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**The Elephant in the Room:
Responding to Racially Charged Words**

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The Elephant in the Room

Responding to Racially Charged Words

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- *An attorney tells a racial joke to a few friends at a bar association social.*
- *Members of a hiring committee express concern that the person of color doesn't seem to "fit" with the firm's culture.*
- *A student uses the n-word in a class discussion.*

I. The Elephant Walks In

Whenever I hear of situations like these, I wonder how I would have responded if I'd been present for the joke, the comment, or the discussion. Would I have recognized the injustice being done or just focused on the discomfort I felt? Would I have spoken up? Would I have known what to say to the elephant in the room?

We lawyers are uncomfortable communicating about race. This discomfort arises in large part because the legal profession is not very diverse,¹ most law schools are not diverse,² and society is still largely

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This essay grew from workshops of the Teaching Effectiveness Program at the University of Oregon School of Law in 2017 led by Lee Rumbarger and Jason Schreiner. I appreciate their guidance and the insights of workshop participants. I also appreciate the experiences shared by national colleagues at the Association of Legal Writing Directors' conference at the University of Minnesota School of Law in July 2017, *Acknowledging Lines: Talking About What Unites and Divides Us*, in response to my media presentation.

1 The profession is becoming a bit more diverse, though the small numbers of minority attorneys and judges are disheartening. According to ABA statistics from 2008, 4.6% were Black or African American, 2.9% were Asian, and 3.8% were

segregated.³ Talking about racial issues, and sometimes even talking with persons of another race, can feel awkward. Talking about race can be difficult even as we make genuine attempts to connect across racial boundaries that exist in our society. Just as complex as talking about race is the subject of this essay: talking about how we talk about race. We may feel stymied because we aren't exactly sure of the reach of First Amendment protections, hate speech statutes, politically correct labels, and rules of professional conduct.⁴ These concerns unwittingly conspire to keep us from knowing how to have even this conversation about how we communicate or anticipating what we might say, even in situations where we know we must respond.⁵

Hispanic or Latino. Among judges, magistrates, and other judicial workers, 6.8% were Black or African American, .3% were Asian, and 3.2% were Hispanic or Latino. <https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/cpsaat11.authcheckdam.pdf> (based on annual averages compiled from the Current Population Survey, a monthly Bureau of Census survey on behalf of the Bureau of Labor Statistics). In 2017, 5.6% were Black or African American, 4.4% were Asian, and 4.8% were Hispanic or Latino. Among judges, magistrates, and other judicial workers, 12.7% were Black or African American, and 7.0% were Hispanic or Latino. Statistically, 0.0% were Asian. Bureau of Labor Statistic, 2017 Current Population Survey, *available at* <https://www.bls.gov/cps/cpsaat11.pdf> ("Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity") (last visited Apr. 27, 2018).

2 Of the 42,800 students admitted to U.S. law schools in 2016, over 67% were Caucasian/White; 11.7% were Hispanic/Latino; 10.7% were Black/African American; 10.2% were Asian; and 5% were Puerto Rican, American Indian/Alaska Native, or Native Hawaiian/Other Pacific Islander. Law School Admission Council, Admitted Applicants by Race/Ethnicity & Sex at <https://www.lsac.org/lscresources/data/ethnic-sex-admits> (last visited Mar. 28, 2018) ("maximum reporting" method included multiple ethnicities selected by some candidates, resulting in a total exceeding 100%). At many schools, the percentage of the student body comprising persons of color will be lower than these aggregate statistics, in part because law schools at Historically Black Colleges and Universities enroll much higher percentages. *See, e.g.*, Thurgood Marshall School of Law, 2017 Standard 509 Information Report, http://www.tsulaw.edu/consumer_info.html (last visited May 1, 2018) (showing 239 of 255 entering students were members of racial minorities).

3 *See* William H. Frey, *Census Shows Modest Declines in Black-White Segregation* (Dec. 8, 2015), <https://www.brookings.edu/blog/the-avenue/2015/12/08/census-shows-modest-declines-in-black-white-segregation/> (last visited Mar. 28, 2018).

