been implemented to remove barriers and

promote equal opportunities, such as flexible work arrangement policies<sup>22</sup>.

2. Attempts will be made to circulate firm materials among equity-seeking communities within law schools and to encourage members of equity-seeking communities to apply for articling positions at [name of firm].
3. Where students are invited to participate in activities outside the interview itself, the firm will inform all students of these activities at the earliest opportunity, in recognition of the facts that some candidates will have family and work responsibilities to arrange in order to attend.
4. Recruiting events will not be held at facilities which engage in discriminatory admission practices and the firm will ensure that no extraneous costs need be incurred for attending such a function.

B. Interviewing candidates for employment or articles

1. No hiring process should be undertaken without the preparation of interview questions in advance. Since the purpose of the interview is to discover the most qualified candidate for the job, the questions should relate directly to the actual requirements of the employment in question. The focus should be on giving information about the employment and eliciting information about the candidate's qualifications, rather than attempting to get to know the candidate personally.
2. During the initial interview, the interviewer should:
  - Outline the firm's expectations and the job description in some detail.
  - Carefully explain evaluation criteria.
  - Inform every applicant about the firm's, workplace equity, harassment, and flexible work arrangement policies.<sup>23</sup>
3. The applicant should be given an opportunity to explain, with reference to the written job description, why she or he is qualified for the job.

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<sup>22</sup> To achieve a firm that is representative of the demographics of the surrounding community, it is necessary to encourage increased diversity among applicants to the firm. Including a statement in firm's materials that invites applicants other than those in the mainstream to apply is one step that can be taken. Providing information about firm policies intended to prohibit discrimination and advance equal opportunities is another. Sending the firm's materials to equity seeking communities within law schools may also promote diversity among applicants.

<sup>23</sup> Volunteering information about firm policies that address discrimination or attempt to ensure equality of opportunity at the firm will avoid the need for applicants to ask about the existence of such policies and risk revealing irrelevant personal information in the process. The policies may also serve as a recruitment tool by encouraging applicants from under-represented groups to feel that the firm is one where they would feel supported and welcomed.

4. When questions relating to personal commitment or future plans are necessary at an interview, all applicants should be asked identification questions.<sup>24</sup>

5. Human rights legislation prohibits making decisions on the basis of characteristics such as family status, sexual orientation, or religion; therefore questions that even indirectly solicit such personal information are to be avoided by those interviewing for the firm. Instead, open ended questions that allow an applicant to offer what, if any, personal information that person feels is appropriate should be asked<sup>25</sup>.

### C. Hiring and Promotion

1. All persons making hiring decisions for the firm will be asked to attend an orientation session to give them the opportunity to become familiar with this policy and to discuss its implementation.
2. Decisions regarding hiring, job evaluations, remuneration, professional development and admission to partnership will be carried out by committees representing as much of the diversity within the firm as possible.
3. The objective is to have additionally under-represented groups represented on all firm committees and at all levels of the firm in proportion to their numbers in the previous year's call to the bar.
4. When assessing candidates for job openings and promotion, the members of the

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<sup>24</sup>Before advertising a vacancy, firms should prepare a job description which focuses on the actual work performed and the skills necessary for that position. The advertisement should be based on the requirements of the position, and efforts should be made to avoid references to the desired qualities which are unnecessary to the job and which may contain hidden biases which exclude individuals from protected groups. In order to minimize bias against groups which are traditionally not well connected within the legal community, firms should advertise vacancies openly, rather than relying on word of mouth.

The Law Society also recommends that firms prepare in advance a list of interview questions and draft answers which relate directly to the job description and criteria: this will assist the interview panel in conducting a fair and objective comparison of candidates. A panel of at least two individuals should conduct the interviews, in order to reduce the likelihood of discriminatory results. For consistency, the same panel should conduct all interviews.

Persons who are members of groups against which discrimination is prohibited, or who appear to be members of such groups, ought not to be subjected to questions that are not put to other candidates. For example, if the interviewer suspects that a person may be a parent, that person should not be asked how they plan to care for their children without compromising their work.

