Federal Judiciary Questions for the Record
Submitted June 20, 2018

Questions from Chairman Grassley: Jenny Yang

1. What is unique about the relationship between clerks and judges that creates such an asymmetrical power dynamic?

A number of factors create an asymmetrical power dynamic between law clerks and judges. First, judges and law clerks work in a highly personalized and interdependent employment relationship, with a one-on-one supervisory relationship. The job of serving as a law clerk is highly competitive, and a judge has sole discretion over hiring as well as future job and professional recommendations. The judge is the only arbiter of the quality of a clerk's work since within a chambers, there are not others in senior positions to evaluate a clerk's performance. This provides judges with significant power in the relationship from the outset.

Second, law clerks are typically just starting out in their careers and are only beginning to develop their professional reputation. Judges, by contrast, are among the most powerful public officials whose decisions have extraordinary impact on people's lives. Judges are highly experienced lawyers with broad legal networks. Judges serve as important mentors for their clerks and can play a significant role in helping clerks obtain future jobs that will shape their careers.

Finally, judges have significant power over law clerks due to the limited mobility of law clerks, while in contrast, a federal judge has a lifetime appointment and is highly unlikely to lose this position or retirement pay due to a complaint. Since law clerks work for a fixed term of often one to two years, there is a high cost to exit. There is a clear understanding that clerks have committed to serving out their full term to avoid a gap before the new law clerk begins. Since the hiring process for law clerks occurs far in advance, little opportunity exists to obtain a clerkship with a different judge should the relationship between judge and clerk prove unworkable.

2. In your testimony before the Committee, you emphasized the need for an independent task force to oversee the judiciary's sexual harassment internal complaint and investigative process. I agree that independent, external oversight of the judiciary is our congressional duty. We can and should conduct rigorous oversight of the judiciary. We fund the court system and structure them by statute. The public depends on us to ensure the judiciary uses American taxpayer dollars responsibly.

a. Congress can pass a law creating an Inspector General to investigate complaints of misconduct, sexual harassment, and retaliation in the judiciary. Do you support such legislation? If yes, can you explain why.

Since an Inspector General (IG) is typically charged with detecting waste, fraud and abuse and has a mandate that is much broader than investigating complaints of sexual harassment, it is my view that an IG would not be the best entity to lead investigations of sexual harassment and retaliation in the judiciary.

At the EEOC, for example, the Office of Inspector General is charged with ensuring integrity, efficiency, and accountability in the agency's programs. The office's mandate is to independently and objectively conduct and supervise audits, evaluations and investigations; prevent and detect fraud, waste, and abuse; and promote economy and efficiency in programs and operations. Because this mandate is much broader than addressing complaints of discrimination, an IG office may not have the specialized expertise on matters of harassment, and employees may not view complaints of harassment to be a high priority for an IG. Indeed, in many agencies, claims of discrimination, sexual harassment, and conditions of employment must be addressed by offices other than the IG.

In addition, IG offices generally have a formalized process, which includes the power to subpoena information and documents. This can create an intimidating environment for victims. The Judiciary's existing formal process for reporting has not been utilized to raise concerns of harassment, so the creation of another formal mechanism for reporting may not solve the problem.

The value in creating an outside task force, ombuds office, or independent entity is that it is charged with the specific mandate of responding to concerns of harassment, employment discrimination, and other conditions of employment. This office would have the independence, expertise, and time necessary to create conditions of trust where workers will come forward to report concerns.

b. Congress can also pass a whistleblower protection law. Do you support such legislation? If yes, can you explain why?

Federal anti-discrimination laws include anti-retaliation protections

for those who engage in protected activity. My view is that ensuring compliance with a robust understanding of existing anti-retaliation protections will aid in harassment prevention without the need for new Whistleblower legislation. Whistleblower laws play an important role in protecting employees who report misconduct particularly where it is not already covered by existing anti-discrimination laws such as gross mismanagement or waste of funds or a danger to public health or safety. In addition, whistleblower laws are often utilized to report broader problems that go beyond an individual's own workplace situation. To build a comprehensive anti-harassment program, it is important to have robust anti-retaliation protections that are tied to reports of discriminatory workplace practices, such as harassment. Where employee protections are clearly defined and understood, ideally all in one place, rather than spread across various statutes, this may foster greater awareness and confidence in the process.