4 Racial discrimination in conduct related to the practice of law is professional misconduct under the ABA's Model Rules: "It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race . . ." MODEL RULES OF PROF'L. CONDUCT § 8.4(g). Attorney "[d]iscrimination and harassment . . . undermine confidence in the legal profession and the legal system. Such discrimination includes harmful *verbal* or physical conduct that manifests bias or prejudice towards others. Harassment includes . . . derogatory or demeaning verbal or physical conduct." MODEL RULES OF PROF'L. CONDUCT § 8.4 cmt. 3 (emphasis added). The rules raise at least a question of a reporting requirement regarding racial speech. *See* MODEL RULES OF PROF. CONDUCT § 8.3(a) (requiring reporting by "[a] lawyer who knows that another lawyer has committed a violation of [these rules] that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"). The Model Rules define the "practice of law" broadly to include "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." MODEL RULES OF PROF'L. CONDUCT § 8.4 cmt. 4. The comments make clear that lawyers may work to promote diversity and inclusion, specifically permitting "initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations." *Id.*

Similarly, judges must perform their duties "without bias or prejudice." ABA MODEL CODE OF JUD. CONDUCT 2.3(A). "A judge shall not . . . by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race . . . and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so." *Id.* Moreover, judges "must require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race . . . against parties, witnesses, lawyers, or others." ABA MODEL CODE OF JUD. CONDUCT § 2.3(C). Manifestations of bias or prejudice include "epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race . . . and crime; and irrelevant references to personal characteristics." *Id.* cmt. 2.

This essay shares two approaches for responding to the elephant in the room. Both approaches are based on guidelines developed by facilitators at workshops I've attended to address my own discomfort at the possibility of responding to a racially charged comment. The first approach seems more appropriate in unstructured situations, such as a social setting or an office meeting. The second approach is designed for leading a Continuing Legal Education (CLE) lecture or a law school class. Obviously, there is overlap between the two approaches, and ideas from each might be useful in a number of situations.

After introducing each approach, I offer scenarios where racially charged words are spoken. The scenarios are drawn from situations I have experienced, heard anecdotally, or read about, and they are presented to provide a basis for reflection. The responses are based on trainings, discussions, and readings, and they express what I might hope to say in the moment.⁶ For people like me, who only think of the right thing to say hours later, in the middle of the night, rehearsing responses can be helpful. I practice these responses, just as I would rehearse a public lecture or professional presentation, to prepare myself to be effective when I next find myself facing an elephant.

To be clear, I have no solution, no magic that will allow every attorney to respond effectively to racially charged words. My responses are personal, and they likely reflect my position as a white,⁷ female, straight, cisgender, tenured law professor.⁸ I hope that by sharing my own efforts to respond to the elephant in the room, I can contribute to a conversation about race that we must have,⁹ yet is still rare.¹⁰

5 This essay addresses only explicit, verbal statements, not implicit racism or conduct. Implicit racism raises different problems and requires different responses.

6 These suggested responses may strike some readers as naïve, misguided, or preposterous, based on that reader's identity and experiences. Again, I intend for them to serve as a catalyst for reflection.

7 While writing this essay, I have become even more aware of the privileges attached to whiteness in our society. White privilege is the view of many white Americans that "their experiences, policies, procedures, practices, actions, words, and beliefs [are] 'normal' and that things outside of those parameters are abnormal." Sheryl J. Willert, *Race, Power, Privilege and Bias: The Responsibility of Corporate America Post 2016 Presidential Elections*, 12 IN-HOUSE DEFENSE Q. 22 (2017). This privilege allows white people to feel included and to do so without thinking of the advantages that inclusion brings. Barbara Flagg calls this the "transparency phenomenon," which "may be a defining characteristic of whiteness: to be white is not to think about it." Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969 (1993).

8 I hope the suggestions also reflect what I have learned from my experiences, my relationships, my reading, and my efforts to become more educated about race. See Catharine Wells, *Microaggressions in the Context of Academic Communities*, 12 SEATTLE J. FOR SOC. JUST. 319, 320 (Fall/Winter 2013) (noting the particular role white women can play in addressing microaggressions in law schools, "but only if we recognize that our hard won places in the establishment create the risk of blindness").

9 "We have a responsibility to push the conversation forward until we're all equal. Till we're all equal in this place. Because until everyone's free, no one's free . . ." *The Strongest Thing a Man Can Do Is Cry*, interview of Jay-Z by Dean Baquet in *T: N. Y. TIMES STYLE MAG.* (Dec. 3, 2017), at 134. This quote echoes a speech by Fannie Lou Hamer, "Nobody's Free until Everybody's Free," which she delivered in 1971 at the founding of the National Women's Political Caucus. *SPEECHES OF FANNIE LOU HAMER: TO TELL IT LIKE IT IS* 139 (Maegan Parker Brooks & Davis W. Houck eds., 2010).

