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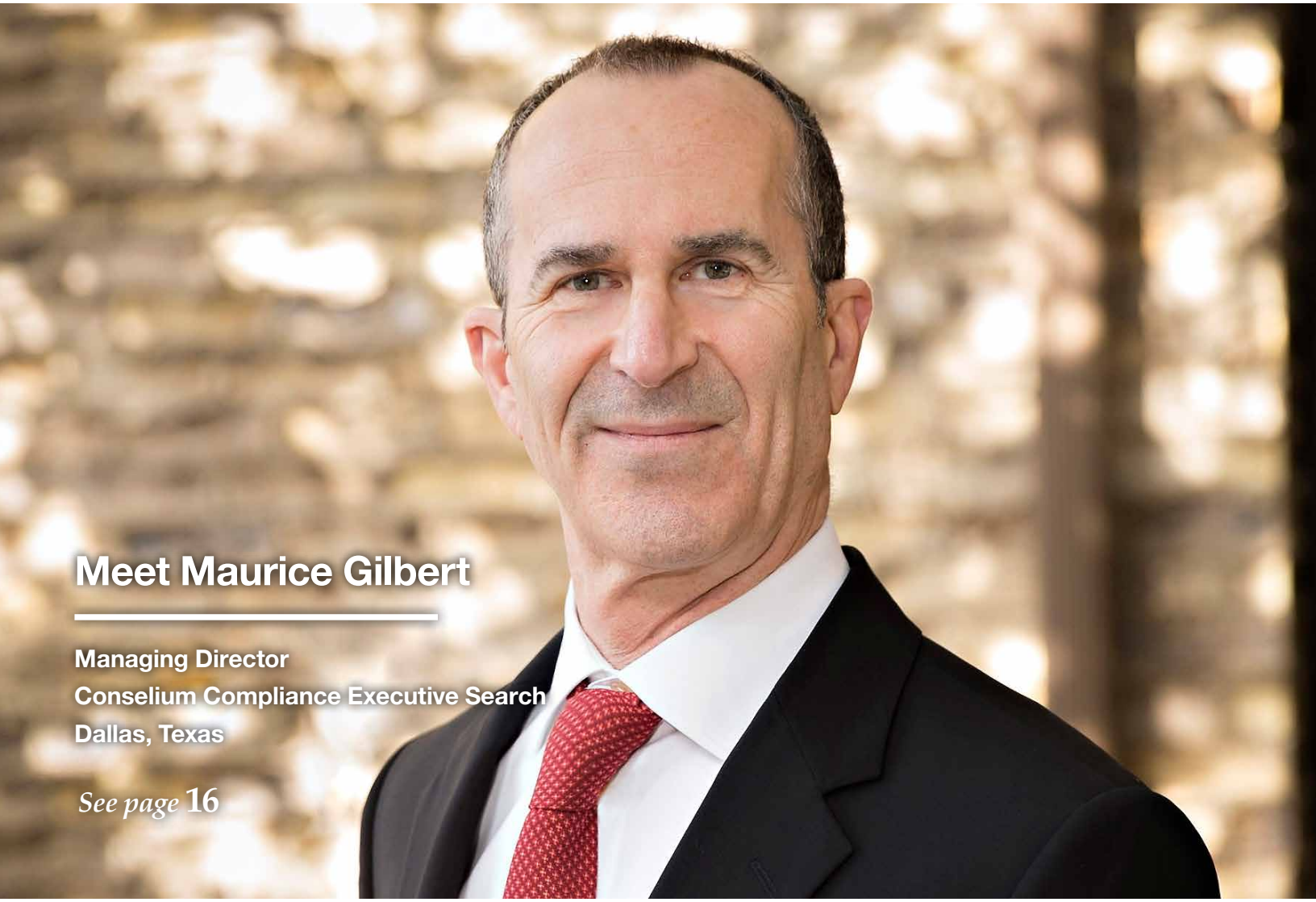

Meet Maurice Gilbert

Managing Director
Conselium Compliance Executive Search
Dallas, Texas

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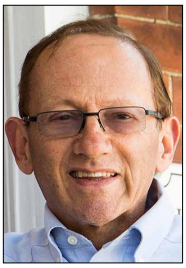
by Joe Murphy, CCEP, CCEP-I

"Let's do interactive, effective anti-harassment training!" Or maybe not?

The EEOC recently posted a draft enforcement guidance for comment; among its features was a discussion of "promising practices," including "interactive" training. I have also seen criticism of harassment training as being not effective, engaging, etc.



Murphy

We all would like training to be effective, memorable, or at least not boring. Why not use techniques that will really reach people? Isn't that what everyone wants–preventive efforts that actually cause people not to commit violations?

But there is another story behind this story. When lawyers say to be careful in our training, they are not simply making things up. Compliance efforts, including innovative training methods, are not necessarily encouraged or respected in our legal system, and innovative efforts in any compliance training, including harassment, can come with unfortunate legal risks.

The government should be straightforward about this; it should be a clearly established principle in our legal system that compliance efforts are to be encouraged and protected. Courts should not treat compliance efforts as mere fodder to be used against companies in litigation. It should be a core legal principle that companies engaged in compliance activities are acting in the public interest and that the fruits of these activities are not to be used against companies, absent exceptional circumstances. Nor should government agencies be allowed to undercut compliance efforts to obtain enforcement shortcuts.

Yet this abuse is part of our legal system. One of the most notable examples occurred in a discrimination case (*Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259 (N.D. Cal. 1992)). A company had conducted anti-discrimination training that included employees reciting what discriminatory comments they had heard in the workplace. During the class someone took notes. Certainly such discussion and note-taking would encourage engagement and learning, but that mattered not to the federal judge hearing the case. She not only allowed plaintiffs complete access to the notes, but she cited what was in the notes as a basis for imposing *punitive damages* on the company.

The lesson? In that same case the judge noted, without comment, that the company's lawyers shut down the training. It never seemed to occur to her how bad a message this was. So what did the Legal community learn? There is a saying: "Fool me once, shame on you. Fool me twice, shame on me." So the (terrible but careful) advice has been: Don't allow note taking and be conservative in your training. If the EEOC, courts, legislatures, and the public want something better in training, then they must face up to the truth. They cannot have it both ways. Either we continue to sacrifice effective compliance work to litigation or we send a consistent message that compliance counts and that effective training will be encouraged, not abused.✳

Joe Murphy *(joemurphyccep@gmail.com) is a Senior Advisor at Compliance Strategists, SCCE's Director of Public Policy, and Editor-in-Chief of* Compliance & Ethics Professional *magazine.*