Stumbling Stones: The John Rosenberg Story - A Continuing Legal Education Handout on Law, Ethics, and the Pursuit of Justice

# Introduction: The Lawyer as a "Stumbling Stone" for Injustice

The title of Jeff Sherr’s one-person play, Stumbling Stones: The John Rosenberg Story, evokes the German Stolpersteine—small, brass-plated stones embedded in sidewalks to commemorate victims of Nazi persecution at their last known residence. These memorials serve as interruptions, forcing passersby to pause, look down, and remember. They are, quite literally, stumbling stones that disrupt the smooth pavement of forgetting. This powerful metaphor extends to the life and career of John Rosenberg, framing the lawyer not merely as a representative of clients, but as an active impediment to the forward march of systemic injustice. The lawyer, in this conception, becomes a "stumbling stone" for powerful interests, for the perversion of legal process, and for the societal amnesia that allows oppression to flourish.

This handout, designed to accompany the performance, explores the profound legal and ethical dimensions of Rosenberg’s work. Its central thesis is that profound personal experience can forge an unwavering professional ethos, transforming abstract ethical duties into a concrete life mission. Rosenberg’s journey—from a child survivor of the Holocaust, where law was weaponized for annihilation, to a relentless champion for the oppressed in America—is the narrative spine of the play and of this legal analysis. His life demonstrates how the trauma of witnessing a legal system's collapse can instill a deep, visceral understanding of the stakes involved in protecting civil rights and upholding the rule of law.  
Rosenberg’s career can be viewed as a two-front war against deeply entrenched injustice. The first battlefield was the Jim Crow South of the 1960s, where, as a Department of Justice attorney, he confronted the state-sanctioned racial terror of the Ku Klux Klan. The second was the Appalachian coalfields, where he battled the corporate and legal machinery that facilitated the economic and environmental exploitation of an entire region.

Though these battlefields seem disparate, a unifying principle connects them: the defense of powerless groups against organized, systemic oppression. Rosenberg's life work was not a random sequence of legal jobs but a continuous, focused mission. In both the Deep South and Eastern Kentucky, the victims were disenfranchised, marginalized, and lacked meaningful access to the local legal and political systems that were supposed to protect them. His childhood experience as a Jew in Nazi Germany provided the foundational lesson: a legal system that fails to protect its most vulnerable becomes a tool for its most powerful. His work prosecuting Klansmen who acted in concert with complicit state officials and his later work challenging coal companies who used legal instruments to dispossess landowners were consistent applications of this core principle. He understood that the structure of injustice—a powerful entity leveraging legal and political systems to exploit a vulnerable population—was the same, whether the motive was racial hatred or corporate greed. His life stands as a testament to the idea that law must be actively wielded as a shield for the powerless, lest it become a sword for the powerful.

# Part I: Forging a Commitment to Justice - From Kristallnacht to the Department of Justice

## A. The Shadow of the Holocaust: The Foundation of a Legal Consciousness

To understand the professional choices of John Rosenberg, one must first comprehend the personal history that forged his legal consciousness. Born in Magdeburg, Germany, in 1931, his childhood was irrevocably shaped by the rise of Nazism. The seminal event occurred on November 9, 1938, during Kristallnacht, the "Night of Broken Glass." At just seven years old, Rosenberg and his parents were forced from their home by Nazis and made to stand in the courtyard of their adjacent synagogue. There, they were compelled to watch as the holy scriptures were burned and the synagogue's interior was destroyed by explosives. The following day, his father was arrested and sent to the Buchenwald concentration camp.  
This was not an abstract lesson in injustice; it was a direct, traumatic encounter with the absolute collapse of civil society and the malevolent perversion of law. The institutions that should have provided protection—the police, the courts, the government—became the very instruments of persecution. After his father's release, the family spent a year in an internment camp in Holland before escaping to the United States in 1940. As a refugee, Rosenberg’s early life in America was marked by the struggle to adapt and survive, moving from New York to South Carolina and eventually North Carolina, where his father worked as a janitor.