3. You're a former law clerk and you've studied the link between power disparities and sexual harassment. Why is it so difficult for law clerks to report harassment? For example, what are the real repercussions of reporting, on a law clerk's relationship with their judge and on their future career?

As a result of the power dynamics explained in response to Question 1, it is especially difficult for a law clerk to speak out about judicial misconduct since this can have grave repercussions on a clerk's career. The Judiciary has a number of organizational risk factors identified in the EEOC Select Task Force on the Study of Harassment in the Workplace Co-Chairs' Report that are powerful predictors of harassment. These include: 1) significant power disparities; 2) employees new to the workforce; 3) isolated workplaces; and 4) workforces where men historically dominate leadership posts.

Since law clerks are just starting out in the law, they do not yet have many professional references or networks to support them. Judges serve as vital mentors for law clerks as they navigate their career. A negative reference from someone as powerful as a judge can derail a law clerk's career. This can mean denials of positions at highly regarded firms, government agencies, or non-profit organizations. In addition, a clerk may later practice in the same judicial district where he or she clerked necessitating an ongoing relationship with the judge. Having a negative relationship with the judge could not only jeopardize future job opportunities, but also could put a lawyer's reputation and clients at risk.

Since the judicial chambers is isolated, it can make it difficult to report concerns. Chambers may handle hiring directly, without formal HR structures overseeing the application, hiring or onboarding process. In addition, there is a longstanding expectation that clerks will maintain confidentiality about their judges, which may prevent clerks

from coming forward for fear of violating this expectation. Since the job is for a set term, and there is little mobility, often it may not be worth the risk of retaliation and the potential long term career impact to report judicial misconduct.

4. I understand the judiciary refers complaints to the local court's Chief Judge instead of elevating it. Many district and circuit courts are a close knit group, with decades-old relationships. And many judges rely on relationships with other judges to get majority opinions. How would these collegial, close-knit environments make it difficult to objectively investigate and evaluate harassment claims?

A system where judges provide oversight over themselves creates challenges to ensuring objective investigation and evaluation of harassment claims. The chief judge is a fellow judge who may understandably tend to give valued colleagues who he or she has known for decades the benefit of the doubt when evaluating whether a judge has engaged in harassing behavior. By contrast, a judge is unlikely to know law clerks well since the position turns over regularly, and there is not much opportunity for contact. In addition, employees will be discouraged from making complaints where the lack of independent oversight provides employees with a perception that a fair and impartial investigation will not be conducted. Finally, within the judicial system, there is a high cost to disrupting the relationships. Judges many rely on one another for majority opinions in appellate courts and are colleagues for decades who will work closely alongside one another during their lifetime appointments.

As discussed more fully in response to Senator Feinstein's Question 1, a system where the Judiciary is charged with policing itself undermines trust in the independence and fairness of the process. I recommend that the Judiciary provide its employees with the same anti-discrimination protections that the Judiciary enforces in all other workplaces. Although the Working Group did not address this in its report, the lack of adequate remedies as well as the absence of an independent review process serves as a substantial deterrent for employees to come forward to report discrimination. Currently, victims of harassment in the Judiciary cannot file suit or obtain meaningful remedies. Instead, they must utilize an internal complaint process that bars victims from recovery of compensatory and punitive damages, most attorney's fees (except as authorized by the Back Pay Act), and is unlikely to lead to disciplinary action. Unlike all other federal and private sector employees, judicial employees have no right to a jury trial, no right to appeal the trial court decision to a three-judge panel, and no right to ensure public sunshine on their complaints. I recommend the Judiciary hold itself to the same standards as other employers. This would include providing judicial employees with the right to a jury trial by filing suit in a federal district court outside of the circuit where they work with the full scope of remedies available under federal civil rights statutes, as well as the right to an appeal.

