

Sustainability:

What Law Firms Have at Stake

Considering moving to a green building? Wishing your landlord would install low-flush toilets in the firm's bathrooms? Ever thought about where all those water bottles in conference rooms end up? Don't know? Don't care?

Even if hard-driven lawyers aren't being extra vigilant about powering down their computers in the evening, corporate clients, realizing how much sustainability is important to their own business, increasingly want to know what their vendors (law firms) are doing to make their own activities more sustainable. Some lawyers report that today, along with pro bono and firm diversity, requests for proposals more often include a sustainability component.

*We need to leave the planet
in a better place than we
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The term "sustainability" has many definitions. The World Commission on Environment and Development, commonly referred to as the Brundtland Commission in recognition of its chair, former prime minister of Norway Gro Harlem Brundtland, defined sustainable development as that "which meets the needs of current generations without compromising the ability of future generations to meet their own needs." (See United National Economic Commission for Europe, Sustainable development—concept and action (n.d.), retrieved from http://www.unece.org/oes/nutshell/2004-2005/focus_sustainable_development.html.)

The U.S. Environmental Protection Agency describes sustainability as "the conditions under which humans and nature can exist in productive harmony, that permit

fulfilling the social, economic and other requirements of present and future generations." (U.S. Environmental Protection Agency, Sustainability: Basic Information (n.d.), retrieved from <http://www.epa.gov/sustainability/basicinfo.htm>.)

In short, we need to leave the planet in a better place than we found it.

If You Can't Beat 'em, Join 'em

Sustainability, admittedly, is a term, and a definition, that could use some better branding. It doesn't fit easily into a headline. It's a concept that includes a certain "let's-all-make-friends-and-play-nice" insipidity. Yet there's still a very big role here for lawyers.

To some, sustainability is a logical outgrowth of strict environmental regulation that developed over the last four decades. Corporate America, realizing it can't beat federal oversight of its environmental activities, moved from contesting that management to managing responsibly on its own. Hence, whether motivated by a do-good ethic or by a desire to save a few dollars and generate positive publicity, companies are greening supply chains, facilities, operations, and products.

Sustainability "is consistent with the general evolution of environmental law," says Sheila Harvey, a member of Pillsbury's Washington, D.C. office and the head of that firm's Climate Change & Sustainability practice. 30 to 40 years ago, the focus was on stopping the discharge of pollutants. "As the discipline evolved, the science behind it evolved, and more emphasis was placed on the interaction of humans and the natural environment," Harvey observes.

As corporations have increasingly focused on sustainability in recent years, hiring chief sustainability officers and issuing annual sustainability reports, their lawyers have sometimes been pressured to follow suit. “Clients are absolutely asking more about law firms’ sustainable practices,” says Gayatri Joshi, vice president of client management at ecoAnalyze, a New York-based consulting firm.

At Atlanta-based Alston & Bird, a shift to more sustainable practices was in some measure inspired by its desire “to proactively mirror the values of our clients, so many of [whom] have instituted highly-respected sustainability programs,” says Peter Masaitis, an L.A.-based partner who is also chair of the firm’s Sustainability Committee. The need to step up to the sustainability plate also stemmed from “a recognition that minimizing our impact on the environment was naturally part of the firm’s broader ‘good citizen DNA,’ in line with its robust pro bono and community service commitments,” Masaitis adds.

A Collaborative Effort

Some firms have appointed chief sustainability officers (CSO) to guide their efforts; smaller ones might do so via committee. Carolyn Kaplan has been CSO at Boston’s Nixon Peabody since 2007. Before that time, individual offices had their own sustainability initiatives. Now, a green operations steering committee—its members include the firm’s chief administrative officer, its IT director, the director of purchasing, several office administrators, as well as Kaplan—helps the firm take a more holistic approach to sustainability.

The group has focused on energy management, green construction, and paper reduction, but what Kaplan is proudest of is that sustainability has become an indelible part of Nixon Peabody’s culture. There’s a synergy between the firm’s programs and its clients own efforts, she says. Indeed, the firm can help clients both achieve their own sustainability goals and identify

the business opportunities associated with sustainability.

At 90-lawyer Tonkon Torp in Portland, Oregon, the firm’s sustainability committee membership includes its purchasing manager, the human resources director in charge of many of the firm’s policies, and its accounting manager. The firm has streamlined forms and encouraged clients to use electronic billing, says Max Miller, co-chair of the firm’s Sustainability Practice Group. Paper usage is tracked, carbon offsets are purchased for airline travel, and the firm’s summer picnic is held at a bicycle-accessible location.

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Alston & Bird’s sustainability committee was formed in 2009 after “a handful of attorneys suggested to management that the firm formalize its existing green practices around a national committee that would continuously evaluate best practices and encourage, from the ground up, a broader awareness of sustainability issues,” Masaitis recalls. “We set up a steering committee with representation from a wide variety of administrative departments and attorneys, and set up local office committees, each with their own leads—all of which, combined together, constitutes the Sustainability Committee.”

