

The Federal Lawyer In Cyberia

MICHAEL J. TONSING

Looking Backward and Forward, Personal (and Local) Reflections on the Evolution of Workplace Training

Given that this month's issue is focused on employment law, it seems appropriate to address the application of technology to preventive employment law training. In doing so, I will stick close to home. (As many faithful readers know, I live in Oakland, Calif., and my law office is in San Francisco.)

Several years ago, I was associated with the country's largest law firm, Littler Mendelson in San Francisco, which was—and continues to be—exclusively engaged in the representation of management in labor and employment law. In 1998, I induced that firm's most

visionary leader, Garry Mathiason, whom I humbly acknowledge as one of my mentors, to write a cover story for an issue of *The Federal Lawyer*. That rather long article was, not surprisingly, visionary too. It was entitled "The Emerging Law of Training" and it was published in TFL in May 1998. The central thesis of his article was that "workplace training and the issues surrounding it are emerging as a coherent body of information, a 'law of training' that can be described, analyzed, and discussed."

In his article, Mathiason wrote the following: "It may be hyperbole to describe the wave of training requirements hitting our nation's employers as a 'tsunami.' Nevertheless, it is undeniably true that government imposed workplace training requirements are rapidly proliferating. Today, training failures can threaten the profitability, and perhaps the survival, of any American business, large or small. Federal lawyers must understand how the new 'law of training' is altering the terrain of the American workplace." Even then, Mathiason knew what doctors and dentists knew.

I joke with my dentist every Halloween about the bowls of candy dentists should have on their receptionist's counter. After all, the more cavities their patients get, the better it is for their business, right? Well, my dentist does not have a candy bowl on the counter; he has tiny toothpaste tubes, instead. Dentists knew in 1998, and know now, that their most important mission is prevention, not rescue.

Too many lawyers at that time seemed to believe that—though they certainly weren't there to foment litigation—they had no role to play in preventing their business clients from becoming the targets of very expensive lawsuits. In those days, sexual harassment claims were rampant, as were race and disability discrimination cases. Most lawyers weren't "fostering cavi-

ties," but most weren't practicing preventive law either. They didn't have toothpaste samples on the counter, so to speak.

Mathiason saw things differently. He believed that an employer's lawyer had a duty to help the client—via employment law training—consciously (and conscientiously) avoid workplace practices that would invite lawsuits. But, as a practical man, he also believed that any lawsuits that *were* filed, despite employers' best efforts, would be lessened in their potential if the firm's clients could show that they had acted in good faith to train their first-line supervisors properly.

Mathiason soon realized that old-fashioned "talking head training" was not a sufficient answer. He told me that he had trained a room full of business executives for a day or two on how to avoid sexual harassment claims in the workplace. But, to his chagrin, during the question-and-answer period that followed the intensive training, these bright executives demonstrated that they simply had not grasped the major points that Mathiason thought he had made. He drove home very frustrated. Then, walking into his living room, Garry had an epiphany when he greeted his two daughters. The girls were on the floor, giggling and playing a game that called for them to roll dice in order to advance a pawn around a game board. (Ah, yes, this was in that golden age before electronic games became ubiquitous.) What if he could make training into a game, Garry thought.

He contacted the major game board producer of the time, Hasbro Corporation, the makers of "Chutes and Ladders" (the game his daughters had been playing). With Hasbro's help, Garry designed a Chutes-and-Ladders-like game board. He called his new game "Winning through Prevention," or WtP, as it was soon dubbed.

Along with a few other Littler attorneys, I took WtP on the road to demonstrate it to groups of human resources personnel and to general counsels of clients. The game was designed to be used in group training sessions involving about 60 to 200 participants. That worked perfectly for our road show sessions, where we were drawing groups of about that size.

The WtP teaching strategy called for the game to be fun and realistic and to involve the players. And, it invariably achieved that goal. Trainees were divided into teams of six or so. Each trainee team had its own table in the training room. Trainers (like me) would use a PowerPoint projector to flash hypothetical ques-



tions onto a screen. Teams of learners were then asked to commit to one of several possible answers. (Was the correct answer A or C? This commitment to an answer was pedagogically crucial, because the “buy-in” of participants made them avid learners.) Most of the hypothetical questions were designed to create a dilemma, because at least two of the possible answers flashed up on the screen thereafter were plausible. This inevitably resulted in different tables becoming committed to different “right” answers. Participants sometimes shouted at one another across the room. Mazel tov! The trainer became—almost literally—a referee, helping these now partisan trainees grasp nuances that hadn’t mattered to them before. We who had produced WtP believed that the best learning took place when buy-in occurred and the answer was wrong. At that point, receptivity to learning grew exponentially. (The 800-page trainer’s manual spent more time explaining why some answers were wrong than why others were right.)