II. Informal Conversations—Speaking to the Elephant

In one of the most valuable trainings I have attended, Janée Woods suggested a five-part checklist that I find useful when I practice responding to racially charged words in less structured situations.¹¹

- Say, “No.”
- Ask questions.
- Provide facts.
- Channel empathy.
- Bear witness.

The following scenarios provide a basis for exploring responses to the elephant in social settings or office conversations.

A. Responding to the Elephant in Social Settings

The elephant can show up in any social or informal setting: bar association lunches; client-development activities; holiday parties; work-related travel; alumni events; or just a quick drink with friends at the end of the day. Riding in a taxi or waiting for drinks to arrive, someone might make a comment about a particular person of color that reflects a negative stereotype or tell a racial joke. Instead of letting such comments slide past and hoping to avoid social awkwardness, how might a lawyer respond?

- *Don't laugh (saying “no” implicitly).* If someone makes a race-based joke,¹² your stone face, followed by a new topic of conversation, can speak volumes.
- *Ask questions.* Whatever the racial comment, asking a question shows your interest and willingness to engage, while making the speaker try to support the comment. “What did you say?” “What support do you have?” If you tend to be reluctant to make waves, you could prepare a one-line, all-purpose response that suggests the question, “I hope you’re not telling me this because you think I agree.”¹³

¹⁰ Ronald M. Sandgrund, *Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community*, 45 COLO. LAW. 67, 73 (Mar. 2016) (illustrating conversations about race in South Africa that never happened in the United States).

¹¹ Janée Woods, *Practicing Resistance: Becoming and Growing as an Ally*, University of Oregon Center for the Study of Women in Society (Feb. 12, 2018); see also What Matters, with Janée Woods, at <https://janeewoods.com> (last visited Mar. 28, 2018). Others have addressed some of these steps. E.g., VERNA A. MYERS, MOVING DIVERSITY FORWARD: HOW TO GO FROM WELL-MEANING TO WELL-DOING 160–62 (2011).

¹² Nadra Kareem Nittle, *How to Respond to a Racist Joke*, <https://www.thoughtco.com/how-to-respond-to-racist-jokes-2834791> (last visited Mar. 28, 2018).

¹³ Sarah Kelly Shannon (@thesarahkelly) TWITTER (Aug. 25, 2017, 4:54 AM), <https://twitter.com/thesarahkelly/status/901050237552340992>.

- *Provide facts.* Another possibility is to provide facts that counter the race-based assertion. These facts could be statistics,¹⁴ scholarly work,¹⁵ or your own experience. Especially if the speaker is also a friend, have a frank conversation. Start by affirming your friendship and your desire to share views that are important to you.¹⁶ “You’re my friend, and I know you didn’t mean to hurt me. But we need to talk about what you just said.”¹⁷
- *Step away, but bear witness.* Sometimes you might decide to walk away from the group when you hear a racial comment or even as the conversation heads toward a racial topic.¹⁸ Ask others who look uncomfortable to join you. “I’m going for more appetizers. Do you want to come?” Then let any persons of color in that group know that you witnessed what was going on, and what further steps you might take. “I could see where her rant was heading. I’m going to stop by her office on Monday to let her know why I couldn’t listen.”

B. Responding in Office Settings

Law offices are not without their elephants. Racially charged words may be blatantly obvious or may be couched in terms that appear neutral, or that feel neutral to the speaker.¹⁹ For instance, in a discussion about

¹⁴ For example, even though “black and white people use marijuana at roughly the same rates,” black people are much more likely to be arrested. Dylan Matthews, *The Black/White Marijuana Arrest Gap*, in *Nine Charts*, WASH. POST (June 4, 2013), available at https://www.washingtonpost.com/news/wonk/wp/2013/06/04/the-blackwhite-marijuana-arrest-gap-in-nine-charts/?utm_term=.d529536df764 (last visited Mar. 28, 2018).