Questions for the Record of Senator Dianne Feinstein
Questions for Jenny Yang, Strategic Partner at Working Ideal
For Hearing Dated June 13, 2018

1. **In what ways can the Working Group's recommendations be improved to ensure judiciary employees are better protected from sexual harassment?**

To better protect employees from sexual harassment, the Judiciary should provide its employees with the same anti-discrimination protections that the Judiciary enforces in other workplaces under Title VII of the Civil Rights Act of 1964. Although the Working Group did not address this in its report, the lack of adequate remedies as well as the absence of an independent review process serve as a substantial deterrent for employees to come forward to report discrimination. Currently, victims of harassment in the Judiciary cannot file suit or obtain meaningful remedies. Instead, they must utilize an internal complaint process that bars victims from recovery of compensatory and punitive damages, most attorney's fees (except as authorized by the Back Pay Act), and is unlikely to lead to disciplinary action.

Although the chief judge or another designated judge will hold a hearing and issue a decision on the complaint, and another judicial officer may review that decision, employees of the Judiciary do not have access to a full Article III judicial process for employment discrimination complaints. Likewise, the second avenue for filing formal complaints, the Judicial Conduct and Disability Act, convenes a council of judges to consider complaints and does not provide a remedy to employees. A system where the Judiciary is policing itself undermines trust in the independence and fairness of the process. Unlike all other federal and private sector employees, judicial employees do not have a right to a jury trial, an appeal to a three-judge panel, or meaningful relief to make them whole for the discrimination suffered. Indeed, Congress passed the Congressional Accountability Act, which allows employees to sue for relief, if necessary. *See* 2 U.S.C. 1301 *et seq.* I recommend the Judiciary hold itself to the same standards as other employers. This would include providing judicial employees with the right to a jury trial by filing suit in a federal district court outside of the circuit where they work -- with the full scope of remedies available under federal civil rights statutes, as well as the right to an appeal.

In harassment cases, compensatory and punitive damages are an essential remedy. Under federal laws prohibiting discrimination, there is a strong presumption that individuals who prevail on claims of discrimination are entitled to full relief, including attorney's fees and costs, which places victims in the position they would have been absent the discriminatory conduct. Compensatory damages seek to make victims whole by compensating them for harm caused by the discrimination, such as costs associated with a job search or medical expenses, as well as for emotional harm suffered, such as mental anguish or loss of enjoyment of life. Punitive damages may be awarded to punish employers that have committed especially malicious or reckless acts of discrimination. In addition, victims of discrimination should be presumptively entitled to an award of attorney's fees and costs as is the case under federal civil rights laws governing private employers as well as the federal government. Often, the costs of litigation can exceed any potential recovery to an individual from that action, which can pose an insurmountable barrier to vindicating one's rights. By coming forward to challenge harassment and other forms of

discrimination, individuals can make a difference in a workplace that may benefit others in the future. Moreover, since law clerks are just starting out in their careers, they will rarely have the resources to pay for a lawyer, and it can be very difficult to find attorneys to represent individual victims of discrimination, particularly against a powerful judge.

The remedies provided by the Model Employment Dispute Resolution Plan (EDR) appear to be limited to retrospective relief to correct a past violation or prospective relief to ensure compliance. These remedies are insufficient to deter misconduct and compensate individuals for harm suffered. This is particularly true for law clerks who are typically employed for only one or two years. An investigation and resolution of a complaint can be time consuming and resource intensive. As a result, law clerks may not even be in a position to benefit from such relief, since they may no longer be employed by the Judiciary by the time a complaint is resolved.

In addition, the Working Group did not have a clear picture of the nature or frequency of harassment in the Judiciary. Although the Working Group made an effort to obtain feedback from current and former employees, senior leaders in the Judiciary solicited and handled the feedback. Thus, individuals may have been reluctant to share information. A formal assessment led by an external entity or expert team with credibility and experience talking to employees increases trust, because it permits employees to share experiences and perceptions much more confidentially. As explained in further detail below, an outside assessment can increase the rate and quality of participation in feedback.

2. **What measures should the judiciary adopt to increase the likelihood that employees will report harassment and misconduct?**

In addition to providing an Article III judicial forum with meaningful remedies such as compensatory and punitive damages as discussed above, the Judiciary should adopt informal avenues to raise concerns – mechanisms with clear structures, resources and support. The Working Group recommended improvements to the two procedures for making formal complaints as well as the creation of an informal process, although it did not provide details on the structure or procedures for the new offices proposed. To be effective, informal reporting mechanisms must have clear standards of practice understood by employees.