One of my favorite road show moments occurred when the director of a major corporation’s Human Resources Department told me that WtP was a perfect solution for the corporation’s employees, given that its first-line supervisors were—on the average—about 26 years old. Bored to tears with training by “talking heads,” these young supervisors were actually calling her to see when they could schedule their mandatory WtP training session. She rolled her eyes and told me that now, the supervisors were miffed if they had to wait for a training session. This response, the director said, was absolutely unprecedented.

What was even more impressive was that, in one year, the number of sexual harassment complaints filed at her company had dropped from 37 to six. This had to be more than chance. Garry Mathiason was on to something.

The May 1998 cover of *The Federal Lawyer* that featured Garry’s prescient article portrayed a trainer (me—now it can be told) using WtP to train a room full of people. Since then, I have moved on, and, alas, I have never again graced TFL’s cover. Meanwhile, the spin-off company formed to market WtP, Employment Law Training Inc., has grown and prospered. The early “WtP technology”—a PowerPoint projector brought into a training room and powered with cleverly designed hypotheticals and pedagogically shrewd answers—eventually had to share the training room stage, and the cubicle, with later advances that built on Garry Mathiason’s original concept.

And soon, computerized training, the next generation, began to emulate—as best it could—the shared experience that a room full of boisterous game participants had shared so often to such advantage. Thanks to two girls and their dad—and to “Chutes and Ladders”—workplace training by talking heads has virtually died; no pun intended. (The last time I looked, Amazon.com had two original copies of WtP for sale; eBay.com had none.) Employment Law Training Inc. (www.elt.com) now provides more sophisticated

training solutions for more than 2,000 clients and has trained more than five million employees using 21st-century delivery systems.

We’ve come a long way.

I also more than rubbed elbows with a Northern California company that developed employment law training of its own but followed a somewhat different path. Back in the early 1990s, an innovative lawyer named Ralph Yanello shared the same vision that drove Garry Mathiason: the idea that many well-meaning employers were ending up in court primarily because they did not know how to navigate their way through the complex web of state and federal employment laws.

Ralph began to research a new concept, forming a small cadre of California lawyers who were also gifted writers and creating a company known at that time as LawLine. Together, Ralph and his colleagues produced an on-demand automated employment law library from scratch. Their goal was to be able to instantly provide tailored written responses to clients’ routine and predictable questions, in the form of well-written, clear, and practical answers that deftly integrated the overlapping—and sometimes conflicting—requirements of California’s laws with federal laws.

LawLine subscribers were asked to provide a profile that indicated, among other things, whether they operated only within California or had operations in other states as well, how many employees they had, and what occupational groupings those employees formed.

Ralph and the technicians at LawLine also developed proprietary software that enabled them to do something that no one else did then and that no one else does today: to instantly provide tailored answers to thousands of questions based on a company’s profile.

It was a daunting task. As Ralph tells it, LawLine invested more than 40,000 hours as it built its library and its application. The company then launched as an automated fax-back service for employers. But Ralph soon realized that the fledgling Internet provided a far better and more powerful platform than fax machines did.

Changing his company’s name to LawRoom, and with only 400 subscribing companies at the time, Yanello’s enterprise made its leap to the Internet (www.lawroom.com). It has, since then, never looked back. By 2010, LawRoom was servicing more than 50,000 member companies in all 50 states, not only providing instantly tailored answers to 6,000-plus questions from human resources professionals but also training employees of more than 2,300 companies on anti-harassment and other topics related to employment law.

In carrying out its mission, LawRoom does not purport to replace lawyers nor does it claim to offer individualized legal advice. LawRoom simply seeks to provide accurate, clear, and concise answers so that human resources professionals can make more informed decisions

CYBERIA *continued on page 16*

and, through LawRoom's training tools, everyone in the workplace can grasp what they need to know in order to comply with state and federal laws.