<sup>25</sup> Personal questions are often seen by interviewers as a way to put a candidate at ease. However, interviewers should be aware that the questions may not be perceived as benign or casual by people who do not conform to the norm suggested by the question. Further, even if candidate selection is a result of neutral criteria, it may be difficult to show that irrelevant personal information solicited during the interview was not a factor in a negative employment decision.

committee should apply objective criteria which relate to the job description and essential skills necessary to perform the job in question.

5. The committee should avoid reliance on non-essential criteria such as personal “comfort” and “fit” with the candidate, as these criteria tend to reflect personal biases.<sup>26</sup>
6. When making an assessment of a candidate's ability to perform the essential duties of the job, the committee should keep in mind the obligation to make reasonable accommodations to the point of undue hardship. An individual who would be capable of performing the essential duties of the job when provided with reasonable accommodation should be considered to be as capable as a similarly qualified individual who requested no accommodation.
7. [If the firm has adopted an Employment Equity Policy the following paragraph can be included here: The Employment Equity policy will be applied in all decisions regarding hiring and promotion.]

D. Firm Policies<sup>27</sup>

1. A variety of policies are in place at [name of firm] which are intended to assist in achieving the ultimate goal of a workplace free of discriminatory practices.
2. Employment Equity

[If the firm has adopted an Employment Equity Policy a concise statement of the policy could be reproduced here.<sup>28</sup>]

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<sup>26</sup> Despite attempts to avoid inappropriate questions, some personal information about candidates will inevitably be revealed in the interview process. Where this sort of information is indicative of membership in a group against whom discrimination is prohibited, interviewers should be careful to ensure that it is not used negatively to differentiate one candidate from another. Those on the hiring committee should be conscious that their own level of comfort with certain personal characteristics will tend to lead them to prefer one candidate over another on grounds unrelated to the requirements of the job. A hiring committee which is as diverse as possible may help to reduce the impact of these often unconscious personal preferences.

<sup>27</sup> In addition to policies on Employment Equity, Flexible Work Arrangements and Harassment, policies should cover such issues as disciplinary offences, sick leave, performance review, promotion, and remuneration. Workplace policies should be reviewed to ensure that they do not make distinctions based on a prohibited ground, and to ensure that seemingly neutral rules do not have an adverse impact on members of a particular protected group.

<sup>28</sup> Sample statement of an Employment Equity Policy in respect of lawyers within the firm:

In recognition of the fact that both subtle and blatant barriers to the practice of law have only recently been acknowledged or addressed, [name of firm] is committed to taking steps to remedy the lack of diversity in the profession and at the firm. Therefore, where job candidates, recruits, or associates seeking professional enrichment or promotion are of equal or substantially equal merit, but where one candidate is a member of one of the groups intended to be protected by this policy and from which increased representation is sought,



### 3. Flexible Work Arrangements and other Accommodation Policies

[If the firm has adopted a Flexible Work Arrangement policy, or any other policy that in furtherance of its duty to accommodate needs arising from personal characteristics referred to in Rule 5.04, they can be referred to here.]

### 4. Harassment Policy

[If the firm has adopted a policy to address harassment relating to any personal characteristics noted in Rules 5.03 and 5.04, a summary and reference to the policy would be appropriate here. ]

### E. Evaluations<sup>29</sup>

1. Evaluations of associates at [name of firm] will be conducted [bi-annually] to ensure that problems are identified at an early stage and can be rectified.
2. Evaluations will be conducted by a committee of [number] persons and records will be kept of each evaluation category and recommendation.
3. Evaluation criteria will be based on performance expectations explained to associates in detail at the initial interview. Evaluations will not be based on stereotypes of any sort. Problems identified will be discussed with the associate and suggestions for improvement will be offered.
4. Open discussion with the associate will be encouraged at each evaluation to allow the associate to notify the firm of any area of dissatisfaction.

