

Responses of Miranda Du
Nominee to be United States District Judge for the District of Nevada
to the Written Questions of Senator Chuck Grassley

1. In your article published May 17, 2004 in the Northern Nevada Business Weekly titled “Seek Counsel at First Union Contact” you wrote the following:

“If your employees were trying to unionize, you would probably want to know about it. And, you most likely wouldn’t want to “accidentally” help them organize. Unfortunately, some unions may engage in certain tactics to try to get you to inadvertently recognize the union.”

If you are confirmed as a United States District Judge, would labor unions or others be concerned about your impartiality?

Response: No. The target audience for the article referenced in this question was businesses who may encounter union organization. The article was written from an advocate’s perspective to offer general legal advice to businesses about training and educating their employees on union organization in light of a decision from the Seventh Circuit Court of Appeals. I believe that in our judicial system, an advocate’s role is different than that of a judge. I believe that an advocate’s role is to zealously represent her clients while a judge’s role is to be zealous in applying the laws to the facts of the case before the judge in a fair and impartial manner.

2. In another article profiling members of your law firm, *Legal Eagles*. Reno Magazine, Sept./Oct. 2006, you were identified as working for a firm that represents large businesses – casinos, grocery chains, and manufacturing companies – that have been sued for discrimination, including age, race, gender, national origin, and disabilities. You were quoted as saying, “Our approach is you have to be aggressive; otherwise you’re sending the message to employees that you’re an easy target to civil claims.”

- a. If confirmed, again I have concerns about the appearance of impartiality in these types of cases.

Response: As stated above, I believe the role of an advocate is different than that of a judge. I believe that as an advocate, I have a duty to represent my clients zealously. In contrast, I believe a judge must be zealous in applying the laws and must do so fairly and impartially without regards to the status of the parties who appear before the court. As an advocate, I have tremendous respect for judges who are fair and impartial. I would aspire to be the kind of judge that I would respect as an advocate.

- b. Can you please explain how you would make the transition from advocate to being a fair and neutral forum to decide and hear cases and controversies?

Response: An advocate's role is to present the best arguments for the client and to anticipate responses to arguments from the opposing party and address them accordingly. A judge's role is to consider arguments presented by all parties and to make a decision about the facts presented based on the applicable laws. I think I can make the transition from an advocate to a judge by being mindful of a judge's role to be fair, impartial and open-minded to the arguments of all parties appearing before the court. I would think of the kind of judge who I would want to appear before – one who would give all parties a fair chance to be heard -- and strive to be that judge.

c. Do you believe most companies are an easy target for frivolous claims?

Response: No. I have handled cases that I believe involve frivolous claims, but I have also handled cases where the claims asserted are not frivolous.

3. I would like to give you an opportunity to address your role in the case of *Woods v. Truckee Meadows Water Authority*, a 2007 case in the court to which you are now nominated.

a. Were you involved in that case, and if so, what was your role?

Response: I was the partner in charge of handling the case and supervising the work of an associate attorney.

b. As I understand the case, there came a point in the case where a decision was made to pursue a third-party complaint against the local union of the International Brotherhood of Electrical Workers. Who made that decision?

Response: The case was filed by our client's employee. The lawsuit asserted claims that were settled during the union grievance process where the Union, International Brotherhood of Electrical Workers, advocated on behalf of plaintiff. In response to the lawsuit, we filed a motion to dismiss plaintiff's claims. The District Court denied our motion, allowing the lawsuit to proceed against our client. At that point, after consultation with the client, we decided to file a third party complaint against the Union for indemnification and contribution. I was involved in making that decision.

c. My further understanding is that the Union's counsel advised in a letter to the Water Authority, that the claims had no basis in law and fact, and further advised that the court lacked subject matter jurisdiction. The letter went on to warn that it (the Union) would seek sanctions if the Water Authority did not withdraw its complaint. Is this accurate, and were you aware of this letter?

Response: The summary of the letter is accurate. The letter was addressed to me and I was aware of it. At that point in time, the District Court had denied our motion to

dismiss so the lawsuit was proceeding against our client. Because the Union had represented plaintiff during the union grievance process to resolve the claims that plaintiff sought to challenge in the lawsuit, we believed the Union was a necessary party to the lawsuit.