As discussed in my testimony, to complement a robust informal complaint options through the human resources function, I recommend establishing an ombuds office as a separate mechanism for employees to raise concerns. Many federal agencies have successfully used ombuds offices to foster early resolutions. Three core principles -- independence, confidentiality, and impartiality guide the ombuds office, which helps to identify potential solutions. Yet, the process does not constitute a formal complaint that puts the employer on notice or triggers an investigation that will likely notify the harasser of the nature of the allegations. This enables the employee to drive the process. To provide transparency, the ombuds office should provide regular reporting of the nature of complaints while maintaining confidentiality. Additionally, as discussed further in response to Question 3, an external advisory board would provide a highly effective model to encourage reporting of harassment and misconduct.

3. **Under the judiciary's existing procedures, complaints filed by employees for sexual harassment and misconduct are referred to the chief judge of each circuit or district for investigation.**

    a. **In your view, does referring complaints to the chief judge discourage employees from reporting sexual harassment and misconduct?**

A policy of referring all complaints to the individual in the most senior role in the management chain of command can discourage reporting and is not consistent with best practices. First, as highlighted by the EEOC Select Task Force on the Study of Harassment in the Workplace Co-Chairs' Report, it is important to provide an array of different channels to report workplace harassment and discrimination – this could include to one's own manager but also other channels such as human resources offices, an ombuds office, an external hotline or web-based reporting services. Since it is not possible to know in advance who might be the subject of a complaint, any policy that does not provide multiple reporting options risks requiring an individual to report to the very person who is engaged in the harassment. Providing multiple channels, including individuals at different levels in the workplace and with different roles, makes it more likely that employees who experience harassing behavior can find someone they feel comfortable and safe reporting their concerns.

Second, employees need to trust that their complaint will receive a full and fair investigation by someone with the training, tools and capacity to assess it, the independence and impartiality to make an appropriate determination about the conduct, and the ability to acquire more expertise by engaging in a regular practice of investigations. In highly decentralized workplaces, where a particular location may only rarely handle reports of harassment or discrimination, keeping the investigation in the local management structure means the investigators cannot gain substantial experience. In addition, this process can also make workers feel isolated.

As discussed further in response to Senator Grassley's Question 4, the chief judge is a peer of an accused judge who may understandably tend to give valued colleagues the benefit of the doubt when evaluating whether they have engaged in harassing behavior. This process could certainly deter individuals from coming forward out of a concern that they will not be believed or appropriate disciplinary action will not be taken. Indeed, the current process garners strikingly few complaints as compared with anecdotal reports of harassment.

    b. **In your view, would employees be more likely to report sexual harassment and misconduct if their complaints were assigned to an independent investigator? Please explain.**

Employees are more likely to report harassment and misconduct if they can trust that those who investigate their reports will provide a process that is fair to all parties. In particular, individuals need to trust that their reports will be taken seriously, that harassers will be appropriately sanctioned, and that they will not suffer any retaliation for reporting.

In certain situations providing that level of assurance may require an independent or third-party investigation. And where there is a history of a lack of trust in existing human resources or internal complaint procedures, or a documented pattern of harassing conduct, a temporary independent authority may be critical to restoring confidence and efficacy. An external structure like a Task Force or an independent Ombuds Office or Diversity Monitor can encourage workers to come forward and also work to build more internal capacity so that the organization can improve its response going forward.

As I explained in my testimony, some courts may not have in-house investigators or individuals with experience investigating complex matters – this is especially a concern if investigations are solely handled at the courthouse level. An outside investigation may be especially warranted in situations such as allegations against a judge or senior level individual, cases that involve significant media attention, or any time there is concern about the objectivity or capacity of the existing internal process.

