

Some Thoughts on What Makes Anti-Harassment Training Effective

by Jed Marcus

Last July, Judge Glenn A. Grant, acting administrative director of the courts, issued Directive #14-19 under the direction of Chief Justice Stuart Rabner and the New Jersey Supreme Court, requiring justices of the court and judges of the Appellate Division, Superior Court, and Tax Court to attend a mandatory full-day educational conference.¹ He candidly acknowledged that our judiciary needs a better “understanding of the complexities and nuances associated with sexual assault, sex offenses, and domestic violence matters” as well as “the impact of implicit bias on decision-making,” and that judges also must be provided with skills allowing them “to recognize and respond to their preconceptions.”²

The directive was not issued in a vacuum. It followed a spate of well-reported incidents where judges made wildly inappropriate comments to sexual assault victims. In one case, a judge asked a woman if she tried to block her “body parts” and close her legs during a sexual assault.³ In another, a 16-year-old accused of raping a 12-year-old escaped trial as an adult because the judge believed the alleged crime was “not... especially heinous or cruel,” and that “[t]he victim did not suffer any physical or emotional injuries as a result [of the alleged rape], other than the ramifications of losing her virginity, which the court does not find to be especially serious harm[.]”⁴ In another highly-publicized case, a 16-year-old rapist who sent a video of the sexual assault at a house party to his friends with the caption, “When your first time having sex was rape,” got leniency from the judge during sentencing because he came from a “good family” and attended “an excellent school.”⁵

Given these cringeworthy episodes (and others like them), I was pleased to read the directive. When I was asked to write an article for the *Quarterly* on harassment training for the state judiciary, I readily accepted, expecting it to be an easy exercise. After all, I, like many of my colleagues in the labor and employment bar, have spent

several decades working with employers on creating anti-harassment and anti-discrimination policies and training programs for their employees. We know, or at least we think we know, that a compliant program, like the one mandated under California law, includes the following components of training: (1) the illegality of sexual harassment; (2) the definition of sexual harassment under applicable state and federal law; (3) a description of sexual harassment, utilizing examples; (4) the internal complaint procedure; and (5) the legal remedies and complaint process available through the state.⁶

But, like the problem of discrimination and harassment itself, thinking about, and putting together, an effective training program is a far more complicated matter because, as the Equal Employment Opportunity Commission’s Select Task Force On The Study Of Harassment In The Workplace (Select Task Force) concluded in 2016, there are serious questions as to whether our currently-constructed training programs are effective in stopping abuse.⁷ That is to say, the composition and narrative of any program can produce mixed results. For example, there is no question, and studies have shown, that training leads to a better understanding of what constitutes sexual harassment and what employees should and should not do.⁸ At the same time, other studies show that training does not seem to have a significant impact on changing employees’ attitudes, and sometimes can have the opposite effect. One study found that male participants exhibited *more* unconscious gender bias after training.⁹ This was particularly true among men who were more likely to embrace traditional gender norms.¹⁰ The Select Task Force reported that “[m]en who completed the training were more likely to say that sexual behavior at work was wrong, but they were also more likely to believe that both parties contribute to inappropriate sexual behavior.”¹¹ The Select Task Force report also noted that “[o]ther experiments indicate that participants who

come into the training with more of a tendency to harass or with gender role conflicts (based on questionnaires completed prior to the training) are more likely to have a negative reaction to the training.”¹²

The meaning of these studies and experiments for employers, including the judiciary, is that training is very good at informing employees about conduct the employer considers unacceptable versus conduct that is unacceptable and unwelcomed by women. However, they should not expect training to change most people’s attitudes and biases.¹³ The Select Task Force found that the better programs were those that focused on “compliance training,” “workplace civility,” and “bystander training.”¹⁴ Of course, at least at a superficial level, so long as informed employees refrain from violating the law or employer policies, maybe it doesn’t matter whether any individual employee harbors unspoken biases. As Select Task Force member Jonathan Segal observed, “[compliance training] is not training to change your mind. It’s training to keep your job.”¹⁵

The available data, then, tells us that some things will work better than others. First, an effective workplace training program is one that emphasizes the specific rules to be followed, along with threats of punishment for those who violate those rules. One study has shown that the threat of punishment increases support for an employer’s misconduct policy, whereas casting training as an issue of morality makes it less likely that women employees who are the subject of discrimination or harassment would report that misconduct.¹⁶

Emphasizing rules and punishment would seem to be particularly effective for lawyers and judges since, as a group, they are extremely rule-oriented and are already guided by rules of conduct providing for punishment if violated. For judges, there are at least four rules of New Jersey’s Code of Judicial Conduct that come immediately to mind.

