

Reflections on bringing Justice to the Citizens of Appalachia

By John Rosenberg, former Executive Director Appalachian Research and Defense Fund of Kentucky. *This article appeared in the legal services Management Information Exchange (MIE)*

In the early fall of 1970, my wife, our six month old son, Michael and I were on a camping trip in Canada. I had just left the Civil Rights Division of the Department of Justice after eight years. I received a call from Terry Lenzner, a former Division colleague, who was now head of Legal Services at the Office of Economic Opportunity ("OEO") in Washington, DC. Terry asked if I would consider working with a new group of attorneys to address some of the serious legal issues in central Appalachia. My family and I drove to Prestonsburg, KY, a town of 4,000 persons in the heart of the Appalachian coalfields. We pitched our tent in the campground outside of Prestonsburg. We never left. During the 30 years that followed, I have benefitted from the most rewarding legal career imaginable.

Following the publication of Harry Caudill's book, *Night Comes to the Cumberland* and the visits of President Johnson and Robert Kennedy to Appalachia, the country became familiar with the enormous poverty of our region, its poor schools, poor housing, poor health care, poor roads and lack of economic opportunities. I quickly learned that there was a direct connection between Appalachia's high incidence of poverty and its coal economy.

The mountains were being destroyed by surface mining. Most of the minerals in Kentucky were owned by out-of-state corporations under "Broadform Deeds," executed at the turn of the century when surface mining methods were unknown. Nevertheless, under the

Kentucky Supreme Court's interpretation of these deeds, the surface owner was powerless to prevent the destruction of his/her property from surface mining methods when the mineral rights were held under these deeds. Yet, the surface owner was taxed on the ownership of the property, and the mineral owner paid nothing. Changing the interpretation of these deeds would become one of our major challenges.

Coal miners were exposed to unsafe mining conditions and severe levels of coal dust which caused pneumoconiosis, or black lung disease. It was only after the Farmington Mine Disaster in Virginia, in which 78 coal miners were killed, that Congress enacted the first meaningful laws directed toward mine safety enforcement and compensation for black lung disease - the Federal Coal Mine Health and Safety Act of 1969. Obtaining meaningful enforcement of that Act became an important objective for us.

Indeed, the lack of enforcement of the mining laws was brought home to me almost immediately after I accepted the job of becoming Appalred's Kentucky Director. The explosion in the Finley Coal Company Mine in December 1970 killed 38 coal miners. We examined the records of this coal mine and found that the responsible regulatory agency had knowledge of violations of dust standards and the company's use of illegal explosives. Proper enforcement of the laws might well have prevented the explosion. We represented the sole survivor of the blast until he could obtain private counsel, and we provided our investigative findings to a Congressional Committee which issued a

report highly critical of the responsible enforcement agency. The coal company owners pleaded nolo contendere to criminal charges and were fined. They served no time in prison.

At the same time, disabled miner groups, which were becoming known as Black Lung Associations, had begun organizing and holding rallies over the failure of the Social Security Administration to provide disability benefits for black lung disease, as the new Coal Mine Health and Safety Act intended. They asked for our help.

So did the welfare rights groups. They had begun to organize as well - to complain about the failings of the welfare and food stamp programs, and the lack of adequate health care for poor people. Hill Burton hospitals were turning away patients who could not pay – even expectant mothers who were about to deliver their babies.

So I welcomed the opportunity to assemble a first class law firm to address these and other poverty related issues here in eastern Kentucky in the heart of Appalachia. My training as a Trial Attorney in the Civil Rights Division laid a good foundation for me. I learned that over preparation of a case would payoff - if not at the trial level, then on appeal. I learned how much a victory in court could mean to a client, and the power of an injunction issued by a judge. Our civil rights cases successfully had challenged literacy tests and poll taxes which had prevented African-Americans from voting for one hundred years; laws that had maintained segregation in the south in education, public accommodations, public facilities, and indeed in a whole way of life. As the legal representatives of the United States, I also learned how important it was for us to maintain our professionalism even when working in hostile surroundings, when faced with hostile adversaries, or hostile Judges. That was an important lesson for me to take

to Appalachia as we began to take on powerful coal interests and public officials, as we began "uphill lawyering."

The early days were difficult, to be sure. Many local residents were suspicious about "outsiders" coming to this area, and especially lawyers who might upset the "power structure." When the President of the local Bar Association appointed a committee to develop a referral system which I might use to refer ineligible clients to local attorneys, the committee instead resolved that we should not be permitted to practice without the Bar's consent and the Bar Association complained about us to OEO (to no avail).