This formative experience—witnessing the state-sponsored destruction of his community and the systemic stripping of rights—instilled in Rosenberg a profound and personal understanding of the fragility of the rule of law. It is from this crucible that his lifelong commitment to using law as a protective force for the vulnerable was born. His decision to attend law school and subsequently join the Civil Rights Division of the Department of Justice was not merely a career choice; it was the logical continuation of a journey that began in the ashes of his synagogue in Magdeburg.

## B. The Legal War on Terror: Prosecuting the Klan in the Deep South

When John Rosenberg joined the Civil Rights Division of the United States Department of Justice in 1962, he entered an environment at the forefront of America's second civil war. Under the Kennedy and Johnson administrations, the Division, led by figures like the tenacious John Doar, was tasked with enforcing federal civil rights laws in the face of "massive resistance" across the South. This was not a tranquil practice of law; it was a high-stakes conflict against a deeply entrenched system of racial segregation and terror, often enforced by a seamless collaboration between private white supremacist groups like the Ku Klux Klan and local law enforcement officials.

As a trial attorney and later a Section Chief from 1962 to 1970, Rosenberg was immersed in this conflict, litigating racial discrimination cases throughout the "deep south". This work provided him with what he later described as a "strong foundation for arguing court cases," honing his skills in hostile environments where the legal system itself was often an arm of the oppressive regime he was fighting. The cases handled by the Division during this era were pivotal, seeking to guarantee voting rights, desegregate public facilities, and, most critically, prosecute acts of racial violence that local authorities ignored or abetted. The work of Rosenberg and his colleagues was a direct challenge to the impunity with which racial terror was inflicted.

### Case Study: United States v. Price, 383 U.S. 787 (1966) (The "Mississippi Burning" Case)

The work of the Civil Rights Division during Rosenberg's tenure is perfectly encapsulated by the landmark "Mississippi Burning" case, United States v. Price.1 While Rosenberg was not a direct prosecutor on this specific case, it exemplifies the exact legal battles he was engaged in and the critical doctrines he would have wielded.

**Factual Background**  
In June 1964, three young civil rights workers—James Chaney, a Black man from Mississippi, and Andrew Goodman and Michael Schwerner, two white men from New York—disappeared in Neshoba County, Mississippi. They had been working to register African American voters as part of the "Freedom Summer" campaign. After a massive FBI investigation, codenamed "Mississippi Burning" (or MIBURN), their bodies were discovered buried in an earthen dam. The investigation revealed a horrifying conspiracy: the men had been arrested by Neshoba County Deputy Sheriff Cecil Price, released into the hands of a waiting group of Klansmen, and then chased down, beaten, and murdered.

**The Legal Challenge**  
The State of Mississippi refused to prosecute the perpetrators for murder. This left the federal government as the only avenue for justice. Prosecutors relied on Reconstruction-era civil rights statutes—18 U.S.C. § 2412 and 18 U.S.C. § 2423.

**The "Under Color of Law" Doctrine**  
The district court dismissed indictments against private Klansmen under § 242. The U.S. Supreme Court reversed, holding that private individuals become state actors when they are willful participants in joint activity with state agents.1 Because Deputy Price, a state agent, participated throughout, the private conspirators also acted "under color of law."

# Part II: A New Battlefield - Justice in the Coalfields of Appalachia

## A. The Founding and Mission of AppalReD

After eight years on the front lines of the civil rights struggle, John Rosenberg and his wife, Jean, moved in 1970 to Prestonsburg, Kentucky, to found the Appalachian Research and Defense Fund (AppalReD). Under Rosenberg’s leadership, AppalReD provided civil legal assistance across Appalachian Kentucky, focusing on black lung disease, abusive land practices, and environmental devastation from strip mining. AppalReD trained generations of attorneys who became leaders in access to justice.

## B. The Broad Form Deed: A Century of Legalized Exploitation

The "broad form deed" severed mineral from surface estates and granted mineral owners sweeping rights to use the surface as "necessary or convenient" for mining—often paired with waivers of surface-damage claims. Agents like John C. C. Mayo acquired vast rights from 1880s–1920s, paying pennies per acre, setting the stage for later strip mining and displacement.

