The CHAIRMAN. Would you unsheathe your microphone, Senator? Thank you.

Senator HEFLIN. Judge Tyler, the American Bar Standing Committee on the Federal Judiciary is a little different in membership from what it was in the consideration of when Judge Bork was before the committee; is that not true?

Judge TYLER. Well, let us see. That is not quite true simply because of the coincidental shifting. Remember, we started——

Senator HEFLIN. A new president comes in—I am seeking to find out if there are members of the American Bar Standing Committee now, who were not members when Judge Bork was considered. Are they all the same?

Judge TYLER. Yes, sir.

Senator HEFLIN. I was under the impression, for example, that Mr. Bob Fiske was on it, and that now Mr. Willis of New York is on the committee.

Judge TYLER. Well, what happened, Senator was this: When we started the work on Judge Bork, as you point out and know, Mr. Fiske was chairperson. Then I took over under the ABA procedures, but we asked Mr. Fiske to come down here with me because he had done so much work on the nomination of Judge Bork.

Senator HEFLIN. I suppose Mr. Andrews probably dealt more with lawyers that had appeared before Judge Kennedy and interviewed those more than any other member of the committee; is that correct?

Mr. ANDREWS. Sir, I interviewed a number of them, but also the members from the New York and East also interviewed a number of lawyers that had appeared before him.

Senator HEFLIN. Most of those were those in the ninth circuit?

Mr. ANDREWS. Yes.

Senator HEFLIN. Now, did you have any assistance or help, or did you do it yourself?

Mr. ANDREWS. There are two representatives from the ninth circuit: Sam Williams out of California, and I am from Seattle. What we do is divide up the ninth circuit because of its size. Sam does most of those around California, and I do the fringes.

Senator HEFLIN. I see. Now, there are a couple of matters that probably are of no real consequence, but maybe I should ask you about it. It appears that there was some complaint by Dr. Hallowell about a lawsuit that challenged the State-wide legislative redistricting and reapportionment made by the California legislature after 1980. I think that she and her husband even charged that there was a conspiracy to thwart their lawsuit and named Judge Kennedy in it.

Would you give us some explanation pertaining to that?

Judge TYLER. Let me answer that one, Senator, because the Hallowells delivered a mound of documents to us very late in our work. It is true that apparently they sent some to Mr. Williams, who unfortunately suffered a stroke several days ago. So we were never able to hear from him on this issue.

However, the papers of the Hallowells—and there are many, many, many. And I use that word three times with good basis in the record. Applications to almost all of the judges on the ninth cir-

cuit were presented to me. I am embarrassed and chagrined to have to report that I read them, and my eyes glazed over early.

The only tactful thing I can say is as follows: First, it is clear to me that the Hallowells did not really appear before Judge Kennedy, as much as they claim they did now. They were before everybody, including Chief Judge Browning. Their arguments were considered ad nauseam by a number of panels.

I am convinced that the notoriety of Judge Kennedy has dictated that they now center their fire on him; whereas, if you analyze their briefs, their petitions, their appeals, Judge Kennedy was a very minor bit player in all of this.

Hence, I did not even think at the last minute—getting all this material—required that I recirculate a vote of all of us. I concluded that I would report to you or anybody else on this committee myself since I had the dubious pleasure of getting all this material and having read it over this past weekend.

The CHAIRMAN. If the Senator will yield for a moment. If I am not mistaken, I have literally a box or more of material relating to this in my office. I believe the gentleman in question was the gentleman who stopped me in the hall yesterday. He was insisting less that I investigate Judge Kennedy than that, as he called it, the corruption of the ninth circuit. It was the ninth circuit, the entire circuit that he was seeking to be investigated. I am not at all surprised, Judge Tyler, your eyes glazed over early.

Judge TYLER. I am putting my reaction, I am afraid, even there tactfully.

Senator HEFLIN. Well, as I said, I thought it was a matter that probably not any great consequence ought to be given to.

There is another matter that causes me slight concern, and that is the matter pertaining to the Van Sickle matter. This largely was reported on the basis of financial income coming in from his representing a woman in a divorce case before he went on the bench on a contingent fee basis. He finally settled it, and there is no question about the finance aspect of it.

This raised some question in my mind because the American Bar's Canons of Ethics indicate that a divorce proceeding should not be taken on a contingent fee basis. Now, those Canons were adopted, I believe, after the divorce case started. I believe it started in 1979. Probably the canons of ethics were adopted after that. It may have been a difference between a disciplinary rule and an ethical consideration. I think whatever was adopted and whatever the American Bar had was after. I do not raise that issue.

But there is some issue, and I would like for you to give some thought to it and maybe give me an answer. As I understood it, at the time California was a community property State. Based on that, is there any ethical issue that you would see under existing rules at the time in 1969 that could cause any problem as to whether it might have been improper to have taken a divorce case on a contingent fee basis?

Judge TYLER. Senator, I am frank to say that this aspect that you are now raising in that matter, I do not believe that we ever addressed. It seemed to us that because of the first point you made that there was nothing wrong here with what happened. So I am afraid that, unless one of my colleagues has an inspiration here, we

will have to respond to you later, because we never focused on this aspect.