There are some examples that take this approach even further – establishing temporary external oversight to increase accountability and build confidence where a crisis has eroded it. Some of the best examples come from discrimination litigation, but this approach is not limited to legal claims or settlements. For example:

- Both the Texaco and Coca-Cola race discrimination settlements established an outside Task Force of highly credible and experienced individuals to oversee the process of reform. These external review bodies worked with the company's leadership and outside experts to evaluate new procedures put in place – including discrimination reporting and complaint procedures and hold leadership accountable for the results.[1]

- Settlements resolving patterns of sexual harassment at the DC Department of Corrections[2] and a Mitsubishi auto plant,[3] and patterns of gender discrimination at Smith

[1] *Roberts v. Texaco*, No. 94-CIV.2015 (S.D.N.Y.); *Ingram v. The Coca-Cola Company*, No. CIV. A. 1:98CV3679RWS (N.D. Ga.) (An analysis by the CPR Institute for Dispute Resolution and Fordham Law School of the Texaco Equality and Fairness Task Force identified key factors that supported the success of the task force – including the independence and qualifications of the members, the written annual reports, and the effective working relationship with the company. *Negotiating Enduring Corporate Change, A Case Study on the Task Force on Equality and Fairness*, (2005), available at http://www.dmwlawfirm.com/resources/Texaco%20Case%20Study.pdf. Reports of the Coca-Cola Task Force are still available on the company's website. https://www.coca-colacompany.com/stories/task-force-reports-2002-2006.

[2] In *Neal v. DC Department of Corrections*, 1:93−cv−02420−RCL (D.D.C.), the consent decree established the Office of the Special Inspector with independent authority to develop new reporting, investigation and training procedures including standing up new internal procedures to replace the practices targeted as inadequate in the lawsuit. The new procedures included an ombuds program and an external hotline, among others. Carolyn Lerner, currently the Chief Circuit Mediator of the DC Circuit, served as the court-appointed monitor in that case.

[3] The consent decree in the EEOC's lawsuit against Mitsubishi required the company to establish a "blue ribbon panel" to oversee establishment of new reporting and investigation procedures and monitoring

Barney[4] are examples of cases that established external monitors to handle complaints and oversee new policies and procedures on a temporary basis.

- The National Security Agency's Equality Task Force reviewed existing agency policies, procedures, and processes to eliminate barriers and promote an agency culture that fosters equal treatment and opportunities for all employees.

In a detailed study of civil rights consent decrees, the Institute for Women's Policy Research concluded that independent external monitors provided several key functions:[5]

- They were independent of the interests of the employer but also of the interests of the plaintiffs' counsel who brought the lawsuit. This objectivity allowed them to focus on resolving the concerns and conflicts that were the basis of the litigation and implement changes required by the consent decree.

- In successful cases, they fulfill a "combined role" of oversight and accountability along with support and technical assistance to employers working in good faith to deploy new policies and procedures.

- They are the kinds of reforms that the social science literature suggests are most likely to be effective.

But over the long term, internal human resources teams must also be empowered with the resources and authority that will assist them in building trust internally, supporting the safety of individuals who have experienced harassment, and ensuring confidentiality of the process. A good external monitor or oversight body can provide support, coaching, resources and also a clear standard to build strong and effective internal procedures going forward once the external review is complete.

c. **Would the creation of an independent office within the judiciary responsible for workplace relations increase the likelihood that employees would report sexual harassment and misconduct? Please explain.**

Creating an internal independent office could reduce barriers and increase reporting provided it has sufficient authority, credibility and confidentiality mechanisms. As explained in my answer above, workers need to trust that the entity receiving and investigating their complaints will take it seriously, will appropriately sanction misconduct and will prevent

---

programs and report back to the court for a three-year period. https://www.eeoc.gov/eeoc/newsroom/release/5-23-01.cfm.

[4] In *Amochaev v. Smith Barney*, No. C-05-1298 (N.D. Cal), the settlement agreement called for the appointment of a Diversity Monitor to review discrimination and retaliation complaints handled by the company's internal dispute resolution process, compensation decisions and procedures and the implementation of training and policy reform under the settlement agreement.

[5] Institute for Women's Policy Research, *Ending Sex and Race Discrimination in the Workplace* (2011), available at https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/C379.pdf.

retaliation. The ombuds programs I discussed in my testimony are often effective models because they are independent, impartial and provide confidentiality.

Internal offices may need to be insulated from the existing chain of command in order to serve as a fully independent and impartial entity. Placing them temporarily under an external oversight monitor can increase their perceived independence and build trust.