## C. The Decades-Long Legal War Over Appalachian Land

Kentucky’s jurisprudence and politics wrestled with the broad form deed for nearly four decades. The arc illustrates how precedent, legislation, and popular sovereignty interact to reshape "settled" property law.

### Case Brief: Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956)

Holding: Typical broad form deeds allowed strip mining and shielded mineral owners from surface-damage liability absent oppressive, arbitrary, wanton, or malicious conduct.4

Rationale: Textualist reading; mineral estate "dominant"; reliance on an established "rule of property" favoring industrial stability.

### Case Brief: Akers v. Baldwin, 736 S.W.2d 294 (Ky. 1987)

Holding: The Kentucky Supreme Court invalidated the 1984 statute (KRS 381.940) limiting mining methods to those known when the deed was signed, as unconstitutional.5,8

Rationale: Separation of powers—legislature cannot direct courts’ interpretation of private contracts.

### The People’s Response: 1988 Constitutional Amendment

Kentuckians ratified Ky. Const. § 19(2), embedding a presumption against surface mining under broad form deeds unless expressly authorized—circumventing the Akers separation-of-powers rationale.6

### Case Brief: Ward v. Harding, 860 S.W.2d 280 (Ky. 1993)

Holding: The Kentucky Supreme Court upheld § 19(2), expressly overruling Buchanan and portions of Akers; future surface mining requires clear and convincing authorization in the instrument.7

### Table: Timeline of the Broad Form Deed Legal Battle

| **Year** | **Event** | **Key Holding / Provision** | **Significance** |
| --- | --- | --- | --- |
| 1956 | Buchanan v. Watson | Mineral owner may strip mine; minimal liability for surface damage. | Establishes pro-industry rule of property.^4 |
| 1984 | KRS 381.940 Enacted | Limits methods to those known at deed execution unless expressly permitted. | Legislative attempt to correct judicial rule.^8 |
| 1987 | Akers v. Baldwin | Statute unconstitutional on separation-of-powers grounds. | Judiciary reasserts interpretive supremacy.^5 |
| 1988 | Ky. Const. § 19(2) Ratified | Constitutionalizes presumption against surface mining without clear authorization. | People override judicial roadblock.^6 |
| 1993 | Ward v. Harding | Upholds amendment; overrules Buchanan; tightens standard. | Final victory for surface owners.^7 |

# Part III: The Ethical Compass - Professional Responsibility in Public Interest Law

Rosenberg’s career exemplifies public service, law reform, and zealous advocacy aligned with the Rules of Professional Conduct. Personal conviction energized, rather than undermined, ethical compliance.

## A. The Duty to Serve: Pro Bono Publico and the Public Interest

ABA Model Rule 6.1 sets an aspiration of at least 50 hours of pro bono per year; Kentucky has adopted this as SCR 3.130(6.1).9,10 Rosenberg’s leadership at AppalReD operationalized this duty at institutional scale.

## B. The Lawyer as Public Citizen and Law Reformer

The Preamble to SCR 3.130 charges lawyers to act as officers of the legal system and public citizens, to seek improvement of the law, and to ensure equal access to justice.11 AppalReD’s strategy—litigation, legislation, constitutional change—models this mandate.

## C. Zealous Advocacy and Ethical Boundaries

Scope of Representation: ABA Model Rule 1.2 / SCR 3.130(1.2) preserves client objectives while granting counsel discretion on means; representation does not equal endorsement.12

Misconduct: ABA Model Rule 8.4 / SCR 3.130(8.4) prohibits dishonesty and conduct prejudicial to justice; integrity is indispensable in resource-asymmetric fights.13

# Conclusion: The Enduring Legacy of a "Stumbling Stone"

Rosenberg’s journey—from the terror of Kristallnacht to the coalfields of Appalachia—underscores historical roots of injustice, the necessity of patient law reform, and the power of principled advocacy. His legacy lives in protected rights, reclaimed lands, and generations of lawyers inspired to be stumbling stones against systemic harm.