No sooner had we gotten our feet on the ground, and filed several important cases (a class action against a local housing authority challenging admission and operating procedures; a petition to prevent repeated violators of strip mining statutes from obtaining additional permits; an administrative action on behalf of the East Kentucky Welfare Rights Organization to reform a federally funded health care program), than did Howard Phillips, Nixon's OEO Director, threaten to defund aggressive programs like ours. My former boss, Steve Pollak, threatened suit, and we survived, although we went through a period when attorneys had to live on half-salaries while our funding was resolved. Our challenge to the federally funded health care program brought on a 5-week General Accounting Office investigation of our program, requested by the local Congressman. The resulting report, I am happy to say, was so favorable, that we used it as positive publicity for many years to come.

As we became established in the community, we also began to get a steady stream of the day-to-day issues in poverty law - family law, disability, housing, and consumer matters; and we took on representation to the extent we could. We

learned several important lessons. The day-to-day cases brought our attorneys into regular contact with the Bar and with judges, which invariably resulted first in a respectful, and then in a supportive attitude towards legal services for the commitment and professionalism of its staff, and the high quality of its work. Secondly, we learned that many of the day to day cases involving individual clients can raise significant issues and lead to major “impact” litigation. A good legal services program, and its offices, should have the capacity to take on major impact cases and a reasonable flow of day-to-day work. We learned that, as a rule, a multi-county office in a rural area ought to strive to have at least four attorneys, with appropriate paralegal and support staff. An office of that size in a small rural community will also become recognized as an important institution, not only within the bar, but also within the civic fabric of the community. It can become an important meeting place for client groups and agencies.

We embarked on that model during the years of expansion from 1974-1980 following the enactment of the Legal Services Corporation Act. We wanted our offices to be accessible to clients, so we tried to locate our offices in county seats which would be within an hour's driving distance of every client. (There are about 250,000 clients below the poverty line in our 37 counties). These county seats generally have populations of 4,000-6,000 persons. There is virtually no public transportation in these counties, and many clients do not have telephones. By 1981, when we were hit with the Reagan cuts, we were well on our way to meeting this target. We had opened ten offices to cover our 37 counties. There were 48 attorneys, 13 paralegals and about 35 support staff. We developed a series of in-house trainings for new staff, and identified subject matter specialists throughout the program.

We opened an office in Lexington on the campus of the University of Kentucky, one block from the law school. The office was ideally located so law students, primarily those on work-study, could conduct research for attorneys throughout the program under the supervision of an Appalred attorney. The law clerkship program in Lexington has proved to be an excellent recruiting forum. In the summers we expanded our clerkship program and we recruited students from law schools all over the United States to work in our area offices, and many of them became Appalred attorneys.

During the 1980's and 1990's we found ourselves victims of the Reagan cuts and retrenchment became the word of the day. Our staffing dwindled, eventually to a low of 23 attorneys. We felt it important to keep our offices in place as they represented our commitment to the counties they served. We kept them all open, even with severely reduced staff. Four attorney offices were reduced to two attorneys and eventually even to one attorney in two single county offices. One office became an outreach office with only a paralegal. Fortunately, we were not required to layoff staff, and retrenchment was accomplished by attrition. At the same time we developed a terrific group of senior attorneys who would form the program's leadership core –and most of these leaders are still with us today.

We could not compete with salaries in other public sector jobs, so we recognized that we could enhance the staff's quality of life by strengthening fringe benefits. Health insurance for families; a self-insured dental and vision program; a sick bank for employees who needed additional time to recover from a serious illness; insurance programs to guard against disabilities; and eventually student loan assistance and retirement programs.

We were proud of the quality of our work. We began having program reunions every five years, and our alumni returned in large numbers. Most of our alumni have remained in public service work.

Now and then, I was able to find time to litigate some major cases myself, and to co-counsel with program attorneys. Most of my major cases involved protests to surface mining and environmental issues. I represented a group of low income citizens who were threatened with proposed surface mining above their homes. We proved that the proposed mining would have intersected old deep mines filled with water, which posed a serious threat to my clients' lives and property. The mining permit was revoked. I also represented several individual landowners who objected to surface mining of their land. In one case, we were successful because we showed that the operator had repeatedly violated the strip mining statutes, and should not have been granted a permit. In another we were not so fortunate. My clients, a disabled veteran and his wife who was a cook in the local elementary school, had successfully fought to prevent the mining of their property for more than thirteen years. However, in the end an unfriendly court allowed the mining to proceed when they could not afford the bond to prevent it. Subsequently, the appellate court agreed that the mining should not have been allowed, but by then the top of the mountain they loved had been removed. The monetary settlement my clients received could not make up for that loss.