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that person will be chosen until the representation of all people in all levels at the firm is at least in proportion to the representation of people of that group in the previous year's call to the bar.

An Employment Equity policy does not offer preferential treatment to any group of applicants; however the policy contemplates that where applicants are essentially equal in their qualifications, preference should be given to a candidate from a group traditionally underrepresented in the firm. Though achieving equity in employment requires more than just addressing statistical imbalances within a workplace, changing the numbers is one step that can be taken on the road to workplace equity.

This model policy on Workplace Equity does not impose any quotas or deadlines on the firm. However, if the representation within the firm does not change within a designated time, the workplace equity policy should be carefully reviewed.

<sup>29</sup> Frequent evaluations enable associates to identify areas for improvement well in advance of the partnership decision, and will help to avoid a situation where an associate proceeds through the ranks receiving positive feedback only to be eventually be denied partnership for vague or undisclosed reasons which may be disguised attempts to justify a glass ceiling.

## F. Mentors<sup>30</sup>

1. Any lawyer has the option at any point to select a mentor from among the senior lawyers and partners at the firm who have offered to serve in that capacity.
2. If the lawyer's evaluation has identified specific problems, he or she may consider that a mentor's assistance in addressing the problems would be helpful.
3. A mentor may be present at any evaluation of the lawyer's performance and may write a separate report for the associate's file.

## G. Compensation<sup>31</sup>

1. All compensation decisions at [name of firm], including salary levels and bonuses, will be made by a committee in accordance with the evaluation criteria presented at the initial interview and used in subsequent performance reviews. These criteria are intended to be neutral and merit-based.
2. There will be consistency between the remuneration of lawyers with substantially similar qualifications, abilities, tenure, and productivity levels.
3. The salaries of flexible schedule lawyers will be reduced only if they have opted for reduced hours, and any reduction will be proportionate to the actual reduction in hours.
4. Flexible working arrangements will not affect an associate's eligibility for bonuses.
5. Flexible working arrangements will not affect an associate's eligibility for benefits, although some benefits based on days of employment may be pro-rated in accordance with the terms of a flexible working arrangement that involves reduced hours.

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<sup>30</sup> Providing the associate with the option of choosing a mentor to assist with any problems provides the associate with invaluable assistance in improving his or her professional skills. In addition, a mentor can provide an alternative evaluation of the associate's work from the point of view of a person who is respected by the associate and familiar with his or her work. Evaluation by the mentor can act as a check on any hidden biases which may arise during the formal evaluation process.

<sup>31</sup> Where possible, more than one person should make decisions regarding compensation. The committee should also be as diverse in its membership as possible, in order to facilitate the identification of stereotypes that may inadvertently result in salary discrepancies between similarly qualified persons who make equivalent contributions.

**G. Professional development**<sup>32</sup>

1. All lawyers at [name of firm] are considered to be a long-term investment in the future of the firm.
2. The professional development of each lawyer is a priority for the firm, regardless of tenure, scheduling choices, or type of law practiced.
3. Each lawyer will be considered eligible for educational opportunities or conference attendance on the basis of the relevancy of the particular opportunity to that lawyer's current or planned future area of practice. Any restriction of educational opportunities due to budget restraints will be applied equitably.
4. Lawyers will be given equal access to files in all areas of specialization within the firm, in accordance with preference and ability, and the demand for the work within the firm. In each department associates will be given challenging, quality work assignments that encourage the growth of each lawyer's skills.

**I. Partnership**<sup>33</sup>

1. Partners will be chosen by a partnership committee that is representative of the diversity of the firm, and partnership decisions will be made on the basis of written objective criteria based on the needs of the firm.
2. The partnership committee will be guided by the associate's evaluations through the years at the firm. Any sudden shifts in the evaluators attitude toward an associate as the partnership decision approaches will be carefully scrutinized to ensure that they do not arise from discrimination on any prohibited ground.<sup>34</sup>

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<sup>32</sup> The section on professional development addresses the concern that certain areas of law are not fully open to all interested and qualified lawyers. The concern is substantiated by statistics such as those that show that female lawyers are concentrated in certain areas of law, such as family law.

