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IN MEMORIAM

Robert J. Kutak: A Brief Appreciation†

GEOFFREY C. HAZARD, JR.*

Robert J. Kutak was a very unusual lawyer. For this reason his aims were often misunderstood within the bar. He was possessed by extraordinary enthusiasm in all things that he did, whether working on a new set of rules for lawyers or working out a new form of municipal financing, which was his primary area of practice. He had extraordinary energy, so that his purposes were not merely aspirations but enterprises on the move. Also, as Robert Meserve observed at the 1983 American Bar Association Midyear Meeting in New Orleans, Bob Kutak was entirely without "side." That is, he was completely sincere and quite oblivious of self-serving purposes. Taken together, these characteristics made a person who seemed to have missionary zeal bent on missionary purposes.

This personality terrified many lawyers. It certainly terrified many lawyers in their encounters with Bob on the Model Rules project. In listening to Bob, the bar began to wonder whether the project for revising the rules of legal ethics had somehow fallen into the hands of the Salvation Army. This concern was inflamed by critics, honest and otherwise, of various proposals in the Model Rules.

In some respects the criticism was justified, at least in my view. For example, the Discussion Draft of the Model Rules had proposed that pro bono service be mandatory on the part of every lawyer. I thought this proposal was unsound in substance, given the bar's attitude, and certainly imprudent in political terms. Bob, however, could not see

† It was with sadness and shock that the Oklahoma Law Review learned of the untimely death of Robert J. Kutak, Chairman of the American Bar Association Commission on Evaluation of Professional Standards, in January of this year. In November 1982, Mr. Kutak had honored the College of Law by accepting an invitation from the College's Enrichment Committee to address the student body and faculty. His Enrichment Series address is published in the following pages.

Professor Geoffrey C. Hazard, Jr., when contacted about writing this *In Memoriam*, quickly responded with this perceptive essay about his friend. To Professor Hazard's insights about Robert Kutak, the students at the College of Law who listened to his address and had the opportunity to meet and talk with him wish to add their appreciation for Mr. Kutak's warmth and friendliness. We extend our deepest sympathies to the Kutak family.—*The Editors*

* Baker Professor of Law, Yale University; Reporter, American Bar Association Commission on Evaluation of Professional Standards; friend of Robert J. Kutak.

how any lawyer worthy of the name could object to the memorialization of an obligation which every lawyer professed. The trouble was that Bob presumed not to see that, regarding pro bono and a lot of other professional concerns, many lawyers need to profess one thing and actually do another—paradoxically, often pretending to be amoral but acting otherwise. Bob suffered no such schizophrenia in law practice and hence literally could not understand the basis of the bar's fear of serious ethical pretension.

Yet Robert Kutak was also an extremely good, tough-minded lawyer in the classic sense. He could be a brilliant advocate, as in persuading the ABA to continue the Rules project when it came under searing attack. He could be a careful analyst, as he was in pushing for coherent concordance of the concept of confidentiality with the concept of the lawyer's fidelity to law. He could be a shrewd counsellor, as in accepting concessions that had to be made in the interest of a legislative consensus on the Rules. These aspects of his character were seen by few, if any, of his critics. If his critics had discerned this part of Bob's character, they might not have been so alarmed and the project might have been a lot less controversial and difficult than it was.

Bob's inability to reveal his worldliness along with his idealism was a serious shortcoming. It was a basic defect, for it manifested itself not only in the Rules project but in other things Bob did. It led people to think he was a dreamer, even that he was a damn fool. But Robert Kutak was not a damn fool, as proved by his record as a successful practicing lawyer, a successful law firm entrepreneur, and a successful practitioner of the art of law reform. When push came to shove, Bob knew the necessity of making some concessions in substance, and perhaps even more in rhetoric, if there was to be success in such undertakings.

He knew all this, but he had difficulty confessing the knowledge. Partly this was a shrewd bargaining stance: Give no ground until your price has been exacted, a proposition that holds in a struggle for reform as well as in a struggle for a client. More deeply, Bob's high-mindedness reflected his resistance to a purely Hobbesian view of the legal process. Bob realized the necessity of being "realistic" in a conventional sense. But he thought there was also another necessity, one that many "hard-headed" lawyers do not perceive or at least cannot openly admit. This is the necessity of having visions of a better world, and the necessity of committing an important part of one's life to realizing those visions. Bob thought that otherwise law practice would reduce itself to a sordid brokerage in power and money. As far as I know, he was right.