

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

also reveals a manifest prejudgment as to the nominee's ideological beliefs before the investigation is ever begun. Moreover, the phrasing used by the anonymous member and the parallels he or she draws to the Bork evaluation give every indication that the member has prejudged the outcome."

Then one last paragraph to quote from. "Aside from the content of the remark, the very fact that they were given to the press is very disturbing. The standing committee's own guidelines and past testimony stressed the critical importance of confidentiality and discretion in the evaluation process, yet the Post story reveals an apparent breach of confidentiality and one highly prejudicial to the nominee at the very outset of the investigation. The impropriety of these prejudicial remarks is underscored by the fact that the member in question was careful to give them under the cloak of anonymity."

Now, I listened to your lecture on the need for confidentiality, but I think that I have got to know whether or not you did find out who that anonymous committee member was.

Judge TYLER. Well, first of all, Senator Grassley-----

Senator GRASSLEY. Did you try to find out who the member was?

Judge TYLER. Yes. I do not know why we have to go through this. I answered this when Senator Hatch posed it.

Senator GRASSLEY. You did try to find out?

Judge TYLER. Surely. And I agreed, when Senator Hatch said this, that we had a meeting. Those who could not make the meeting were spoken-----

Senator GRASSLEY. Did you discipline the person?

Judge TYLER. I have no power to discipline any-----

Senator GRASSLEY. Is the person still on the committee?

Judge TYLER. As I said before, he is. Surely.

I have no power, Senator Grassley, to discipline anybody. You have got to understand that I am not a-----

Senator GRASSLEY. You mean the committee cannot take any action when a member of the committee violates its own rules?

Judge TYLER. Senator, I do not and no other one of us appoints people to this committee. That is the prerogative of the president of the ABA.

The fact of the matter is, as I explained to Senator Hatch, this report in the Washington Post was very unpleasant for the reasons that you just quoted in your own letter, and that we endeavored to deal with this; and I believe we have dealt with it as best we could and effectively so within the limit of our powers.

Senator GRASSLEY. Well, if the person has that kind of bias towards a person expressed in-----

Judge TYLER. Sir, he may not really. Many of us-----

Senator GRASSLEY. How can he serve on the committee and advise us impartially?

Judge TYLER. Senator, he is not doing anything to ill advise you now at all. He is one member of 15 people who have voted unanimously about this candidate.

Also, let us be honest about it. In this world of ours, I have known no person of any rank, status, race, creed, or color that does not suddenly once in a while pop off and say things that he or she later regrets.

You are right if you took these words literally as I have confessed to you a thousand times before you this morning and how many times do I have to do it this morning. He shouldn't, if he said those things, said them for the very reasons you state.

But it ill behooves this committee to keep repeating this, for heaven sakes. How much time can we spend on this any more than we've spent. I don't condone this if it happened the way it was said. Nobody does.

Senator GRASSLEY. I think it's been pointed out very well by Senator Hatch and by Senator Simpson the status that this committee of the ABA is given. There isn't any other trade association in the United States I know of that comes before a congressional committee that has the standing that this ABA Committee has in advising the Senate.

We don't give the testimony of the National Association of Manufacturers or the U.S. Chamber of Commerce or any other trade association the stature we give to the ABA and its ratings of federal judicial nominees.

So that's the difference. You ask me why be concerned about it. That's why I'm concerned about it. That's why I wrote the letter to you.

Judge TYLER. And I answered, and I answered this morning. All I'm saying to you, sir, is why repeat ourselves, and second of all, we're not—

Senator GRASSLEY. Because I listened to a lecture on the need for confidentiality and what I wanted to know is what—

Judge TYLER. And I'm sorry you feel I was lecturing.

Senator GRASSLEY. What did you do about the individual that showed this sort of bias? I would appreciate an answer to my question.

Judge TYLER. I said what happened, Senator, and I don't really think I serve you or anybody else well by repeating it. I do not have the power to appoint. I do not have the power to fire. I am aggrieved as much as you have just pointed out. So are we all.

We're doing our best.

Now, whether or not our views are accredited is not our responsibility. We appear at the request of this committee. If you don't like what we say, you are free to ignore us. I'm sorry.

But I just do not want to continually be put in the position of being accused about this when we can only say what we've already said.

Senator GRASSLEY. It may be irritating, but I'm trying to have a public dialogue with you based on the quasi-public function that the ABA serves.

Let's face it; like it or not, the ABA has taken on a quasi-public function as far as its evaluation of federal judicial nominees is concerned. It should be required to conduct its business according to this status.

Maybe you do not think you serve that sort of function?

Judge TYLER. I agree we do. But what else can we say that has not already been said.

Senator GRASSLEY. Well, let me ask you this. Can the president of the ABA step in and discipline this person for making those biased remarks that were printed in the press?

Judge TYLER. The president of the ABA, I suppose, could step in. But the president of the ABA has not done so, particularly since I've reported to him that we think we have worked this out.

Now, since that episode occurred, since you wrote that letter, since I responded, we have done the things that I said in response to Senator Hatch.

We have done no more; we have done no less. Now, I know that you do not particularly care for us, apparently. But there is nothing I can say about that or do about that, other than what we have already said.

Mr. ELAM. Senator, I would like to add one other thing.

The chairman of this committee, Judge Tyler, gave that matter careful attention. It was a subject of discussion within the committee.

He was extremely concerned, and he totally agreed with the thrust that it is absolutely important that we do have confidentiality, and that there not be any statements made.

So I do not want it left that he's not concerned. He has been intensely concerned and consistent with the other things he has said today.

Senator GRASSLEY. Let me inquire along a little bit different line about the future, and forget about the past.

Let me put it this way. When is the ABA going to start complying with the Federal Advisory Committee Act which requires open public meetings of all advisory committees?

Judge TYLER. Senator, again, that subject was covered earlier in my response. We are not under the coverage of that act. We are private lawyers.

I cannot imagine anybody missing the point here. I do not want to withhold anything.

Senator GRASSLEY. Let me ask you this. With regard to the advice that you give to the Department of Justice—

Judge TYLER. The advice we give to the Department of Justice is very simple and succinct. We do not show them our reports.

And we are people who cannot agree with your apparent view that there is some right on the part of the public to know exactly what I and other committee members do or say in our work in our private offices on judicial investigations. I just do not think that makes sense at all.

And it does not make sense with respect to our appearing here before the Senate.

We are what we are, and you are free to treat us as you see fit. That is the point of my letter this fall to Senator Metzenbaum.

We do not expect we have the right to do what the Senate Judiciary Committee does. You are a legally constituted body; we are not.

You are free to accept or reject our views. Any time on any nomination for any court in the federal system.

Senator GRASSLEY. That is all, Mr. Chairman.

The CHAIRMAN. Judge, what do you think the reaction would be if we concluded, as I guess is implied by some of my colleagues, that we no longer were going to seek the advice of the American Bar Association?

What would be the reaction of the bar? Other than your being momentarily relieved. Seriously. It is a serious question. Because I