# Appendix A: Suggested Questions & Answers for CLE Discussion

### • On the Role of Personal History

Q: How does Rosenberg’s Holocaust experience inform duties under Rule 6.1 and the Preamble? Does deep conviction risk conflicts?

A: Rosenberg’s history converted abstract duties into a vocation; SCR 3.130(6.1) pro bono and the Preamble’s public-citizen role become lived practice. Conviction fuels lawful persistence, not deviation, when channeled through rules.

### • On Legal Strategy

Q: Compare DOJ’s U.S. v. Price approach with AppalReD’s broad-form deed strategy.

A: Both escalate to higher authority when local systems are compromised: federal civil-rights statutes in Price2,3,1; a state constitutional amendment in Kentucky.6

### • On the Nature of Law

Q: What does Buchanan→Akers→Amendment→Ward teach about ‘settled law’?

A: Doctrine is dynamic; branches and the people iteratively reshape it. The arc shows checks and balances and popular sovereignty.

### • On Judicial Philosophy

Q: Contrast Buchanan/Akers philosophies with Ward.

A: Buchanan emphasized reliance/industry stability; Akers prioritized judicial supremacy/separation of powers; Ward deferred to popular sovereignty embedded in the constitution.

### • On Ethical Challenges

Q: What ethical pressures arise when representing impoverished clients vs. powerful opponents?

A: Temptations toward sharp practice must be rejected under 8.4; counsel must honor client objectives (1.2) while ensuring informed decisions under pressure.

### • On the ‘Stumbling Stone’ Metaphor

Q: Modern equivalents and tools?

A: Predatory lending, environmental injustice, criminal-legal inequities; tools include impact litigation, legislative advocacy, community organizing, and constitutional paths.

# Appendix B: Table of Authorities

## Cases

• Akers v. Baldwin, 736 S.W.2d 294 (Ky. 1987).

• Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956).

• United States v. Price, 383 U.S. 787 (1966).

• Ward v. Harding, 860 S.W.2d 280 (Ky. 1993).

## Statutes and Constitutional Provisions

• 18 U.S.C. § 241 (Conspiracy against rights).

• 18 U.S.C. § 242 (Deprivation of rights under color of law).

• Kentucky Constitution, Section 19(2).

• Kentucky Revised Statutes (KRS) 381.940 (1984) (invalidated).

## Rules of Professional Conduct

• ABA Model Rule 1.2 (Scope of Representation & Allocation of Authority Between Client & Lawyer).

• ABA Model Rule 6.1 (Voluntary Pro Bono Publico Service).

• ABA Model Rule 8.4 (Misconduct).

• Kentucky Supreme Court Rule (SCR) 3.130 (Preamble: A Lawyer's Responsibilities).

• Kentucky Supreme Court Rule (SCR) 3.130(1.2) (Scope of Representation).

• Kentucky Supreme Court Rule (SCR) 3.130(6.1) (Donated Legal Services).

• Kentucky Supreme Court Rule (SCR) 3.130(8.4) (Misconduct).

# Footnotes

1 United States v. Price, 383 U.S. 787 (1966).

2 18 U.S.C. § 241 (Conspiracy against rights).

3 18 U.S.C. § 242 (Deprivation of rights under color of law).

4 Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956).

5 Akers v. Baldwin, 736 S.W.2d 294 (Ky. 1987).

6 Ky. Const. § 19(2) (1988) (Broad Form Deed Amendment).

7 Ward v. Harding, 860 S.W.2d 280 (Ky. 1993).

8 KRS 381.940 (1984) (rule of construction limiting mining methods) (invalidated in Akers).

9 ABA Model Rule of Professional Conduct 6.1.

10 Ky. SCR 3.130(6.1).

11 Ky. SCR 3.130, Preamble: A Lawyer’s Responsibilities.

12 ABA Model Rule 1.2; Ky. SCR 3.130(1.2).

13 ABA Model Rule 8.4; Ky. SCR 3.130(8.4).