

Excuse Me:

Teaching Interrupting Bias as a Lawyering Skill

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2018 AALS Conference on Clinical Legal Education

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Regulatory Framework

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ABA Standard 302 – Learning Outcomes

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- “A law school shall establish learning outcomes that shall, at a minimum, including competency in the following:
- (a) Knowledge and understanding of substantive and procedural law;
- (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system;
- (d) Other professional skills needed for competent and ethical participation as a member of the legal profession;”

Interpretation 302-1

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- *“For the purposes of Standard 302(d), other professional skills are determined by the law school and may include skills such as, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, **cultural competency**, and self-evaluation.”*

Title IX – 20 U.S.C. § 1681(a)

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- *“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”*

Reporting – The “Responsible Employee”

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- *“Under Title IX, ‘responsible employees’ with authority to take action to redress sexual violence, or who have been deemed mandated reporters by their institutions, or who students reasonably could believe have authority or responsibility over such matters, are required to report discrimination.”*
- Colleen Flaherty, *Endangering a Trust*, Inside Higher Ed (Feb. 4, 2015), <https://www.insidehighered.com/news/2015/02/04/faculty-members-object-new-policies-making-all-professors-mandatory-reporters-sexual>

Rules of Professional Conduct



“Discrimination and harassment on the basis of gender, race, ethnicity, sexual orientation, disability, marital and socioeconomic status is, and unfortunately continues to be, a problem in our profession and in society.”

Paulette Brown, Immediate Past-President, American Bar Association

Model Rule 8.4 - Misconduct

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- “It is professional misconduct for a lawyer to:
- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.”

Model Rule 8.4 – Comment 3

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- “A lawyer who, **in the course of representing a client**, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are **prejudicial to the administration of justice.**”

New Model Rule 8.4(g)

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- *“It is professional misconduct for a lawyer to:*
- *...*
- *(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in **conduct related to the practice of law.**”*

New Model Rule 8.4 – Comment 4

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- *“Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.”*

Interrupting Bias

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How we teach it

The Coworker

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Bystander Scenario – Opposing Counsel

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The setting is a courtroom in Housing Court – the judge is not yet on the bench so it's ok to talk.

A group of lawyers are talking casually: the landlord's attorney (a man in his 40s), the tenant's attorney (a clinical professor), and two law students from the clinic (a man and a woman, in their 20s) – are talking casually.

The conversation goes something like this...



Our Role as Teachers

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BASIC PRINCIPLES

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- Model the skill.
- Set the tone and expectations early.
- Incorporate this skills instruction into the curriculum.

MODEL THE SKILL

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- Be humble.
- Slow it down.
- Be internally motivated to counteract bias.
- Speak up.

**See ABA Implicit Bias videos and toolkits.*

SET THE TONE EARLY

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- Address the topic at orientation.
- Set or develop with students the ground rules for professionalism in practice.
- Talk about how to engage in discussions about difficult topics.
- Get buy-in from students about why this is important.

INTEGRATE INTO THE CURRICULUM

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- Teach interrupting bias early and often:
 - ✦ First year orientation,
 - ✦ Ethics course,
 - ✦ Experiential courses,
 - ✦ Doctrinal courses.
- Devote a class or training to teaching the skill.
- Use hypos or role plays so students can practice the skill.
- Provide students with the tools to respond (see handouts).

What methods do you use?

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- Resources suggested during this session:
 - Harvard Implicit Bias tests: <https://implicit.harvard.edu/implicit/takeatest.html>
 - ABA Implicit Bias Initiative: <https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html>
 - Teaching Tolerance (Southern Poverty Law Center): <https://www.tolerance.org/>
 - Speak Up! campaign videos and resources (from Teaching Tolerance):
 - ✦ Videos: <https://www.youtube.com/playlist?list=PLCKMtQa1oNDTsmNe44ZL291nXst4ZIm7c>
 - ✦ Pocket Guide: http://www.tolerance.org/sites/default/files/general/speak_up_pocket_card_2up.pdf
 - ✦ Handbook: http://www.tolerance.org/sites/default/files/general/speak_up_handbook.pdf