The firm’s move to double-sided printing has saved 34,000 reams of paper and some \$160,000 in printing costs, Masaitis reports. Diversion of food waste and other material has kept 38 tons of biodegradable waste out of landfills, he says. The firm has moved from disposable cups and cutlery to compostable and biodegradable materials. The firm purchases paper products with recycled content. Today, water pitchers, rather than water bottles, appear in most conference rooms.

Sustainability standards are being developed by more than several dozen law firms that have joined the Law Firm Sustainability Network, which was formed last year by ecoAnalyze. Naturally, law firms aren't so obsessed with decreasing water usage or the discharge of hazardous chemicals. Rather, a lawyer's sustainability challenges tend to focus on paper and energy usage and how to work with building management, reports Joshi.

The standards the network is developing may address stakeholder engagement, whether a firm has a formal sustainability policy, and so on. The group itself, which includes big-firm members such as Bryan Cave, Cravath, and Proskauer Rose (as well as Nixon Peabody, Holland & Knight, Pillsbury, and Alston & Bird, firms mentioned here), is sharing information and building up a library of case studies.

Depending on Definition

Undoubtedly, not everyone embraces the notion of sustainability or the idea that climate change is caused by human activities or can be controlled by them. Some clients (*e.g.*, Big Oil) might be undertaking environmentally friendlier activities while, say, having no immediate plans to stop drilling for fossil fuels.

Pillsbury's Climate Change & Sustainability practice was initially controversial, acknowledges Harvey. However, law firms need not limit themselves to a very rigid definition of sustainability to which some clients, while making overall progress, may object. "We have always thought of sustainability as the larger umbrella," she says. It's "an overarching concept that says we humans have to do what we do with less impact on the environment."

Of course, even clients who consider climate change to be hoo-ha don't mind saving on their legal bills. "Being responsible doesn't necessarily go against clients' values," says

Joshi. Becoming more resource-efficient does not mean a firm with climate change deniers on its roster is acting against their interests. A firm with less overhead costs can pass along those savings to its clients.

Beyond Superfund

Even if sustainability is merely another entry on an ever-growing politically correct checklist, the effort to become more sustainable may actually be worth a law firm's while. Some lawyers are finding that the explosion of interest in environmentally friendly endeavors is actually boosting their legal practices in areas not precisely considered to be "green."

Miami-based Michael Tschupp, a member of Espinosa Trueba and an intellectual property attorney focusing on green IP issues, reports an increase in litigation as more people develop trademarks that are very similar to one another. (Google the phrase "green trademark" for a quick sense of the vast controversies here.) Because of the explosion in efforts to improve the environment, there's been a corresponding spike in the number of clients seeking patent protection for their gadgets, so much so that the U.S. Patent and Trademark Office created a fast-track pilot program for green technology applications (though it terminated at the end of March).

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Greenwashing, or falsely advertising, or at least not quite accurately maintaining that a product is environmentally friendly, has likewise kept lawyers busy. More green products on the market also means that more are likely to fail. Kevin Hudson, chair of the construction practice at Foltz Martin in Atlanta, has worked on cases involving the performance of energy systems. Issues such as who bears responsibility for pollution

control system performance—the designer of the machine, the contractor who put it together as specified, or the owner who might not have used the system as specified—are winding their way through the courts.

There is also space for real estate lawyers in the sustainability arena. Developers and other clients are interested in the regulations that may impact them, such as the D.C. Green Building Act requiring all new private office buildings of a certain square footage to be U.S. Green Building Council LEED-certified (Leadership in Energy and Environment), reports Kyrus Freeman, a partner at Holland & Knight in Washington, D.C. That firm’s own sustainable development practice is something of a hybrid. Not limited to environmental lawyers and their regulatory realms, it includes transactional lawyers as well as real estate attorneys like Freeman.

Zoning lawyers may find something of a bonanza as the economy and new construction efforts pick up. For instance, some regulations specify minimum parking requirements, Freeman explains. In a sustainable world, though, public transportation tends to be more highly valued, which means that zoning regulations in some areas may be changed to promote ways of getting to work besides in one’s own car. Anticipate maximum parking requirements rather than minimum ones in the coming years.

As environmental lawyers deal with regulatory issues before EPA and other agencies, sustainability practitioners may find their practices are much broader than appearances before environmental regulators.

Sustainability reporting by companies is becoming increasingly common. Lawyers may find work as the Securities and Exchange Commission looks at corporate disclosures on climate change and other environmental issues.

“We have clients who routinely receive questions from their investors [such as], to what degree [are] the company’s environmental performance or sustainability criteria taken into account in compensation of senior management of a company?” Harvey advises. Shareholder resolutions directed at environmental matters, climate change issues, and how companies are accounting for carbon emissions, also keep lawyers well-fueled.

Lawyers with sustainability practices report that there is very much an educational component to their efforts. Teaching clients to understand what the sustainability movement is, and whether and how it is going to result in either direct regulatory pressures or legal requirements, are very much an element of her firm’s practice, Harvey reports. How sustainability might affect a client’s position with its customers and investors must also be addressed. ■

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