¹⁵ Cynthia Lee, *Denying the Significance of Race: Colorblindness and the Zimmerman Trial*, in KENNETH J. FASCHING, TRAYVON MARTIN, RACE, AND AMERICAN JUSTICE 31–38 (Varner et al. eds., 2014).

¹⁶ “What Can I Do about Casual Comments?” in Southern Poverty Law Center, *Speak Up: Responding to Everyday Bigotry* (Jan. 25, 2015), available at <https://www.splcenter.org/20150126/speak-responding-everyday-bigotry#social-events> (last visited Mar. 28, 2018).

¹⁷ See Robin DiAngelo, *White Fragility*, *infra* note 35 (minutes 55:10–57:10 of YouTube video) (explaining the challenges of white people not being open to hearing those concerns from persons of color).

¹⁸ For white readers, this strategic decision to step away should not be used as a cover for white fragility that renders you unwilling to engage. As Robin DiAngelo writes, “[W]hites are often at a loss for how to respond in constructive ways. Whites have not had to build the cognitive or affective skills or develop the stamina that would allow for constructive engagement across racial divides.” Robin DiAngelo, *White Fragility*, 3 INT’L J. CRITICAL PEDAGOGY 54, 57 (2011). Staying silent when racially charged words are spoken perpetuates white privilege. Robin DiAngelo, *Nothing to Add: A Challenge to White Silence in Racial Discussions*, 2 UNDERSTANDING & DISMANTLING PRIVILEGE 2 (Feb. 2012); see also *supra* note 7 (discussing white privilege).

¹⁹ These “neutral” comments might be based on an implicit bias. See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006); see also Erik J. Girvan, *On Using Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 GEO. MASON UNIV. CIV. RTS. L.J. 1, 7 (2015), available at <http://sfs.gmu.edu/crlj/wp-content/uploads/sites/16/2016/01/GMC101.pdf>. A simple Implicit Association Test, taken online, can be an effective first step in recognizing our own implicit biases, including those along racial lines. See Implicit Project, available at <https://implicit.harvard.edu/implicit/> (last visited Mar. 28, 2018). The key is that every person, and every attorney, has implicit biases. See Sandgrund, *supra* note 10, at 73 (describing a Latina attorney who held an unconscious bias

hiring, someone might want to raise the bar for a person of color, suggesting the need for another writing sample or preferring to consider only candidates from certain schools.²⁰ In staffing a new client matter, or discussing advancement in the firm, someone may note that a person of color doesn't "fit" very well with the team being assembled or with the firm's culture.²¹ In meeting new clients, an attorney might try to make small talk by asking, "No, where are you *really* from?"—assuming from the clients' appearance that they aren't Americans.²² Each of these elephants needs to be recognized and addressed.

- *Say, "No," and provide facts.* If someone is disparaging a particular colleague, offer support for that colleague and back it up with your experience: "I disagree. I've found his analysis to be strong. Remember the *Skye* case?" or "I've had a different experience. I like brainstorming with her because she's so creative."
- *Ask questions.* When the elephant appears as a general comment based on negative stereotypes, your questions can show that you disagree and make the speaker examine his views.²³ "Why do you think that?" "Do you have a specific example?"
- *Channel empathy.* It's possible that the speaker has had little contact with the person being discussed, and channeling empathy can highlight the problem while moving the speaker to a better place. "Maybe you haven't had many opportunities to talk to her, but I'm sure if you stop by her office or invite her to lunch you'll find she's one of our best new associates. I'll be glad to set up a lunch for the three of us next week."

that favored white male colleagues). Being aware of these biases makes it possible to avoid acting on them. Paulette Brown, *A Top-Down Approach to Increasing Law Firm Diversity: What Managing Partners Need to Know*, in BUILDING AND ENCOURAGING LAW FIRM DIVERSITY, *4 (Thomson Reuters/Aspatore 2016). Moreover, biases are more often triggered during stressful times, when we default to what is familiar rather than what is right or what is best. *Id.*

²⁰ JOANN MOODY, FACULTY DIVERSITY: REMOVING THE BARRIERS 7–8 (2d ed. 2012).

²¹ *Id.* at 9–10.