Perhaps my most satisfying case involved the death knell of the interpretation of the Broadform Deed. After we had been repeatedly rebuffed in our judicial challenges to the Court's interpretation, which authorized coal extraction by strip mining without the landowner's consent, we drafted a legislative solution. The Supreme Court of Kentucky, by a divided court, declared

that legislation unconstitutional. Two years later, in 1988, with the massive statewide organizing effort of a grass roots group, the Kentucky Fair Tax Coalition, (KFTC), a Constitutional Amendment, restating our legislation, was passed by 92% of the voters. The coal industry then challenged the validity of the Amendment on the basis of the Federal Constitution's taking clause. The challenge came in a pending appeal in which I was representing two elderly landowners. They had objected to surface mining of their property, and the coal company had initially obtained an injunction against them from "interfering" with the company's right to mine. The Attorney General of Kentucky joined me in defending the constitutionality of the Amendment, and the Court upheld its validity. The coal company was thereby prohibited from surface mining on my clients' property. That was a great day!

We were not that fortunate in our sole appearance before the United States Supreme Court. In that case, which I co-counseled, we represented a class of widows who challenged the eligibility provisions for health benefits from the United Mine Workers Health and Retirement Funds. Our client's application had been denied because her husband, although eligible to apply for a pension, had not done so because he had kept working until he was killed in a mine accident. We argued that this denial and the denial of similar applications was arbitrary and capricious. The United State Court of Appeals for the D.C. Circuit agreed. However, we lost 9-0 in the Supreme Court which held that the Courts would not review collectively bargained provisions for arbitrariness. It is hard to win one of those cases when the companies and the unions are together on the other side, but we felt our efforts were worth it. Later agreements between the companies and the union rectified this wrong.

I also was very involved in the redevelopment of the town of David, a coal

camp about ten miles from Prestonsburg. After the mine closed, the town fell into a state of disrepair. The houses were owned by a group of local businessmen who collected rent but refused to do any substantial-repair work. After a series of community meetings, we incorporated the David Community Development Corporation (DCDC), which bought "the town" - about 40 houses and the surface area surrounding the town from ridge to ridge. Over the next few years, the DCDC financed and sold the houses to the resident-renters; built about 20 new low income and moderate income homes; developed a new water and sewer system; and supported the development of a model alternative school for high school drop-outs, the David School, a separate non-profit organization. We did virtually all of the legal work required for David's redevelopment.

We constantly sought better ways to address the needs of our clients. We organized the Mine Safety Project to address the serious problem of coal miners who had been fired or discriminated against for complaining about unsafe conditions in the mines. We won precedent setting cases in the United States Court of Appeals for the District of Columbia and Fifth Circuit. We also continued our representation of the State and National Black Lung Association in advocating for more reasonable laws and regulations to govern the administration of the federal black lung program. We achieved a major victory in a class action lawsuit against the Kentucky State Park System for discrimination against blacks and women, which resulted in a settlement including affirmative action hiring goals. We filed two of the first discrimination cases in Eastern Kentucky against fiscal courts for refusing to employ women as emergency medical technicians -both of which resulted injury verdicts in our clients favor.

In the most recent years, I am proud that we have become an outstanding consumer law firm focusing on representation of low income clients who have been the victims of predatory lending practices, improper mobile home setups, and clients who are often faced with foreclosure actions. Our landmark Federal Court victory made the practices of "check cashers" subject to Kentucky's Usury statute and the federal RICO statute.

We established a successful low income housing project to focus on home repairs for low income citizens whose homes were in need of repair and could not afford new housing. With the use of volunteers, the new non-profit has repaired over 250 homes, built fifty wheelchair ramps and helped provide new housing to a number of low income families over the last three years.

Appalred could not have maintained its record of strong advocacy without the support of its Board. I cannot praise our Board Members enough. The attorneys representing local bar associations have been fully supportive of Appalred, even when we might have filed a controversial case in their county or even against one of their clients. The attorney Board Members generally were self-selected attorneys whom we identified and who volunteered to be designated by their Bar Associations. Our Board Chairs, especially, have given more of themselves than one can expect. They lobbied extensively and successfully for filing fee legislation and additional funding which we were able to obtain through a general appropriation - and they became disciples of legal services within the Bar.