Finally, the Judiciary must ensure that the internal office has the training, resources and capacity to fully and fairly investigate complaints and can provide a safe and confidential process to individuals reporting harassment and discrimination. The EEOC Select Task Force Co-Chairs' Report includes a number of recommendations for effective internal complaint procedures – including providing a safe and supportive environment, timely responses, thorough documentation, and well-trained and objective investigators, among others.[6]

4. **What type of information should the judiciary collect from employees to ensure it has a comprehensive understanding of the scope of sexual harassment and misconduct?**

The Judiciary should conduct a full assessment of its climate, culture and workplace practices in order to ensure it has a comprehensive understanding of the current scope of sexual harassment and misconduct. Because the level of formal reporting is so low, the Judiciary needs a program of proactive outreach and information collection rather than simply waiting to see if individuals come forward and report. In addition, the courts should establish a plan to measure and evaluate any reforms put in place, such as the impact of training and the effectiveness of new informal reporting channels or procedures.

A full climate and culture assessment would allow the Judiciary to understand and document the current level of workplace harassment as well as other equity and inclusion concerns more broadly. This comprehensive review would cover all of the Judiciary's internal programs and policies on harassment and other forms of workplace discrimination -- including complaint procedures, investigation practices, and workplace culture and climate. The assessment would enable the Judiciary to better understand barriers to reporting, which could help the Judiciary determine whether the low number of reports is an accurate reflection of the risk of harassment. This kind of assessment is focused on systems, trends and themes, rather than identifying or investigating specific incidents or individuals, but it also can document the overall level of harassing behavior and experiences – providing a baseline to understand the impact of reforms. Done well, organizational assessments can help to target the root cause of problem, create confidence in reporting and resolution mechanisms, and build trust within the organization.

The assessment should be conducted by an experienced, well-qualified external entity with a high level of public credibility. Using an external entity and keeping data collection and analysis separate from any individual's managers or colleagues ensures the process is independent and impartial, which in turn increases employee trust and participation. The assessment should permit employees to participate on a confidential basis if they choose.

[6] EEOC Select Task Force Co-Chairs' Report.

One component of the assessment should be to analyze formal policy, human resources policy and complaint procedures by reviewing documents and conducting interviews with both leadership and staff responsible for designing or carrying out these policies and practices. The assessment should review those policies and practices against best and promising practices.

However, because formal policies may not work in practice as designed, it is also critical to assess the outcomes and experiences of individuals at all levels of the workplace. This includes quantitative analysis of employment data (hiring, promotion, termination and representation at different levels and among different functions, compensation data, and formal or informal complaint reports and resolutions). The data can be compared with appropriate benchmarks and also can be analyzed to understand trends over time and by role and demographics.

The assessment should also include more qualitative measures of perceptions and experiences of harassing behavior and more broadly of workplace inclusion -- through an anonymous online survey and also direct discussions with individuals. While climate surveys are a useful instrument, an online survey alone is not as effective as an assessment that uses multiple methods - including focus groups or individual conversations structured by role and demographics. Some employees are most comfortable participating in an anonymous survey. But adding direct discussion allows for follow ups to clarify or expand on information. The qualitative information also provides an additional perspective on the survey data – and can help identify potential gaps, biases or limitations in the responses.

A thorough external review would help the Judiciary obtain a full understanding of existing risk factors and potential barriers to accessing existing reporting and response channels. This would allow courts to better direct resources toward the most appropriate and cost-effective prevention practices and interventions, and identify the reforms needed to build inclusive harassment-free environments with high public trust. Finally, the assessment would create a baseline of current conditions to use in evaluating the impact of any new procedures or processes over time.

5. **The Working Group has proposed some changes to its education and training programs to help law clerks and employees under their rights in the workplace. What additional steps should the judiciary take to ensure that law clerks and employees understand their rights in the workplace?**

Regular and interactive training of all employees through a variety of education and training methods helps to ensure that everyone in the organization understands the governing policies and expectations, as well as the consequences of violations. Where training has focused on simply avoiding legal liability, it has not been effective at harassment prevention. Training should emphasize a culture of respect and civility to establish clear norms for interacting. It is also important to focus on reaching workers beyond those who experience harassment to empower bystanders to speak up when they witness harassment by providing them with tools on effective intervention. Effective training teaches employees skills to use in their workplace and can reduce workplace harassment. Anti-harassment training must be part of a comprehensive

prevention effort with leadership engagement and accountability. Training alone will not be successful unless there is an authentic commitment from the top that engages leaders at all levels of the organization.