²² This statement is an example of microaggression: "brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative . . . slights and insults toward the target person or group." Eden B. King et al., *Discrimination in the 21st Century: Are Science and Law Aligned?* 17 PSYCHOL. PUB. POL'Y & L. 54, 56 (2011) (quoting Derald Wing Sue, et al., *Racial microaggression in everyday life: Implications for clinical practice*, 62 AM. PSYCHOLOGIST 271, 273 (May–June 2007)). Another example is asking a person of color how he got his job—assuming it was not on merit. See <http://www.microaggressions.com> (last visited Mar. 28, 2018) (defining types of microaggressions and providing examples); see also Ronald Wheeler, *About Microaggressions*, 108 LAW LIB. J. 321, 323–25 (2016).

In microaggressions, a white person assumes her view is normal and simply makes a statement; because no insult was intended, she assumes none was felt. When told that a listener was insulted, she is likely to shift the blame to the listener, who is presumed to be too sensitive. Wells, *supra* note 8, at 322–24. Repeated microaggressions take their toll on the listener and can have a negative impact on workplace performance. David W. Fujimoto, *Thrown Under the Bus: Victims of Workplace Discrimination after Harris*, 48 U.S.F. L. REV. 111, 138–39 (2013).

²³ Nittle, *supra* note 12.

- *Bear witness.* Sometimes a colleague or supervisor uses words intended to honestly address racial discomfort, but those words carry a racial charge instead. This situation might arise in a group interview, if attorneys spend more time describing the firm’s diversity policy than asking the candidate about his impressive credentials. Or it might happen when a supervisor admits to a person of color, “I’m uncomfortable talking to you” or “I’ve never worked with a black person before.” Reference to the sole other person of color in the office (“Maybe you’d be more comfortable talking to Barry”), or to the person of color who left after a few years (“I remember Robin having a similar problem”), will also be counterproductive.²⁴ A colleague hearing any of these exchanges might not be able to say anything helpful in the moment, but she can later share with the person of color that she heard and was also uncomfortable. She might also circle back to colleagues with feedback and suggestions for better communication.

III. Responding to the Elephant in a CLE or a Classroom

When an attorney is an instructor or guest lecturer for a CLE or a law school class, the attorney can take additional steps—in preparation and during class—to respond to racially charged statements. First, the instructor can set expectations for class engagement; the instructor also has time to anticipate challenging topics, plan his own words with care, and consider where discussions might go. Second, the instructor has a leadership role that is quite different from an attorney in a social or office setting and that requires engaged response to assure no one’s learning or professional opportunities are hindered by other participants. This section begins with suggestions for preparing in advance for the elephant’s appearance and then explores what to say and do in the moment.²⁵

²⁴ Law firms have invested in diversity hiring for decades. Caroline F. Hayday & Carlos Dávila-Caballero, *Strengthening Diversity and Inclusion Efforts through Leadership and Lawyer Engagement*, in BUILDING AND ENCOURAGING LAW FIRM DIVERSITY *1. Firms nonetheless continue to struggle with retention and promotion, and half of the minority lawyers in major law firms leave within three years. Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1045 (2011); see also Nat’l Ass’n for Law Placement, *Representation of Women and Minorities Among Equity Partners Has Increased Only Slightly*, NALP BULL. (Apr. 2017) (<https://www.nalp.org/0417research/>) (citing 2016 NALP survey showing 5.8% of equity partners in multi-tier law firms were racial or ethnic minorities).

²⁵ This section of the article draws extensively on workshops provided by the University of Oregon’s Teaching Effectiveness Program, referred to above in the author’s note (*).

A. Preparing to Teach

When the topic of a CLE or class is likely to raise racial issues, the instructor should prepare in advance to keep the conversation civil while welcoming different views.²⁶ Guest lecturers might spend a few minutes before class thinking of hot-button issues, policies, or words that might be used in class and develop responses based on the suggestions below. Further, adjunct instructors in law schools can make civil engagement and persuasive discourse a course objective, stated in the syllabus and referred to at the beginning of sensitive discussions or whenever challenging topics come up.²⁷ Professor Charles Calleros includes the following in his syllabus:

Deriving Maximum Benefits from Diversity of Perspectives: We should welcome and listen to all perspectives, across the full spectrum of views, with the aim of understanding them fully. As an important facet of our academic and professional training, we must also express our views with utmost civility, good faith, and mutual respect. I urge you to focus on issues and ideas, and to address your arguments to me, rather than to other students. . . . I hope that views stated in class will inspire further constructive conversations after class, again in civil terms and with all mutual respect, in the discussion forum of our course website and in friendly discussions and debates over lunch or coffee.²⁸