Our Client Board Members, too, have been exceptional representatives of their groups and meaningful participants on our Board. Their interaction with Attorney Board Members has been an educational and valuable experience for both groups and helpful to setting policy for Appalred. Over the

years we developed close working relationships with the grassroots groups in our service area, and we created a Community Advisory Council, consisting of representatives of low income groups in our service area. The Advisory Council, in turn, selected the client members of our Board, a very useful process. The meetings of the Advisory Council, which staff and I attended kept us current on major issues of importance to them; and gave us the opportunity to provide them with information we felt was important to them, including pending legislation.

My wife Jean and I, along with other activists in the mountains, had joined to found the Kentucky Fair Tax Coalition (KFTC). This organization directed its initial efforts to having the state levy taxes on in-place minerals at fair cash value and then on eliminating the court interpretation of the Broad Form Deed. With its victory in obtaining passage of the Board Form Deed Constitutional Amendment, KFTC gained statewide prominence. It continues on as a major voice for social justice in Kentucky with its new name, Kentuckians for the Commonwealth. Representatives of KFTC chapters in our service area have been significant participants on our Advisory Council and on the Appalred Board.

Probably nothing can be more helpful in providing credibility to a legal services program than community involvement by its Director and staff in the communities where they live. This is particularly true if the same lawyers and staff are involved in controversial lawsuits which attack public officials, school districts, or powerful corporate interest such as coal industries or other significant employers in a rural area. Citizens in a community recognize and appreciate volunteer efforts that are directed towards helping that community, so they begin to view other more controversial activities as credible activities, as well.

From the time we arrived in Prestonsburg, Jean and I have been involved with members of the community in addressing the inadequacy of our educational system virtually from the time we moved to Prestonsburg. In that process we befriended and advocated with many other parents. Our schools in eastern Kentucky were known to be poor and, as the first or second largest employer in our counties, to be highly politicized. We were involved in many local battles with our School Board. Many of Appalred's cases were directed at the failure of local school districts to provide adequate education for students with special needs. As a member of the Board of Morehead State University, a position that may appear to be far removed from legal services work, I have advocated for educational services from Morehead to be provided at the local level in our mountain communities, where our large low income population is located. In part this has resulted in the establishment of a major branch of Morehead State University here in Prestonsburg. I was also able to organize a group of teachers and parents interested in improving science and math education in our community. In my mind that is key to this region's future. Our group expanded to include representatives of a number of community and private colleges. We then established the East Kentucky Science Center, a non profit corporation whose efforts have been directed towards the building of a planetarium and science museum here on the campus of our local community college. We just broke ground for our new facility, and I am very proud of our accomplishments.

My interaction with these organizations and citizens has given me the opportunity to publicize the work of legal services to them. I add the names of all the persons who are associated with these organizations to the Appalred mailing list. They receive at least an annual letter about our activities with an envelope which

provides them an opportunity to contribute to the program, which many do; but most of all it has expanded the exposure of Appalred and legal services to these persons who otherwise would not be familiar with our work.

A great value of being in a rural area is the extent to which over time we are able to identify with that community and have the community members identify with us. One of my most memorable experiences was the speech I was asked to give at the anniversary dinner of one of the two African American churches in this county. They were aware of the work that Appalred had done in this community, so they asked me to draw parallels between their history as a minority in eastern Kentucky with my history as a holocaust survivor, and the work Appalred had been doing on behalf of disadvantage persons.

As I review my life in legal services, I only regret that we have had to fight so many times for resources and even for survival. The needs of our clients are so serious, and they will not be served without us. I found John Ebbott's article in the last MIE *Journal* to be on the mark, and those are the dollar figures we should be striving for. Interestingly, in my mind the four attorney model we were striving for in the 1970's is still the one that can best meet the needs of a rural area like this one - a system that has the capacity to meet the day to day legal needs of a community, and the "impact" work that may be required.

I am excited about the new non-profit we have established, the Appalachian Citizen's Law Center, which will succeed to Appalred's coal related work. With financial support from a private foundation, we will again be able to handle these cases without being subjected to the LSC restrictions. As Chair of the Board, I will focus on resource development and volunteer lawyering.

My family and I arrived in this country from Germany in 1940 as immigrants and escapees from the Holocaust. We are eternally grateful to have found a home in this country. So, to me, despite its infirmities, it is the finest country on earth. As a lawyer in legal services and in the Civil Rights Division, I have had the opportunity to work to remedy some of these infirmities.

I could not have chosen a better way to spend these years. I will cherish the memory of my thirty years in legal services and my wonderful colleagues in our justice community throughout this country. I will continue to work on behalf of legal services whenever I have the opportunity to do so.