- d. After additional back and forth between the Union and the Water Authority's counsel, the Union filed its motion to dismiss and the Water Authority did not oppose the motion but agreed the court lacked subject matter jurisdiction. The District Court dismissed the action. Do you agree that dismissal of the action was appropriate?**

Response: The District Court dismissed the entire action for lack of subject matter jurisdiction, including both plaintiff's original lawsuit against our client and our client's third party complaint against the Union. I agree that dismissal of the action was appropriate and it was a remedy that our client had sought from the District Court although we did not raise the same issues that the Union raised in its motion to dismiss. In response to the Union's motion to dismiss, plaintiff did not oppose the motion but offered to stipulate to voluntary dismissal of the lawsuit. All parties involved filed a stipulation to dismiss and the District Court entered the order dismissing the entire action. The District Court did not rule on the Union's motion to dismiss our client's third party complaint.

- e. In addressing the sanctions issue, the court stated "Having reviewed the record and considered arguments of counsel at the hearing on this motion, the court finds that although TMWA's counsel acted recklessly ... it did not do so with the intention to harass the union or to proceed for an improper purpose." Accordingly, the court concluded sanctions were warranted against the Water Authority pursuant to 28 U.S.C. 1927. Again, to clarify, you were counsel for the TMWA, correct? At your hearing, you stated you do not believe that you were reckless in that case. Do you have any explanation for what the court described as a reckless action?**

Response: I was counsel of record for TMWA. Although I disagree with the Magistrate Judge's finding of recklessness, I think that having the benefit of hindsight, there were more prudent actions that could have been taken to defend plaintiff's lawsuit against our client after the Union raised the jurisdiction issue. But at that time, I believed we pursued the best course of action for our client. After the District Court denied our client's motion to dismiss, we had to defend the claims asserted against our client. Because plaintiff's claims were based on conduct that occurred during the union grievance process, we believed the Union was a necessary party. Our client was seeking indemnification and contribution from the Union in the event plaintiff succeeded in his claims against our client.

- f. The finding of reckless action was not a mere observation of the court, but a legal finding allowing awarding of sanctions pursuant to 28 U.S.C. 1927. If you were not reckless, under what authority did the judge state the sanctions were warranted?**

Response: The Magistrate Judge based her finding of reckless action on the fact that in response to the Union's motion to dismiss, our client agreed that the District Court should dismiss the lawsuit because of the jurisdictional defect raised by the Union. The Magistrate Judge found that by doing so, we implicitly admitted that the third party complaint that we brought against the Union was reckless. The Magistrate Judge also reasoned that "[a] more prudent course would have been to raise these very same issues with the plaintiff or to file a second motion to dismiss." While I agree that it would have been more prudent to pursue these other options, I disagree that not pursuing them was reckless.

- g. Is there anything further you would like to add with regard to this case?**

Response: As noted above, in hindsight, there were more prudent actions that could have been taken to defend the lawsuit against our client after the Union raised the jurisdiction issue. Specifically, we could have filed a second motion to dismiss with the District Court and waited for a decision before deciding how to proceed against the Union. We also could have approached plaintiff's counsel to ask him to stipulate to dismissal, and based on the fact that plaintiff did offer to dismiss the lawsuit in response to the Union's motion to dismiss, this approach probably would have yielded success. Although we ultimately resolved the sanctions issue with the Union and the District Court entered an order to strike the Union's motion for sanctions as moot, I have learned a great deal from this experience and it has helped me become a better lawyer and if confirmed, a better judge.

- 4. Given that you received a partial "Not Qualified" rating from the ABA's Standing Committee on the Federal Judiciary, I wanted to give you an opportunity to outline your qualifications and experience. I note from your questionnaire that you have no criminal law experience and you state you were "involved in" four jury trials. Would you please explain to the Committee why you are qualified to set as a United States District Judge?**

Response: I have been a litigator in federal court for the past seventeen years and I have appeared in federal court on a regular basis. I have represented both plaintiffs and defendants. I was the Chair of a major practice group at a prominent Nevada law firm for over seven years. I have significant litigation experience, including participating in four jury trials. In addition to the jury trials, I have handled a number of preliminary injunction hearings, which are essentially mini-bench trials. I have successfully handled a labor arbitration hearing. I have conducted oral argument before the Ninth Circuit Court of Appeals on three occasions. I have drafted a number of appellate briefs to both the Ninth

Circuit Court of Appeals and the Nevada Supreme Court. I have argued and drafted dozens of motions before the federal court. I have taken and defended over fifty depositions and interviews. In addition, I have supervised numerous litigation and arbitration matters in my role as corporate counsel for one of my clients. I think these experiences will help me be successful as a judge if confirmed.