Some analyses have found that certain approaches have a stronger impact such as targeting training material and methods to specific roles or contexts and extending learning over time – while factors like gender equity in leadership or measurement and accountability may be even more important than training.[7]

The EEOC Select Task Force Co-Chairs' Report reviews this research and makes some recommendations for effective training, including:

- Training should include specific programs for supervisors and managers that provide practical guidance and clear messages about their responsibilities as leaders;
- Training programs should be regular and reinforced;
- Training should be interactive and engaging, with live trainers to the extent feasible;
- Training should include an evaluation component.

To ensure employees understand their rights and how to get help if they experience harassment, the Judiciary should also implement some simple and low-cost tools like Know Your Rights posters and digital resources. In addition to making materials available in an accessible format on the intranet, workplace postings on reporting procedures in common areas can be effective in promoting awareness of the Judiciary's policies and complaint process. These resources should also highlight multiple methods to make complaints or get assistance.

6. **What steps should the judiciary take to ensure that judges and other supervisors understand their obligations to refrain from sexual harassment and misconduct? How can the judiciary ensure that these steps are effective?**

Tailored training for judges and other supervisors is essential to provide leaders with the tools to respond to and report concerns of harassment as well as to create a climate to prevent harassment and retaliation. To ensure the success of these efforts, it is vital to engage leadership in consistent messaging of the organization's values and commitment to creating respectful harassment-free workplaces.

---

[7] Katarina Bezrukova, Chester S. Spell, Jamie L. Perry, Karen A. Jehn, *A meta-analytical integration of over 40 years of research on diversity training evaluation*, Psychological Bulletin (2016), *available at* http://psycnet.apa.org/record/2016-43598-001; Dobbin & Kalev (2017), *supra;* Iris Bohnet, *What Works: Gender Equality by* Design (2016); Alex Lindsay, Eden King, Ashley Membere and Ho Kwan Chung, *Two Types of Diversity Training That Really Work*, Harvard Business Review (2017), *available at* https://hbr.org/2017/07/two-types-of-diversity-training-that-really-work; Michele E. A. Jayne and Robert L. Dipboye, *Leveraging Diversity to Improve Business Performance: Research Findings and Recommendations for Organizations*, Human Resource Management (Winter 2004).

Another important step is to ensure more women judges and greater diversity in leadership positions in the court. Where leadership is male dominated, women may not feel comfortable coming forward with concerns of sexual harassment for fear that these problems may be minimized.

The Judiciary should consider training for judges and other supervisors that goes beyond rights and responsibilities, and addresses topics such as:

- Bystander intervention training for judges who as peers are in the best position to have a productive conversation with other judges who may engage in inappropriate behavior.
- Training on building respectful workplaces that addresses the judicial role and how the power that judges may have in a courthouse workplace affects the culture and interpersonal dynamics positively or negatively.
- Skills training for judges as supervisors and managers of employees, including good models of workplace leadership that can integrate with their judicial role.

As the research cited in response to Question 5 above explains, expanding the number of women in leadership positions, conducting regular evaluations of training programs and promoting measurement and transparency are important and potentially cost-effective mechanisms that make training part of a holistic solution. Ultimately, training cannot be a stand-alone solution and must be part of a broader strategy that holds leadership accountable for addressing workplace harassment. This includes changes to the systems and practices that may create risk factors or contribute to an abusive environment or discriminatory workplace culture. This is a key conclusion of the EEOC Select Task Force Co-Chairs' Report, and it is consistent with available research and best thinking in the field.

7. **According to a CNN investigative report from January 2018, judicial discipline orders posted on U.S. court of appeals websites are "dumped onto circuit court websites as a series of numbered files with no indication of the allegations, person complaining or outcome."**

    a. **What steps should the judiciary take to make judicial discipline orders more transparent and accessible to the public?**

To increase transparency of judicial disciplinary proceedings, the Judiciary should make decisions on complaints and outcomes publicly available in a searchable database. In addition, issuing an annual report summarizing judicial discipline decisions by issue and court would make this information accessible to the public. Providing sufficient context to understand the nature of an individual disciplinary decision is important to the public's ability to understand and evaluate whether appropriate disciplinary action was taken based on the findings.