Senator HEFLIN. Well, I do not think there was any rule at that particular time. This is in 1969. I have gone back into it and checked it out. My State is not a community property State. But the rationale that has motivated the American Bar now to promulgate a model canon of ethics pertaining to it does raise some issue.

It is quite stale, and I do not really give it a great deal of consideration. But I was interested since the American Bar has promulgated such a rule as to whether or not this is something that you did consider. If so, what would be your feelings on it?

Mr. ELAM. I do not think, Senator Heflin, we did consider that. You are absolutely correct that there is an evolving standard in the ABA as it relates to that subject; namely, that contingency fees are not recommended in divorce matters. I also believe that was clearly subsequent to the time that Judge Kennedy was in private practice.

Senator HEFLIN. I do not think there is any question about that; it is subsequent.

Now, has the report of the American Bar been entered into the record?

The CHAIRMAN. Yes, it has been.

Senator HEFLIN. It has been. All right.

Now, in evaluating Judge Kennedy's nomination, I suppose you discussed the nomination with the sitting judges in the ninth circuit. Mr. Andrews, that is a pretty good number of judges. How many judges are on the ninth circuit now?

Mr. ANDREWS. We are over 20 now.

Senator HEFLIN. Did you discuss with each of them Judge Kennedy and his background, their opinions of him, their feelings about him?

Mr. ANDREWS. Yes, sir. Everyone that was available. I think there were two that we did not get to. We got to every other one.

Senator HEFLIN. You got to all except two?

Mr. ANDREWS. Yes, sir.

Senator HEFLIN. And what was generally your responses from them?

Mr. ANDREWS. In my experience in talking to judges in rating other judges, he received the highest rating and highest acclaim of any judge that I have ever talked to. They had a deep and abiding respect for his sense of justice, for his ability to give everyone a fair hearing, and to make a decision on the facts before him. That came from judges that enjoyed a reputation of being liberal and judges that also enjoyed a reputation of being conservative.

Senator HEFLIN. I have been handed by a member of staff a statement to the effect on the previous question about the model code of professional responsibility, which the ABA adopted in 1969, it served as a basis for professional responsibility in most States. Now, that was in 1969, but it is my understanding that California had not adopted it, and this was as of 1969.

Mr. ANDREWS. That is my understanding.

Senator HEFLIN. So I think that even if it were to be in 1969 that most of the States did not start adopting the model code or modified model codes until several years thereafter. So I do not think it

was controlling. But that issue about community property and the rationale is something that entered my mind. But there was no prohibition even from an ethical consideration. As I understand it, under this model you had disciplinary rules which were outright prohibitions, ethical considerations which were aspirational relative to how a lawyer should carry out his conduct. This being an ethical consideration, an EC, it was not then, even under the American Bar as of that time, binding.

Mr. ANDREWS. That is correct.

Senator HEFLIN. Just to have that accurately stated.

Are any of you from community property states?

Mr. ANDREWS. Yes.

Senator HEFLIN. Is there any more of a rationale which seemingly motivated the American Bar in its promulgation of this rule that would be applicable more to a community property State than it would to a non-community property State?

Mr. ANDREWS. Certainly. The problem of a contingent fee in a divorce proceeding would be much more glaring in a community property state. The ethical problems would be much more severe there.

Mr. ELAM. Senator Heflin, I am reminded, I do not believe California now ever adopted the code of professional responsibility which was recommended by the ABA in 1969.

Senator HEFLIN. Well, I do not think there is any violation of any rule. Of course, even in 1969 it was not a disciplinary rule; it was an ethical consideration known as EC-220. But I just raised the question about the rationale. I do not think, really, that is too important, but it was just an issue that struck me.

That is all.

The CHAIRMAN. Thank you.

Before I yield to my colleague from Iowa, I point out that we are approaching 2 hours, and Christmas. The Senator from Iowa. [Laughter.]

Which is unfair. I did not pick you, Senator. It just struck me now. It was not directed at you. It was directed at myself.

Senator GRASSLEY. You will have a hard time convincing me of that.

The CHAIRMAN. I promise you. Take all the 3 minute you need.

Senator GRASSLEY. Judge Tyler, referring again to the Washington Post article that Senator Hatch previously referred to, and reminding you that on November 4, 1987, six members of this committee sent you a letter about that article—and that letter was signed by Senators Thurmond, Hatch, Simpson, Specter, Humphrey and myself—I would like to quote three paragraphs from that letter.

"The committee member in question"—referring to the committee member of the ABA—"reportedly indicated that"—and I quote—"'There are concerns that Ginsburg shares many of the conservative ideological beliefs that doomed the Bork nomination.' He or she was further quoted as stating, and I quote again, "It looks to me like we may be going from a Bork to a Bork-let."

Then going on in the letter, "This statement indicates that, contrary to the standing committee's own standards and guidelines, the nominee's ideology will be a major focus of the evaluation. It