5. **Based on your limited experience, are there any skills or experiences you don't have that you think are necessary for a federal judge, and how do you plan to make up for this lack of experience?**

Response: I realize that I lack criminal law experience. I believe that I can make up for my lack of experience by being especially studious and diligent in learning this area of the law. In the hope that I would be fortunate enough to be confirmed, I have started by observing a sentencing hearing and gathering general information on our district's criminal docket through conversations with some of our federal district court judges. I also have been monitoring our court's criminal docket for a criminal trial that I can observe. I believe I will have the opportunity to consult with fellow judges in the District of Nevada should I have general questions about the criminal docket. I plan to take full advantage of other available resources, including education programs offered by the Federal Judicial Center and other written publications. I also believe that the knowledge and skills that I have acquired through my civil litigation experience can be applied to criminal matters. For example, the rules of evidence are the same for criminal and civil trials. Deciding criminal cases requires the same reading, analytical and writing skills as in civil cases. I will make it my priority to become proficient in criminal law to ensure that parties who appear before the court have their matters be decided by a well informed judge.

6. **What is the most important attribute of a judge, and do you possess it?**

Response: I think there are many attributes that are important for a judge to possess, but the most important attribute is integrity. A judge who has integrity will command respect even where the judge rules against a party. I believe I possess the integrity necessary to be a good judge.

7. **Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

Response: I think a judge should be fair, impartial, open-minded, civil and humble. As an advocate, I respect judges who exhibit these elements of judicial temperament. They give litigants faith in our judicial process. I would aspire to meet the standard for what I believe to be the appropriate judicial temperament.

8. **In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

Response: Yes. I believe a district court judge's role is to apply binding precedents to the facts of each case before the court. I am committed to following precedents of the United States Supreme Court and the Ninth Circuit Court of Appeals even where I may personally disagree with such precedents.

9. **At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

Response: I think there are general principles that guide a district court judge in deciding cases of first impression and I would follow such principles. I would look to decisions issued by the United States Supreme Court and the Ninth Circuit Court of Appeals for analogous situations. If no such cases exist, I would expand my search to other federal court of appeals and district court cases for guidance. If the question involves interpretation of a statute, I would first review the express language of the statute and apply the plain meaning of the words used in the statute. If the statute is not clear, I would examine the legislative intent and reach a decision that is narrowed to the facts of the case presented.

10. **What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your own judgment of the merits, or your best judgment of the merits?**

Response: I would apply the United States Supreme Court decision or the decision of the Ninth Circuit Court of Appeals and not use my own judgment of the merits.

11. **Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?**

Response: I believe it is appropriate for a district court judge to find that a statute is unconstitutional only if the statute clearly violates the United States Constitution or if Congress has clearly exceeded its Constitutional authorities.

12. **As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?**

Response: I will do what I have always done -- work diligently and studiously. I plan to prioritize the cases assigned to me and work to ensure they are decided in a timely manner. For cases that have been pending the longest, I would determine whether trial should be scheduled, whether it would be appropriate to order the parties to participate in a settlement conference or whether pending motions need to be decided. I will also work diligently to review pending motions and decide them in a timely manner. I will also utilize Magistrate Judges to help decide pre-trial, non-dispositive motions and preside over settlement conferences as appropriate. I plan to utilize other tools available for judges to help move

cases to resolution, including getting updates through status conferences and setting firm deadlines.

13. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Yes. I believe that a judge should be involved in controlling the pace and conduct of litigation. If confirmed, I will hold attorneys accountable for moving their cases along. I will follow Rule 1 of the Federal Rules of Civil Procedure to ensure that parties “secure the just, speedy, and inexpensive determination of every action and proceeding.”

14. Please describe with particularity the process by which these questions were answered.

Response: I received the questions on the afternoon of October 11, 2011. I read through the questions and thought about the issues raised. I also reviewed the materials referenced in some of the questions. I prepared my responses over the course of a couple of days. After I discussed my responses with an official at the Department of Justice, I forwarded my responses to the Department of Justice for review and submission to the Senate Judiciary Committee.

15. Do these answers reflect your true and personal views?

Response: Yes.