Rule 1.1 states that “[a] judge shall participate in establishing, maintaining and enforcing, and shall personally observe, high standards of conduct so that the integrity, impartiality and independence of the judiciary is preserved. This Code shall be construed and applied to further these objectives.”¹⁷

- Rule 1.2 provides that “[a] judge shall respect and comply with the law.”¹⁸
- Rule 2.1 requires that “[a] judge shall act at all times in a manner that promotes public confidence

in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”¹⁹

- Rule 3.6 prohibits a judge from discriminating “because of race, creed, color, sex, gender identity or expression, religion/religious practices or observances, national origin/nationality, ancestry, language, ethnicity, disability or perceived disability, atypical hereditary cellular or blood trait, genetic information, status as a veteran or disabled veteran of, or liability for service in, the Armed Forces of the United States, age, affectional or sexual orientation, marital status, civil union status, domestic partnership status, socioeconomic status or political affiliation.”²⁰

The Code of Judicial Conduct clearly encompasses prohibitions against discrimination and harassment toward court staff, attorneys and members of the public who stand before the bar²¹ and provides for punishment in the event they are violated.²² In other words, the code, as along with the judiciary’s policies and procedures, sets a tone of accountability. At the same time, the Select Task Force points out that “accountability” should not be equated with “zero tolerance, [which] is misleading and potentially counterproductive.”²³ It does not recommend a “zero tolerance” policy because it may actually “contribute to employee under-reporting of harassment, particularly where they do not want a colleague or co-worker to lose their job over relatively minor harassing behavior – they simply want the harassment to stop.”²⁴ Instead, “[a]ccountability requires that discipline for harassment be proportionate to the offensiveness of the conduct.”²⁵

Second, training should be conducted on a regular basis. Regular, consistent training reinforces key management objectives. Importantly, it also communicates management’s commitment to a workplace free of discrimination and harassment. If management is not seen as making the eradication of harassment and discrimination a high priority, employees will notice, and no amount of training will work.

Third, a one-size-fits-all approach will not work. Effective compliance training for the judiciary must be tailored to the specific realities of the judicial workplace. The Select Task Force found that “[u]sing examples and scenarios that realistically involve situations from the specific worksite, organization, and/or industry makes the compliance training work much better than if the

examples are foreign to the workforce.”²⁶ Typical training programs address the power dynamics and relationships between supervisor and employee and between coworkers and, as such, can be useful when discussing workplace civility and compliance between and among judges and court staff. These programs are not useful and have no applicability to the personal dynamics judges face in the courtroom when dealing with attorneys and members of the public who come before them as plaintiffs, defendants, witnesses and jurors. Here, we must understand that judges face unique challenges dealing with difficult and contentious issues, advocates and parties. Accordingly, the training we provide them must be contextualized to the environment in which they work.

Fourth, the best training is conducted by trainers who are qualified and engaging and are prepared to answer sometimes difficult questions from participants. Many employers use online or video-based training because of cost or scheduling efficiencies. While they are certainly lawful, they are not very effective because they are not contextualized to the specific work environment, cannot provide detailed information about the individual employer’s policies or complaint procedures, and cannot answer participants’ questions. My own experience is that live training engages the participants and makes it more likely that they will better understand their compliance obligations.

Speaking of live training, does it really matter whether the policy trainer is male or female? Not really,

according to one study, which found that using male trainers did not increase male subjects’ unconscious bias, but, on the contrary, that these subjects were in fact more likely to rate women as likable.²⁷ The author of the study is not sure why this is, surmising, however, that presenting a male voice of authority promoting anti-harassment and discrimination policies to males who are committed to traditional gender roles may lead to a more positive reception.²⁸ This returns us to the third point I made above, which is that decisions about the design of an employer’s training program have to be based on the specifics and context of the particular workplace.