The Judiciary may wish to keep the name of the complainant confidential as a general matter. The EEOC's federal sector appellate decision practice could serve as a model to consider. In 2015, in order to strike a balance between the privacy interests of the complainant and the ability of the public to readily reference the principles in these decisions, the EEOC instituted a

new practice where federal sector appellate decisions issued for publication use a randomly generated name as a substitute for the name of the complainant. This randomly generated name is assigned using a computer program that selects names from a list of pseudonyms bearing no relation to the complainant's actual name. A complainant who wishes to be identified by his or her name in a case caption rather than by a randomly generated name may submit a written request to the EEOC. In 2013, the Commission earlier changed its practice of publishing federal sector appellate decisions with the name of the complainant. Decisions published after Oct. 1, 2013, used the term "Complainant" in the caption of the case, rather than the complainant's name.

b. **How will making these orders more transparent – for example, by making them accessible to the public – help combat sexual harassment and misconduct in the judiciary?**

Making orders transparent creates greater accountability within the Judiciary. Where problems can be hidden from public view through confidential proceedings, there is less incentive to invest in prevention and take formal action. Public sunshine on the allegations reveals both the underlying conduct and the disciplinary measures, creating an incentive to take prompt corrective action. Further, the transparency will help victims of harassment learn whether the misconduct they have experienced is part of a larger problem. This may encourage victims of discrimination to come forward, particularly if they see that meaningful action has previously been taken by the courts in response to complaints. Finally, making orders public and accessible will also serve to promote consistency across the courts as prior disciplinary decisions can serve as a guide to courts considering similar issues and send a message to all about the likely response to inappropriate conduct.

8. **In your testimony before the Judiciary Committee, you recommended that the judiciary publish demographic employment data. How will publishing demographic employment data help combat sexual harassment and misconduct in the judiciary?**

Analyzing judicial hiring patterns by gender, race and ethnicity are critical steps to ensuring that the Judiciary utilizes the full scope of talent in the clerkship applicant pool. It is not enough for the Judiciary to simply collect demographic hiring data on clerks. The Judiciary should analyze this data for each judge and share this data across the Judiciary as well as with the public. Measurement and transparency on hiring and other employment data are critical mechanisms to uncover workplace discrimination and promote accountability across an organization. Where judges can benchmark their hiring with other judges and courts, it creates a greater awareness of opportunities to hire clerks from a wider range of backgrounds. Having trend data across a number of years will also highlight whether certain judges are deciding not to hire women in an inappropriate effort to avoid harassment complaints by women.

Senate Judiciary Committee
"Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary"
Questions for the Record
June 13, 2018
Senator Amy Klobuchar

Question for Jenny Yang, Former Equal Employment Opportunity Commission (EEOC) Chair

In your testimony, you mentioned the need to broaden the definition of "employee" to ensure that complaint procedures for cases of harassment in the Judiciary protect all workers – including interns and certain temporary employees – from harassment. This is an important point to me, as our effort in the Senate expanded protections to unpaid interns, fellows, and detailees.

- Why is it important for the federal Judiciary to have a policy that makes clear that all workers are protected from harassment and other workplace misconduct?

It is important that the Judiciary's policies make clear that all workers in the Judiciary are protected from harassment, employment discrimination, and other workplace misconduct. Under federal employment discrimination laws, protections flow only to "employees" and not independent contractors, fellows, interns or other workers who do not meet the definition of "employee'' under these statutes. These workers may work alongside court employees, yet have no federal anti-discrimination protections against sexual harassment at the courthouse.

The Judiciary should voluntarily include independent contractors, temporary employees, fellows, detailees, interns, and externs within the group of workers who are protected under the judiciary's anti-discrimination policy to ensure there are not gaps in protection that could undermine efforts to create a safe and respectful workplace. Without such protections, incentives exist to disclaim liability or discount concerns when workers who are not employees raise issues of judicial misconduct. In addition, all workers, even those who do not meet the definition of "employee" should be provided with anti-harassment education and training to ensure they are aware of the policies and procedures of the court, including how to report and respond to harassment and other forms of discrimination. All employers -- and especially the courts -- as institutions of public trust, have an interest in ensuring that everyone works in a respectful workplace environment where they can be productive.