Experienced lawyers and novice law students alike might benefit from instruction on how to state their views without being provocative.²⁹ A few pointers on how to present ideas persuasively could be added to the course syllabus. Including handouts or short video links can help participants think about how to engage effectively.³⁰

²⁶ For a more extensive treatment of preparation, see Vanderbilt University, Center for Teaching, *Difficult Dialogues*, <https://cft.vanderbilt.edu/guides-sub-pages/difficult-dialogues/> (last visited Mar. 28, 2018); University of Michigan, Center for Research on Learning and Teaching, <http://www.crlt.umich.edu/multicultural-teaching> (last visited Mar. 28, 2018); see also Jeannine M. Love et al., *Facilitating Difficult Dialogues in the Classroom: A Pedagogical Imperative*, 38 ADMINISTRATIVE THEORY & PRACTICE 227, 229–30 (2016) (urging faculty to engage in self-reflection and to “anticipate student resistance to difficult dialogue” before leading classes on sensitive topics).

²⁷ American Bar Association standards for accrediting law schools have increasingly turned to course objectives and outcome measures. See *Chapter 3, Program of Legal Education*, https://www.americanbar.org/groups/legal_education/resources/standards.html (last visited Mar. 28, 2018).

²⁸ Charles Calleros, March 2018 (on file with the author). Also included is a note about use of class recordings: “I hope to have IT record class to facilitate your review of lectures, but it would be a serious breach of class rules to post or otherwise repeat a recording, quotation, or paraphrasing of anyone’s statement in class for the purpose of ridiculing that person’s contribution; that could discourage robust class discussion.” *Id.* Other instructors involve students in developing group rules for classroom discussions. Judith A.M. Scully, *Seeing Color, Seeing Whiteness, Making Change: One Woman’s Journey in Teaching Race and American Law*, 39 U. TOL. L. REV. 59, 69–71 (2007).

²⁹ I begin each spring semester by telling students what they learn about appellate advocacy should also help them have more productive classroom discussions and post more persuasively on social media.

³⁰ E.g., Jay Smooth’s Ill Doctrine, *How To Tell People They Sound Racist*, http://www.illdoctrine.com/2008/07/how_to_tell_people_they_sound.html (last visited Mar. 28, 2018).

B. Responding to Racial Comments in Class

The CLE or course instructor is the recognized discussion leader and thus has a role different from that described in the prior section on social or office settings. Unfortunately, organizations offering CLE courses and law schools employing adjuncts rarely offer training or even guidance to these practitioners. To address an inappropriate statement in a class setting, consider these steps:³¹

1. observe objectively what is happening;
2. state your response; and
3. act.

The first step is to observe the other participants' response in a non-judgmental way. You might echo the speaker's comment in a neutral way: "I hear that you are sharing your views on affirmative action." Or you could observe the expressions of other participants: "Others in the room seem disturbed by that comment." You might provide some context, especially if the comment is tangential to the topic: "Today's topic is housing, and you've brought up free speech on campus."

In the next step, state your own reaction, presented either as your own view or as a more general position. You might disagree: "I see that point very differently." Or you could attribute the different view to an indeterminate group, which might include yourself and many in the classroom: "That's a provocative position on an important issue. How do you respond to those who see it very differently, who see it as . . ." Or you might share your personal reaction: "I'm very uncomfortable with that assertion, but it leads to an important conversation."

Finally, lead the group through an activity to engage the issue. Assuming the comment raises legitimate views on multiple sides, you might explain the importance of being able to argue from different perspectives and assign sections of the room to support or oppose the viewpoint expressed in the comment. You could serve as moderator or as a neutral judge trying to reach a decision. For a particularly sensitive topic, you might try a think-pair-share approach to the conversation.³² Each participant thinks alone for a minute or two, and then joins with a partner

³¹ The Teaching Effectiveness Program at my university offers a multi-step approach. Jason Schreiner, *Strategies for Engaging with Difficult Topics, Strong Emotions, and Challenging Moments in the Classroom* (on file with the author). I reduced that approach to these three steps, which I am more likely to remember in panic mode. These three steps were summarized in a blog by Professor Jennifer Romig. Professor Jennifer Romig, *Civil Disagreement*, LISTEN LIKE A LAWYER BLOG (Aug. 28, 2017), <https://listenlikealawyer.com/2017/08/28/civil-disagreement/>.