I was privileged to work directly with Ralph and LawRoom as the company began developing its first training modules in a Bay Area suburban location. Ralph—who loves what he does—has always remained a “hands on” trainer. With his carefully assembled team of lawyer/writers he crafted short interactive courses to help employees recognize and avoid inappropriate conduct that could lead to problems in the workplace. In a number of instances, separate modules were created; one would address the needs of line employees and another would address the concerns of managers and supervisors. These courses were illustrated with hypothetical situations that were designed to emulate those that are likely to arise in the typical workplace. The modules also could be easily modified to include company policies and company lingo (using the appropriate title for a first-line supervisor, for example) and also to incorporate company logos, thereby giving the modules a look and feel that made them even more comfortable for the users. Thus, the training was not only on point but also quite compelling. Those characteristics remain trademarks of Ralph's company's products today. Not only are the many training modules now in the LawRoom repertoire convincingly accurate, but they are also absorbingly interactive.

And, the 6,000 tailored answers are educational and thorough, but never boring. Though they are detailed enough to satisfy any lawyer, they are written in plain English. The answers don't drone on. Even though they are heavily documented, they are neither legal briefs nor treatises. The answers explain the law, but they do not give legal advice.

In my opinion, straightforward answers can stave off the need to call outside counsel in many instances. However, when the complexity of an issue demands the individualized response of a lawyer, that lawyer will be able to build upon the response offered by LawRoom—and the lawyer not only will not need to reject the response but also will be pleased with the quality of the resource that his or her clients had at their disposal.

In fact, I myself have recommended to business clients that they subscribe to LawRoom and they—and I—have been pleased with the results. To me, it is like encouraging a client's human resources director to get an advanced degree in the specialty.

And we are still evolving.

Today, many of our nation's larger corporations employ a chief learning officer, or CLO. That is a title that befits an individual whose role is greater than that of a trainer; a CLO is one who looks at the training of employees on a more strategic level. A decade ago, there were few CLOs, today they are not uncommon. In fact, there is now a magazine entitled *Chief Learning Officer* (www.clomedia.com), which is quite good and

has a well-deserved following.

Clearly, corporate training—perhaps both because of and in spite of the current recession—is in the midst of a major transformation. And what is now dubbed “e-learning” (we used to call it online training) is taking on characteristics that I couldn't even imagine when I was working with Garry Mathiason and Ralph Yanello. Certainly, both Employment Law Training Inc. and LawRoom have evolved with the times and have remained highly relevant. However, e-learning, as financially attractive and efficient as it has become, is not necessarily the only answer to a corporation's training needs even in times when companies are looking for ways to cut costs. Companies, especially larger ones, are rediscovering that they need to foster collaboration and that they need to leverage their e-learning resources. As we discovered almost two decades ago with WtP, the best learning does not take place in silos. (Littler Mendelson has, in fact, grown beyond its spin-off, Employment Law Training Inc., and now provides a wide range of training options through its Littler Learning Group. See www.littler.com/practice-areas/training-compliance-ethics-leadership.)

Emerging demands for efficiency and accountability have created the need for companies like Bersin & Associates, a company based in Oakland, Calif., that specializes in what it calls “enterprise learning and talent management.” Founded by Josh Bersin, who serves as its chief executive officer and president, Bersin & Associates provides targeted services to human resources decision-makers seeking product and market data, insight on trends, and expert advice. Josh Bersin has been a columnist for *Chief Learning Officer* magazine for the last several years and is a frequent contributor to *BusinessWeek*, the *Harvard Business Review*, and the *Wall Street Journal*. The company's website (www.bersin.com.) provides several downloadable—and highly recommended—webinars on topics that will be of substantial interest to human resources directors and their employment lawyers.

Conclusion

Today, all employment lawyers recognize that workplace training and education in employment law are necessary components in virtually every American business entity. The range of choices is increasingly diverse, having been broadened and deepened by pioneers in the employment law training enterprise. And, the evolution continues. No employment lawyer can afford to ignore this new reality. **TFL**

Michael J. Tonsing practices law in San Francisco. He is a member of the FBA editorial board and has served on the Executive Committee of the Law Practice Management and Technology Section of the State Bar of California. He also mentors less-experienced litigators by serving as a “second chair” to their trials (www.Your-Second-Chair.com). He can be reached at mtonsing@lawyer.com.