Developing a robust policy against harassment and discrimination in the workplace requires a multi-prong effort. Yes, that effort includes an effective training protocol, but it also includes management buy-in, a written policy identifying the rules, an effective complaint procedure, competent investigations, and appropriate punishment for those employees who violate the rules. All this coalesces when the policy is adequately communicated and that’s where training comes in. It is a key component of any harassment prevention effort. ■

Jed Marcus, an arbitrator and mediator, is a member of the employment litigation and employee benefits panel of the American Arbitration Association and a labor and employment lawyer with Bressler, Amery & Ross, P.C. in Florham Park.

Endnotes

1. Directive #14-19 (July 17, 2019), available at njcourts.gov/notices/2019/n190717e.pdf.
2. *Id.*
3. See *In re John R. Russo, Jr.*, Supreme Court Docket No. 082636 (Jan. 28, 2020) (Advisory Committee on Judicial Conduct recommending that judge be removed because, among other things, he made disparaging sexual remarks to an applicant for a domestic violence TRO).
4. See Sulaiman Abdur-Rahman Judge Opposes Criminal Prosecution In Child Rape Case, NJ Senators Want Her Removed From Bench, *Trentonian* (July 6, 2019), available at https://www.trentonian.com/news/judge-opposes-criminal-prosecution-in-child-rape-case-nj-senators/article_3d8354e2-a02c-11e9-93d3-efddffcc4e65.html.
5. See Anna Orso, N.J. judge who gave leniency to teen from a ‘good family’ in sexual assault case is off the bench, *Philadelphia Inquirer* (July 17, 2019), available at [inquirer.com/news/new-jersey-judge-james-troiano-off-bench-superior-court-sexual-assault-case-good-family-20190717.html](https://www.inquirer.com/news/new-jersey-judge-james-troiano-off-bench-superior-court-sexual-assault-case-good-family-20190717.html).
6. See Cal. Gov’t Code § 12950.1(a).
7. Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, U.S. Equal Employment Opportunity Commission (June 2016), available at [eeoc.gov/eeoc/task_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf).

8. Heather Antecol & Deborah Cobb-Clark, Does Sexual Harassment Training Change Attitudes? A View from the Federal Level, 84 *SOC. SCI. Q.* 826 (2003).
9. Justine E. Tinkler, Yan Li & Stefanie Mollborn, Can Legal Interventions Change Beliefs? The Effect of Exposure to Sexual Harassment Policy on Men's Gender Beliefs, 70 *SOC. SCI. Q.* 480-94 (2007).
10. Justine E. Tinkler, How Do Sexual Harassment Policies Shape Gender Belief? An Exploration of the Moderating Effects of Norm Adherence and Gender, 42 *Soc. Science Research*, 1269-83 (2013).
11. Select Task Force Report, *supra* n.7, p. 47.
12. *Id.*
13. *Id.* at 48-49.
14. *Id.* at 49.
15. *Id.* at 50 (alteration supplied).
16. Justine E. Tinkler, Jody Clay-Warner & Malissa Alinor, Communicating About Affirmative Consent: How the Threat of Punishment Affects Policy Support and Gender Stereotypes, 33 *J. Interpers. Violence* 3344-3366 (November 2018).
17. Code of Judicial Conduct, Rule 1.1.
18. *Id.*, Rule 1.2.
19. *Id.*, Rule 2.1.
20. *Id.*, Rule 3.6.
21. *See* Rule 3.6., Comments 1-4.
22. *See In re Seaman*, 133 N.J. 67 (1993) (Superior Court judge suspended for sexually harassing law clerk); *Matter of Brenner*, 147 N.J. 314 (1997) (municipal court judge disciplined for hugging and kissing subordinate employee); *In re Subryan*, 187 N.J. 139 (2006) (Superior Court judge suspended for improper conduct toward law clerk and inappropriate comments). *See also In re John R. Russo, Jr.*, *supra* note 3.
23. Select Task Force Report, *supra* n.7, p. 40.
24. *Id.*
25. *Id.*
26. *Id.*, p. 50.
27. Justine Tinkler, Skylar Gremillion & Kira Arthurs, Perceptions of Legitimacy: The Sex of the Legal Messenger and Reactions to Sexual Harassment Training, 40 *Law & Soc. Inquiry* 152, 169 (Winter 2015).
28. *Cf. id.* (concluding that "men may have an important role in promoting equality since they are less likely to elicit backlash and resistance").