³² This approach is credited to Frank Lyman at the University of Maryland in 1981. See Danxi Shen, Pair and Share, <https://abconnect.harvard.edu/pair-and-share-research> (including variations and alternative approaches) (last visited Mar. 28, 2018).

to exchange ideas. Finally, the pairs share their ideas with the whole class. The advantage of these two approaches—the assigned debate and the think–pair–share—is that you manage the conversation to ensure equal time and civil discourse.³³

If the comment was particularly harsh, the group might need to take a break. “A number of people seem disturbed by that comment. I’m uncomfortable, too, but the comment raises an important point for us to tackle. I need a few minutes to collect my thoughts, and some of you might as well. Let’s take five minutes and reconvene. Some of you might want to step out for a breath of air. Some might want to sit quietly and reflect on your own views.” If the comment came up near the end of a session that continues after lunch or on another day, you might instead end this session, encourage participants to reflect,³⁴ and promise to begin the next session with a discussion. Depending on the situation, you might seek outside assistance in leading the next session, perhaps from an expert on the topic or an administrator who is familiar with the tensions raised or the personalities involved. Adjunct professors should contact the Dean of Students and the Associate Dean of Academic Affairs, both to keep them apprised of the situation and to seek guidance. Transparency is important in the moments immediately following the racially charged comment as well as in later conversations and discussions. Participants need to know that you are not ignoring the comment by deferring discussion until later, and administrators need to have context to respond to any concerns that might be raised. All will benefit from your admission that navigating the conversation is challenging, but important.

Throughout each of these steps, you remain the head of the CLE or class session and the leader of the discussion. You should not rely on a participant from an underrepresented group to object to the racially charged comment, lead the conversation about why the comment is offensive, or offer a perspective that contradicts a racist comment. While any participant may choose to take a vocal role in the instructor’s activity addressing a racist comment, the instructor needs to avoid the awkward situation in which everyone looks to a person of color in the room to shoulder the burden of moving the conversation forward. That is especially fraught when there are few participants from the underrepresented group in the CLE or class, or even in the community.

³³ Of course, these approaches would not be appropriate for comments that are not open to debate (e.g., plainly attacking a student who is a member of a racial group).

³⁴ A complication especially in the law school setting is that, while the instructor might not engage with the students until the next session, the students may continue to engage in intervening classes or on social media.

The examples above suggest that a participant is the one who raised the challenging point. If you as the instructor spoke in a way that you recognize was inappropriate, an immediate and genuine apology can begin to bridge any divides and model good communication.

Finally, don't ignore resources. For the foreseeable future, our nation—including our law offices and law schools—will be grappling with issues about race, and some people are experts in dealing with these discussions. The law firm's human-resources office or diversity committee can help. If the setting is a law school, the Dean of Students or other administrator can offer advice. Many blogs, essays, articles, books, YouTube videos, and TED talks are available on this topic.³⁵

IV. Responding to the Elephant: Breaking the Cycle

People from across our segregated society attend law school. Most law schools are not diverse,³⁶ meaning the predominant law-school culture is that of white classmates, white professors, and white administrators.³⁷ The law school should be a place where all students can learn, free of prejudice, but sometimes racially charged statements pass without comment. Students graduate and become attorneys, and some remain unaware that racial comments are hurting their practice,³⁸ their colleagues who are persons of color,³⁹ and their clients.⁴⁰ These attorneys then become partners, judges, or mentors to other attorneys and law students. Elephants keep lumbering in.

We all have to respond. Responding will help us achieve justice in our law schools and in the workplace. Moreover, creating diverse envi-