To ensure that all lawyers have equal access to professional opportunities, the policy states that factors such as supply and demand, ability and interest, should be the only considerations affecting the area of law in which a lawyer practices.

All supplemental professional opportunities should be awarded on the same criteria.

<sup>33</sup> The partnership committee should represent as much diversity as possible given the composition of the firm. Employment equity goals of the firm should be considered where appropriate.

<sup>34</sup> Sudden changes in attitude toward an associate, and sudden changes in an associate's performance evaluations as the partnership decision approaches, can be indicative of discriminatory attitudes. A female associate who has had good evaluations throughout her tenure may suddenly be evaluated less positively if there are partners who believe that the firm should be limited to its quota of female partners.

3. An associate should not be penalized with respect to the partnership decision for having taken advantage of flexible working arrangements, aside from a possible delay in eligibility for partnership where a leave arrangement involves absence from the firm in excess of six months. In such cases, the delay shall be no longer than the actual time of absence.

## VIII. MONITORING THE POLICY<sup>35</sup>

- A. This policy will be reviewed and evaluated on an annual basis.
- B. As part of the annual review, the composition of the firm's lawyer complement will be assessed and compared to all available data on the demographics of the membership of the Law Society of Upper Canada. If no substantial changes in the composition of the firm can be shown, the policy will be reviewed and amended to effect the desired changes.

## IX. COMPLAINT PROCEDURES

- A. Where a member of the firm or an applicant for employment believes that there has been a failure or breach of the policy, he or she should follow the complaint procedures identified in the firm's [harassment] policy<sup>36</sup>.
- B. The firm will treat all such complaints in a serious manner, will investigate all formal complaints, and will discipline any person found in breach of this policy without regard to his or her status within the firm.
- C. Where a member or employee of the firm has been discriminated against by a non member of the firm, such as a client, opposing counsel, court personnel,

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Sudden changes in performance evaluations may also be an indication of harassment for reasons prohibited by the *Human Rights Code* or by Rule 5.03 or 5.04. Where an associate has been harassed by a person who evaluates his or her work, and has objected to or resisted that harassment, the evaluation may not reflect a fair assessment of the associate's work.

The committee should inquire carefully into the reasons for sudden shifts in evaluations to ensure that an individual is not denied partnership on the basis of discrimination.

<sup>35</sup> If the policy in its present form produces no noticeable change in the composition of the firm after a designated period, it may be that insufficient efforts are being made to implement the policy, or that people in leadership roles within the firm are not sincere about implementing it. At that point, the firm should consider setting fixed goals for implementation.

<sup>36</sup> The harassment model policy outlines a detailed complaint procedure. The same procedure would be appropriate for receiving complaints under this policy, and would avoid the unnecessary duplication of efforts.

or a member of the judiciary, [name of firm] will support and assist that person alleging discrimination in whatever manner seems appropriate<sup>37</sup>.

D. Remedies are also available under the *Human Rights Code*.

## **X. CONCLUSION**

A. [Name of firm] has adopted a policy of zero tolerance towards discrimination and all barriers to equal opportunity.<sup>38</sup>

B. To support values of equality and justice in the law generally the firm will apply those values in its own employment decisions.

C. [Name of firm] will review this policy on an annual basis and revise it as necessary to ensure that it is accomplishing its goals.

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<sup>37</sup> Where a member or employee of the firm has been discriminated against by a non member of the firm, it is important for the firm to commit itself to supporting the firm member or employee. Although there are obvious economic pressures, it completely frustrates the purpose of the policy if a firm allows one of its lawyers to be marginalized because of the discriminatory attitudes of persons outside the firm.

<sup>38</sup> A strong and succinct reiteration of the commitment set out in the Introduction should conclude the policy.