³⁵ E.g., materials collected at The Derek Bok Center for Teaching and Learning, Harvard University, <https://bokcenter.harvard.edu> (last visited Mar. 28, 2018); Professor Jennifer Romig, *Civil Disagreement*, LISTEN LIKE A LAWYER BLOG (Aug. 28, 2017), <https://listenlikealawyer.com/2017/08/28/civil-disagreement/>; Facing History and Ourselves, *Preparing Students for Difficult Conversations*, available at <https://www.facinghistory.org/resource-library/facing-ferguson-news-literacy-digital-age/preparing-students-difficult> (last visited Mar. 28, 2018); Russell McClain, *Helping Our Students Reach Their Full Potential: The Insidious Consequences of Ignoring Stereotype Threat*, 17 RUTGERS RACE & L. REV. 1 (2016) (tracing the impacts of stereotype threat from admissions, through law school, and into practice); Robin DiAngelo, *White Fragility*, at <https://www.youtube.com/watch?v=ktVaZVVgJyc> (last visited Apr. 18, 2018). For the ALWD conference "Acknowledging Lines: Talking About What Unites and Divides Us" in July 2017, referred to in the author's note (*) above, the organization's website listed sources for participants to read before the conference. ALWD, *Food for Thought*, available at <http://alwd.umn.edu/food-thought> (last visited Mar. 28, 2018).

³⁶ See LSAC statistics, *supra* note 2.

³⁷ To address challenges in the lack of diversity among faculty and administrators, see Moody, *supra* note 20.

³⁸ Law firms stand to lose business and lose cases if their attorney composition does not match the diversity of their clients and if attorneys cannot perform in diverse environments. Brown, *supra* note 19, at *2, *5, *8.

³⁹ See *supra* note 24, discussing the challenges law firms face in retention of attorneys who are persons of color.

⁴⁰ Sandgrund, *supra* note 10, at 70 (describing witness interviews in which a lawyer of color was able to obtain more valuable information than senior white lawyers were).

ronments can lead to better solutions to complex problems.⁴¹ While it is important for organizations⁴² and law firms⁴³ to make broad statements about increasing diversity, that is not enough to create diverse spaces where we can learn from and support one another. Each of us has to be ready to respond to the elephant in the room.

41 See Willert, *supra* note 7, at 22 (citing studies from 1995, 2011, and 2015 that demonstrate “a strong causal connection between diversity and innovative thinking, problem solving, and productivity”). A 2018 report by McKinsey and Company found significant correlation between diversity and business performance. Vivian Hunt et al., *Delivering Through Diversity* 1–2 (Jan. 2018) (executive summary), available at https://www.mckinsey.com/~media/McKinsey/Business%20Functions/Organization/Our%20Insights/Delivering%20through%20diversity/Delivering-through-diversity_full-report.ashx. “While social justice, legal compliance, or maintaining industry-standard employee environment protocols is typically the initial impetus behind [diversity] efforts, many successful companies regard [inclusion and diversity] as a source of competitive advantage, and specifically as a key enabler of growth.” *Id.* at 1; see also Brown, *A Top-Down Approach to Increasing Law Firm Diversity*, *supra* note 19, at *2 (“If you select a diverse group of people to look at a problem, rather than a group consisting of the same types of people, you tend to come up with a better solution.”); Kenneth O.C. Imo, *Leadership Matters: Obstacles and Opportunities in Diversity and Inclusion*, in BUILDING AND ENCOURAGING LAW FIRM DIVERSITY (Thomson Reuters/Aspatore 2016), at *5 (arguing that homogeneity “translates into a ‘herd mentality’ ”); Sandgrund, *supra* note 10, at 70 (attorneys and experts in a dialogue agree that “diversity of thought and experience helps inform, if not enhance, our decision-making and analysis”).

42 The American Bar Association recognizes the value of diversity, and one of its four key goals is to enhance diversity in the legal profession. See AM. BAR ASS’N MISSION, available at https://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Mar. 28, 2018). In 2010, the ABA’s Presidential Initiative on Diversity reported that “[i]t makes good business sense to hire lawyers who reflect the diversity of citizens, clients, and customers Indeed, corporate clients increasingly require lawyer diversity and will take their business elsewhere if it is not provided.” ABA PRESIDENTIAL INITIATIVE COMMISSION ON DIVERSITY, *Diversity in the Legal Profession: The Next Steps* 9 (2010).

43 Some of the movement to diversify law firms comes from clients. Rhode, *supra* note 24, at 1041; Melinda S. Gentile & Monique S. Cardenas, *The Diversity Dividend: Diversity Does Pay* (Spring 2017), available at https://www.pecklaw.com/wp-content/uploads/2017/10/Melinda_S_Gentile_DBR_Article.pdf (last visited Mar. 28, 2018) (explaining that corporations’ legal departments are increasingly asking outside counsel about the diversity of their firms’ lawyers, with some large corporations even providing incentive programs and paying a bonus to law firms with greater diversity).